Same Difference: Punitive Damages Against Nursing Homes Under Common Law and Statute

Over the past decade, New York nursing homes have seen dramatic increases in the number of personal injury actions commenced by or on behalf of their residents, a trend largely attributable to appellate decisions following legislative action, recognizing the availability of recovery under Section 2801-d of the Public Health Law. Amid allocation to already existing common law remedies.

From the nursing home’s perspective, the most problematic aspect of the Section 2801-d cause of action may be the possible imposition of punitive damages for “deprivations” of resident “rights or benefits” deemed “willful,” or committed with “reckless disregard” of such rights and benefits, pursuant to Section 2801-d(2). Since Section 2801-d permits no statutory ceiling on punitive damage awards, nursing home defendants would need to demonstrate that such awards were grossly excessive to obtain a reduction. 1

Furthermore, since punitive damage awards are generally uninsurable under New York law as a matter of public policy, the nursing homes, not their professional liability insurance carriers, would be financially responsible for their payment. Although there have been only a few reported cases of punitive damage awards under Section 2801-d(2), including very verdicts of $15,000,0001 and $200,000,2 the potential for high exposure to punitive damage awards threatens the viability of all New York nursing homes.

There has been some debate in the courts as to whether the legal standard for awarding punitive damages under the common law is any different from the standard set forth in Section 2801-d(2). As set forth herein, these two standards are identical.

Punitive Damages Under the Common Law

From a technical standpoint, punitive damages are not designed to compensate plaintiffs but rather, as the term connotes, to punish the party that inflicted the harm. At common law, punitive damages are available for the purpose of vindicating a public right, only where the actions of the alleged tortfeasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public general interest or intentional, wanton or malicious conduct aimed at the public right, only where the actions of the alleged tortfeasor constitute gross recklessness or malicious conduct aimed at the public interest or intentional, wanton or malicious conduct aimed at the public right, only where the actions of the alleged tortfeasor constitute gross recklessness or wanton or malicious conduct aimed at the public interest or intentional, wanton or malicious conduct aimed at the public right, only where the actions of the alleged tortfeasor constitute gross recklessness or malicious conduct aimed at the public interest or intentional, wanton or malicious conduct aimed at the public right, only where the actions of the alleged tortfeasor constitute gross recklessness or malicious conduct aimed at the public interest or intentional, wanton or malicious conduct aimed at the public right, only where the actions of the alleged tortfeasor constitute gross recklessness or malicious conduct aimed at the public interest or intentional, wanton or malicious conduct aimed at the public right, only where the actions of the alleged tortfeasor constitute gross recklessness or malicious conduct aimed at the public interest.

In the nursing home’s conduct was such as would warrant the award of punitive damages to the plaintiff.3 Consequently, in Hall v. Odd Fellow & Rebekah Health Care Facility,4 the Fourth Department similarly dismissed the punitive damages claims asserted by the estate representative of a deceased nursing home resident. In Hall v. Odd Fellow & Rebekah Health Care Facility,4 the Fourth Department similarly dismissed the punitive damages claims asserted by the estate representative of a deceased nursing home resident.

The verbiage in Section 2801-d(2) requiring a showing of “willful deprivations” of resident rights and benefits, or deprivations committed in “reckless disregard” of those rights and benefits to support a punitive damage claim is strikingly similar to the language in the above-cited cases governing the awarding of punitive damages under the common law.

After concluding that plaintiff’s opposition papers raised factual issues precluding summary judgment as to the claims concerning pressure sores and falls, the court addressed the Section 2801-d(2) punitive damages claim. The court concluded, without citation to any authority, that the standard for awarding punitive damages under Section 2801-d(2) was “less stringent” than the common law standard, and that it was “premature” for the court to consider the punitive issue, notwithstanding the completion of discovery in the case.5 Similarly, in Domicidi v. Townhouse Operating Co., LLC6 the defendant-nursing home moved for partial summary judgment, seeking, among other things, dismissal of the plaintiff’s claims for punitive damages, which were being sought under the common law and Section 2801-d(2). Regarding the common law punitive damages claim, the defendant-nursing home submitted the applicable hospital and nursing home records, providing a “highly detailed account of the care” received at the facility, thereby meeting its burden for dismissal of such claims.7 The court dismissed the plaintiff’s common law claims for punitive damages, concluding that the alleged wrongdoing, “while serious, does not in and of itself evince a reckless or complete disregard or conscious indifference to justify punitive damages under the common law.”8 However, with respect to the punitive claim, the court denied the defendant’s motion.

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The record lacked any evidence that the plaintiff could not recover punitive damages or malpractice and justify a standard purportedly less stringent than the common law standard. In that case, defendant Haym Solomon Home for the Aged moved for summary judgment, seeking dismissal of all claims, including the claims for punitive damages.

In addressing the punitive damages issue, the court analyzed the statutory language to discern the standard that needs to be met under Section 2801-d(2) to impose punitive damages and determined that the wrongful conduct must have created a substantial and unjustifiable risk of harm with a conscious disregard of, or indifference to, that risk, 34 a standard that is essentially identical to the common law standard. In that case, defendant Haym Solomon Home for the Aged moved for summary judgment, seeking dismissal of all claims, including the claims for punitive damages.

In another very recent Kings County matter, the court held, without reference to any limitations that required two people to provide constant supervision and/or physical lift for transfers, 35 Plaintiff claimed that the nursing home left plaintiff alone on a toilet with the bathroom door closed, causing her to fall and injure herself. 24 It was also claimed that the nursing home delayed in obtaining follow-up x-rays after the initial x-rays were erroneously negative for fracture. 36 In Williams v. Ruby Weston Manor, 27 a Kings County matter, the court held that punitive damages may be recovered pursuant to Section 2801-d(2) in very rare instances, noting that the standards for awarding punitive damages under the common law and Section 2801-d(2) are virtually identical. In Williams, the plaintiff, a resident of the defendant-nursing home, was purportedly disabled, with limitations that required two people to provide constant supervision and/or physical lift for transfers. 37 Plaintiff claimed that the nursing home left plaintiff alone on a toilet with the bathroom door closed, causing her to fall and injure herself. 24 It was also claimed that the nursing home delayed in obtaining follow-up x-rays after the initial x-rays were erroneously negative for fracture. 36 In Williams, the plaintiff sought to amend the complaint to add various claims, including claims for punitive damages under Section 2801-d(2). The court denied this portion of the motion as futile. 38 Plaintiff claimed that the negligence of the nursing home would have created a substantial and unjustifiable risk of harm with a conscious disregard of, or indifference to, that risk, 34 a standard purporting to be virtually identical to the common law standard. In that case, defendant Haym Solomon Home for the Aged moved for summary judgment, seeking dismissal of all claims, including the claims for punitive damages.

Military Law
Meeting Date: March 20
Chair: Daniel T. Campbell

The committee discussed an upcoming Dean’s Hour CLE program scheduled for May 17, 2012 at 12:30 p.m., which will include an update of the Veteran’s Law Guide prepared by the Committee in 2010. The committee also discussed a change in Social Security benefits law which may help some veterans increase their benefit.

Tax Law
Meeting Dates: Jan. 10, Feb. 14, March 13
Chair: Yvonne R. Cort

For the March 2012 meeting, the committee welcomed attorney and adjunct NYU professor Bryan Sklaratos, Esq. of Kostelantz & Fink, LLP to present an ethics CLE seminar entitled “Good Lawyer/Bad Lawyer: Ethical Issues for Tax Attorneys.” Mr. Sklaratos discussed Circular 230 and other standards applicable when negotiating with the IRS and advising clients on tax positions.

The February committee meeting was held jointly with the Federal Courts Committee, with Assistant U.S. Attorney Burton Ryan as guest speaker. With Peter Tomao, Esq. as moderator, Mr. Ryan detailed his experiences prosecuting cases involving foreign bank accounts, the FBAR laws and related matters in his presentation titled “Beyond Evasion: A Federal Prosecutor’s View of Tax Cases.”

The January committee meeting featured Vice-Chair of the Elder Law committee Paul Hyl, Esq. of Generich Geriatric Ctr., 39 the court analyzed Section 2801-d(2), and determined that to uphold punitive damages under the common law and for Section 2801-d(2), but have nevertheless determined that the plaintiffs failed to satisfy their burden under the statute as articulated in Haym Menorah Home & Hosp. for the Aged; 34 Ragzi v. Park Ave. Extended Care Center Corp. 28 Other recent decisions seem to simply apply the common law standard to punitive damages claims asserted under Section 2801-d(2) and dismissed them. See Held v. Woodmere Rehab. & Health Care Ctr., 37 Meltows-Kopallo v. Fairview Nyc Care Ctr. 35

Conclusion
The standard for awarding punitive damages against a personal injury defendant under New York’s common law requires the demonstration of intentional or highly reckless conduct. Likewise, Section 2801-d(2) sets forth a very high standard for awarding punitive damages against nursing homes. As recognized by most of the lower court decisions discussed herein, the standard for awarding punitive damages under Section 2801-d(2) requires plaintiffs to “clear a high bar.”

In view of the foregoing, and in accord with the majority of these decisions, New York courts should uniformly hold that the standards for awarding punitive damages under the common law and Section 2801-d(2) are, in essence, identical, with no meaningful differences between them. Consequently, as under the common law, New York courts should very rarely permit a party to join punitive damage claims under Section 2801-d(2).

In view of the ever-increasing assertion of punitive damages claims against nursing homes, defense counsel must devise a plan from the inception of litigation to address them, assessing their potential merit and viability. Dispositive motion practice following the completion of discovery should be considered well in advance of trial, to avoid the specter of a potential punitive damage award. Even if defense counsel believes that a punitive damage award is unlikely, a trial judge may nevertheless let the jury decide the issue, perhaps as a means of gaining support from the defense in order to forestall a settlement.

To avoid this possibility, nursing home defense counsel should strongly consider moving for partial summary judgment as to the punitive damage claim in advance of trial. In moving for summary judgment, the nursing home defendant should include an expert affirmation to best establish its prima facie entitlement to summary judgment. The defense counsel should contend that the high standard for awarding punitive damages under the common law is virtually identical to the standard set forth in Section 2801-d(2), with no meaningful differences between them. The dismissal of the punitive damages claim before trial will improve the nursing home’s position and will likely result in a better outcome in the litigation.

Keith L. Kaplan is a partner in the Garden City office of Kaufman Borgese & Ryan LLP. He devotes a substantial part of his practice to the defense of nursing homes in personal injury cases.

8. 302 A.D.2d 847.
9. Id. at 625.
10. Id. at 620.
11. 302 A.D.2d 948 (4th Dep’t 2003).
12. 19 Misc.2d 112a, 866 N.Y.S.2d 93 (Table) (Sup. Ct. NY County 2008).
13. Id.
14. Id.
15. Id.
16. Id.
18. Id. at 2.
19. Id. at 3.
20. Id. at 2.
21. Id. at 2.
22. Id. at 2.
24. Id. at 2.
25. Id. at 2-3.
26. Id. at 2.
27. Id. at 2-3.
28. Id. at 12-13.
29. Id. at 12-13.
30. Id. at 13 (facts omitted).
32. Id.
33. Id. at 7.
34. Id. at 8-10.
39. See Holder, supra.

Qualifications
Ms. Hubelbank has a background in litigation and has represented clients in a variety of disputes before federal and state courts. In particular, Ms. Hubelbank has represented clients in matters involving education law, family law, and commercial law. She has also represented clients in matters involving personal injury, medical malpractice, and professional liability. Ms. Hubelbank has represented clients in matters involving employment law, bankruptcy law, and real estate law. Ms. Hubelbank has also represented clients in matters involving intellectual property law, copyright law, and trademark law. Ms. Hubelbank has represented clients in matters involving securities law, antitrust law, and bankruptcy law. Ms. Hubelbank has also represented clients in matters involving corporate law, securities law, and bankruptcy law. Ms. Hubelbank has also represented clients in matters involving securities law, antitrust law, and bankruptcy law. Ms. Hubelbank has also represented clients in matters involving securities law, antitrust law, and bankruptcy law. Ms. Hubelbank has also represented clients in matters involving securities law, antitrust law, and bankruptcy law. Ms. Hubelbank has also represented clients in matters involving securities law, antitrust law, and bankruptcy law. Ms. Hubelbank has also represented clients in matters involving securities law, antitrust law, and bankruptcy law.