

Health Law: Quality & Liability

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Medical Malpractice -
Damages



Recap med mal



Duty - owed
because in a
treatment
relationship



Duty - defined by
standard of care
established by
expert witnesses



Right way to **prove**
standard of care
depends - on DEF
geography,
specialty



Breach – DEF
failure to conform
to **applicable**
standard of care



Causation – PTF
injury results
from DEF breach

But for

Always sufficient

Lost chance

Alternative sufficient
in some states

Let's move from
causation to
damages

Damages

4 types of
damages

Economic
Non-economic
Punitive
Nominal

Economic Damages

Measurable
Quantifiable

Past lost wages
Future lost wages
Past medical
Future medical



Is she now
alive or dead?

Alive →

Much higher economic
damages: future
medical expenses =
\$5 million ($\$250,000 \times$
20 years)

Dead → No
future medical
expenses



**Non-
economic
damages**

Pain & suffering
Loss of enjoyment
of life

Often capped
by state law at
\$250,000

**Punitive
damages**

Usually, damages =
economic
+
non-economic

Rarely, also
punitive (aka
exemplary)
damages

2008 medical liability costs

\$3.15b economic damages

\$2.40b non-economic

\$0.17b punitive

Requires **more** than
just negligence or
gross negligence

Negligence

No awareness or
consciousness required

Just a lack of care

Most medical
malpractice is
ordinary
negligence

Gross negligence

Greater lack of care than with negligence

Not even the care of a careless person



More culpable

conduct required for punitive damages



Reckless disregard

Aware that conduct **probably** creates risk

Consciously disregard substantial risk



DEF realized dangerous, done anyway



Willful ignorance

Aware of conduct very probably creates risk

Not just probability but **practical certainty**

Deliberately avoid knowledge



Actual knowledge

Deliberate intent

Conscious objective to harm

Subjective hope



Determining
amount of
punitive
damages

About
punishment, not
compensation

Likelihood serious harm
Degree DEF aware of likelihood
Profitability DEF conduct
Duration
Attitude and conduct on discovery
Financial condition DEF

**Nominal
damages**

Like punitive
damages,
very rare

Normally
just \$1

Not worth
transaction
costs of
litigation

PTF **not** physically
injured

But **rights** were
violated

Battery – procedure
without consent

But PTF better off

EXAMPLE

Abandonment – physician
fired patient w/o notice

But . . . patient found new
physician right away