

To: New Jersey Law Revision Commission
From: Angela Febres, Legislative Law Clerk
Re: Application of the New Jersey Tort Claims Act to Wrongful Imprisonment Claims as discussed in *Nieves v. Off. of the Pub. Def.*, 241 N.J. 567 (2020).
Date: July 6, 2021

MEMORANDUM

Project Summary

The New Jersey Tort Claims Act (TCA), N.J.S. 59:1-1 et seq., “delineates both procedural and substantive requirements for bringing a tort claim against the State, public entities, and public employees.”¹ The TCA “renders public employees liable for an act or omission to the extent that a private person would be liable for same, unless an immunity attaches.”²

In *Nieves v. Office of the Public Defender*, the New Jersey Supreme Court considered whether “legal malpractice claims are exempt from the [TCA]” and whether the plaintiff’s “‘loss of liberty’ damages claim is subject to the verbal threshold of the TCA.”³ The Court considered whether N.J.S. 59:9-2(d) is clear regarding whether loss of liberty damages are a subset of pain and suffering damages.

Statute Considered

N.J.S. 59:9-2 subsection d. provides, in pertinent part, that:

No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of \$3,600.00...⁴

Background

The plaintiff, Antonio Chaparro Nieves, was represented at trial by the Office of the Public Defender (OPD) “for criminal charges related to sexual assault.”⁵ Although convicted of the charges, Plaintiff was subsequently granted post-conviction relief based on the ineffective assistance of trial counsel.⁶ The underlying indictment against Plaintiff was later dismissed when DNA evidence confirmed that he did not commit the crime.⁷

¹ *Nieves v. Off. of the Pub. Def.*, 241 N.J. 567, 575 (2020).

² *Id.*

³ *Id.* at 573.

⁴ N.J.S. 59:9-2 subsection d.

⁵ See *Nieves*, 241 N.J. at 570.

⁶ *Id.*

⁷ *Id.*

Plaintiff recovered \$608,333.33 in damages as a result of the 12 years that he was wrongfully incarcerated pursuant to N.J.S. 52:4C-2 of the Mistaken Imprisonment Act.⁸ He also filed a legal malpractice action seeking “loss of liberty damages,” alleging that the OPD’s “deficient” representation was the proximate cause his wrongful conviction and imprisonment.⁹

The trial court concluded that the TCA and its “verbal threshold” requirements (N.J.S. 59:9-2 subsection d.) were inapplicable to Plaintiff’s case.¹⁰ The Appellate Division reversed the decision of the trial court and granted the Defendant’s motion for summary judgment, concluding that the TCA applied, and that Plaintiff failed to meet its requirements.¹¹ The New Jersey Supreme Court granted Plaintiff’s petition for certification.¹²

Analysis

The Tort Claims Act

Pursuant to the TCA, the “primary source of public entity liability” is “an injury proximately caused by an act or omission of a public employee within the scope of his employment.”¹³ Generally, public employees will be “liable for an act or omission to the extent that a private person would be liable for the same, unless an immunity attaches.”¹⁴

The TCA “governs its coverage through its defined terms.”¹⁵ It defines the terms “public entity” and “public employee.”¹⁶ According to N.J.S. 59:1-3, a “public entity”... “includes the state, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.”¹⁷ “Public employee” is defined as “an employee of a public entity” and “[e]mployee’ includes an officer, employee, or servant, whether or not compensated or part-time, who is authorized to perform any act or service[.]”¹⁸

The Court reasoned that because the OPD is part of the State’s executive branch, and relies on State funding, there is “no room to doubt that the OPD meets the TCA’s definition of a public entity.”¹⁹ It reached the same conclusion regarding individual public defenders, relying on case law that previously considered the OPD and public defenders to be public employees in a legal malpractice claim under the TCA.²⁰ The Court determined that “the TCA with its immunities, defenses, and limitations on tort claims filed against public entities and their public employees

⁸ *Id.* at 570-571.

⁹ *Id.*

¹⁰ *Id.* at 572.

¹¹ *Id.* at 572-573.

¹² *Id.* at 573.

¹³ *Id.* at 575.

¹⁴ *Id.* citing N.J.S. 59:3-1a.

¹⁵ *Id.* at 576.

¹⁶ *Id.*

¹⁷ N.J.S. 59:1-3.

¹⁸ *Id.*

¹⁹ *See Nieves*, 241 N.J. at 576.

²⁰ *Id.* citing *Rogers v. Cape May Cty. Off. of the Pub. Def.*, 208 N.J. 414 (2011).

applies to defendants.”²¹

Tort claims, which include legal malpractice claims, “are governed by the TCA when brought against the State, public entities, and public employees.”²² The Court determined that the action brought by Plaintiff was subject to the TCA and examined his claims in this context.²³

As mentioned above, a plaintiff’s TCA claim for “pain and suffering” is subject to a limitation commonly referred to as the “verbal threshold.”²⁴ This statutory threshold is designed to prevent claims for “subjectively measured damages for pain and suffering which are not compensable.”²⁵ To overcome the verbal threshold, a plaintiff must demonstrate “(1) an objective permanent injury, and (2) a permanent loss of bodily function that is substantial.”²⁶

Plaintiff alleged that his wrongful imprisonment resulted in his loss of liberty. Since the “verbal threshold... applies to pain and suffering claims and not to economic damages” the Court considered whether he was required to “submit to the requirements for a pain and suffering award in pursuing his noneconomic claim for loss of liberty damages.”²⁷ The Court recognized that Plaintiff’s loss of liberty damages are included in a “subset of emotional distress damages” and that although the New Jersey Supreme Court has not addressed the issue of emotional distress damages in a legal malpractice action, the Appellate Division has done so and that “emotional distress damages are... potentially recoverable in certain legal malpractice settings.”²⁸

The Court determined that even if Plaintiff was entitled to damages for emotional distress, such damages are “controlled under the TCA through its limitations on the recovery of pain and suffering award.”²⁹ The Court explained that “case law holds that emotional distress is considered pain and suffering under the TCA.”³⁰ Since Plaintiff had already received an economic damages award, the Court reasoned that his remaining claim had to “be analyzed under the TCA’s constraints on a pain and suffering award.”³¹ As such, it “failed to satisfy the standard for vaulting the verbal threshold for a pain and suffering damages claim” under the TCA.³²

Justice Albin agreed with the majority’s determinations that the TCA “applies to legal malpractice actions brought against public defenders” and that non-pecuniary damages should be

²¹ *Id.*

²² *Id.* at 579.

²³ *Id.* at 580.

²⁴ *Id.*

²⁵ See *Nieves*, 241 N.J. at 580 quoting *Ayers v. Twp. of Jackson*, 202 N.J. Super. 106, 118 (App. Div. 1985).

²⁶ *Id.* at 581 quoting *Toto v. Ensuar*, 196 N.J. 134, 145 (2008).

²⁷ *Id.*

²⁸ *Id.* at 583-84. In reaching this conclusion the Court examined the Restatement (Third) of the Law Governing Lawyers § 53 (Am. Law Inst. 2000) (recognizing that a lawyer liable for legal malpractice may be subject to economic damages for emotional distress). In addition, while the rules regarding damages vary depending upon the jurisdiction, many cases focus on intentional, outrageous, or reckless behavior or similarly egregious circumstances and some have allowed emotional distress damages for malpractice causing a client’s imprisonment. (Second) of Torts § 905 (Am. Law Inst. 1979).

²⁹ *Id.* at 584.

³⁰ *Id.* citing *Ayers v. Jackson*, 106 N.J. 557 (1987); *Collins v. Union City Cty. Jail*, 150 N.J. 407 (1997).

³¹ *Id.*

³² *Id.*

limited to instances of “egregious or extraordinary circumstances”.³³ He disagreed, however, “that the TCA’s limitation on awards for ‘pain and suffering’... also limits awards for loss of liberty, which is a distinct species of damages not mentioned in the statute.”³⁴ He added that the “overly expansive interpretation” of the TCA by the majority will “likely foreclose persons who are wrongly arrested and imprisoned from recovery damages for their losses of liberty caused by state, county, and municipal actors.”³⁵

Justice Albin noted that nothing in the statute “limit[s] the recovery of damages for loss of liberty.”³⁶ “Although damages for pain and suffering and loss of liberty are subsets of non-pecuniary damages, loss of liberty damages are not a subset of pain and suffering damages.”³⁷ Justice Albin noted that “pain and suffering” and “loss of liberty” damages are distinct from one another, and have been treated as such by other jurisdictions.³⁸ The Model Civil Jury Charge 8.11E “distinguishes between damages for disability impairment, loss of enjoyment of life, and pain and suffering.”³⁹ Justice Albin also pointed out that the New Jersey Supreme Court previously recognized the difference between loss of life damages and pain and suffering damages.⁴⁰ He stated that loss of liberty “is an objective fact” that does not “require an inquiry into subjective feelings of emotional distress or mental anguish” and that the “majority’s conflation of loss of liberty damages with pain and suffering damages undoubtedly will become a source of confusion in future cases.”⁴¹

Pending Legislation

To this time, three bills have been introduced in the New Jersey Legislature that pertain to N.J.S. 59:9-2.⁴² None of these bills address the issue discussed in *Nieves*.

Conclusion

Staff seeks authorization to engage in additional research and outreach to determine whether it would be appropriate to modify N.J.S. 59:9-2 in response to the issues raised by *Nieves v. Off. of the Pub. Def.*

³³ *Id.* at 585.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* See *DelaCruz v. Borough of Hillside*, 183 N.J. 149, 164 (2005) (“[T]he effect of the verbal threshold is limited to pain and suffering claims; [other] damages are not limited by the [TCA]).

³⁷ *Id.* at 586.

³⁸ *Id.* at 587.

³⁹ *Id.*

⁴⁰ *Id.* at 588 citing *Ayers v. Jackson*, 106 N.J. 557, 576 (1987); *Tarr v. Caisulli*, 181 N.J. 70, 77-78 (2004).

⁴¹ *Id.* at 588-89.

⁴² See A.B. 3460, 219th Leg., First Annual Sess. (N.J. 2020) (Amends N.J.S. 59:9-2(d) to make minor corrections in the text, such as changing “\$3,600.00” to “\$3,600”); S.B. 1791, 219th Leg., First Annual Sess. (N.J. 2020) (changes minor stylistic and typographical elements) (identical to A.B. 3460); S.B. 1566, 219th Leg., First Annual Sess. (N.J. 2020) (proposing an amendment to N.J.S. 59:9-2(c) adding language to the statute to clarify that punitive damages are prohibited in every action brought under the Torts Claim Act, notwithstanding relief that could be sought under other law, including the “Law Against Discrimination” and the “Conscientious Employee Protection Act”).