Punitive Damages

How to Plead, Prove and Obtain Punitive Damages in Virginia

by Scott M. Perry and Mikhael D. Charnoff

Obtaining punitive damages in Virginia is never easy. And even if you do, they are capped at $350,000.[1] Code of Virginia §8.01-38.1. That said, in the appropriate case, there are ways to properly plead punitive damages to survive demurrer, to prove them, and to recover. In addition to punishing a malicious or reckless defendant, and deterring others from similar conduct, punitive damages also put unique pressure on insured defendants. Insurance policies do not cover punitive damages for intentional conduct.

The punitve damage standard

Let us start with the basics. Punitive damages are available in tort cases in Virginia if the defendant acted with actual malice or under circumstances amounting to a willful and wanton disregard of a plaintiff's rights.[2] *Coalson v. Canchola*, 287 Va. 242 (2014). Given that defendants rarely act with actual malice, you will almost always be pursuing such damages under the willful and wanton disregard standard. So what circumstances constitute willful and wanton disregard?

The Supreme Court of Virginia has discussed this in numerous cases. While the model jury instruction does not use the word "recklessness," the Court has held that punitive damages may be based upon "such recklessness or negligence as to evince a conscious disregard of the rights of others." *Hamilton Dev. Corp. v. Broad Rock Club, Inc.*, 248 Va. 40 (1994). While not every intentional tort case necessarily supports a punitive damages claim, most involve recklessness sufficient to plead the claim. Thus, for example, the authors were able to plead (and recover) punitive damages in a medical malpractice case that also alleged intentional infliction of emotional distress. The same facts that supported the IIED claim were sufficient to support a punitive damages request.

Pleading punitive damages

Punitive damages are not subject to a higher pleading standard[3] and yet on demurrer defendants will often argue that a punitive damage claim is not adequately pled by implying that a higher pleading standard applies. Trial judges may be inclined to assume that a higher pleading standard is required because punitive damages are, in theory, disfavored. *Owens-Corning Fiberglass Corp. v. Watson*, 243 Va. 128 (1992). So it is important to disabuse them of this belief.

To further avoid this danger, and as good pleading practice, the Complaint should contain facts sufficient to support the punitive damage request. If there are no facts pled from which one could conclude that the alleged conduct was actually intentional or that it rises to the level of egregious conduct required, punitive damages risk being dismissed at the demurrer stage by circuit courts.[4]

While many lawyers plead punitive damages as a separate count, they are really just a species of recovery sought. Thus, they need only be expressly pled in an *ad damnum* or other prayer for relief. Rule 1:4(d) and 3:7(b). While the authors are aware of at least one circuit court allowing pleading punitive damages as a separate count,[5] other circuit courts do not.[6] The better way to avoid the risk of a successful demurrer on this issue (especially given case law indicating they are disfavored) is to plead punitive damages in the *ad damnum* of the appropriate counts.

Proving punitive damages

The most important thing to remember when proving punitive damages in Virginia is that they are subject to the same burden of proof as ordinary negligence claims: the greater weight of the evidence.[7] *Smith v. Litten*, 256 Va. 573 (1998) (approving jury instruction using that standard for punitive damages). This is one area where Virginia favors plaintiffs as many states require proof of punitive damages by clear and convincing evidence.

While the fact patterns that would support punitive damages are infinite, some examples from the Supreme Court provide guidance. Although this fact pattern does not likely occur often, Virginia

allows the recovery of punitive damages where the defendant has consciously disregarded plaintiff's property rights. *Hamilton*, *supra*. As a result, conversion claims may support punitive damages. *PGI Inc. v. Rathe Prods., Inc.*, 254 Va. 334 (2003). Punitive damages are generally only available in cases with pecuniary loss. *Syed v. ZH Techs., Inc.*, 280 Va. 58 (2010). There are, however, exceptions. For example, defamation *per se* claims often support punitive damage claims even in the absence of pecuniary damages. *Newspaper Publ'g Corp. v. Burke*, 216 Va. 800 (1976).

Many cases address the availability of punitive damages when intoxication is involved. Intoxication may serve to elevate negligent conduct to gross negligence sufficient to show disregard for life. In such circumstances, punitive damages are available. *Allstate Ins. Co. v. Wade*, 265 Va. 383 (2003). As to intoxicated drivers, Code of Virginia §8.01-44.5 now governs the availability of punitive damages. This section creates a presumption of sufficient culpability for punitive damages when: (1) the defendant's BAC was .015 or higher; (2) at the time the defendant began drinking or while he was drinking or while he was driving he was aware or should have been aware that he was impaired; and (3) the defendant's intoxication was a proximate cause of the injury. If an intoxicated defendant "unreasonably" refuses to submit to a blood alcohol test at the time of the negligence, the refusal creates a presumption of sufficient culpability for punitive damages given certain additional circumstances set out in the statute. *Id*. *See also,* accompanying article, Allen and Davis, "Punitive Damages for DUI in Virginia," in this issue of *The Journal*.

Since wrongful death and survival actions are based in negligence, punitive damages are recoverable. Code of Virginia §8.01-52 (wrongful death) and *Worrie v. Boze*, 198 Va. 891 (1957).

Punitive damages are available against an employer in vicarious liability cases given certain circumstances. The plaintiff must establish that the act was done within the scope of employment and that the employer expressly authorized, participated in, or subsequently ratified, the act. *Hogg v. Plant*, 145 Va. 175 (1926). Fact patterns in which the employer has expressly authorized or participated in the act are rare. Thus, punitive damage claims against employers usually involve proof of ratification. In the authors' experience, ratification most often can be proven by the employer's failure to act when informed of what occurred. For example, in the authors' case involving an anesthesiologist who denigrated, mocked, and falsified the medical record of his patient, the employer's failure to discipline or take any meaningful remedial action against the anesthesiologist was sufficient to go to the jury on ratification.[8] This is a good place to note that not only are punitive damages claims rare in medical malpractice claims, but they are also governed by the medical malpractice damage cap. *Bulala v. Boyd*, 239 Va. 218 (1990). Thus, if a damage award that includes punitive damages exceeds the medical malpractice cap, then the patient's total recovery is limited to the cap.[9]

The trial lawyer should be aware of several additional areas of Virginia precedent. The plaintiff may, but is not required to, prove the defendant's financial standing in order to obtain punitive damages. *Smith v. Litten*, 256 Va. 573 (1998). Given Virginia's $350,000 cap on punitive damages, not many appeals involve allegations of grossly excessive awards. The Fourth Circuit, applying Virginia law, has suggested that the jury should be given an instruction that provides guidance on how to determine the amount of the award. The instruction recommends the jury consider the relationship to the harm caused, other penalties imposed for the conduct, any improper profits obtained along with the plaintiff's costs, and any limitation based on ability to pay.[10] *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (1991). Finally, because pre-judgment interest is designed to make a plaintiff whole, it is not available for punitive damages which by definition are not compensatory. *See LeBrun v. Yakeley*, 67 Va. Cir. 122, 123 (2005).

While punitive damages are not easily obtained, they serve an important deterrent purpose. In the *D.B. v. Tiffany Ingham, et al.* case tried in June of 2015 in Fairfax County Circuit Court, the fact pattern and the award of punitive damages demanded the attention of the public and the medical community. From anecdotal stories, we have learned that healthcare providers have been warned not to

disparage, defame, or otherwise treat their patients without appropriate dignity simply because the patient is anesthetized.[11] Thus, it appears punitive damages serve their salutary purpose.

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Endnotes

1. The cap was enacted in 1987. The amount has not been increased since then and, unlike the medical malpractice damages cap, it has no escalation clause.
2. Punitive damages are not available in breach of contract actions, although the same suit can allege tort claims for which punitive damages are recoverable. *Kamlar Corp. v. Haley*, 224 Va. 699 (1983).
3. Compare this to fraud claims, and claims under federal law, which must be pled with particularity. *Mortarino v. Consultant Eng'g Servs.*, 251 Va. 289, 295 (1996).
4. *See e.g. Koschene v. Hutchinson*, 73 Va. Cir. 103 (2007) (sustaining demurrer for failure to allege actual conduct which could be construed as most egregious, wanton or willful conduct); *Wallace v. Farah*, 72 Va. Cir. 37 (2006) (striking claim for punitive damages on demurrer with prejudice where Complaint fails to allege willful or wanton acts); *Williams v. Medical Facilities of America*, 75 Va. Cir. 416 (2005) (striking claim for punitive damages on demurrer for failure to plead supportive facts); *see also Miller v. P.G. Harris Const. Co.*, 79 Va. Cir. 631 (2009); *McGlen v. Barrett*, 78 Va. Cir. 90 (2009); *Carrolla v. Rogers*, 61 Va. Cir. 447 (2003); *Fernandez v. Cadow*, 61 Va. Cir. 436 (2003).
5. *See e.g. Peterson v. Fairfax Hosp. Sys.*, 31 Va. Cir. 50, 68 (1993).
6. *See e.g. Compton v. Foster*, 82 Va. Cir. 279, 286 (2011) ("Virginia does not recognize a separate and independent cause of action for exemplary, or punitive, damages"); *Spicer v. City of Norfolk*, 46 Va. Cir. 535, 541 (1996).
7. The exception is in defamation cases where malice is alleged. In such cases, the plaintiff must prove by clear and convincing evidence that the defendant knew the statements were false when made or that he made them with reckless disregard for the truth. *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142 (1985).
8. The jury ultimately awarded $500,000 for emotional distress, of which $200,000 was punitive damages.
9. The practical result of this is that in large damages cases, health care providers are not only artificially protected from paying in full the compensatory damages, but they also are immune from punitive damages. As an example, if a jury awards $2 million in compensatory damages and $250,000 in punitive damages, the doctor owes $0 in punitive damages to the patient (assuming the malpractice occurred when the $2 million cap was in effect).
10. These authors would object to such instruction as it appears to suggest elements and/or factors not required to obtain punitive damages.
11. For more on the effect on health care providers resulting from this punitive damage award, *see* https://www.washingtonpost.com/local/anesthesiologist-trashes-sedated-patient-jury-orders-her-to-pay-500000/2015/06/23/cae05c00-18f3-11e5-ab92-c75ae6ab94b5_story.html