# Punitive Damages in Attorney Malpractice Cases

Recent cases characterized as "malpractice" actions against attorneys have included awards of punitive damages.[1] In each case there existed claims for relief based upon malpractice in its traditional "professional negligence" sense and conduct which arguably fell beyond the professional duty owed by an attorney.[2] In essence, the attorney's conduct was judged as a whole: no distinctions were drawn between the breach of a professional responsibility owed to the client and wrongful acts which outside of the attorney-client relationship would still be actionable. The two merit separate consideration. For example, an attorney's intentional misrepresentations to a client on matters which bear no relation to a lawsuit the client has asked the attorney to bring, and which the attorney has negligently allowed the statute of limitations to run on, are separate acts.[3] Letting the statute run is clearly malpractice.[4] Intentional misrepresentations on other matters may be characterized as fraudulent or malicious conduct, or as a wanton disregard of the client's rights.[5]

Distinguishing such conduct from malpractice is important for several reasons: (1) punitive damages are generally inappropriate when the conduct is mere negligence;[6] (2) the elements of each cause of action are different;[7] and (3) the public should not be en-

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1. *See* Blegan v. Superior Court of Los Angeles County, 125 Cal. App. 3d 959, 178 Cal. Rptr. 470 (1981); Mitchell v. Transamerica Insurance Co., 551 S.W.2d 586 (Ky. Ct. App. 1977); McKinnon v. Tibbets, 440 A.2d 1028 (Me. 1982); Rodriguez v. Horton, 95 N.M. 361, 622 P.2d 261 (1980).

2. Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys*, 9 OHIO N.U.L. REV. 1, 8 (1982).

3. *See* R. MALLEN & V. LEVITT, LEGAL MALPRACTICE § 1 (2d ed. 1981) [hereinafter cited as MALLEN & LEVITT].

4. *See id.* at § 433.

5. *See id.* at § § 40-68. *See also* Luvera, *How to Avoid Legal Malpractice*, 31 Mo. B.J. 127 (1975).

6. *See* D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 4.6 (1980).

7. *See generally* Dahlquist, *supra* note 2, at 7 (describing the elements of an attorney malpractice action sounded in negligence as causation, duty, negligence, damages, and defenses). *See also* McKinnon v. Tibbets, 440 A.2d 1028, 1030 (Me. 1982) (listing the elements of an action for fraud or deceit as (1) a false represen-

couraged to perceive attorney malpractice as more than it really is.

A jury award of $10,574.81 in compensatory damages and $25,000.00 in punitive damages was upheld by a New Mexico court.[8] Rodriguez sued his attorney for malpractice and fraud arising from Horton's actions in settling a workmen's compensation case on Rodriguez's behalf. Issues which concerned the Court of Appeals of New Mexico in *Rodriguez v. Horton* were, inter alia:

> a. Whether there was substantial evidence to submit the issues of fraud and malpractice to the jury.
> b. Whether punitive damages should have been awarded.[9]

The court determined there was substantial evidence on all issues submitted to the jury. The court went on to note the jury "could have found Horton guilty of fraud . . . and . . . of malpractice."[10] Neither the appellate court nor the trial court put a specific label on Horton's conduct. The nature of the jury award suggests that more than malpractice was found.[11]

The court did state why it felt punitive damages were appropriate.

> The jury properly awarded punitive damages in this case. Punitive damages may be awarded when the conduct of the wrongdoer is maliciously intentional, fraudulent, or committed with a wanton disregard of the plaintiff's rights. They are awarded as punishment of the offender. From the evidence at trial, the jury could have concluded that Horton acted in wanton disregard of Rodriguez's rights. Besides misleading his client in the $8,000 Workmen's Compensation settlement, Horton settled without authorization Rodriguez's malpractice claim against the chiropractor who treated him after the back injury. He also charged excessive fees for miscellaneous services, claiming he or his associate spent over twenty hours at $50 an hour for letters to a few creditors, advice on how to obtain social security and welfare benefits, preparation on a simple di-

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tation (2) of a material fact (3) made with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or refrain from acting in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to his damage).

8. Rodriguez v. Horton, 95 N.M. 361, __, 622 P.2d 261, 263 (1980).

9. *Id.* at __, 622 P.2d at 263.

10. *Id.*

11. For a general discussion of the basis for damages awards, *see* MALLEN & LEVITT, *supra* note 3, at § § 300-320.

> vorce which was never filed, and a Municipal Court proceeding involving a first offense DWI charge. (citations omitted)[12]

Calling the damages reasonable under the circumstances, the court stated that the punitive damages were "not so unrelated to the compensatory damages as to show passion and prejudice on the part of the jury."[13]

Thus, without distinguishing Horton's conduct in any practical manner, the *Rodriguez* court determined there was sufficient evidence to support an award of punitive damages. The court did not identify which conduct directly supported the components of the total award.

Horton objected to jury instructions which he argued did not properly state the law.[14] The court disagreed, and in dicta set forth a significant delineation of the components of awarded damages by type of conduct. "There was substantial evidence of unintentional or negligent misrepresentation, of malpractice, *and of willful or wanton misconduct justifying the imposition of punitive damages to instruct the jury on these issues.*"[15] This statement recognizes a distinction between conduct which is malpractice and conduct which is not. One might conclude from this statement that if Horton had committed only malpractice no punitive damages would have been awarded. On the other hand, the court may have unintentionally expanded the scope of attorney malpractice to include other than "wrongful acts or omissions arising out of the rendition of professional services."[16]

The *Rodriguez* decision raises at least two important questions. If the compensatory damages were awarded solely to compensate Rodriguez for Horton's malpractice, would Rodriguez have been entitled to punitive damages in a separate action for fraud? Was it the proper function of the trial court to punish Horton for his conduct?

In *McKinnon v. Tibbets*,[17] the Supreme Judicial Court of Maine confronted a case illustrating the need for jury guidance in this area. McKinnon sued his former attorney Tibbets for malprac-

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12. Rodriguez v. Horton, 95 N.M. 361, _, 622 P.2d 261, 265 (1980).
13. *Id.*
14. *Id.* at _, 622 P.2d at 266.
15. *Id.* (emphasis added).
16. *See* MALLEN & LEVITT, *supra* note 3, at § 1.
17. 440 A.2d 1028 (Me. 1982).

tice, later amending his complaint to include a count for fraud and a demand for punitive damages. At trial McKinnon dropped the malpractice claim. Actual damages were stipulated by the parties at $50.00. The jury returned an award of $10,000, of which $9,950 were necessarily punitive damages.[18]

Judgment was affirmed so far as it related to compensatory damages and reversed as to the punitive damages. The court noted: "[a] majority of courts confronted with this issue have held that punitive damages cannot be recovered in a fraud action unless the fraud was malicious, gross or wanton. . . . Since punitive damages are intended as a deterrent to deliberate, malicious, or grossly negligent conduct . . . they should not be awarded for conduct which is simply actionable."[19] The court found Tibbet's conduct "tortious" but not to the level of "outrageousness that is required before a rational jury may find by a preponderance of the evidence that punitive damages are warranted."[20] In a footnote the court commented: "[n]either party has questioned the propriety of awarding punitive damages as a matter of judicial discretion. We assume, therefore, for the purposes of this opinion, that exemplary or punitive damages may be awarded where there is a rational finding of wanton, malicious, reckless or grossly negligent conduct."[21] There was "no evidence on the record to suggest" that Tibbets had acted "wantonly or with reckless indifference to the rights of plaintiff."[22] With such strong language supporting the non-existence of serious wrongful conduct it becomes apparent that the jury acted either irrationally or with disregard to legal distinctions between the two types of conduct.

A Kentucky jury award was overturned as speculative and as "an exercise in pyramiding an inference upon an inference."[23] The

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18. *Id.* at 1031.
19. *Id.*
20. *Id.*
21. *Id.* n.3.
22. *Id.*
23. Mitchell v. Transamerica Insurance Co., 551 S.W.2d 586 (Ky. Ct. App. 1977). The Mitchells had retained Carr to file suit against the owners and operator of a tractor-trailer rig which had struck their car on an interstate highway in Kentucky. Carr let the one year Kentucky statute of limitations expire without filing suit and without informing the Mitchells. Carr did attempt to settle with his malpractice carrier for an amount the Mitchells had previously discussed as possible damages resulting from their accident. Carr later admitted his negligence to the Mitchells. They promptly hired another attorney who brought an action in

jury awarded the Mitchells $90,854.62 in compensatory and $15,000 in punitive damages against their former attorney Carr. The Court of Appeals of Kentucky obeerved that Carr's conduct was clearly malpractice,[24] improper,[25] and involved "bad judgment to say the least."[26] The court failed to find the Mitchells had been damaged by Carr's misconduct. "Moreover, it was not the function of the trial court to punish Carr. His misconduct will be judged in another forum."[27]

*Mitchell* and *McKinnon* point to a serious inquiry concerning the perception of attorney misconduct that is held by jury members and the public at large. In both cases large punitive awards were made and later overturned by appellate courts that found no basis for the awards.[28] Is the lay perception of attorney responsibility so unusually different from the legal basis for holding an attorney liable in such cases? Returning to *Rodriguez*, one can question anew the basis for awarding $25,000 in punitive damages against Horton. Was the jury overly sympathetic to a plethora of conduct which appeared more egregious as a whole than if analyzed by type of conduct? Did the appellate court avoid this question by stating that the punitive damages were not so unrelated to the compensatory damages as to show passion and prejudice on the part of the jury?[29]

According to the logic of *Mitchell*, Rodriguez would have to prove pecuniary loss arising from the misconduct on which the punitive damages were sought. The "reasonable relationship" of punitive damages to compensatory damages would be based upon injuries arising solely from willful, wanton or reckless misconduct.

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the Federal District Court of Southern Indiana against the truck owners and operator. Indiana has a two year statute of limitations and the defendants were subject to process there. Carr was apparently unaware of this. The Mitchells received a $60,000 settlement in the Indiana action.

24. *Id.* at 587.

25. *Id.*

26. *Id.*

27. *Id.* at 588.

28. *See* Mitchell v. Transamerica Insurance Co., 551 S.W.2d 586, 588 (Ky. Ct. App. 1977) (the court observed: "[W]e are certain, however, that damages assessed in the case before us were based upon uncertainties and speculation. . ."). *See also* McKinnon v. Tibbets, 440 A.2d 1028 (Me. 1982) (the court found "no evidence to suggest" that Tibbets acted wantonly or with reckless indifference to McKinnon).

29. Rodriguez v. Horton, 95 N.M. 361, ____, 622 P.2d 261, 265 (1980).

Thus, if Rodriguez's compensatory award related solely to Horton's malpractice, no basis for a punitive award would exist absent a further showing of injury and damage. It becomes necessary to determine the basis of the compensatory award by type of conduct. And under *McKinnon*, the fraudulent, or other non-malpractice wrongful conduct, should be such that standing alone it is more than merely "actionable."[30]

The result in *Rodriguez* could easily be called correct under such an analysis. Legal distinctions between Horton's conduct and the jury processes applied in determining the award would perhaps be more synchronized and understandable.

Arguments for and against allowing attorney conduct to be viewed categorically were addressed in a recent California case. In *Blegen v. Superior Court of Los Angeles County*,[31] the California Court of Appeals reviewed a complaint against real parties in interest Dunbar and Taylor (both attorneys). Blegen had filed a malpractice suit against Dunbar and Taylor. Blegen accused both attorneys of negligence for allowing the statute of limitations to run on his medical malpractice claim against a hospital and others.[32] His amended complaint also included a claim for punitive damages against Dunbar based upon Dunbar's actions in handling the medical malpractice claim.[33] Dunbar held a medical degree as well as a legal degree and allegedly had advised Blegen to forego needed remedial surgery pending the outcome of Blegen's medical malpractice claim.[34]

The trial court granted a motion by Dunbar to strike the claim for punitive damages.[35] The California Court of Appeals reversed, holding that the complaint pleaded "sufficient facts to apprise the defendant of the basis upon which relief is sought, and to permit the drawing of appropriate legal conclusions at trial, absence of the labels 'willful,' 'fraudulent,' 'malicious,' and 'oppressive' from the complaint, does not defeat the claim for punitive damages."[36]

Dunbar argued his advice as a person holding a medical degree

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30. *See* McKinnon v. Tibbets, 440 A.2d 1028, 1031 (Me. 1982).

31. 125 Cal. App. 3d 959, 178 Cal. Rptr. 470 (1981).

32. *Id.* at 961, 178 Cal. Rptr. at 471.

33. *Id.*

34. According to Blegen, Dunbar advised this knowing of Blegen's pain and need for immediate remedial surgery in order to enhance Blegen's claim. *See id.*

35. *Id.* at 964, 178 Cal. Rptr. at 473.

36. *Id.* at 963, 178 Cal. Rptr. at 472.

and his professional relationship to Blegen as an attorney were distinct activities. Blegen had retained him as an attorney, not a doctor; any bad medical advice by Dunbar was only ordinary negligence in his professional capacity as an attorney. The appellate court viewed his dual training differently. Under the facts pleaded by Blegen more than simple negligence was shown. "It demonstrates a conscious disregard for petitioner's safety sufficient to sustain a claim for punitive damages."[37] The "relevance of Dunbar's . . . medical degree is the extent to which his medical training gave him a special awareness of the consequences of his legal advice that petitioner forego surgery. Whether or not this special awareness amounted to a conscious disregard of petitioner's safety is a question of fact to be determined at trial."[38]

The *Blegen* court thus pinpointed a practical basis for judging Dunbar's conduct. Like *Rodriguez*, *Mitchell*, and *McKinnon*, the conduct giving rise to Blegen's claim for punitive damages is arguably outside the professional scope of the attorney-client relationship. However, because Dunbar's "special knowledge" was closely tied to his legal advice, there is a logical basis for determining that his actions as an attorney were in conscious disregard for Blegen's safety.

The question remains as to what real basis a jury would use to resolve this "question of fact."[39] The scope of the attorney-client relationship is clearly an issue. The jury's determination of what this scope includes in a particular factual setting ultimately decides the nature and extent of any award. Is it not the overriding public perception of attorneys and the term "malpractice" that shapes this determination?

*Conclusion*

The real concern in considering awards of punitive damages against attorneys is clearly in distinguishing and understanding the types of conduct and cases for which punitive damages are appropriate. "Malpractice" should be actively distinguished from more serious wrongful conduct. Legal distinctions between the two types of conduct are difficult to maintain or apply in the face of public misunderstanding about the term "malpractice." Courts should

37. *Id.*
38. *Id.*
39. *Id.*

strive to emphasize that juries shape their findings to reflect a recognition of different types of conduct. The court in *Mitchell* observed "trying to predict what a jury might do at any given time or place is hazardous and is one of the vagaries of life."[40] Should a court or attorney expect any less without first resolving the process on which a decision is to be based?

The real effort to maintain sensible jury awards in attorney malpractice cases must come from the practicing legal profession. Attorneys must remain keenly aware of the effect their conduct has upon the public's perception of the legal profession. This effect is perhaps magnified when an attorney is called upon to prosecute a claim for legal malpractice. The attorney who adds a demand for punitive damages in such a case is clearly correct in seeking a just reward for his client. Attorneys should scrupulously avoid the temptation to use such a claim where the real issue will be jury sympathy or misunderstanding. To do otherwise works an injustice upon the defendant attorney and encourages harmful public misconceptions about the role of attorneys in our society.

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40. Mitchell v. Transamerica Insurance Co., 551 S.W.2d 586, 588 (Ky. Ct. App. 1977).