

LITIGATION

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MONDAY, OCTOBER 6, 2008

The Rules On Punitive Damages



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PUNITIVE DAMAGES continue to generate headlines and heated debate across the country. As New York practitioners are well aware, the U.S. Supreme Court has in recent years addressed the due process constitutional standards governing punitive damage awards. In June, the Court ruled in the Exxon Valdez case that the

Appeals and other New York state and federal courts on the viability of punitive damage claims under New York law. Whether you are a plaintiff's lawyer advancing such a claim in the good-faith belief that the facts of your case justify such an award, or defense counsel moving against a punitive damage demand at the pleading or summary judgment stage, it is critical for litigators to understand these developments and trends in New York law.

Punitive damages awards continue to generate headlines and heated debate across the country. The New York Court of Appeals and other New York state and federal courts are weighing in on the viability of punitive damage claims.

maximum award of such damages allowed under federal maritime law was equal to the jury's award of compensatory damages.¹

Although these High Court decisions may grab the lion's share of law review articles and legal blog discussions, litigators should be aware of important decisions by the New York Court of

The Standards

The standards for awarding punitive damages under New York law are well settled.

These damages, also known as exemplary damages, serve a dual purpose: first, to punish the tortfeasor, and second, to deter both the wrongdoer and others similarly situated from engaging in the same conduct in the future.² New York courts have strictly limited punitive awards to the most reprehensible instances of wrongdoing; they are only awarded in cases involving gross, wanton or willful fraud, or other morally culpable conduct.

A defendant's wrongdoing must

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be more than intentional, and must evince “a high degree of moral turpitude and demonstrate[] such wanton dishonesty as to imply a criminal indifference to civil obligations.”³ Simple negligence or bad behavior will not support a punitive award under New York law, regardless of the underlying theory of recovery pleaded.

Whether the defendant’s conduct meets this high bar justifying punitive damages is, of course, where plaintiff’s and defendant’s counsel inevitably part company. Representing a badly injured claimant, a plaintiff’s counsel may be convinced that a multi-million dollar punitive award is justified. On the other hand, defense counsel may well see a demand for punitive damages as nothing more than a baseless, even “knee jerk” litigation tactic, and may move to dismiss the demand on the grounds that the behavior alleged, even if proven, is not the kind of malicious conduct justifying punitive damages.

In other cases, the battleground for punitive damages may be at the summary judgment stage. As discussed below, courts applying New York law have not hesitated to dismiss punitive damage claims before trial where they are unsupported by the facts.

Wrongful Adoption

In *Ross v. Louise Wise Services*, the New York Court of Appeals addressed the viability of punitive damages in the context of a “wrongful adoption” case.

The plaintiff-parents brought claims against the defendant-adoption agency alleging that the agency wrongfully withheld pertinent medical history regarding the child they adopted in 1961. Despite the plaintiffs’ statement that they wanted to adopt “a healthy infant from a healthy family,” the child they adopted was actually born to parents with significant histories of emotional disturbance and mental illness.

Years later, after their then-adult son was diagnosed as a paranoid schizophrenic, the plaintiffs asserted claims for wrongful adoption/fraud, negligence and breach of fiduciary duty, and intentional infliction of emotional distress. The Court of Appeals, noting that the defendant-agency concededly misrepresented facts about the child’s background, affirmed the ruling below that the parents had presented sufficient triable

facts on their fraud claim for compensatory damages.

However, the Court reversed the Appellate Division, First Department ruling affirming the trial court’s denial of the defendants’ motion for summary judgment with respect to the claim for punitive damages. The Court reiterated the fundamental standards that punitive damages may only be awarded as a matter of New York law to punish conduct that was deliberate “and has the character of outrage frequently associated with crime.”⁴ The Court of Appeals concluded that “even if [the defendant’s] failure to disclose may have been tortious, its conduct in connection with the adoption did not evince the high degree of moral turpitude required for punitive damages. Nor would punitive damages be warranted against the Agency for deterrence.”⁵

The Court explained that the plaintiffs’ complaint “includes a single cause of action for wrongful adoption and fraud *at the time of the adoption*.”⁶ Therefore, the reprehensibility of defendant’s conduct must be evaluated under the prevailing norms in the early 1960s when the adoption took place.

The Court noted that the defendant’s policies were in line with the then-current thinking on both the cause of mental illness (nurture more significant than nature) and how adoptions should best be handled (disclosure of negative medical information to adoptive parents was to be avoided). Thus, the Court concluded that the defendant’s conduct was not malicious or vindictive in light of the prevailing norms, even though those norms no longer reflect the current thinking on mental illness or adoption policies.

Accordingly, a claimant should be precise in defining the time period of the conduct allegedly justifying punitive damages. In cases where the conduct at issue happened many years ago, as is often the case in the toxic tort context, a plaintiff must be prepared to show that the conduct was outrageous based on the norms and knowledge then prevailing.

Defense counsel may seek to engage an expert witness to establish that the conduct was not sufficiently malicious or vindictive at the time. Finally, if circumstances have changed so that the allegedly offending conduct could not happen today, as with a change in the law, defense counsel may properly assert that the goal of deterring future improper conduct cannot be satisfied.

Regardless of whether you are the proponent or opponent of the punitive damage claim, preparation, including the retention of expert witnesses, may be necessary to build a proper record for the court to determine whether punitives can be recovered.

Residential, Hotel Injury Cases

Some of the more common cases where punitive damages have been recovered in New York have been in the landlord-tenant context.

For example, in *Solis-Vicuna v. Notias*,⁷ a mother and her infant daughters sued the defendant building owners alleging lead paint poisoning of the children while they resided in the building. After the jury rendered a verdict in the infants’ favor, awarding them \$380,000 and \$420,000, respectively, for future pain and suffering, and imposing punitive damages in the amount of \$260,000, the building owners moved under CPLR 4404 to set aside the verdict and to dismiss the punitive damages findings, or alternatively, to reduce the punitive award as excessive.

The trial court held that the punitive award was supported under the facts of the case, finding that there was clear and convincing evidence to show that the defendants were aware of the dangers of lead given the presence of children in the apartment. Several inspections of the premises were conducted by the Department of Health, and the defendants were notified of a dangerous lead condition by an order to abate on several occasions. The defendants’ knowledge of the lead hazard and failure to take action were found adequate to support the punitive damage award.

Additionally, the *Solis-Vicuna* court, citing the U.S. Supreme Court’s ruling in *BMW of North America Inc. v. Gore*,⁸ held that the amount of punitive damages awarded was not excessive when compared with the compensatory damages awarded. The court held that there was sufficient evidence of reprehensible conduct and noted that the punitive award, less than one third of the compensatory award, was not disproportionate.

In another lead paint case, *Morris v. Flaig*,⁹ former tenants sued their landlords alleging violations of New York law and the federal Residential Lead-Based Paint Hazard Reduction Act (RLPHRA), alleging that their daughter’s diagnosis of pervasive devel-

opmental disorder was caused by lead paint at their Brooklyn residence. The district court granted summary judgment to the landlords as to the tenants' claims for constructive eviction, negligent infliction of emotional distress, and nuisance.

After the jury found the landlords liable for negligence and breach of the implied warranty of habitability and awarded the tenants \$5,268 in compensatory damages and \$110,000 in punitive damages, the tenants moved for partial judgment notwithstanding the verdict, and the defendants moved for judgment as a matter of law and for remittitur of the punitive damages award. District Judge Joseph Bianco held that "[a]lthough claims for breach of the implied warranty of habitability sound in contract, they are dramatically different from breach of contract claims arising from breach of privately negotiated agreements."¹⁰ The court recognized that:

The rights implied into all rental agreements in New York under RPL §235-b are non-waivable, and directly address concerns of health and public safety, and deterring landlords from committing egregious violations of the implied warranty of habitability directly serves the public interest.... Indeed, a number of New York courts have historically permitted punitive damages for wanton violations of the implied warranty of habitability (citation omitted).¹¹

However, the district court did find that the punitive award, more than 20 times the compensatory award, was grossly excessive under both state law and the federal constitutional standards enunciated by the U.S. Supreme Court, and the punitive award was conditionally remitted to \$50,000.

Unlike the residential lead paint cases discussed above, in *Grogan v. Gamber Corp.*,¹² a case of first impression in New York, the Supreme Court, New York County denied recovery of punitive damages for injuries allegedly caused by hotel bedbug bites.

The plaintiffs brought suit against both the hotel owner and the hotel exterminators with whom the hotel had a service contract, alleging that "the presence of bedbugs was tolerated and defendants' indifference to this condition [was] evident from their haphazard procedures in treating infected rooms and those adjacent at/or near them."¹³

Moving for summary judgment, the defendants argued that even if the plaintiffs could prove all of their claims at trial, they still

could not meet New York's high threshold for punitive damages. In order to establish their claims, the plaintiffs relied on an affidavit of a professor of medicine who also possessed a doctorate in entomology.

The trial court nevertheless granted summary judgment on the punitive claim, recognizing that punitive damages are limited to reprehensible actions that rise almost to the level of a crime. The court distinguished a bedbug case from the Seventh Circuit¹⁴ which permitted punitive damages, holding that while the violations in that case involved violations of a state statute and city code, and the hotel owner there rented out rooms knowing that they had live, feeding bedbugs, "[a]t bar, the issues of culpability relate to negligence only."¹⁵

Accordingly, a claimant in a lead paint, bedbug or other personal injury case must establish knowledge of a serious risk to health and a conscious disregard of the hazard to support his demand for punitive damages. Personal, first hand knowledge of the hazard and persons at risk, such as seen in the landlord-tenant cases, is critical.

Market Share Liability Cases

Finally, in a ruling of great interest to the mass tort bar, district judge Shira Scheindlin ruled last fall in *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*,¹⁶ a case in which the authors' firm represents a number of defendants, that punitive damages could not be recovered where New York claimants relied on market share liability to prove causation.

In the *MTBE* multidistrict litigation, the plaintiffs sued a number of defendant corporations for damages stemming from contamination, or threatened contamination, of their groundwater with MTBE, a chemical added to gasoline. Converting the defendants' Rule 56 motion into a motion in limine, Judge Scheindlin held that while "[m]arket share liability has the effect of placing the burden on the defendant to prove that it did not cause a particular harm," a New York claimant seeking to recover punitive damages "should also be required to identify the defendants that caused the harm rather than lumping all defendants together to find the deepest pocket among them."¹⁷

The district court concluded that allowing punitive damages where a claimant is

relying on market share liability would be inconsistent with *Hymowitz v. Eli Lilly and Co.*,¹⁸ New York's leading case on market share liability.

Conclusion

While keenly following the U.S. Supreme Court's important pronouncements concerning federal limitations on punitive damage awards, New York practitioners should also keep a watchful eye on important punitive damage rulings under New York law.

Recent decisions offer important guidance on how a punitive claim must be pleaded and proven by plaintiffs, and how defense counsel can succeed in many cases in having a punitive demand dismissed before trial as insufficient as a matter of law or factually unsupported.

New York's high bar for punitive damages requires that practitioners focus from the very onset of litigation on the elements of a successful punitive damage claim and how to defend against such a demand.

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1. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).

2. *Ross v. Louise Wise Servs. Inc.*, 8 N.Y.3d 478, 489 (2007).

3. *Walker v. Sheldon*, 10 N.Y.2d 401, 405 (1961). See also *Randi A.J. v. Long Island Surgi-Ctr.*, 842 N.Y.S.2d 558, 564 (2d Dept. 2007) ("Courts in this State have long recognized that those who, without specifically intending to cause harm, nevertheless engage in grossly negligent or reckless conduct showing an utter disregard for the safety or rights of others, may also be deserving of the imposition of punitive damages.")

4. *Ross* at 489 (quoting *Prozeralik v. Capital Cities Communications Inc.*, 82 N.Y.2d 466, 479 (1993)).

5. *Id.* at 490. In 1983, the Legislature enacted Social Services Law §373-a requiring the disclosure of medical histories to preadoptive parents and adult adoptees. The law was amended in 1985 to include adoptive parents.

6. *Id.* at 491 (emphasis added).

7. No. 17769/2002, slip op., 2008 WL 2513656 (N.Y. Sup. Ct. Kings County June 23, 2008).

8. 517 U.S. 559 (1996).

9. 511 F. Supp. 2d 282 (E.D.N.Y. 2007).

10. *Id.* at 297.

11. *Id.*

12. 19 Misc. 3d 798 (N.Y. Sup. N.Y. County 2008).

13. *Id.* at 803.

14. *Mathias v. Accor Econ. Lodging Inc.*, 347 F.3d 672 (7th Cir. 2003).

15. 19 Misc. 3d at 808.

16. 517 F. Supp. 2d 662 (S.D.N.Y. 2007).

17. *Id.* at 662.

18. 73 N.Y.2d 487 (1989).