

# The Metropolitan Corporate Counsel®

National Edition

www.metrocorpocounsel.com

Volume 22, No. 9

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September 2014

## What Standard Of Proof Is Required To Prove Punitive Damages?

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The application of punitive damages in mass tort actions in New York is an unsettled area of the law that impacts the way counsel should approach its pretrial motion practice. Decisions describing the potential for punitive damages in cases where intentional conduct has not been established have, at times, moved from a discussion of “reckless *and* wanton” conduct to “reckless *or* wanton” conduct. The difference has led to confusion regarding the heightened standard for punitive damages.

Without clearer guidelines from the appellate courts as to what constitutes sufficient grounds for charging punitive damages, a trial judge’s authority to charge punitive damages in mass tort cases remains unclear. The safest way for litigants to attempt to control risks associated with trying such cases now is through pretrial motion practice, either at the summary judgment or *in limine* stage, to eliminate the punitive damage claim.

### The Standard(s)

The New York Pattern Jury Instruction on punitive damages states that a jury must find defendant’s conduct to be wanton or malicious, bordering on criminal, before finding punitive damages. See New York Pattern Jury Instruction § 2:278. It

further states “[a]n act is malicious when it is done deliberately with knowledge of the plaintiff’s rights, and with the intent to interfere with those rights. An act is wanton and reckless when it demonstrates conscious indifference and utter disregard of its effect upon the health, safety and rights of others.” See *id.*

The last time the Court of Appeals issued a decision with respect to punitive damages was to overturn a finding in *Marinaccio v. Town of Clarence*, 20 N.Y.3d 506, 986 N.E.2d 903 (2013). In *Marinaccio*, the court stated “[p]unitive damages are permitted only when a defendant purposefully causes, or is grossly indifferent to causing, injury and defendant’s behavior cannot be said to be merely volitional; an unmotivated, unintentional or even accidental result of a legally intentional act cannot, alone, qualify [citations omitted].” See *id.* Previously, the Court of Appeals had made an even stronger statement that “[p]unitive damages are awarded in tort actions ‘where the defendant’s wrongdoing has been intentional and deliberate and has the character of outrage frequently associated with crime.’” See *Prozeralik v. Capital Cities Comm’n, Inc.*, 82 N.Y.2d 466, 479 (1993) (internal citation omitted). In determining that punitive damages were improperly charged in a medical malpractice action, the Court of Appeals stated that “punitive damages were improperly charged as a matter of law. The standard for an award of punitive damages is that a defendant manifest evil or malicious conduct beyond any breach of professional duty.” See *Dupree v. Giugliano*, 20 N.Y.3d 921, 924 (2012).



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Despite the clear language indicating that the level of conduct required for a finding of punitive damages is near that of criminality, juries are sometimes given the issue in cases involving far lesser conduct.

Creating further confusion, there is a split in the appellate departments with respect to the standard of proof required for a finding of punitive damages. The First and Second Departments both require clear and convincing evidence before a finding of punitive damages can be made. See *Randi A.J. v. Long Island Surgi-Center*, 46 A.D.3d 74, 842 N.Y.S.2d 558 (2d Dep’t 2007); *Munoz v. Peretz*, 301 A.D.2d 382, 753 N.Y.S.2d 463 (1st Dep’t 2003). On the other hand, the Fourth Department merely requires a preponderance of the evidence before a punitive finding can be made. See *Drabczyk v. Fisher Controls*, 92 A.D.3d 1259, 938 N.Y.S.2d 715 (4th Dep’t 2012).

As discussed below, the use of the word “reckless” in the New York Pattern Jury Instructions and certain cases creates a significant problem for defendants when the issue of whether to charge the jury on punitive damages is argued.

### The Interplay Between Punitive Damages And Recklessness

In cases involving multiple potential tortfeasors, plaintiffs frequently seek a finding of recklessness against defendants in order to get joint and several liability through CPLR § 1602(7). The Court of Appeals addressed the issue of recklessness in the mass tort context in *Maltese v. Westinghouse*, 89 N.Y.2d 955, 678 N.E.2d 467 (1997). The *Maltese* court stated that recklessness was akin to a “gross negligence standard, requiring that ‘the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow’ and has done so with conscious indiffer-

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ence to the outcome [citations omitted].” See *Maltese* at 596-7. The Court of Appeals went on to affirm the First Department holding that the jury finding of recklessness was properly set aside on post-trial motion. Because the Court of Appeals did not believe Westinghouse had acted recklessly, it did not address the issue of whether the standard for finding recklessness and punitive damages was the same. The lack of a ruling on the specific interplay between the standards for recklessness and punitive damages has created a situation where courts are allowing punitive damages to be charged in cases on what is essentially a gross negligence standard.

In *Drabczyk*, the Fourth Department upheld the trial court decision to charge punitive damages, but overturned the jury finding based on insufficient evidence to make that finding. The Fourth Department stated “[w]e recognize that the Court of Appeals declined to determine whether the reckless disregard standard or a higher standard applies to the issue of punitive damages (see *New York City Asbestos Litig.*, 89 N.Y.2d at 957, 655 N.Y.S.2d 855, 678 N.E.2d 467). We therefore conclude that, because the jury found that defendant acted with reckless disregard for decedent’s safety, the court did not abuse its discretion by charging the jury on the issue of punitive damages.” See *Drabczyk* at 1260. In *Drabczyk*, the uncontroverted testimony established that the current testing of the purportedly harmful product demonstrated that it did not violate the regulations in place at the time of the purported exposure.

Stated another way, the defendant in *Drabczyk* created a product in compliance with federal and state occupational health and safety standards, and only by analyzing the product over 30 years later using methods unavailable at the time of manufacture was plaintiff able to establish any potential hazard. The takeaway from the Fourth Department decision is that a trial court may operate within its discretion to charge punitive damages where a defendant is following governmental safety regulations in place to avoid the very harm at issue. Until there is a resolution of the issue undecided by the Maltese court, however, the discretion of trial judges to charge punitive damages remains unclear.

#### Use Of Motions

In order to dispose of punitive damages as an issue in advance of trial, a defendant should explore the possibility of motion practice. In state court, a motion for partial summary judgment on the issue of punitive damages may be available. See, e.g., *Leighton v. Lowenberg*, 103 A.D.3d 530, 960 N.Y.S.2d 87 (1st Dep’t 2013). There, the First Department upheld a grant of partial summary judgment on the issue of punitive damages in a dental malpractice claim because the claims made did not rise above an ordinary malpractice claim. On the other hand, some courts are unwilling to consider such a motion. See *Messner v. Medtronic, Inc.*, 39 Misc.3d 1213(A), (N.Y. Sup. 2013). The judge in *Messner* refused to consider a motion for partial summary judgment on punitive damages, stating “In New York

punitive damages may not be considered until there is a finding of compensatory damages. Consequently, it is premature to consider the application to dismiss those counts seeking punitive damages.” See *id.*, at 11.

Under New York law, punitive damages are not distinct claims, but rather are a remedy. As such, under the Federal Rules of Civil Procedure, punitive damages may not be susceptible of a motion for partial summary judgment in order to create a clear record with respect to potential settlement rationale, or to lift that threat before trial. That said, numerous federal courts in New York have entertained motions *in limine* on the issue of punitive damages. See *In re Methyl Tertiary Butyl Ether (“MTBE”) Products Liability Litigation*, 517 F.Supp.2d 662 (S.D.N.Y. 2007).

Depending on whether a defendant is in a state or federal venue, it should be prepared to file the proper motion in order to take the threat of punitive damages out of the equation prior to resolution of a case through either settlement or trial. Regardless of how the motion is styled, it is imperative that defendants facing potential punitive liability act at the earliest possible moment to remove that threat during litigation.

Until such time as the Court of Appeals clarifies the distinction between the evidence necessary to determine a finding of recklessness and that sufficient to charge for punitive damages, the threat of an unsupportable punitive damages finding against defendants in New York courts is significant.