

## Exemplary damages

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While any malpractice lawsuit can be frightening, a claim that alleges your conduct was malicious and that seeks additional punitive or exemplary damages may magnify your anxiety. This anxiety is likely to increase exponentially when you learn that exemplary damages are not covered by your insurance policy. While claims for exemplary damages should certainly be appreciated and respected, they are not a factor in the overwhelming majority of health care liability claims.

Punitive damages, now referred to as exemplary damages, are governed by statute (1). Prior to September 1, 1995, exemplary damages in a health care liability claim were predicated on a finding of gross negligence (2). In 1995, however, Governor Bush signed legislation that eliminated gross negligence as a basis for the allocation of exemplary damages and required that such claims be based on fraud, malice, or, in wrongful death cases, gross neglect (2). Each of these terms is defined by statute. While a health care provider can be sued by a patient for fraudulent conduct (3), this is rarely the basis for exemplary damages in a health care liability claim.

Exemplary damages serve to provide the claimant with recovery above and beyond compensatory damages in order to punish the wrongdoer for egregious conduct and to deter the wrongdoer and others from similar conduct in the future (4). Texas law establishes that it is against public policy in Texas to insure against exemplary damages (5). As a result, once your insurance company becomes aware of an allegation of exemplary damages, you will receive a reservation of rights letter notifying you that a claim for exemplary damages exists, that this claim is not covered by your professional liability insurance policy, and that you have the right to retain personal counsel to defend those allegations. In any event, the counsel assigned to your case by the insurance carrier will continue to represent you and defend all claims that are being asserted, including the claim for exemplary damages. The insurer has to send you this notification, however, for it to stand on its rights to not cover you for any exemplary damages that may be awarded. If you have a question about the need for personal counsel, you should contact your attorney to discuss this matter and obtain advice on how to proceed.

Under the statute, malice is defined 2 ways. First, "malice" exists if there is "a specific intent by the defendant to cause substantial injury to the claimant" (6). The definition of malice used more frequently in health care liability claims is "an act or omis-

sion, which when viewed objectively from the standpoint of the actor at the time of this occurrence, involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others" (7). In wrongful death cases, gross neglect is defined in the same manner as the second definition of malice set forth above (8).

A plaintiff is not entitled to exemplary damages based upon a finding that a health care provider acted negligently. To show malice, the plaintiff must establish that an extreme degree of risk existed, that there was a likelihood of serious injury and not just a remote possibility of injury or even a high probability of minor harm. Further, the plaintiff must show that the defendant knew about this peril and demonstrate that the defendant, through his acts or omissions, did not care (9). A finding of malice must come from "clear and convincing evidence" (10), defined as "the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established" (11).

Because exemplary damages are assessed to punish and deter the wrongdoer, allegations of malicious conduct entitle the claimant to obtain information about the defendant's financial status (12). Absent this information, the jury would have no basis on which to determine an amount that would truly punish and deter (13). An amount that would financially ruin one person might be negligible to another. While defense counsel generally will resist the claimant's requests for financial information, the defendant must understand that the information is relevant when allegations of malice exist. Courts generally are sensitive and place confidentiality provisions on any disclosure of information; they are also likely to limit what needs to be produced. It has been held, however, that federal income tax returns do not accurately reflect an individual's net worth and are not relevant evidence about net worth (14). Generally speaking, a financial statement filed with some type of financial institution may need to be produced. Frequently, however, claimants' counsel do not require financial information during the discovery process but wait until shortly before the case goes to trial.

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There is a question as to whether or not an expert witness can address whether conduct meets the definition of malice set forth in the statute. There are extensive opinions that address whether or not individuals are qualified to render expert testimony on various issues that arise during litigation (15–17). The Texas Supreme Court held that an expert witness could not address the issue of gross negligence (the standard before the current statute) because there was no evidence that the expert was qualified to address the definition of gross negligence (18). The same rationale should apply to testimony about malicious conduct. Preventing a claimant's expert witness from testifying that a health care provider's conduct was malicious would be an important victory at trial and would certainly be beneficial in attempts to convince the jury that there was no malicious conduct on the occasion in question.

If a case that involves a request for exemplary damages goes to trial, the defendant is entitled to a bifurcated trial (19, 20). This means that the case is first tried on the issue of liability, compensatory damages, and whether or not there was malicious conduct. Because the jury is not asked to address exemplary damages at this trial, no information is put before the jury as to the defendant's financial position. In the event that malicious conduct is found to exist, a second trial, immediately after the first trial, is held solely to determine the appropriate amount of exemplary damages (19, 20). In addition to the defendant's financial position, evidence about the following factors is presented to the jury to consider in determining the amount of exemplary damages:

- The nature of the wrong
- The character of the conduct involved
- The degree of culpability of the wrongdoer
- The situation and sensibilities of the parties concerned
- The extent to which such conduct offends a public sense of justice and propriety (21, 22)

If exemplary damages are assessed, the amount is limited by statute: "Exemplary damages against the defendant may not exceed an amount equal to the greater of (A) two times the amount of economic damages plus an amount equal to any non-economic damages found by the jury, not to exceed \$750,000.00, or (B) \$200,000.00" (23). In essence, the statute provides that the exemplary damages cannot be disproportionate to the economic and noneconomic damages. Further, the nonexemplary damages are determined first, and the jury cannot be made aware of these limitations in any manner. To avoid confusion, it should be noted that these caps apply only to exemplary damages; there are no

valid caps on liability under Texas law for noneconomic damages (e.g., pain and suffering) in general malpractice cases (24).

While allegations of malice are frequently asserted in health care liability claims, they are very difficult to establish and are generally not pursued. The scenarios that give rise to such claims tend to focus on egregious conduct, such as providing professional services while impaired, mistreating the elderly in nursing homes, and giving the wrong medication or treatment while acknowledging that such a course of action generally is not accepted or recognized as reasonable. Additionally, these claims generally are limited to circumstances in which the defendants are large corporations or have significant liquid assets. Exemplary damage assertions frequently are made to shock and intimidate and to make the defendant health care provider and his insurance carrier consider settlement or a settlement amount that they might not otherwise consider. Claimants generally focus on the coverage limits provided by liability insurance and not on available personal assets (25). For financial planning purposes, however, physicians should understand that personal assets are exposed not only when compensatory damages exceed policy limits but also when exemplary damages are awarded.

1. *Texas Civil Practice and Remedies Code*, §41.001 et seq. (Vernon's 2000).
2. *Universal Services Co. v. Ung*, 904 S.W.2d 638, 641, n. 2. (Tex. 1995).
3. See *Jackson v. Julian*, 694 S.W.2d 434, 436 (Tex. App.—Dallas 1985, no writ).
4. *Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988).
5. *Texas Insurance Code*, art. 5.15–1, §8 (Vernon's Supp. 2002).
6. *Texas Civil Practice and Remedies Code*, §41.001(7)(A).
7. *Texas Civil Practice and Remedies Code*, §41.001(7)(B).
8. *Texas Civil Practice and Remedies Code*, §41.003(A)(3).
9. *Mobil Oil Corp. v. Ellender*, 698 S.W.2d 917, 921 (Tex. 1998).
10. *Texas Civil Practice and Remedies Code*, §41.003(B).
11. *Texas Civil Practice and Remedies Code*, §41.001(2).
12. *Lunsford*, 746 S.W.2d at 473.
13. *Lunsford*, 746 S.W.2d at 472–473.
14. See *Chamberlain v. Cherry*, 818 S.W.2d 201, 205 (Tex. App.—Amarillo 1991, no writ).
15. Thornton RG. Judicial decision-making in litigation. *BUMC Proceedings* 2000;13:94–96.
16. See *E. I. Dupont de Nemour v. Robinson*, 923 S.W.2d 549 (Tex. 1995).
17. *Brodgers v. Heise*, 924 S.W.2d 148 (Tex. 1996).
18. *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605 (Tex. 1998).
19. *Texas Civil Practice and Remedies Code*, §41.009.
20. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994).
21. *Texas Civil Practice and Remedies Code*, §41.011.
22. *Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981).
23. *Texas Civil Practice and Remedies Code*, §41.008.
24. *Lucas v. U.S.* 757 S.W.2d 687 (Tex. 1988).
25. Thornton RG. Settling a claim within policy limits. *BUMC Proceedings* 2002;15:336–337.