New Jersey Supreme Court Ruling Clarifies Standards for Punitive Damages in Medical Malpractice Actions

On August 25, 2022, the Supreme Court of New Jersey issued its decision in *Rivera v. The Valley Hospital, Inc.*, reversing the trial judge's interlocutory order denying the defendants' motions to dismiss a claim for punitive damages and holding that punitive damages would not be appropriate in the case. In the opinion, Justice Pierre-Louis reiterated the proposition enunciated in prior case law that punitive damages in medical malpractice actions are only available in "exceptional cases."

This case arose out of surgery performed in October 2014 on a female patient for benign uterine fibroids. The operation was performed with a medical device known as a morcellator, which was intended to reduce the size of the uterus or myomas by creating smaller pieces of tissue that could readily be removed through small incisions or with laparoscopic instruments. The post-surgical pathology analysis of the tissue, however, revealed the presence of a malignant high grade leiomyosarcoma. The Court noted that the medical literature indicated that uterine leiomyosarcoma is a rare cancer that is difficult to diagnose preoperatively because uterine sarcomas are difficult to distinguish from noncancerous fibroids.

The patient died of cancer in September 2015. A malpractice action was commenced seeking compensatory and punitive damages with several claims including medical malpractice and lack of informed consent. The defendants included the operating surgeon and the hospital where the surgery was performed. In addition, plaintiffs named both the president and the risk manager of Valley Hospital as defendants, not only for lack of informed consent but also for failing to establish a moratorium on the use of the power morcellator at the hospital.

The allegations against all defendants emerged from an April 17, 2014 Safety Communication issued by the U.S. Food & Drug Administration (FDA) discouraging the use of power morcellation during laparoscopic hysterectomies and myomectomies. The FDA's communication set forth an estimate that 1-in-350 women undergoing the procedure would be found to have an unsuspected malignancy and that the use of the device had the risk of spreading cancerous tissue within the abdomen and pelvis, with the potential for worsening the patient's long-term survival. The FDA did not recall the device or prohibit its use.

After issuance of the FDA Safety Communication, Valley Hospital administrators and physicians considered possible responses including the drafting of a procedure-specific informed consent form. The discussions included an assessment of the infrequent occurrence of a malignancy and the benefits to a patient from a laparoscopic rather than open surgical procedures. The new informed consent form was not completed or approved before the October 2014 surgery involved in the lawsuit. In November 2014, the FDA issued an updated Safety Communication explicitly warning against use of power morcellation "in the majority" of fibroid patients. While it recommended that a "black box warning" be added by the manufacturers of those devices, it still did not issue a recall or prohibition on their use. In late December 2014, Valley Hospital discontinued the use of the power morcellation device.

Plaintiffs premised the claim for punitive damages on the surgeon's failure to warn of the increased risk of a cancer diagnosis or to recommend less risky alternative procedures and argued that the continued use of the morcellator device after the FDA Safety Communications was reckless and in willful and wanton disregard of the patient's safety.

Reviewing the standards under the New Jersey Punitive Damages Act (PDA), the Court emphasized that the statute requires clear and convincing evidence that the defendant's conduct was actuated by actual malice or accompanied by a wanton and willful disregard of persons who might be harmed. Critical to this analysis was the statute's definition of "wanton and willful disregard" as "a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission."

Measuring these requirements for an award of punitive damages against the summary judgment standard, the Court stated that plaintiffs failed to submit proofs in opposition to the motion that presented a genuine issue of material fact. The Court characterized the FDA Safety Communication as "purely advisory in nature." It concluded that "[a] reasonable jury could not find by clear and convincing evidence that punitive damages are warranted by these facts." There was no evidence of conduct that occurred with knowledge of a high degree of probability of harm and reckless indifference to the consequences. Noting that "there is risk to virtually every medical procedure," the Court stated that the evidence here showed that the likelihood of the malignancy was less than one percent and that this was insufficient to justify an award of punitive damages.

Plaintiffs had the support of the New Jersey Association for Justice as *amicus curiae*, while several organizations submitted *amici* briefs in support of the defense. These included the Medical Society of New Jersey and the American Medical Association (with Greenbaum attorney John Zen Jackson acting as amicus counsel for the MSNJ and the AMA), as well as the New Jersey Hospital Association, the New Jersey Patient-Doctor Alliance, and the New Jersey Defense Association.

The common defense theme emphasized the several adverse effects on healthcare if the bar for an award of punitive damages was set too low, permitting claims to go forward without adhering to the statutory requirements and the summary judgment evidential burden. Lowering the threshold showing required for such a claim with denial of summary judgment would have unintended collateral consequences with a chilling effect on the willingness of physicians to offer surgical procedures known to have serious risks - a circumstance commonly present in medical interactions - even where the probability of the risk materializing is small or uncertain.

The *Rivera* decision does not immunize medical defendants from claims for punitive damages, but it does reinforce the trial bench's obligation to rigorously apply the standards for clear and convincing evidence of willful and wanton conduct.

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