



## ***KD Alert: NY's Highest Court Further Limits Available Damages in Legal Malpractice Actions***

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*In a recent Court of Appeals decision, New York's highest court reversed an appellate court's ruling and held that plaintiffs in legal malpractice actions against criminal defense attorneys cannot recover non-pecuniary damages even in situations where the alleged malpractice results in years of wrongful imprisonment. The Court of Appeals appears to have based its decision on the need to avoid "at best, negative and, at worst, devastating consequences for the criminal justice system" and placing "a chilling effect on the willingness of the already strapped defense bar to represent indigent accused."*

*In Dombrowski v. Bulson, 2012 N.Y. LEXIS 1244, 2012 NY Slip. Op. 4203 (2012), the plaintiff had been represented by the attorney-defendant in an underlying criminal action where after a jury trial, plaintiff was convicted of attempted rape, sexual abuse and endangering the welfare of a minor. After the conviction, plaintiff moved to vacate the conviction based upon an ineffective assistance of counsel argument, which was denied by the trial judge. Thereafter, plaintiff sought a writ of habeas corpus, which was granted, based upon a finding that errors by defense counsel made it difficult for the jury to make a reliable assessment of the victim's credibility. The indictment against plaintiff was ultimately dismissed. Plaintiff was, however, incarcerated for over five years before he was able to ultimately secure his freedom.*

*The trial court dismissed the subsequent legal malpractice claim, but the Appellate Division, Fourth Department reinstated the portion of the complaint seeking non-pecuniary damages. Noting the long-standing premise that non-pecuniary damages cannot be sought for malpractice that occurs in civil actions, the Fourth Department held that an individual who has been wrongfully convicted as a result of attorney malpractice should be allowed to recover compensatory damages for loss of liberty and other losses that were the direct result of his or her imprisonment. The Fourth Department, in finding that pecuniary damages were recoverable, analogized the case to claims for false arrest and malicious prosecution because the harm resulting from all three claims is loss of liberty.*

*However, the Court of Appeals reversed the Fourth Department, maintaining New York's strict rule that only pecuniary damages are recoverable in legal malpractice actions. While empathizing with the wrongfully-convicted criminal defendant, the Court distinguished malpractice claims against criminal defense attorneys from false arrest and malicious prosecution on the grounds that the latter two are intentional torts, requiring an element of malice, while a malpractice claim is based solely on a "failure to exercise due skill or care." The Court then noted that the scope of recovery for deliberate torts is broader than those based upon negligence. The Court also expressed grave concern that allowing non-pecuniary damages would have a chilling effect on the willingness of the defense bar to represent indigent accused and would provide defense attorneys with an incentive not to participate in post-conviction efforts to overturn wrongful convictions.*

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