



## Alerts

### Public Policy Precludes Nonpecuniary Damages in Legal Malpractice Case Arising out of Criminal Defense

August 8, 2012

*Lawyers for the Profession® Alert*

*Dombrowski v. Bulson*, 19 N.Y.3d 347, \_\_\_ N.E.2d \_\_\_, 2012 WL 1946592 (N.Y. 2012)

#### Brief Summary

The Court of Appeals of New York held that recovery of damages in legal malpractice actions is limited to pecuniary damages.

#### Complete Summary

Plaintiff client sued defendant, his former criminal defense counsel, seeking to recover damages for loss of liberty arising from the client's alleged wrongful incarceration and for lost wages. The client had been convicted in September 2000, of attempted rape, sexual abuse, and endangering the welfare of a child. The client moved to vacate his conviction based on the argument that he had ineffective assistance of counsel. Ultimately, the indictment against him was dismissed.

The client alleged that as a result of the attorney's alleged negligence, he was incarcerated from January 2001 until July 2006. The trial court granted the lawyer's motion for summary judgment, finding that the client's receipt of Social Security disability benefits while incarcerated precluded his claim of pecuniary damages, and that damages for nonpecuniary loss were not available in legal malpractice actions. The appellate court modified and reinstated the portion of the complaint seeking nonpecuniary damages.

The Court of Appeals of New York initially noted that New York courts that have addressed the issue have generally rejected the claim that a plaintiff in a legal malpractice action is entitled to nonpecuniary damages arising out of representation in civil proceedings. The client argued that a different result should obtain based upon the type of egregious harm most likely to be suffered by a defendant who is the victim of malpractice in a criminal action—the loss of liberty attendant to a period of incarceration—harm that is nonpecuniary in nature.

The Appellate Division—First Department had previously acknowledged the argument that limiting recovery to pecuniary damages in cases of malpractice arising from criminal matters would likely deny the claimant any meaningful

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relief, but found that such limitation was a policy decision that applied equally whether the actions arose in the civil or criminal context. *Wilson v. City of New York*, 294 A.D.2d 290, 292-93, 743 N.Y.S.2d 30 (1st Dept. 2002). The Appellate Division—Fourth Department in this case reached the opposite conclusion, however, finding a parallel between actions for malpractice in a criminal action and claims for false arrest and malicious prosecution. The Court of Appeals of New York concluded that false arrest and malicious prosecution are intentional torts, and that it makes sense that the scope of recovery for deliberate torts is broader than for torts based on the failure to exercise the standard of care. The court concluded by stating:

We see no compelling reason to depart from the established rule limiting recovery in legal malpractice actions to pecuniary damages. Allowing this type of recovery would have, at best, negative and, at worst, devastating consequences for the criminal justice system. Most significantly, such a ruling would have a chilling effect on the willingness of the already strapped defense bar to represent indigent accused. Further, it would put attorneys in the position of having an incentive not to participate in post-conviction efforts to overturn wrongful convictions. We therefore hold that plaintiff does not have a viable claim for damages, and the complaint should be dismissed in its entirety.

### Significance of Opinion

This decision is significant because a plaintiff suing his or her former criminal defense counsel not only must generally establish his or her innocence, but he or she is also limited to pecuniary damages and is not entitled to recover damages for nonpecuniary damages stemming from the incarceration.

For further information, please contact [Terrence P. McAvoy](#).

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## 2013 Legal Malpractice & Risk Management Conference

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For more information, please visit the LMRM Conference website—[www.LMRM.com](http://www.LMRM.com)—or contact the conference planner, Renee Odom, at [rodod@hinshawlaw.com](mailto:rodod@hinshawlaw.com).