

## CHAPTER 6

# Saving Lives: Taking a Jail Suicide Case to Court<sup>a1</sup>

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*Hassiba Belbachir is one of the hundreds of individuals driven to take their own lives each year while in custody in jails and prisons within the United States.*<sup>2</sup>

Suicide is a leading cause of death in this country's detention facilities. The rate of suicide for individuals in custody is 50% greater than the rate of suicide in the unincarcerated population, and for pretrial detainees the rate of jail suicide runs at least 400% above prison suicides.<sup>3</sup> This article will focus on the evaluation of a potential case and the drafting of an initial complaint for civil rights violations and other claims to redress a suicide occurring while a person is in custodial detention.<sup>4</sup>

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<sup>2</sup> Hassiba Belbachir and the story of what happened to her will serve throughout this article to exemplify and remind of a life that was lost.

<sup>3</sup> Fred Cohen, *The Mentally Disordered Inmate and the Law* (New Jersey: Civic Research Institute, 2000) Chapter 14, fn 1-2 (citations omitted). See also, *Jutzi-Johnson v. U.S.*, 263 F.3d 753, 757 (7th Cir. 2001); Christopher J. Mumola, *Suicide and Homicide in State Prisons and Local Jails* (NCJ-210036), [www.ojp.usdoj.gov/bjs/abstract/shsplj.htm](http://www.ojp.usdoj.gov/bjs/abstract/shsplj.htm).

<sup>4</sup> Courts have consistently applied the same constitutional criteria to pretrial detainees (under a 14<sup>th</sup> Amendment substantive due process analysis) as to convicted prisoners (under the 8<sup>th</sup> Amendment cruel and unusual punishment provisions). Arguably, a lesser standard should apply to persons who are detained prior to being convicted of any crime. See, e.g., Cohen, at ¶ 14.2(3).

The substantial number of suicides in custody has led to much litigation. The prevalence of the phenomenon has also led experts in suicide prevention to develop standards and curricula to train jailers<sup>5</sup> to recognize those at risk and to intervene to provide the seriously needed medical intervention to save lives. Successful lawsuits have brought justice to the families of those who took their own lives in custody, exposed deficiencies in institutional policies and practices, and promoted positive reform and change to try to ensure that those in custody are provided with needed care and protected from harm.

This litigation can also be a source of income for civil rights attorneys. In 2007, for example, an attempted suicide case in a Wisconsin county jail settled for \$13.1 million,<sup>6</sup> and in another case, despite a 2006 appeal that granted qualified immunity to 4 of 15 jailers, a jury awarded \$2.5 million in punitive and \$250,000 in compensatory damages.<sup>7</sup> In 2006, a California jury awarded \$858,200 to the mother of a 19 year old schizophrenic who hung himself after three months in solitary confinement without being provided any treatment;<sup>8</sup> in 2004, the Seventh Circuit upheld a jury verdict in a jail suicide case of \$1.5 million in punitive damages against the jail's private health care provider and \$250,000 in compensatory damages.<sup>9</sup> Of course, the range of verdicts and settlements spans the gamut, and many litigants do not get past summary judgment motions. However, the importance of these cases and the potential for compensation warrant taking on a jail suicide case with the appropriate facts.

### Who is at Risk for Suicide in Jail

*27 year old Hassiba Belbachir was born in Algeria into a Muslim family of three brothers and three sisters. She was the youngest daughter, doted upon particularly by her older sisters. She was lively, fun-loving and enjoyed shopping and spending time with her family, including her young*

<sup>5</sup> The term "jailer" is used throughout this article rather loosely to include custodial officers as well as health care providers in the custodial institution.

<sup>6</sup> *Mombourquette ex rel. Mombourquette v. Amundson*, 469 F. Supp. 2d 624 (W.D. Wis. 2007).

<sup>7</sup> *Clark-Murphy v. Foreback*, 439 F.3d 280, 2005 FED App. 0047P (6th Cir. 2006); *Jury Awards Family of Dead Inmate \$2.75 Million*, May 5, 2007, [www.mlive.com/newsflash/michigan/index.ssf?base/news-43/1178404862120820.xml;storylist=newsmichigan](http://www.mlive.com/newsflash/michigan/index.ssf?base/news-43/1178404862120820.xml;storylist=newsmichigan).

<sup>8</sup> *Verdella Shaw v. San Joaquin County*, 2006 WL 1408397 (E.D. Cal. 2006) (denying defendants' motion for new trial).

<sup>9</sup> *Woodward v. Correctional Medical Services of Illinois, Inc.*, 368 F.3d 917 (7th Cir. 2004) The above amounts do not include a separate settlement made against the sheriff and his deputy.

nieces and nephews. She spoke Arabic, French and earned a certificate in Spanish from a University in Spain. She was living in Chicago and trying to learn English. Hassiba took great care with her appearance and those around her told her she could be a model.

Studies demonstrate statistical trends and general risk factors for those who take their own lives while in custody, depending on whether the person is a pretrial detainee in jail awaiting trial, or a prisoner who has been convicted and sentenced.<sup>10</sup> The "typical" individual who succumbs to suicide is an unmarried white male about 22 years old, newly admitted to jail, with no significant history of incarceration.<sup>11</sup> Prison suicides are generally older men, convicted of violent offenses, who may have spent considerable time in custody. Suicide rates are also high among women, and among juveniles placed in adult correctional facilities.<sup>12</sup> Mental health issues are a major risk factor, and of particular concern given that more than half of the prison and jail population has a recent history or symptoms of a mental health problem.<sup>13</sup> Suicides tend to occur while individuals are in solitary cells and during times when staffing is the lowest, such as nights and weekends. Suicides are generally accomplished by hanging, using objects of clothing (socks, underwear, belts, shoelaces, shirts) or sheets or towels.<sup>14</sup>

### Initial Considerations in Screening a Case

*Hassiba traveled from Chicago to New York and continued on to*

<sup>10</sup> The National Institute of Corrections (NIC), the U.S. Justice Department and the National Center on Institutions and Alternatives (NCIA) are currently conducting a national study on jail suicides.

<sup>11</sup> William C. Collins, Esq., "The Courts' Role in Shaping Prison Suicide Policy," in *Prison Suicide: an Overview and Guide to Prevention*, ed. Lindsay M. Hayes, Project Director (N.I.C. 1995).

<sup>12</sup> *Preventing Suicide: A Resource for Prison Officers* (Department of Mental Health, World Health Organization: Geneva, 2000), pp.7,10. (Females attempt suicide twice as often as their incarcerated male counterparts). Women detainees, as well as foreign nationals and those belonging to racial and ethnic minorities, may present differently, and may particularly evidence the limitation of statistical generalizations.

<sup>13</sup> *Mental Health Problems of Prison and Jail Inmates* (Bureau of Justice Statistics, U.S. Department of Justice, 2006). Detainees who commit suicide commonly have poor social and family support, prior suicidal behavior and emotional problems leading to feelings of hopelessness. A detainee who expresses such feelings or admits suicidal ideation or plans should be considered a high risk for suicide. *Preventing Suicide: A Resource for Prison Officers* (Department of Mental Health, World Health Organization: Geneva, 2000), p. 7.

<sup>14</sup> *Preventing Suicide: A Resource for Prison Officers*, (Department of Mental Health, World Health Organization: Geneva, 2000), pp. 7, 10.

*London, where British authorities took her into custody on immigration charges and returned her to the custody of U.S. immigration in Chicago. Once in U.S. custody, she was taken to a hospital where her vomiting, abdominal pain and other symptoms were diagnosed as acute gastritis and anxiety. She was detained in a local county jail under contract with U.S. Immigration and Customs Enforcement. Only after her death would immigration officials report she was to have been released from custody within another week.*

Statistics will mean little to the grieving family members who present a potential case to a litigator. The family may experience feelings of guilt, agonizing over what they might have done differently, such as hire an attorney or post bail, or grief may color their ability to be objective. They may not be the most reliable historians, as they are often loathe to admit or accept that their loved one was mentally ill and/or took his/her own life. They may offer alternative theories, without evidentiary basis, such as that their loved one was the victim of a homicide.

With the main witness -- the deceased -- unavailable; the family in denial or in the dark; and the other potential witnesses, fellow/sister detainees, unidentified and not readily accessible, the lawyer's initial tasks are daunting. She must tackle the investigation of a potential case with a Sherlock Holmes determination to uncover all available facts. At the same time, she must grasp how her jurisdiction interprets the legal standards for deliberate indifference and other potential claims. A thorough investigation of all possible evidence and theories of liability is necessary, not only to appease family members' search for answers and justice, and not only to expose vulnerabilities in systems, policies, training and attitudes, but also to encourage reform and prevent future fatalities. It is necessary because the attorney must determine, at the earliest possible stage, whether she will be able to meet the high threshold of deliberate indifference and prove that the individual jailers had notice that the detainee was at risk for suicide.

Provided the attorney is consulted early enough, she will want to attend and participate in the coroner's inquest (in Illinois, the purpose of which is to determine whether the death was accidental or a homicide) or get involved to the extent possible in whatever official investigation is provided for by applicable local law. Practice varies significantly, even from county to county, and could be influenced by whether the suicide was widely publicized. A lawyer should try to question witnesses at the inquest, usually police, sheriff's detectives and/or the coroner. The answers can shed light on what the jailers knew and when they knew it. Even if official questioning is not allowed, merely attending an inquest can be an important fact-gathering expedition. Officials may be willing to meet

with the attorney and the family. Including the family is important, not only because they are desperately searching for answers; but also because their presence, their grief, can have the effect of softening official resistance to disclosure. Such encounters offer many opportunities: to visually inspect the physical evidence gathered at the scene of the death; to view photos of the scene and the autopsy; perhaps to see the area of the jail where the body was discovered; to get a sense of the jail's policies and practices (whether, for example, there were video cameras and tapes of the area); as well as to learn of potential defendants, witnesses and defenses.

If the lawyer is contacted early enough, a second autopsy may be requested, in addition to the one conducted by the county where the death occurred. Families often do not trust officials from the same county whose jailers allowed their loved one to die. A county should facilitate the second autopsy by a licensed pathologist. If a second autopsy is not an option, it is nevertheless an option to consult an independent pathologist to review the autopsy report and additional evidence.

If the attorney is not consulted early enough to attend or participate in the inquest, she will want to contact the coroner to get a copy of the transcript and any photographs shown to the coroner's jury. In order to obtain these and other documents, a lawyer must have appropriate authority to act on behalf of the deceased person's estate.

A probate court within the state of the occurrence will establish a representative of the estate.<sup>15</sup> Not only is the main witness not available, but a deceased person cannot serve as a plaintiff, and cannot authorize the release of information in the possession of the jailers, health care providers, or others. Even if the decedent has no assets, a probate estate must still be opened, with the potential value of a lawsuit listed as the sole asset. State probate laws will determine preferences for who may be appointed administrator of the estate. In Illinois only residents of the state are eligible for appointment. Family members can nominate or consent to a particular administrator to be legally recognized as the personal representative to proceed on behalf of the estate, with the authority to sign the needed releases.

The probate process also leads to determining the heirs entitled to any recovery through a successful lawsuit. Each state's intestate laws set forth rules of descent and distribution for persons who die

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<sup>15</sup> A civil rights litigator may wish to refer this aspect of the case to a probate attorney, who will be familiar with the local probate court and relevant state law statutes setting forth who is competent to act as representative of the estate, how to petition for letters of administration, how to obtain leave to settle, etc.

without a will, to establish who shares in the estate of the decedent. Identifying the heirs will also lead to important evidence of damages for the jail suicide litigation. Heirs and other witnesses will provide memories of the deceased and describe the effect of the death upon surviving loved ones.

The probate case will remain open during the pendency of the civil rights litigation, and any settlement or recovery will be subject to the scrutiny of the probate court.

Once the administrator of the estate is appointed, the investigation process can proceed more smoothly, as the administrator has the official capacity to authorize the release of otherwise unobtainable information. Leave no stone unturned. . . this is the time to think creatively.

### **Launching a Comprehensive Investigation Before Filing a Case**

*A correctional officer filled out an intake form when Hassiba arrived at the county jail. She was particularly upset that he falsely identified her as a Hispanic Catholic. He then marked both "yes" and "no" next to the question whether she was currently extremely depressed or suicidal. Once assigned to a housing unit, she requested that her cell door be left open and complained of attacks involving shortness of breath, muscle cramping and rigidity throughout her body.*

State and federal Freedom of Information Acts are useful tools in gathering information. A lawyer must think expansively about where relevant documentation can be sought. A nonexhaustive list of places to seek documents includes:

- \*Custodial sheriff, police or corrections department: Prison and jail records, medical, mental health and intake records, may reveal what the detainee reported to the jailers, as well as the adequacy of the jailers' response, and may also lead to other witnesses. Telephone and visiting records should identify who had contact with the decedent. (Anyone who notified jailers of suicidal ideations or plans expressed by the decedent would provide crucial evidence.) Records of any previous incarceration may also contain evidence that the jailers knew the decedent was a suicide risk. At the earliest possible moment in the process of requesting information, the attorney will want to formally request the jailers to preserve all the evidence.
- \*Sheriff, police or other law enforcement department which conducted death investigation: Photos of the scene, diagrams of the jail, and witness statements can be very helpful in the

evaluation process as well as ultimately serve as evidence in a filed case.

- \*Pathologist who performed autopsy and wrote medical examiner's report: Such reports often contain factual information provided by potential defendants, and may offer valuable insight into things such as the time of death, how long the decedent had been dead at the time the body was discovered, etc.
- \*Coroner present at the scene and who conducted investigation of death: Again, photos of the scene, diagrams of the jail, and witness statements can be very helpful in the evaluation process. (One should not assume that they will necessarily be the same photos and witness statements as obtained by the corrections or pathology investigation.) In Illinois, one can request a transcript of the inquest hearing.
- \*Agencies responsible for oversight of the prison, jail or lockup: In Illinois, for example, the state Department of Corrections' Jail, Detention and Standards Unit conducts annual inspections of county jails, noting deficiencies. Illinois law also requires jails to report to the DOC all unusual occurrences, including suicides and attempted suicides.
- \*Clerk of the court: Previous arrests and prosecutions can also lead to evidence of notice and mental health issues.
- \*Other Records: Educational, medical, mental health, and employment records of the decedent will not only assist the attorney in becoming familiar with the decedent, and thus be useful in assessing the value of a case, but they may also reveal valuable information about the decedent's risk of suicide.

Informal inquiries are often helpful, including to local public defenders or the criminal defense bar, who may have clients detained with the deceased, and who may be familiar with jail history and practices. The internet is another resource, which can help lead to reports about the specific prison, jail or health care provider, and may result in evidence of previous suicides or suicide attempts. Counties and cities have their own websites, where they may post minutes of board meetings where the suicide or attempted suicide is discussed. Detention and jail standards may be available as well. Court or legal research websites may reveal other lawsuits against potential defendants, and may also reveal prior or pending litigation involving suicide or deliberate indifference. Even without knowing the name of any specific individual wrongdoer, a search including the name of the jail or sheriff and suicide might bear fruit.

There is little limit to the possibilities in a factual investigation geared toward leaving no stone unturned. Early and comprehensive

investigation is the key to uncovering evidence that will eventually result in a favorable outcome.

### Examining Applicable Law in Relevant Jurisdiction

The United States Supreme Court has set forth the general constitutional standard of deliberate indifference, which applies to a jail suicide case.<sup>16</sup> This standard applies to convicted prisoners, through the Eighth Amendment; to pretrial detainees, through the due process clause of the Fourteenth Amendment. An attorney must carefully examine the case law in her jurisdiction, as the analysis of jail suicide cases is extremely fact driven, and may even turn on how the facts are argued. Cases vary from jurisdiction to jurisdiction, but there are reported decisions from many circuits favorable to plaintiffs in deliberate indifference cases.<sup>17</sup>

### Consulting an Expert

*Hassiba became increasingly anxious and depressed in her jail cell. She was nauseous, dizzy, experienced physical numbness, irregular heart beats, and repeatedly requested medical attention. She cried loudly, sobbing continuously in her cell; moaning, her body physically shaking as she gasped for air to breathe. Jailers placed her in one of two cells in the county's isolated medical unit.*

Expert testimony is essential in jail suicide cases,<sup>18</sup> much like it is

<sup>16</sup> *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (The Eighth Amendment places a duty on prison officials "to protect prisoners from violence at the hands of other prisoners" and themselves, at 833.)

<sup>17</sup> See, e.g., *Kulp v. Veruette*, 167 Fed. Appx. 911 (3d Cir. 2006) (reversing dismissal of complaint against correctional officer and health care providers where 18 year old committed suicide in their custody); *Buffington v. Baltimore County, Md.*, 913 F.2d 113, 17 Fed. R. Serv. 3d 577 (4th Cir. 1990) (officers liable where deceased had threatened suicide, initially treated appropriately but then left alone in a cell); *Schultz v. Sillman*, 148 Fed. Appx. 396, 2005 FED App. 0688N (6th Cir. 2005) (question of fact for jury whether Michigan state prisoner's suicide was result of deliberate indifference); *Woodward v. Correctional Medical Services of Illinois, Inc.*, 368 F.3d 917 (7th Cir. 2004) (upholding jury verdict of \$1.75 million in jail suicide); *Turney v. Waterbury*, 375 F.3d 756 (8th Cir. 2004) (sheriff may be liable for jail detainee's suicide); *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175 (9th Cir. 2002) (county employees may have been deliberately indifferent to heart attack victim's mental illness while he was in custody at county jail); and *Snow ex rel. Snow v. City of Citronelle, AL*, 420 F.3d 1262 (11th Cir. 2005) (jury could reasonably believe there was strong risk that plaintiff would attempt suicide, and that defendants took no action to prevent her suicide).

<sup>18</sup> Avery, Rudovsky and Blum, *Police Misconduct Law and Litigation*, 3<sup>rd</sup> Edition (West Group, Saint Paul, MN, 2001), *Actionable Conduct*, § 2:32 Jail Suicides (recognizing that an expert can analyze facts present that in



in medical malpractice cases. It is never too early to consult an expert, or at least think ahead about what experts may be available. An expert can be a guide through the discovery process, recommending what types of documents to seek, suggesting areas of inquiry in depositions, informing about prevailing jail and detention standards, etc. An expert can also be crucial to debunk defenses. A common defense asserted by jailers is lack of notice; that they could not have known the individual was suicidal, or that they relied on professional judgments. An expert can explain to a jury how the facts of your case clearly indicate that the deceased was a suicide risk and that the officials knew and did not take appropriate action.

### **Determining What Defendants to Sue**

Suicide in custody cases can involve a number of defendants from different agencies. The city police lockup keepers, county sheriff and his jailers or department of corrections officers are routinely named as the responsible custodians, depending on where the death occurred. In situations where the detention facility is run by a private business, the correctional corporation may also be a defendant. In facilities where law enforcement has contracted with a private health care provider, whose nurses, social workers, and physicians responsible for providing medical and mental health care may also be named as defendants. If the detainee is in federal custody, there may be U.S. Marshals, ICE personnel, or Federal Bureau of Prisons staff to be identified. Defendants may include individuals, including supervisory personnel, who actually came into contact with, observed or had knowledge of a detainee. The level of culpability will depend upon the actual knowledge and personal involvement of the individual.<sup>19</sup>

### **Deciding What Claims to Bring**

*Hassiba communicated her illness to correctional officers, medical staff and other detainees. She was entitled to speak with the Algerian Consulate, which would have provided her contact with someone who understood her language and culture, but no one informed her of this right. She did not want to worry family members who were thousands of miles away. Only*

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combination would alert a competent jailer to a suicide risk as well as identify deficiencies in policies and training).

<sup>19</sup> Avery, Rudovsky and Blum, **Police Misconduct Law and Litigation**, 3rd Edition (West Group, Saint Paul, MN, 2001), *Actionable Conduct*, § 2:32 Jail Suicides, citing, e.g. *Jacobs v. West Feliciana Sheriff's Dept.*, 228 F.3d 388 (5th Cir. 2000); *Gordon v. Kidd*, 971 F.2d 1087 (4th Cir. 1992), as amended, (July 7, 1992).

after her death would immigration officials notify the Algerian Consulate that she had been in custody.

Throughout the investigation phase, a lawyer will want to be cognizant of the applicable statute of limitations for federal and state claims. In Illinois, for example, state claims must be filed within one year of the date the cause of action accrued; while in the Seventh Circuit, federal claims must be filed within two years of the date.<sup>20</sup>

A federal claim may be brought pursuant to 42 U.S.C.A. § 1983. Each city, county or state jailer who is deliberately indifferent to a detainee's serious medical needs may be found liable. The standard for deliberate indifference is very high: the jailer must have actual notice that the detainee is a suicide risk. However, the standard can be met in a variety of ways.<sup>21</sup>

Another possible federal claim is a cause of action pursuant to Title II of the Americans with Disabilities Act<sup>22</sup> and Section 504 of the 1973 Rehabilitation Act,<sup>23</sup> alleging that jailers failed and refused to reasonably accommodate the decedent's mental and physical disabilities and to modify their jail facilities, operations, services, accommodations and programs to reasonably accommodate his/her disability. The law provides for compensatory and punitive damages against public entities.

A *Bivens* claim is appropriate when a case involves individual employees of a federal agency. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>24</sup> the Court held that a federal law cause of action for money damages could be inferred directly from the Constitution. As to federal defendants sued in their individual capacities, the due process rights of pretrial detainees are protected by the Fifth Amendment, and the same substantive law applies as to the state actors. Compensatory and punitive damages may be sought but there is no provision for an award of attorney fees beyond a contingency agreement with the client.

A person may sue the United States government under the

<sup>20</sup> For § 1983 claims, the statute of limitations is determined by the law of the state in which the violation took place. *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985).

<sup>21</sup> See, e.g., *Cavalieri v. Shepard*, 321 F.3d 616, 622 (7th Cir. 2003) (deliberate indifference could exist where jail guard failed to inform receiving institution of detainee's suicidal risk); *Sanville v. McCaughtry*, 266 F.3d 724, 739 (7th Cir. 2001) (deliberate indifference could "easily" exist where prison officials failed to act after observing that suicidal prisoner had covered cell window, blocking their view).

<sup>22</sup> 42 U.S.C.A. §§ 12131-12134

<sup>23</sup> 29 U.S.C.A. § 794

<sup>24</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)

Federal Tort Claims Act,<sup>25</sup> and allege common law torts such as wrongful death. This may be done separately or included in the complaint, but either way the strictures must be followed (i.e., file an administrative claim within the statute of limitations; wait six months for the government to adjudicate the claim, deny the claim or do nothing; and then proceed in the appropriate United States District Court.<sup>26</sup> ). An FTCA claim must include a sum certain in dollars for the amount of the claim for the personal injuries and wrongful death.

An important additional warning: ". . . 28 U.S.C.A. § 2676, has the effect of requiring a plaintiff who brings both FTCA and non-FTCA claims arising from the same subject matter to choose his remedy before the FTCA claim proceeds to judgment. Once judgment is entered on the FTCA claim, that judgment nullifies the parallel non-FTCA claim, even if it had previously proceeded to judgment."<sup>27</sup> Factors to be considered in electing between a *Bivens* or FTCA remedy include non-indemnification of federal employees, potential problems in collecting against those employees found liable, as well as the issue of attorney fees.<sup>28</sup>

Pendent claims may be brought pursuant to state law. Claims sounding in state law can be brought only against state actors, and not federal actors.<sup>29</sup> In a suicide case, there are a variety of state torts that may be alleged, from wrongful death, to intentional infliction of emotional distress, to conspiracy. Respondeat superior and other indemnification claims should not be overlooked.<sup>30</sup>

Defendants need only to have negligently caused or failed to prevent a suicide in order to be liable in a tort action. A lawyer can maximize the prospects of success by alleging that the same facts show a civil rights violation and in the alternative, certainly negligence. Specifically, liability based on a tort theory can be trig-

<sup>25</sup> 28 U.S.C.A. §§ 1346(b)(1), 2674

<sup>26</sup> 28 U.S.C.A. § 2671-2680

<sup>27</sup> *Manning v. Miller*, 2006 WL 3825043 (N.D. Ill. 2006)

<sup>28</sup> Contingency attorney fees are the only fees available in an FTCA claim and are limited to a maximum of 25% of the total recovery. 28 U.S.C.A. § 2678.

<sup>29</sup> The Westfall Act, 28 U.S.C.A. § 2679(a), confers immunity on federal actors for violation of state tort law.

<sup>30</sup> Each jurisdiction's advocates have their own internal debates about whether to bring civil rights cases in federal or state court. The decision of whether to file a jail suicide case in state or federal case is subject to similar analysis. General considerations include: federal courts are more familiar with Constitutional claims; potential jury pools will be different; the relative speed of getting to trial; and the potential for defendants removing to federal court cases alleging federal claims filed in state court, while federal courts can adjudicate state law violations as pendent claims.

gered by constructive knowledge, and foreseeability is generally easier to establish than in civil rights cases.<sup>31</sup> Be aware, however, that some states impose immunity barriers that allow government agencies and officials to be immune from damages for some or all of their actions.<sup>32</sup> On the other hand, some states do not consider any comparative fault on the part of the suicide victim.<sup>33</sup> Such distinctions underscore the importance of carefully examining the relevant case law in the jurisdiction where the jail suicide occurred.

### Other Claims

In immigration detention cases, there may be a claim under international law alleging that jailers failed to notify the Consulate of the suicide victim's nation of origin that the person was in custody, and similarly failed to notify the detainee that she could contact the Consulate, in violation of the Consular Convention and the Vienna Convention on Consular Relations (Vienna Convention)<sup>34</sup>, a multilateral treaty; Article 36 of which requires, among other mandates, that authorities shall notify an arrested foreign national of "his rights" under the Convention "without delay."<sup>35</sup>

There may be potential for a *Monell* policy claim.<sup>36</sup> Many facilities have inadequate policies and procedures with regard to suicide prevention. Initial intake and screening of detainees may be inadequate. Officials may not be properly trained to identify those

<sup>31</sup> William C. Collins, Esq., "The Courts' Role in Shaping Prison Suicide Policy," in *Prison Suicide: an Overview and Guide to Prevention*, ed. Lindsay M. Hayes, Project Director (N.I.C. 1995).

<sup>32</sup> William C. Collins, Esq., "The Courts' Role in Shaping Prison Suicide Policy," in *Prison Suicide: an Overview and Guide to Prevention*, ed. Lindsay M. Hayes, Project Director (N.I.C. 1995), citing *Tittle v. Mahan*, 566 N.E.2d 1064 (Ind. Ct. App. 1991), opinion vacated in part on other grounds, 582 N.E.2d 796 (Ind. 1991); *Agee v. Butler Cty.*, 72 Ohio App. 3d 481, 594 N.E.2d 1050 (12th Dist. Butler County 1991). See also, *Howard v. City of Atmore*, 887 So. 2d 201 (Ala. 2003) (jailer may be denied immunity for wrongful monitoring of detainee).

<sup>33</sup> See, *Sandborg v. Blue Earth County*, 615 N.W.2d 61 (Minn. 2000) (The jailer-detainee relationship is an exceptional circumstance in which the duty to protect against a known possibility of self-inflicted harm transfers entirely to the jailer, and comparing the fault of the detainee is therefore not appropriate.)

<sup>34</sup> Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261

<sup>35</sup> See, *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007).

<sup>36</sup> *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611, 17 Fair Empl. Prac. Cas. (BNA) 873, 16 Empl. Prac. Dec. (CCH) P 8345 (1978). Due to the particularities of *Monell*, it may be preferable to wait to see what judge is assigned to the case before making a final decision on whether to bring a policy claim.

at risk for suicide and in need of further intervention. Mechanisms for communication between correctional staff and medical personnel may be a systematic problem.

Prior to the time of filing, an expert should evaluate information gathered through Freedom of Information Act requests and other endeavors, and after filing should continue to evaluate information obtained through subpoenas to agencies for documents related to previous suicides or attempted suicides; annual inspections and reviews, both internal and external; training records of the defendants; written policies for suicide prevention; detainee grievances related to medical and mental health care; etc. While a policy claim may complicate and prolong the litigation, it may have more of an impact on preventing future suicides.

### Conclusion

*Hassiba told medical staff that she thought she was going to die. She cried as she told staff that death was "dripping slowly, drop by drop." Eight days after her arrival in immigration detention at the county jail, she knotted her jail-issued knee socks together and wrapped them tightly around her neck. She lay face down on the cement floor of her cell and strangled herself.*

*A poetic four page note written in French left on a desk in her solitary cell included her goodbyes and her hope to join her mother who had died years earlier. She was discovered only when a correctional officer entered the unit to serve a sack lunch and found her body already cold and lifeless, her face purple. Her sister traveled from her home in Canada to McHenry County, Illinois to claim Hassiba's body.*

Those who operate detention facilities must be held accountable for the health and safety of the vulnerable individuals in their care. Mere detention must not be a death sentence. The statistics of suicide in custody speak volumes of the need for continued attention to this phenomenon. Suicide in custody can be prevented through appropriate training, screening, observation, intervention, and treatment policies and practices. Litigation may contribute to this effort, particularly when cases are carefully selected, exhaustively and creatively developed, doggedly and persistently pursued, and brought to a favorable conclusion.<sup>37</sup>

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<sup>37</sup> This article addresses only the very beginning of the litigation of a jail suicide case. There is continued support for those who want to consult beyond the initial stages. The National Police Accountability Project of the National Lawyers Guild operates a listserv where lawyers routinely exchange discovery ideas and documents and pleadings, share experiences with expert witnesses, and strategize: [www.nlg-npap.org](http://www.nlg-npap.org).

