

# CRS Report for Congress

## **Punitive Damages in Medical Malpractice Actions: Burden of Proof and Standards for Awards in the 50 States**

**Updated January 18, 2006**

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**Prepared for Members and  
Committees of Congress**

# Punitive Damages in Medical Malpractice Actions: Burden of Proof and Standards for Awards in the 50 States

## Summary

This report consists of a chart setting forth the burden of proof and standards for awards of punitive damages in medical malpractice suits in the 50 states. The burden of proof refers to the plaintiff's duty to present evidence to prove his case. The lowest burden, which usually applies in civil cases, is "preponderance of the evidence." To recover punitive damages, however, a majority of states, as this report indicates, impose a higher burden of proof — proof by "clear and convincing evidence." Finally, for punitive damages, Colorado requires proof "beyond a reasonable doubt," which is the highest standard — usually the burden that the government must meet in criminal prosecutions.

Standards for awards of punitive damages refer to what the plaintiff must prove to receive an award of punitive damages. To recover compensatory damages in a medical malpractice case, the plaintiff typically must prove negligence. To recover punitive damages, the plaintiff must prove that the defendant's conduct was more egregious than negligence, and usually more egregious than gross negligence. This report sets forth the specific requirements.

Most of the provisions listed in the chart apply to punitive damages not only in medical malpractice cases, but in other tort cases as well. Where "*punitive damages prohibited*" appears, the prohibition may be limited to medical malpractice cases, or it may apply to other tort cases as well.

A chart of state caps on awards of punitive damages and of noneconomic damages in medical malpractice cases may be found in CRS Report RL31692, *Medical Malpractice Liability Reform: Legal Issues and 50-State Survey of Caps on Punitive Damages and Noneconomic Damages*, by Henry Cohen.

## Contents

Introduction .....	1
Chart .....	2

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## Chart

State and Citation	Burden of Proof	Standard
Alabama, § 6-11-20	clear and convincing evidence	“the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice”
Alaska § 09.17.020	clear and convincing evidence	“defendant’s conduct (1) was outrageous, including acts done with malice or bad motives; or (2) evidenced reckless indifference to the interest of another person”
Arizona <i>Medasys Acquisition Corp. v. SDMS, P.C.</i> , 55 P.2d 763 (Az. 2002)	clear and convincing evidence	defendant engaged in “reprehensible conduct” and acted “with an evil mind”
Arkansas § 16-55-206; § 16-55-207	clear and convincing evidence	“defendant knew or should have known ... that his or her conduct would naturally and probably result in injury or damage and that he or she continued the conduct with malice or in reckless disregard of the consequences ...” or “defendant intentionally pursued a course of conduct for the purpose of causing injury or damages.”
California Civil Code § 3294	clear and convincing evidence	“oppression, fraud, or malice”
Colorado § 13-25-127(2); § 13-64-302.5	beyond a reasonable doubt	“fraud, malice, or willful and wanton conduct”
Connecticut <i>Freeman v. Alamo Management Co.</i> , 607 A.2d 370 (Conn. 1992); <i>Sorrentino v. All Seasons Servs.</i> , 717 A.2d 150 (Conn. 1998)	preponderance of the evidence	“a reckless indifference to the rights of others or an intentional and wanton violation of those rights.”
Delaware T. 18, § 6855	preponderance of the evidence	“injury complained of was maliciously intended or was the result of wilful or wanton misconduct by the health care provider”
District of Columbia <i>Railan v. Katyal</i> , 766 A.2d 998, 1012 (D.C. 2001); <i>Croley v. Republican Nat’l Comm.</i> , 759 A.2d 682, 695 (D.C. 2000)	clear and convincing evidence	“egregious conduct”; “malice or its equivalent”
Florida § 766.207(7)(d)	<i>punitive damages prohibited</i>	

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Georgia § 51-12-5.1	clear and convincing evidence	“willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences”
Hawaii <i>Dairy Road Partners v. Island Ins. Co.</i> , 992 P.2d 93 (Hawaii 2000)	clear and convincing evidence	“defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some wilful misconduct or that entire want of care which would raise the presumption of conscious indifference to the consequences”
Idaho § 6-1604	preponderance of the evidence; for actions accruing after 7/1/03, clear and convincing evidence	“oppressive, fraudulent, wanton, malicious or outrageous conduct”; for actions accruing after 7/1/03, delete “wanton.”
Illinois 735 ILCS 5/2-1115	<i>punitive damages prohibited</i>	
Indiana § 34-51-3-2; <i>USA Life One Ins. Co. of Indiana v. Nuckolls</i> , 682 N.E.2d 534 (Ind. 1997)	clear and convincing evidence	defendant “acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing”
Iowa § 668A.1	“preponderance of clear, convincing, and satisfactory evidence”	“willful and wanton disregard for the rights or safety of another”
Kansas § 60-3701	clear and convincing evidence	“willful conduct, wanton conduct, fraud or malice”
Kentucky § 411.184	clear and convincing evidence	“oppression, fraud or malice”
Louisiana <i>Naquin v. Fluor Daniel Services Corp.</i> , 935 F. Supp. 847 (E.D. La. 1996)	<i>punitive damages prohibited</i>	
Maine <i>St. Francis de Sales Federal Credit Union v. Sun Insurance Company of New York</i> , 818 A.2d 995 (Me. 2002, revised 2003)	clear and convincing evidence	Malice, either express (where the defendant “is motivated by ill will toward the plaintiff”), or implied (defendant’s conduct “is so outrageous that malice toward a person injured as a result of that conduct can be implied.”) Implied malice is not established “by the defendant’s mere reckless disregard of the circumstances.”
Maryland <i>Owens-Illinois, Inc. v. Zenobia</i> , 601 A.2d 633 (Md. 1992)	clear and convincing evidence	“evil motive, intent to injure, or fraud”

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Massachusetts Ch. 229, § 2; <i>Caperci v. Hutoon</i> , 397 F.2d 799 (1 <sup>st</sup> Cir. 1968).	preponderance of the evidence in wrong death cases; <i>punitive damages</i> <i>otherwise prohibited</i>	“malicious, willful, wanton or reckless conduct . . . or gross negligence”
Michigan <i>Jackson Printing Co., Inc. v. Mitan</i> , 425 N.W.2d 791 (Mich. 1988)	preponderance of the evidence	“defendant commits a voluntary act which inspires feeling of humiliation, outrage, and indignity”
Minnesota § 549.20	clear and convincing evidence	“deliberate disregard for the rights or safety of others”
Mississippi § 11-1-65(1)(a)	clear and convincing evidence	“actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud”
Missouri <i>Altenhofen v. Fabricor, Inc.</i> , 81 S.W.3d 578, 590 (Mo. App. 2002)	clear and convincing evidence	“conduct that is outrageous, because of the defendant’s evil motive or reckless indifference to the rights of others”
Montana § 27-1-221	clear and convincing evidence	defendant “has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and: (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff”
Nebraska <i>Miller v. Kingsley</i> , 230 N.W.2d 472 (Neb. 1975)	<i>punitive damages</i> <i>prohibited</i>	
Nevada § 42.005	clear and convincing evidence	“oppression, fraud or malice, express or implied”
New Hampshire § 507:16	<i>punitive damages</i> <i>prohibited</i>	
New Jersey § 2A:15-5.12	clear and convincing evidence	“actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed”

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New Mexico Uniform Jury Instructions — Civil § 13-1827 <i>United Nuclear Corp. v. Allendale Mut. Ins. Co.</i> , 709 P.2d 649 (N.M. 1985)	preponderance of the evidence	“malicious, willful, reckless, wanton, fraudulent or in bad faith”
see <i>Randi A.J. v. Long Island Surgi- Center</i> , 842 N.Y.S.2d 558, 568 (2007); <i>Pearlman v. Friedman, Alpern &amp; Green, LLP</i> , 750 N.Y.S.2d 869 (2002)	apparently unsettled	“intentional or deliberate wrongdoing, aggravating or outrageous circumstances, fraudulent or evil motive, or conscious act in willful and wanton disregard of another’s rights”
North Carolina § 1D-15	clear and convincing evidence	“(1) Fraud. (2) Malice. (3) Willful or wanton conduct.”
North Dakota § 32-03.2-11	clear and convincing evidence	“oppression, fraud, or malice, actual or presumed”
Ohio § 2315.21	clear and convincing evidence	“malice, aggravated or egregious fraud, oppression, or insult”
Oklahoma T. 23, § 9.1	clear and convincing evidence	“reckless disregard” (lower cap) or “intentionally and with malice toward others” (higher cap)
Oregon § 31.740	<i>punitive damages prohibited</i>	
Pennsylvania T. 40, § 1303.505	preponderance of the evidence	“willful or wanton conduct or reckless indifference to the rights of others”
Rhode Island <i>DelPonte v. Pusyka</i> , 615 A.2d 1018 (R.I. 1992)	preponderance of the evidence	“defendant’s actions are so willfull, reckless, or wicked that they amount to criminality”
South Carolina § 15-33-135; <i>King v. Allstate Ins. Co.</i> , 251 S.E.2d 194 (S.C. 1979)	clear and convincing evidence	“malice, ill will, or conscious indifference to the rights of others, or a reckless disregard thereof”



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South Dakota § 21-1-4.1 § 21-3-2	“In any claim alleging punitive or exemplary damages ... , before any such claim may be submitted to the trier of fact, the court shall find, after a hearing and based upon clear and convincing evidence ... willful wanton or malicious conduct ....”	A jury, by a preponderance of the evidence, may award punitive damages if it finds “oppression, fraud, or malice, actual or presumed.”  “They allege that it would make no sense for a trial court to apply the clear and convincing evidence standard in deciding whether the jury should even be permitted to determine punitive damages, and then turn around and allow the jury to apply a lesser standard in making such determination. We disagree.” <i>Flockhart v. Wyant</i> , 467 N.W.2d 473, 475 (S.D. 1991)
Tennessee <i>Hodges v. V.S.C. Toof &amp; Co.</i> , 833 S.W.2d 896 (Tenn. 1992)	clear and convincing evidence	“intentional, fraudulent, malicious, or reckless”
Texas Civil Practice and Remedies Code § 41.003	clear and convincing evidence	“(1) fraud; (2) malice; or (3) wilful act or omission or gross neglect in wrongful death actions”
Utah § 78-18-1	clear and convincing evidence	“willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others”
Vermont <i>McCormick v. McCormick</i> , 621 A.2d 238 (Vt. 1993)	preponderance of the evidence	“conduct manifesting personal ill will, evidencing insult or oppression, or showing a reckless or wanton disregard of [a party’s] rights”
Virginia <i>Owens-Corning Fiberglas Corp. v. Watson</i> , 413 S.E.2d 630, 640 (Va. 1992)	clear and convincing evidence	“Willful and wanton negligence [which] is defined as acting consciously in disregard of another person’s rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another”
Washington <i>Stanard v. Bolin</i> , 565 P.2d 94 (Wash. 1977)	<i>punitive damages prohibited</i>	
West Virginia <i>TXO Prod. Corp. v. Alliance Resources Group</i> , 419 S.E.2d 870 (W.Va. 1992)	preponderance of the evidence	“not only mean-spirited conduct, but also extremely negligent conduct that is likely to cause serious harm”

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Wisconsin § 895.85; <i>City of W. Allis v. Wisc. Elec. Power Co.</i> , 635 N.W.2d 873 (Wisc. App. 2001).	“Before the question of punitive damages can be submitted to a jury, the circuit court must determine ... that to a reasonable certainty the conduct was ‘outrageous.’ ... The evidence must also be ‘clear and convincing.’”	“The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.”
Wyoming <i>McCulloh v. Drake</i> , 24 P.3d 1162 (Wyo. 2001); <i>Alexander v. Meduna</i> , 47 P.3d 206 (Wyo. 2002)	preponderance of the evidence	“Outrageous conduct, malice, and willful and wanton misconduct”