Lawyer Negligence that Results in a Jail Sentence: Can the Client Recover Noneconomic Damanges Due to the Wrongful Incarcercation?

By Anthony Viorst

Introduction

I recently filed a legal malpractice case against a criminal defense attorney, in which counsel made a clear error that caused his client to spend several years in prison. If counsel had not committed the error, the client's criminal charges would have been dismissed. As counsel was court-appointed, and was paid by the State of Colorado, the client suffered little or no economic damages, but indisputably suffered significant emotional distress associated with her time as an inmate in the Colorado Department of Corrections. After the case was filed, defense counsel moved, pursuant to C.R.C.P. 12(b)(5), to dismiss any claim for noneconomic damages, under the authority of *Aller v. Law Office of Carole C. Schriefer P.C.*[1] The matter was briefed and, based upon the reasoning set forth below, the trial court denied the motion to dismiss.

In *Aller, supra*, a panel of the Colorado Court of Appeals held that "emotional distress or other non-economic damages resulting solely from pecuniary loss are not recoverable in a legal malpractice action based on negligence[2]." Thus, under *Aller*, if a lawyer causes a client to lose money, the emotional distress that the client suffers due to the loss of that money is not compensable. However, the *Aller* panel did not address the recover-ability of noneconomic damages which are unrelated to pecuniary loss, but instead are related to wrongful incarceration. Although this issue has not been directly addressed by the Colorado appellate courts, those Colorado cases that have addressed the issue indirectly, as well as persuasive authorities and cases from other jurisdictions, suggest that such damages can be recovered.

Colorado Authorities

Colorado recognizes the tort of negligent infliction of emotional distress. The elements of this tort, as set forth in CJI-Civ. 9:2, are as follows:

1. The defendant was negligent;
2. The defendant's negligence created an unreasonable risk of physical harm to the plaintiff;
3. The defendant's negligence caused the plaintiff to be put in fear for her own safety and such fear was shown by physical consequences or long continued emotional disturbance, rather than only momentary fright, shock, or other similar and immediate emotional distress; and
4. The plaintiff's fear caused her injuries, damages, or losses.

Regarding the second element–that defendant's negligence created an unreasonable risk of physical harm—Colorado law does not define the term "physical harm," but it does define the term "bodily injury," which is essentially synonymous. The term "bodily injury" is statutorily defined as "physical pain, illness, or any impairment of physical or mental condition.[3]" This definition, which is satisfied merely by showing that a victim suffered "physical pain," is very broad. Arguably, the risk of being wrongfully incarcerated—which necessarily involves regular shackling, sleeping on a hard surface, and confinement in a small space—also creates the risk of physical pain, thereby satisfying the definition of bodily injury or physical harm.

Regarding the third element, Plaintiff need not prove that she suffered actual physical harm, but rather need only prove that she was placed in fear for her own safety, and that she suffered a "long continued emotional disturbance." Although there is no Colorado case directly addressing whether wrongful incarceration meets this standard, an element of the tort of false imprisonment is "restriction of the plaintiff's freedom of movement,[4]" and there are several cases addressing the damaging emotional effects of such a restriction.[5] Significantly, on at least two occasions, a lawyer has been

found liable for the tort of false imprisonment, based upon professional misconduct.[6]

The case of *Gordon v. Boyles*,[7] also supports the view that a wrongful conviction and incarceration can cause a significant emotional disturbance. In *Gordon*, the Court of Appeals stated that "[i]f a libelous communication is defamatory per se, damage is presumed, and a plaintiff need not plead special [economic] damages" whereas "[i]f the statement is defamatory per quod, special damages must be alleged to sustain the claim[8]." The Court then listed the categories of slander per se as "imputation of (1) a criminal offense; (2) a loathsome disease; (3) a matter incompatible with the individual's business. . . or (4) serious sexual misconduct[9]." *Gordon* is instructive because it clearly shows that there are some types of negligent or reckless conduct that give rise to a claim for noneconomic damages, even in the absence of economic damages or physical injury. And, it is noteworthy that *Gordon* lists one of the categories of slander per se as imputation of a criminal offense. If a plaintiff can recover noneconomic damages after being falsely accused of a criminal offense, a plaintiff would likely be able to recover noneconomic damages after being falsely convicted of a criminal offense.

Finally, although the *Aller* Court denied recovery for noneconomic damages resulting solely from pecuniary loss,[10] the Court also cited an Illinois case, *Doe v. Roe*, for the proposition that "when the attorney has reason to know that a breach of his fiduciary duty is likely to cause emotional distress, for reasons other than pecuniary loss, that damages will be given as compensation for mental suffering[11]." Similarly, the *Aller* Court cited *Wagenmann v. Adams*, *supra*, as follows:

> In *Wagenmann v. Adams*, 829 F.2d 196, 221-22 (1st Cir. 1987), the First Circuit Court of Appeals upheld an award for emotional distress damages in a malpractice case based on negligence because the attorney's negligence resulted in the plaintiff's being dispatched to a mental hospital and deprived of his liberty. These circumstances are not present here.

The implication of this comment by the *Aller* Court is that, if the circumstances present in *Wagenmann* **had been** present, the aggrieved plaintiff/client would have been entitled to compensation.

Three years after the *Aller* opinion, in *Schultz v. Boston Stanton*,[12] the plaintiff brought a legal malpractice claim against his former criminal defense attorneys, alleging that as a direct and proximate result of their professional negligence, he had "been damaged by being incarcerated in a federal prison." In *Schultz*, the Court of Appeals reversed the trial court's summary judgment order (which was based upon grounds other than damages), and remanded the case for trial.

Other Authorities

A leading commentator in the field of legal malpractice has noted that the measure of damages in legal malpractice cases based upon criminal litigation is different from the measure of damages in legal malpractice cases based upon civil litigation. He has described that difference as follows:

> The many decisions that make up the body of existing law concerning the measure of damages in a legal malpractice action usually are not helpful where the injury arose out of the handling of a criminal defense. Most reported cases are concerned with injuries to property, a cause of action or a defense, all of which culminate in an economic loss. In contrast, the criminal defendant's main injury is a loss of liberty.[13]

Recognizing this distinction, the majority of courts that have addressed the issue have held that the client of a criminal defense attorney may sue and recover damages for the loss of that client's liberty.[14] The grounds for this rule is that incarceration is a foreseeable result of a criminal attorney's negligence:

> When an attorney's negligence causes a client's loss of liberty, courts have been willing to step away from the general rule barring damages for emotional distress. Generally, these cases hold that when an attorney represents a criminal defendant, incarceration is the foreseeable result of negligence. Accordingly, damages for the mental anguish arising from that foreseeable result, a non-pecuniary damage, should not be barred.[15]

Due to the foreseeability of this harm, many courts have also found that when an attorney commits legal malpractice in a criminal case, and causes the client to be wrongfully incarcerated, the traditional elements of a negligent-infliction-of-emotional-distress claim need not be proven.[16] To the extent that a legal malpractice plaintiff must show that placing a person in prison subjects that person to an unreasonable risk of physical harm (an element of a claim of negligent infliction of emotional distress), case law from other jurisdictions supports the position that wrongful incarceration creates a substantial risk of physical and emotional harm.[17]

Conclusion

As shown above, there is significant implicit Colorado case law, as well as

explicit authorities and cases from other jurisdictions, suggesting that noneconomic damages can be recovered by a legal malpractice plaintiff who has been wrongfully incarcerated.

Endnotes:

[1] *Aller v. Law Office of Carole C. Schriefer, P.C.*, 140 P.3d 23 (Colo. App. 2005).

[2] *Aller, supra,* 140 P.3d at 27-28 (citing *Gavend v. Malman*, 946 P.2d 558, 563 (Colo. App. 1997)).

[3] C.R.S. §18-1-901(2)(c).

[4] CJI-Civ. 21:1.

[5] *See, e.g., Crews-Beggs Dry Goods Co. v. Bayle*, 5 P.2d 1026, 1027 (Colo. 1935) (upholding false imprisonment judgment in favor of plaintiff where "a corporation operating a department store in Pueblo, Colo., through its agents, servants, and employees, imprisoned her at its store without probable cause, and, in the presence of customers, rudely and roughly searched her person, and accused her of having stolen articles of merchandise"); *Union Pacific Railway Co. v. Dennis*, 213 P. 332, 334 (Colo. 1923) (upholding false imprisonment judgment in favor of plaintiff where "he was taken from his home in the nighttime, subjected for hours to a rigid examination, transported to the city of Denver, confined in the city jail for six days, refused bail, photographed for the newspapers, denied communication with friends, family or counsel, detained in unsanitary quarters, in degrading company, and given insufficient sustenance"); *Grimes v. Greenblatt*, 107 P. 1111, 1113 (Colo. 1910) (upholding false imprisonment judgment against private party who caused plaintiff to be "arrested, detained, and imprisoned . . . and confined in the city jail for the period of about 10 hours").

[6] *See Havens v. Hardesty*, 600 P.2d 116, (Colo. App. 1979) (upholding judgment for false imprisonment against attorney where "mistake in initiating an action which forced an innocent party to be named as 'judgment debtor' was the cause of the innocent party's arrest"); *Pomeranz v. Class*, 257 P. 1086, 1087 (Colo. 1927) (upholding judgment for false imprisonment against attorney who procured a void arrest order from a court acting without jurisdiction).

[7] *Gordon v. Boyles*, 99 P.3d 75 (Colo. App. 2004).

[8] *Id.* at 79.

[9] *Id.*

[10] *Aller, supra,* 140 P.3d at 26.

[11] *Aller, supra*, 140 P.3d at 29 (citing *Doe v. Roe*, 681 N.E.2d 640 (Ill. App. 1997)) .

[12] *Schultz v. Boston Stanton*, 198 P.3d 1253, 1255 (Colo. App. 2008).

[13] Ronald E. Mallen, Legal Malpractice, §27:62, at 1392 (2017 ed.).

[14] *See, e.g., Drollinger v. Mallon*, 260 P.3d 482, 490 (Or. 2011) ("To the extent that plaintiff alleges damages that are associated with his continued incarceration–damages like loss of freedom, loss of income, and loss of companionship of family and friends –he must plead and prove" that those damages would not have been incurred in the absence of attorney malpractice); *Macias v. Moreno*, 30 S.W.3d 25 (Tex. App. 2000) (affirming judgment against criminal-defense lawyer who committed legal malpractice where client suffered emotional distress due to incarceration); *Lawson v. Nugent*, 702 F. Supp. 91, 95 (D. N.J. 1988) (under New Jersey law, "and considering the weight of authority in other jurisdictions, this court holds that . . . plaintiff should be allowed to prove damages for emotional distress attributable to the extra twenty months of confinement" resulting from the legal malpractice of his criminal defense attorney); *Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987) (under Massachusetts law, plaintiff was entitled to recover noneconomic damages for loss of liberty; "Were we to accept the notion that a client's recovery on the grim facts of a case such as this must be limited to purely economic loss, we would be doubly wrong. The negligent lawyer would receive the benefit of an enormous windfall, and the victimized client would be left without fair recourse . . . Despite having caused his client a substantial loss of liberty and exposed him to a consequent parade of horribles, counsel would effectively be immunized from liability . . .").

[15] Rhoades and Morgan, *Recovery for Emotional Distress Damages in Attorney Malpractice Actions*, 45 S.C. L. Rev. 837, 845 (1994).

[16] *See Rowell v. Holt*, 850 So.2d 474, 480 (Fla. 2003) ("[T]he citizens of a free society can conceive of no greater injury than the continued unjust deprivation of liberty. The special duty undertaken by Rowell's attorney, along with the foreseeability of the harm that would flow from his breach of that duty, lead us to conclude that the impact rule [for negligent infliction of emotional distress] should have no application here . . ."); *Holliday v. Jones*, 264 Cal. Rptr. 448, 458 (Cal. App. 1989) ("If the purpose in prohibiting the award of emotional distress damages absent physical injury or intentional or affirmative misconduct is to screen out fraudulent or speculative claims, the necessity for such screening is simply nonexistent here when loss of liberty and its consequent impact on [the client] is not only a reasonable and foreseeable consequence of [the attorney's] professional incompetence in defending [the client] in his murder trial, but virtually a guaranteed result.")

[17] *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of **physical restraint**—lies at the heart of the liberty" protected by the constitution); *Seretse-Khama v. Ashcroft*, 215 F.Supp.2d 37, 53 (D. D.C. 2002) ("The deprivation of one's **physical liberty** for almost four years and continuing into the future is an undeniably substantial and irreparable harm"); *Wanatee v. Ault*, 120 F.Supp.2d 784, 788 (W.D. Iowa 2000) ("[E]very day of unconstitutional incarceration generally constitutes irreparable harm to the person in such custody"); *Cobb v. Green*, 574 F.Supp. 256, 262 (W.D. Mich. 1983) ("There is no adequate remedy at law for a deprivation of one's **physical liberty**") (emphasis supplied).