PUNITIVE DAMAGES

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In our current environment of deregulation, lack of corporate belief in facts or science, and our President making off the cuff remarks without regard to veracity or optics emboldening remorseless conduct, accountability seems in short supply. As a result, America has become more attuned to the potential gross negligence of professionals and corporations than perhaps at any time in a generation. Trial lawyers have an opportunity to do extraordinary things for our clients and society with the effective use of gross negligence claims. The core of a gross negligence claim is the punitive damage—the punishment that results. Punishment that is publicly levied by a jury of peers, designed to wake us all up and to take note—this was wrong and it should have never occurred.

These are the verdicts headlines are made of. They curb wanton behavior. They rein in the reckless and kick-start the lazy. I do believe that gross negligence verdicts have a positive impact on future patient care, client care, employee care, and customer care. Now, possibly more then ever, the lawyers of AAJ must demonstrate the courage and candor needed to counter the greed and recklessness that so often cause gross negligence.

The traditional approach to professional negligence cases espoused by most well-known practitioners is to limit your case to succinctly demonstrating the negligence of the distracted driver, health care provider, corporation, etc., in the occurrence in question. The thinking behind the traditional approach is that it is hard enough to prove in any given case that the standard of care was breached, so why take on any additional burden of trying to show that the defendant is generally an incompetent, greedy, fork-tongued serpent. The traditional approach encourages the plaintiff's attorney to think in terms of proving negligence, not reckless disregard, not greed, evil motivation, or even deviant behavior. Likewise, in general, in most cases involving injuries due to negligence, most plaintiff's attorneys are deterred from even thinking about developing a case for punitive damages because of the phraseology of state statutes or jury instructions requiring a showing of "malice" or "actual malice" as a prerequisite for a finding of punitive damages.

The purpose of this presentation is to encourage plaintiff's attorneys throughout the United States to view corporate negligence, medical malpractice, and catastrophic injury cases differently through three simply axioms which we will call Weisbrod's Laws I, II, and III.

Weisbrod's Law I

EVERY MEDICAL MALPRACTICE, CATASTROPHIC INJURY, AND CORPORATE NEGLIGENCE CASE IS A PUNITIVE DAMAGES CASE UNTIL PROVEN OTHERWISE.

Most states allow punitive damages in negligence cases based on a showing that the defendant's conduct was in reckless disregard for the rights of others.

Note the following cases: *Norcon, Inc. v. Kotowski*, 971 P.2d 158 (Alaska 1999); *Daou v. Harris*, 678 P.2d 934 (Ariz. 1984); *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747 (Cal. 2007); *Short v. Downs*, 537 P.2d 754 (Col. Ct. App. 1975); *Buie v. Barnett First Nat'l Bank* (266 So.2d 657) (Fla. 1972)*; Mack Trucks, Inc. v. Conkle, et al.*, 263 Ga. 539 (Ga. 1993)*; Berenger vs. Frink*, 314 N.W.2d 388 (Iowa 1982); *Partch v. Hubele*, 188 Kan. 86 (Kan. 1961); *Loitz v. Remington Arms Co.*, 138 Ill.2d 404, 414, 563 N.E.2d 397, 150 Ill. Dec. 510 (1990); *Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd.*, 329 N.W.2d 306 (Minn. 1982); *Sheffield v. Sheffield*, 405 So.2d 1314 (Miss. 1981); *Jordan v. General Growth Dev. Corp.*, 675 S.W.2d 901, 905 (Mo. App. 1984); *Weiss, et al. v. Goldfarb, et al.*, 154 N.J. 468 (Sup. ct. N.J. 1998); *Sanchez v. Clayton*, 117 N.M. 760, 765-67, 877 P.2d 567, 572-74 (1994) (N.M. 1994); *Rocanova v. Equitable Life Assur. Socy.*, (83 NY2d 603, 612 N.Y.S.2d 339, 634 N.E.2d 940) (Ct. App. NY 1995); *Rogers v. T.J.X. Companies, Inc.*, 329 N.C. 226 (N.C. 1991)*; Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 650, 1994 Ohio 324, 635 N.E.2d 331; *McCarroll vs. Reed*, 679 P.2d 851 (Okla. Ct. App. 1983); *Williams v. Philip Morris USA, Inc.*, 344 Ore. 45, 176 P.3d 1255, 2008 Ore. LEXIS 5 (2008); *Gray v. H.C. Duke & Sons, Inc.*, 387 Pa. Super. 95, 563 A.3d 1201, 1205 (Pa.Super. 1989); *Behrens v. Raleigh Hills Hospital, Inc.*, 675 P.2d 1179 (Utah 1983); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981).

In most states, recovery hinges on meeting a legal definition which usually boils down to "heedless and reckless disregard" regardless of the semantics used. Here is a sample of six states' legal definitions which must be met for punitive damages:

> **a. Arizona** — In Arizona, the test for whether punitive damages can be awarded for gross negligence depends on whether there is clear and convincing evidence that the defendant acted with "an evil mind." In order to establish your opinions with regard to this case, please assume that under Arizona law, a defendant acting with "an evil mind" is defined as follows: "where the defendant, not intending to cause injury, consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others."
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> **b. California** — In California, "gross negligence" has been defined as "an extreme departure from the ordinary standard of conduct" or "want of even scant care." *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185-1186. The standards are distinct alternatives and you need only prove one standard to prove gross negligence. *Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App3d 184, 196-197. Gross negligence "amounts to a rule or policy that a failure to exercise due care in those situations where the risk of harm is great will give rise to legal consequences harsher than those arising from

negligence in less hazardous situations." *Colich & Sons v. Pacific Bell* (1988) 198 Cal.App.3d 1225, 1240.

c. Kentucky — In Kentucky, Instructions to Juries by Palmore and Eades, §39.15, with regard to punitive damages, gives the following model instruction: "If you find for P and award him a sum or sums in damages under instruction, and if you are further satisfied from the evidence that D acted toward P with oppression or malice, you may in your discretion award punitive damages against D in addition to the damages awarded under instruction. As used in this instruction: ... "malice" means ... (b) conduct that was carried out by D with both a flagrant indifference to plaintiff's rights and a subjective awareness that such conduct would result in human death or bodily harm. If you award punitive damages, in determining the amount thereof, you should consider the following factors:

(a) the likelihood at the time of such misconduct by D that serious harm would arise from it;
(b) the degree of D's awareness of that likelihood;
(c) the profitability of the misconduct to D;
(d) the duration of the misconduct [and any concealment of it] by D and,
(e) the actions by D to remedy the misconduct once it became known to him.

d. New York — New York has a generally heightened standard for proving a punitive damages case where punitive damages "are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as 'gross' and 'morally reprehensible,' and of 'such wanton dishonesty as to imply a criminal indifference to civil obligations.'" *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 315 (Ct. App. NY 1995) (*citing Rocanova*, 83 N.Y.2d at 614, *supra*, *quoting Walker v. Sheldon*, 10 N.Y.2d 401). New York raises the level of culpability necessary for punitive civil damages to a truly criminal level. *See Walker*, 10 N.Y.2d 401, 404-405, *supra* (punitive damages when "such wanton dishonesty as to imply a criminal indifference to civil obligations" that is "aimed at the public generally").

e. Ohio — Ohio Jury Instructions—civil, §23.71(2) states "malice" includes a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. Great probability is further defined as "probability" means likelihood, and "great probability" means considerable or sizable likelihood. Substantial is further defined as "substantial" means major, of real importance, of great significance, not trifling or small.

f. Texas — "Gross negligence" means more than momentary thoughtlessness, inadvertence, or error of judgment. It means such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety or welfare of the person affected.

So what is "a flagrant indifference to plaintiff's rights" or "a conscious disregard for the rights and safety of other persons/" or "actual malice"? It's a jury argument. It can be made in almost every medical malpractice case, corporate negligence, or negligence case which results in permanent injuries, catastrophic injuries, or death, because almost every such case involves more than one mistake by the defendant or defendants. Those mistakes are almost always the result of system failures, dirt, or greed.

Weisbrod's Law II

IN ALMOST EVERY PROFESSIONAL NEGLIGENCE CASE INVOLVING SUBSTANTIAL DAMAGES, THERE IS A SYSTEM FAILURE, DIRT, GREED, OR A COMBINATION THEREOF—YOUR JOB IS TO KEEP DIGGING UNTIL YOU GET THE DIRT.

A. All About Dirt:

What is "dirt" in the context of corporate or professional negligence litigation? Let's take an example of most defense lawyers charged with defending a "sore back" case in the old days of workers compensation law or defending rear end automobile collisions. When the insurance adjuster called and said "get me some 'dirt' on the plaintiff, he must be faking," the good and righteous defense attorney would, of course, hire a private investigator to follow the plaintiff around and take movies.

How far does the defense go in the effort to get "dirt"? I once had a workers compensation case where private investigators let the air out of my client's tires on his car while he was in his doctor's office getting physical therapy to see if they could film him trying to change the tire when he came out. I had a wrongful death medical malpractice case once with St. Paul Insurance Company where they hired a private investigator to pose as the representative of a life insurance company who had money to pay to the victim's family on a life insurance policy if the family would answer some "dirt" questions on the deceased, like where his former wives lived.

Insurance companies have known the power of "dirt" and how to use it from the first day insurance was sold on this planet. Why do they always teach young insurance defense lawyers to ask every plaintiff if they have ever been arrested, let alone convicted, of any crime? You can bet your right arm that any insurance defense lawyer worth spit has run a criminal record check on your plaintiff in any injury case and probably has also run such a check on your plaintiff's parents, children, brothers, sisters, uncles, aunts, and cousins. These same insurance defense attorneys will, however, be the first to call it unscrupulous and harassing if a plaintiff's lawyer uses the same methods of investigation and the same search for dirt on a defendant doctor, expert witness, or health care provider.

B. Doctors, Lawyers, and Other Professionals are Human Beings

Plaintiff's attorneys are taught that the general public generally puts professionals (especially doctors) on a pedestal. Thus, the general thinking is that it is harder to win a

malpractice case, especially if there is a swearing match between a doctor and a patient. We are taught that most jurors will almost always believe the doctor over the patient. Plaintiff's attorneys soon forget that Dr. Joe Everyman, M.D., goes to the bathroom and puts his pants on one leg at a time like everyone else. The number one mistake all attorneys make is to treat doctors and other health care providers with great deference and respect. If you are so busy being in awe and acting deferential to some distinguished medical professional, you will no doubt forget to inquire into that person's daily habits.

Human beings, medical professionals included, have a number of frailties. Remember this statistic: It has been reported that as much as 10% of the population now has a drug or alcohol problem.[1] That means there is a 10% chance that the Dr. Joe Everyman, M.D. you are deposing has a drug or alcohol problem that may have interfered in the treatment of your client. Lawyers also have those same frailties. All you have to do is pick up any state bar journal which lists the lawyers who have been privately reprimanded, publicly reprimanded, or whose licenses have been suspended or revoked for drug abuse, alcohol abuse, or other similar impairments to see that lawyers are no better than the rest of the population when it comes to dealing with these problems.

People sometimes do bad things and go to jail. Doctors and lawyers sometimes do bad things and go to jail. (They can also come out of jail and practice medicine or law again and be defendants in malpractice cases.) Corporate decision-makers are people and often do bad things in the name of increasing share prices. People sometimes do bad things and lose their drivers licenses. Doctors and lawyers can lose their drivers licenses, too. Corporations can ignore literature and research that shows their product is dangerous. People sometimes do bad things with money and file for bankruptcy. Doctors, lawyers, and truck drivers do all the things other people do because they are people, too.

C. Legal Relevancy and Admissibility of Dirt

1. Rules of Evidence
2. Credibility
3. Impeachment

D. Categories of "Dirt"

1. Medical incompetence
    a. Prior suits
    b. Medical school records
    c. Residency records
    d. Employment history

[1] "The most commonly accepted rule of thumb is that 10% of the population will have a drug or alcohol addiction problem, and physicians by-and-large are representative of the entire population." Los ANGELES TIMES, July 18, 1993, quoting Gail Jara, Executive Director of the California Society of Addiction Medicine. Additionally, in a recent Texas State Board of Medical Examiners Newsletter, of the 101 public disciplinary actions taken by the Board and reported in their bi-annual report, 36 were disciplinary actions because of drug or alcohol impairment.

e. Staff privileges
f. Training records
g. Personnel file
h. Driving records

2. Medical or physical incapacity
    a. Psychological imbalance or mental illness
    b. Physical handicap, eyesight, hearing, old age, etc.
3. Drug or alcohol problems
4. Criminal activity
5. Financial problems
6. Greed
7. Divorce records

E. Getting the Dirt

1. Thorough court record search
    a. Criminal and civil
    b. Divorce papers
    c. Bankruptcy files
2. Medical records
3. Financial records—deed/title search
4. Medical school and residency records
5. Staff privileges and personnel files
6. Interview ex-co-workers, employees or associates
7. Talk to competitors
8. Private investigator
9. Hand out in adult movie theaters

F. Methods of Discovery and Investigation after Filing Suit to Get the "Dirt"

1. Interrogatories
    a. "Standard" interrogatories
    b. Always include "dirt" questions, i.e. criminal convictions, alcohol or drug use, revocation of privileges, etc.
2. Request for production—be creative and detailed
    a. Insurance policies (Don't forget most insurance policies do not cover punitive damages. Thus, by seeking punitive damages, more pressure is brought to settle within policy limits in order to avoid exposure of the defendant's personal assets for punitive damages.)
    b. Corporation (professional association) and partnership papers
    c. Hospital management agreements
    d. Hospital policies and procedures, medical staff bylaws, etc.—consult JCAHO, ACOG, NACOG, AAP, and other national standards
    e. Advertisements

f. In-service education materials, continuing medical education list and materials
g. Hospital staff applications
h. Personnel records
i. Committee minutes, board of trustee's minutes, incident reports
j. JCAHO surveys/Medicare surveys
k. Other patient records with names deleted
l. Expert reports
m. emails
n. time cards
o. phone records
p. black box

3. Oral Depositions
   a. Depose everybody—doctor's office help, nurses, hospital administrators, switchboard personnel, scheduler, sales rep
   b. Videotape
   c. Experts, depose everyone—especially nondefendant treating doctors named as experts
      (1) Do literature search—get everything written by any defendant expert—read it before the deposition
      (2) Do court record search for cases where expert has been sued
      (3) Get any previous depositions expert has given in other cases—check "jury verdicts" services, for example, and TrialSmith or other litigation information aggregators to get all the information you can
      (4) Subpoena duces tecum—curriculum vitae, file on case, articles written, research used or relied on

PERSUADE THE INSURANCE CARRIER THAT YOU ARE GOING TO GET A PUNITIVE DAMAGES ISSUE TO THE JURY AND PERSUADE THE JURY THAT YOU HAVE A PUNITIVE DAMAGES CASE.

A. How to get your experts to testify to punitive damages:

Experts feel better about testifying in a case where there is not just a little negligence but where there is gross negligence. Count up the number of negligent acts or omissions in the case, review them with your expert, and then conclude, together with your witness: "Well, doctor, based on what you tell me, we have not one but four deviations from the standard of care. Don't you think if we just had one deviation we would be dealing with negligence, but where we have four deviations from the standard like in this case, isn't that gross negligence?"

Explain to your witness that legal definitions are all about semantics. The legal definition for gross negligence in Kentucky is "conduct that was carried out by the defendant with both a flagrant indifference to the plaintiff's rights and a subjective awareness that such conduct would result in human death or bodily harm." Put the definition in writing in front of your witness. Then break it down with your witness. Discuss "flagrant indifference." Say your case involves a laboratory test that was ordered by a physician but the physician never followed up to get the results of the test where the results of the test would have called for different treatment of the patient. Isn't it flagrant indifference for any doctor to order a test but not bother to check into what the results of the test are? Assume your case is an obstetrical one which involves fetal monitoring strips. The monitoring strips show fetal distress, yet the physician continued to allow the patient to labor. Isn't that flagrant indifference to the rights of the unborn child?

Then discuss the element of "subjective awareness." All subjective awareness means is that the defendant knew or should have known that such conduct could result in human death or bodily harm. How do you show that a defendant doctor knew or should have known that his conduct would result in death or bodily harm? Take the laboratory test example. When deposing the defendant, ask a question such as, "Doctor, were you taught in medical school that when you order a laboratory test it's important to get the result? If not in medical school, were you taught that in your residency? Well, you certainly knew at the time you ordered this test in this case that it was important to get the results of the test you ordered, didn't you? And you knew, prior to the time that you ordered that laboratory test in this case that there had been occasions in the past in the practice of medicine where people died or were seriously injured because either the proper laboratory tests were not ordered or somehow the results didn't get back to be used for the patient. You've heard or were aware of cases like that, weren't you?" After establishing that predicate with the defendant, it is a simple matter to point out to your expert witness that the defendant testified in his or her own deposition that they knew that such conduct "would result in human death or bodily harm."

Make sure your witness understands that this legal definition does not require that the defendant had to be able to predict the future or that the defendant intended to cause human death or bodily harm. Explain to your witness that this is further illustrated by the instruction to the jury in how they're to determine punitive damages in that they are to consider "the likelihood at the time of the misconduct by the defendant that serious harm would arise from it" and "the degree of the defendant's awareness of that likelihood." Thus, it is clear that the definitions do not require that the defendant had to actually know that the conduct he was engaging in would result in human death in that particular instance but simply that the defendant knew or should have known that there was a likelihood that such conduct would result in human death or bodily harm.

Regardless of which jurisdiction you are in, inform your witness of the definition of gross negligence or malice in that jurisdiction. Put that definition in writing in front of your witness and go through the definition word for word, breaking down the meanings of various phrases and reviewing them with your witness. For example, be sure to explain that "conscious disregard" may be proved from circumstantial evidence.

Next, explain to your expert witness the difference between actual damages and punitive damages. Explain that if the witness gives an opinion that the case involves gross negligence under the proper definition, greater damages can be recovered. Explain further that if the defendant and the insurance company know that these greater damages may be recovered, it will make it more likely to get the case settled without your witness having to come to trial to testify.

The next thing to do is to commit your witness' opinions to writing by use of a written questionnaire letter. If you do not commit your witness to the definitions in writing, then get your witness to testify to the definitions during your witness' deposition. One way to do this is to place a copy of your state's pattern jury instructions on punitive damages in your expert witness' file. When the defense attorney deposes your witness and asks why a copy of the jury instructions is in the witness' file, the witness will respond "because the plaintiff's lawyer wanted to know if, in my opinion, the conduct in this case matched that definition." If the defense lawyer still doesn't pick up on what's going on when they see the definitions in your witness' file, you might be well-advised to ask your witness a few questions yourself at the end of the deposition.

B. How to Persuade a Jury to Award Punitive Damages

In jurisdictions that allow attorney voir dire of the jury panel, you should voir dire the jury on the legal definition in your state concerning punitive damages. Ascertain if they can follow the definition and commit them to awarding punitive damages if the facts of the case meet the definition. You must further voir dire the jury on an amount of punitive damages and on the idea that punishment sets an example so that the conduct will not occur in the future. You must voir dire the jury on the concept that if you're making $12,000 a year, $4,000 would be significant punishment, and if you're making $12 million a year, $4,000 would be less than a slap on the wrist but $4 million would go a long way to changing attitudes or conduct.

In opening statement, you must highlight the fact that there was more than one negligent act; you must number each negligent act and stress, for instance, that there are four acts of negligence, not just one, in the case.

As you put the testimony on from the defense witnesses and your expert witnesses, you must reiterate the number of negligent acts. When you put on your expert witnesses, you must ask them to assume your state's definition for "malice" or "gross negligence." Give them the exact words of the definition and ask them if they have an opinion as to whether the defendant's conduct on this case meets the definition. You must stress to your expert witness and the jury that they cannot use their own definition of "malice," and that while they may think if they simply heard the word "malice" outside of the context of your case, that it would mean that there was probably some intent involved, but that they must remember that legal definitions involve semantics and that under the strict definition of "malice" that is being dealt with in this case, there is no intent involved. You must remind the jury and your expert witness that they cannot substitute their own definition of "malice," but they must strictly accept the legal definition of "malice" that they're being given and assume that it's true whether they know that definition to be true or not. Thus, your expert's testimony and the jury's decision must be confined to the legal definition and not to their speculation as to what the definition may mean.

In closing argument, everything must be brought together and reinforced. You must end the case by telling the jury that the job they have to do will take great courage, that it would be easy simply to find the defendant negligent and award the plaintiff their actual damages but that it takes great courage to punish and set an example. Yet, if they have that courage, and only if they have that courage, will they save others in your community from the same fate as befell the plaintiff in the case they are hearing.

Most of us became trial lawyers because we wanted to help other people. Most of us would much rather prevent grossly negligent conduct from ever occurring than to have to represent the victims that have been killed or catastrophically injured from grossly negligent conduct. Punitive damages are designed to prevent other people from being injured by the same conduct in the future. Therefore, one of the greatest things a trial lawyer can do to prevent injury to others is to seek punitive damages in an appropriate case and secure a reasonable jury award. Accordingly, the caring, sensitive trial lawyer who values human life approaches each case with this thought in mind: **EVERY CATASTROPHIC INJURY OR DEATH CASE IS A PUNITIVE DAMAGES CASE UNTIL PROVEN OTHERWISE.**