
Legal Briefs

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Punitive damages

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It is unusual for punitive damages to be awarded against nurse anesthetists. In malpractice lawsuits, a plaintiff is harmed by the negligence of a practitioner. A member of a profession, such as a nurse anesthetist, must render the same standard of care to the patient as other members of the profession would have rendered in similar circumstances. If the practitioner fails to follow the standard of care and damage results, the practitioner is liable to the injured patient for the damages caused.

In many malpractice cases in the healthcare area, the amount of damage is a major area of dispute. In the case of bodily injury, monetary damages are awarded to compensate people for damage that has no monetary value. What is the value of a chipped tooth? How do you compensate for the loss of eyesight or death? Some lawyers have been quite successful refining techniques maximizing jury awards for damage to the body. Awarding damages when harm results from a failure to meet the standard of care compensates the individual who was damaged and encourages practitioners to be careful. Damages based on the "value" of the injury caused, even if it is difficult to value, are called "compensatory."

If the wrongdoing has been intentional or gives a sense of outrage, courts have permitted the jury to award "punitive" or "exemplary" damages. Something more than mere negligence is required for punitive damages. There must be circumstances of aggravation, spite or "malice," a fraudulent or evil

motive, or a conscious disregard of the interests of others. (Prosser, *Handbook of the Law of Torts*, page 9). Punitive damages are private fines imposed to punish reprehensible conduct and to deter its future occurrence.

An important element of punitive damages is lack of insurance protection. Many malpractice insurance policies do not insure against intentional acts. Punitive damages are imposed for intentional actions and therefore are not covered by malpractice insurance policies. Critics of the legal system contend that in the healthcare field, when juries award punitive damages they merely multiply their award. Since awarding "compensatory" damage for bodily damage has little basis in reality anyway, "compensatory" damage already punishes the defendant, and awarding "punitive" damages is just another opportunity.

Ophthalmologic incident involving anesthetist and anesthesiologist

Cases imposing punitive damages against nurse anesthetists are rare but in a fairly recent case in Georgia, the injured plaintiff sought punitive damages from both the nurse anesthetist and an anesthesiologist for an ophthalmologic incident. The jury awarded \$300,000 in compensatory damages and \$700,000 in punitive damages. The Georgia Court of Appeals, in a close, 5-4 split, reversed the award of punitive damages. The facts of the case were disputed. During cataract surgery at Newton General Hospital, a patient suffered a vitreous ex-

trusion and subsequently lost her vision. The surgeon claimed (and apparently the surgeon's view was accepted by the jury) that the vitreous extrusion resulted from a rise in intraocular pressure which can accompany a rise in blood pressure. It can also occur when a patient moves on the operating table.

The surgeon testified that the anesthesia machine ran out of Forane[®] and had to be refilled during the operation. Running out of an anesthetic agent in the middle of surgery is, obviously, a violation of the standard of care. The nurse anesthetist testified that she had checked the anesthesia machine before surgery began, that the machine did not run out of Forane, and that the patient was not "light" during surgery. The patient sued the anesthesia providers and the jury awarded both compensatory and punitive damages. The anesthesia providers appealed the award of punitive damages.

Four of the nine judges would have upheld the award of punitive damages. They reasoned that the jury had determined that the anesthesia machine had run out of anesthetic agent. It would not have run out if it had been checked, and the failure to check the level of anesthetic was similar to failing to check the level of gas before flying an airplane. It shows such a "conscious indifference" to the patient's well-being that the jury was entitled to award punitive damages. On the other hand, the majority of the Court of Appeals held that there was no evidence of an intentional disregard of the rights of the patient nor was there any evidence that the anesthesia providers knowingly or willfully disregarded the rights of the patient so as to authorize a finding of conscious indifference to consequences (200 Ga. App. 788; 409 S.E. 2d 572, 1991).

One reason why the majority of the court in the *Newton Hospital* case did not let the jury's award for punitive damages stand may have been that the factual matters in the case were disputed. The nurse anesthetist testified that she followed her usual presurgery procedures that morning and specifically recalled checking the anesthesia machine canister to insure that it contained a sufficient amount of Forane, she recorded her check on the anesthesia chart, and stated that the anesthesia machine was checked and working prior to the start of the procedure. The surgeon testified that when the patient seemed to have become "anesthetically light," the nurse anesthetist refilled a canister with an aqua-greenish liquid whereas at the trial the anesthesiologist identified Forane as a clear liquid.

Hospital charts did not indicate that the Forane supply ran out, but they did reveal that the patient experienced blood pressure fluctuations, including a rise in blood pressure, which is consistent with the

patient becoming "light." Other nurses in the operating room were split as to what they observed. One testified that she was aware that the patient moved and became "light," but the other two denied seeing the patient become "light." The majority of the appeals court decided that the evidence in the case did not suggest such a total abandonment of duty as to justify a finding of conscious indifference or malice or willful misconduct. Consequently, it was inappropriate to award punitive damages.

Emergency room nurses were found liable

There has been an earlier Georgia case in which emergency room nurses had failed to record and relay to the physician on call information concerning a patient's complaints of stomach pain, or that the patient had a heart condition, and that the patient had taken a nitroglycerin pill shortly before her arrival at the hospital. No vital signs were taken and no history of medication was obtained. The uninformed physician on call discharged the patient from the hospital, and the patient died from a myocardial infarction which she had had an 85% to 90% chance of surviving if she had been properly treated at the hospital. In that case, the emergency room nurses were found liable for both compensatory and punitive damages. (*Hodges v Effingham County Hospital Authority*. 182 Ga. App. 173; 355 S.E. 2d 104, 1987).

Case involving ventilator manufacturer

Another case involving punitive damages arose in Arkansas, where a jury assessed \$3,000,000 in punitive damages against the manufacturer of a ventilator. There was evidence that the manufacturer of the ventilator was aware that anesthetists using a selector valve could easily place hoses on the wrong unmarked valves with disastrous results.

In the Arkansas case, someone had incorrectly put a hose where only a bag should have been connected. When the nurse anesthetist decided to change bags, she attached a hose to the wrong port. The effect of the improper connection was to permit the anesthesia machine to continue to pump air into the patient's lungs with no way for the air to escape. The ensuing build-up of pressure and lack of oxygen resulted in damage to the patient's lungs and brain. The manufacturer claimed it was not at fault because separate acts of negligence had to occur for the accident to result. Many witnesses testified that the accident was foreseeable. The unmarked value had been criticized in premarket tests, and other incidents involving the machine had been reported.

The standard for imposing punitive damages in Arkansas is that the defendant must have known,

or ought to have known, in the light of the surrounding circumstances, that its conduct would naturally or probably result in injury and that the defendant continued such conduct in reckless disregard. The court upheld the jury award because the manufacturer knew that the patient's life always depended on the artificial breathing supplied by the ventilator (*Airco, Inc., Appellant, v Simmons First National Bank, Guardian*, 276 Ark. 486; 638 S.W. 2d 660; 1982).

Could not the same point be raised in the *Newton Hospital* case? Anesthetists certainly know that serious damage can result when the anesthetic runs out. Why do the courts permit punitive damages in the Arkansas case but not in the Georgia case? The difference seems to be not the knowledge of the consequences, which is present in both cases, but whether the defendant actually knew of the defect. The equipment manufacturer had been advised by preproduction reports and the occurrence of other incidents that the ventilator was defective. There was no evidence that the nurse anesthetist had actually known that the Forane would run out.

One can see the difficulties in applying these accepted principles of law to actual facts. In the *Newton Hospital* case, the dissenting opinion would have imposed punitive damages. The nurse anesthetist testified that she followed a preparatory equipment check. If she had performed the check, she should have seen that the Forane was low; if she had not performed the check, she showed the same disregard of potential consequences as did the equipment manufacturer. The dissenting judges agreed with the jury. The majority of the judges may have been influenced by the disputed testimony of negligence at trial or the admirable effort the anesthetist made to stabilize the patient and minimize the damage after the incident arose.

Monitoring a drug's side effects

In a Minnesota case not involving nurse anesthetists, the issue of punitive damages came up in a somewhat strange manner (*Lundgren v Eustermann*, 370 N.W. 2d 877 Minnesota, 1985). The patient's family physician had prescribed Thorazine[®] for the patient's emotional problems. The defendant physician asked for summary judgment on the issue of whether he should be liable for punitive damages. The primary issue in the appeal was whether a licensed consulting psychologist could give expert testimony on the standard of medical care to be followed by the family physician.

The psychologist wanted to testify that Thorazine should not have been prescribed for 6 years and that the physician had an obligation to monitor the patient for adverse side effects from use of the

drug. (There was no medical record that the prescribing physician had monitored for side effects.) The plaintiffs argued that the defendant's failure to keep a medical record of any monitoring of the drug's side effects on his patient constituted willful indifference.

Assuming that the lack of documentation fails to meet the standard of care required of a physician, the court held that something more outrageous was required for the imposition of punitive damages. The appeals court agreed with the trial judge that there was no evidence of willful indifference by the defendant's doctor to his patient's rights or safety to justify the awarding of punitive damages under Minnesota law.

Interestingly, the court also held, as a matter of law, that the psychologist was not a competent witness against the family physician. The question in malpractice cases is whether the defendant violated the standard of care. The psychologist had testified that the course of treatment followed by the family physician was harmful and "not acceptable medical practice." The defendant was a family physician in Minnesota. To show malpractice the patient had to show that the physician violated the standard of care applicable to a medical doctor in prescribing the drug for a patient. Could the psychologist testify to this standard?

"What the . . . [psychologist] lacks, however, is practical experience or knowledge of what physicians do. He himself has never prescribed Thorazine for a patient. It is one thing to study Thorazine in the laboratory and to discuss it in the classroom, but it is quite another thing to prescribe the drug for a patient under the circumstances of a family medical practice. [The psychologist] . . . does not know how physicians themselves customarily use Thorazine in the treatment of their patients."

The court stated that the best expert on the standard of care to be followed by a physician is another physician. There are, however, some exceptions and one exception the court notes is an earlier case where the court agreed that nurse anesthetists can be competent expert witnesses on the standard of care provided by anesthesiologists.

Because of the great risks involved in anesthesia, nurse anesthetists are aware that the smallest moment of carelessness can have disastrous consequences. This situation may lead to malpractice attorneys seeking punitive damages when bad consequences result from lapses. Nurse anesthetists can avoid the imposition of punitive damages by being able to prove that they followed procedures, such as the use of checklists designed to minimize the possibility of lapses and by being able to document that they acted in the best interest of their patients, even after an incident may have occurred.