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The Assessment of Compensatory Damages for Medical Error by the Greek Courts: An Economic Analysis

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Abstract. In this paper, after summarizing and reviewing the methods of computing damages for wrongful death or injury in the law and economics literature, we present the way in which damages should be compensated for according to the mainstream Greek tort law theory. We then examine the actual calculation of damages by Greek courts during the period from 2003 to 2008 in order to discover the rationale behind court assessments of damages, especially in the difficult cases of lost future opportunities due to injuries and the valuation of life in the cases of wrongful death. Finally we offer a number of proposals that the Greek judges can use to estimate damages more accurately within the existing legal framework.

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1. Introduction

How human life is valued depends on the context in which the valuation is done and the purpose of the valuation. An extensive literature has been developed over the years concerning methods evaluating human life and courts are supposed to base their decisions on compensatory damages on these methods. The general concept is that compensatory damages should keep the victim at the same utility level that he had before the tortuous act (perfect compensation), i.e., leaving him on the same indifference curve. This literature is mainly concentrated on the analysis, use and comparison of two groups of indices which possess a great degree of popularity today: The *Value of Statistical Life* (VSL) as opposed other *Traditional Damages Fundamentals for Compensation and Deterrence.*[2]

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[2] Scholars support the view that the question of what is the right value of life cannot be answered in the abstract. The correct value will depend on the purpose to which it is being put. This distinction is not made simply with respect to which party is using the VSL—in particular, whether the value is being used by the government or by the judicial system. For both the government and the courts, there are different contexts in which there might be consideration of value of life estimates, with the chief areas being compensation and valuation of the reduction of the risk of personal injuries for benefit assessment.

However, these indices bear some fundamental methodological issues. For example, should the value of statistical life (VSL) be used in liability contexts, either in determining damages or assessing liability, i.e., as a measure of the welfare loss of a fatality for purposes of compensation? Should these values be specific to the particular lives involved or should there be a uniform index based on average estimates across broad populations, such as workers in risky jobs? Confronting these issues, some distinguished scholars in economic and legal disciplines have recently offered favorable comments for the use of the hedonic damages approach[3].

However, the VSL approach has a constructive role to play in personal injury cases. Similarly, the traditional measures of economic damages also serve a valuable economic function and should remain the approach used in setting compensatory damages.[4] Although the components of compensation in personal injury cases are quite standard for both methods, it is worth summarizing them briefly to draw a comparison between them in estimating economic damages calculations.

In what follows therefore, we first present the VSL approach and the other more traditional methods in assessing the value of human life by restricting the discussion to the cases which have appeared in court rooms that set damage amounts pertinent to the individual.[5] In these cases the values should differ with respect to whether those protected are young or old, sick or healthy, or involuntarily exposed to risk or voluntarily choosing the risk.[6] After summarizing and reviewing the methods

[3] See, O'Hara (1990), Richard Posner (1995), pp. 307-308, and Eric Posner and Cass Sunstein (2005).

[4] W. Kip Viscusi (2008).

[5] This paper does not deal with the use of VSLs by governmental agencies, because, to our knowledge, governments use VSL numbers to assess the prospective economic benefits of risk reduction policies and not for purposes of compensation. As Viscusi argues, the use of VSL became widespread a quarter century ago in several departments of the U.S. administration. However, the use of VSL numbers by the Federal government has not been uniform in the sense that there is no official "government number" for the value of statistical life. The differences across agencies appear to stem largely from organizational differences and the fact that agencies differ widely in the values that they use. (See Viscusi, 2008, pp. 4 and 5). For example, the U.S. Department of Transportation agencies, such as the Federal Aviation Administration (FAA), had long used the value of compensation in court cases involving wrongful death when assessing damages, so these agencies have adjusted the values upwards to move closer to estimated VSL levels, but the agencies have not adjusted the values of life to a sufficient extent.

[6] Unlike individual cases in courts that set damages amounts pertinent to the individual, government agencies invariably use the same VSL irrespective of the case being analyzed based on the following argument: Government policies protect large groups of people, so VSL numbers that are reflective of the average value of the protected population are reasonable. If the protected populations have risk-money tradeoffs that are similar to the tradeoff rates reflected in VSL studies, then there is little error that arises from using average values. However, if the VSL of the protected population is quite different, the assumption that the benefit values are transferable is not valid.

of computing damages for wrongful death or injury in the law and economics literature, we present the way in which damages should be compensated for according to the mainstream Greek tort law theory. We then examine the actual calculation of damages by Greek courts during the period from 2003 to 2008 in order to discover the rationale behind court assessments of damages, especially in the difficult cases of lost future opportunities due to injuries and the valuation of life in the cases of wrongful death. Finally we offer a number of proposals that the Greek judges can use to estimate damages more accurately within the existing legal framework.[7]

2. The Essential Elements of the VSL Approach[8]

The value of a statistical life (VSL) and is defined as the rate of tradeoff between risk and money for small risks of death. For labour market studies, which comprise most of the VSL literature, the VSL represents the compensating wage differential that workers receive for job fatality risks. The VSL is based on marginal rates of tradeoff for small risks, and is only pertinent in contexts in which one is envisioning the pricing of such lotteries of life and death.[9] The VSL amount will overstate how much people will pay (willingness-to-pay, WP) to avoid the certainty of death because wealth effects will make the willingness-to-pay amount below the VSL. Following the same line of argument, the VSL will understate how much people must be compensated to face a series of increases in fatality risk that may cause death. This method estimates the willingness-to-accept (WA) a measure of risk. However, even this method is subject to bias: it reflects people's valuation of small risks and for some cannot reliably be used in measuring the value of life. In addition, this can mostly measure the value of risk for risk-neutral or risk-loving individuals who incur the lowest cost from the risk (*selectivity bias*). We could make this assessment more accurate by using data on the amounts people are willing to pay (WP) to avoid risks (the demand for smoke detectors, the effect of air pollution on property values, the relation of the demand for specific car models and their fatality

[7] However, here we do not deal with some very interesting issues concerning liability in case of negligence and the problem of proximate cause. Economists adopted the "Learned Hand formula" to establish negligence. For a doctor to be considered negligent the expected harm by the medical error should exceed the cost of precaution. See, Vliamos and Chatziplaton (2008), and Hatzis (2007). We are going only to concentrate on the issue of the assessment of compensation for the injured party when the court has already found liable and negligent the doctor.

[8] This section draws heavily on W. Kip Viscusi and Joseph E. Aldy: *The Value of a Statistical Life: A Critical Review of Market Estimates throughout the World*, Discussion Paper No. 392, 11/2002, Harvard Law School, Cambridge, MA 02138; and Viscusi, 2008, *op.cit*.

[9] Based on labour market evidence for the U.S. economy, the current median VSL is about $7 million, calculated as wage premiums for risky occupations: Viscusi (2008), found that American society pays people an additional $700 a year, on average, to take on risky work in hazardous occupations. Given one death per 10,000 risk takers, on average, the cost to society adds up to $7 million for each life lost.

rate, etc.) The use of VSLs to value lives in personal injury cases similarly offers the prospect of considerably larger damage amounts.

In several studies, researchers divide the VSL by the number of years of life expectancy and allowing for the influence of discounting, obtain the value of a statistical life year (VSLY), that is, the money value (amount) that each year of life is worth. However, critics argue that this methodology makes the strong assumption that each year of life has the same value. Nevertheless, the VSLY measures may have some role to play in estimating individual discount rates with respect to the expected duration of life rather than as a replacement for VSL numbers. Moreover, the VSLY numbers also may be useful in imputing a VSL for retirees and other groups for which a VSL has not been estimated reliably.

However, there have been attempts to develop some further empirical refinements in the heterogeneity of VSL by considering differentiations with respect to age, race, gender, smoking status and a variety of demographic profiles. Such values could then be pertinent to the circumstances of a particular personal injury, as the VSL number can be linked to the facts of the case. For example, the U.S. Environmental Protection Agency, acting within the framework of the proposed Clear Skies Act, valued the lives of senior citizens over 70 years of age at 37 percent less than the values assigned to younger age groups. This argument is supported by further academic work done mainly by Viscusi and his associates, who estimate the VSL-age relationship as an inverted-U curve following the pattern of lifetime consumption.[10] This empirical relationship contradicts models that assume a constant value per life year, because if each life year had the same value then the VSL would be a steadily declining function of one's age. However, this is not always the case. The balance sometimes people strike between money and risk may remain stable or even rise with age as their wealth and personal consumption increase. Thus, the VSL for a sixty-year old could be greater than that of a twenty-year old. That means that the remaining life expectancy is not the sole determining factor. Individual wealth and willingness to bear risk both vary with age so that over many decades VSL may increase with age even though one has fewer years to live.

3. Traditional Damages Fundamentals for Compensation and Deterrence

The components of compensation in personal injury cases are economic damages and noneconomic damages.[11] The rationale for calculating economic damages (financial loss) is the income loss associated with an accident or injury, i.e., the amount of compensation needed to fully insure the income losses associated with the accident. Thus, the task for setting these damages values is not to determine how much the person's well being is worth to society or how much should be paid to prevent the injury.

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[10] See mainly Aldy and Viscusi (2002).

[11] Viscusi (2008, p. 8) argues, that it is more accurately to call them 'payments for "financial" loss and "nonfinancial" loss'.

Economic damages include the present value of the lost earnings for the accident victim, where this amount is reduced by the deceased's consumption in the case of a fatality. Some jurisdictions also deduct for taxes. Economic damages also may include other case-specific expenses, such as medical costs and rehabilitation expenses plus interest payments and sometimes punitive damages. The economic damages component is pertinent to the financial loss to the individual, though in many cases the prospective economic loss is based on the average performance of one's demographic and occupational group. Because of the linkage to the injured party's earnings and expenses, the damages are individual-specific. People who earn less will receive lower damages for themselves or their heirs, whether the earnings gap is due to low education, few job skills, age, race, gender, or a decision not to work. Children and the retired will consequently fare particularly badly in terms of court awards, but they would receive a much larger payment based on VSL estimates, especially if these estimates make no adjustments for individual heterogeneity. The variations of economic damages with individual circumstances are widely accepted for economic damages calculations so that use of a uniform VSL level for all personal injury cases, as is often done in hedonic damage analyses, is inconsistent with this approach.

Noneconomic damages also will vary, based on case characteristics which will then provide for compensation for the pain and suffering of the accident victim and the grief and welfare loss to the family. Noneconomic damages extend beyond the financial harm. From an economic standpoint, one would only choose to insure such losses fully if the accident did not reduce the marginal utility of income. For both fatalities and nonfatal injuries that are comparable in severity to the typical job injury, serious accidents reduce the marginal utility of income. As a result, the optimal insurance amount not only does not provide for noneconomic damage compensation above and beyond the value of economic loss, but also may provide for less than full replacement of earnings if the accident reduces the marginal utility of income sufficiently. In the case of accidents whose severity is comparable to that of job injuries, the optimal replacement rate is approximately 0.85, assuming that these benefits are not subject to taxation. Thus, taking this result at face value, there is generally no rationale at all for noneconomic damages from the standpoint of optimal insurance if the accident reduces the marginal utility of money and the financial losses are fully addressed, net of all deductions from the award, such as legal fees.

Should noneconomic damages even be part of conventional damages measures, as they now are, and if so, how should they be set? In general, it is not optimal for people to be fully compensated for pain and suffering damages that they have suffered due to a serious or fatal injury insofar as their marginal utility of money has declined as a result of such an injury. Very minor injuries, such as temporary hand burns, are tantamount to income losses and do not alter the marginal utility of income, whereas catastrophic injuries do. The reason why making accident victims whole after catastrophic losses is not optimal is that people generally will not

wish to buy insurance to compensate themselves or their heirs fully for the noneconomic losses associated with accidents. Similarly, people do not purchase insurance to compensate for the grief that will result from the death of a spouse or child.

4. The Economic Approach to Tort Law

The economic approach to tort law emphasizes the need for economic efficiency and this is achieved by the minimization of the total cost of accidents, which includes three types of costs:

(1) Primary costs = the harm to the patient due to the medical error (the cost of medical care after the medical error, the lost earning capacity, hedonic losses, etc.)

(2) Secondary costs = the cost of bearing the costs of accidents (the societal costs resulting from accidents). In our case the cost of an accident due to a medical error will result in less suffering if the victim is rich or if the victim is risk-neutral or risk-loving. The opposite is also true.

(3) Tertiary costs = the cost of the tort system itself (mostly administrative costs, that is, courts, lawyers, experts, loss of time, legal error, etc).

There is also another kind of cost associated with accidents: the cost of precaution.

The economic goal is thus to minimize the sum of the cost of medical error and the cost of preventing medical error. We should invest in preventing medical error as long as the marginal benefit of precaution in minimizing the other types of costs is great or equal to the marginal cost of preventive measures (such as insurance, self-insurance, avoidance of difficult or high-risk procedures, etc.)

A correct estimation by the court is instrumental in creating the right incentives to the parties. In case of under-compensation, the doctors are acting more negligently than it is efficient since there is a moral hazard problem. In addition, under-compensation could induce opportunistic behaviour on behalf of the doctors, leading to more risky operations. This effect could, in the long run, lead to more medical errors and then to distrust towards the medical profession and a backlash effect from the patients, leading to a suboptimal number of medical operations. On the other hand, overcompensation could lead to an increase in demand for medical procedures by the patients, a parallel drop in supply by the doctors (defensive medicine) and adverse selection effects (responsible and competent physicians may withdraw entirely from a high-risk area of practice and the same goes with medical students choosing areas of practice). In both situations transaction costs would be augmented in the form of increased insurance expenses by the patients and the doctors respectively.[12]

The economic rationale behind compensation is for the victim to be fully compensated. Full compensation means that the victim should be as good as it would be if the accident had not taken place, that is, the points (a) no accident and (b) accident with full compensation to be on the same indifference curve. This is almost

[12] See Vliamos and Chatziplaton (2008).

impossible to be achieved, especially by a court. However the goal (from an efficiency perspective) is for the injurer to wholly internalize the cost of the accident. For law and economics, more important than fully compensating a victim is to create disincentives for inefficient negligence by the medical personnel. Only an efficient number of accidents should take place.

Compensation should cover two types of damages: financial losses (lost income) and nonmonetary (hedonic) losses. The goal of the court is to find a money sum that is equivalent to the loss experienced by the victim (in case of injury) or her family (in case of death).

Financial loss includes, first of all, any medical expenses. It should also include future losses, i.e., the reduction in earning power. The court should estimate future earnings (their present value), taking into consideration the victim's education and expertise (human capital), health status before the medical error, life expectancy, fringe benefits, increases in productivity, the real interest rates, inflation and tax rules. For the estimation to be correct, the court should look into cross-sectional data on earnings and expected work-life for different occupations and industry groups. We believe that it should not discount the amount of the future income (by the real interest rate) since this effect will most probably be offset by the inflation rate. The difference is, most of the time, minimal and since it is uncertain, it cannot send mixed signals to the parties.

The educational level has not only income effects, but also substitution effects: more human capital means not only a higher salary, but also a higher opportunity cost of retirement and leisure time in general. On the other hand, even though leisure is more expensive, there is more demand for it due to wealth effects, but also preferences shaped by the higher level of education and culture.

In the case that the victim is a child, courts should base the compensation on a prediction of the level of education that the child would have acquired, given the demographic characteristics of her parents (educational level and income), and then use the median earnings and expected worklife of persons with these characteristics (level of income, age, gender).

In the case of a woman, courts should estimate the lost value of household services (cooking, cleaning, doing laundry, child care, etc.). The household services can be estimated using replacement cost (the cost of "outsourcing" to outside professionals) or the opportunity cost of the homemaker. Both methods have problems since the first method could lead to overcompensation (since it includes the transaction cost of finding several market alternatives and it does not include any scale economies) or under-compensation (if the woman is a homemaker with minimal or zero connection to the world of paid employment), respectively.

Besides future monetary losses because of the lost income, there are also hedonic losses for the lost enjoyment of life, pain and suffering (in the case of death or injury). However, recent empirical work demonstrates that people's self-reported happiness is surprisingly resilient to many large changes in life conditions.

Apparently, significant adverse events and conditions inflict little or no hedonic damage because those who suffer losses do not focus on them on a daily basis.

One method to estimate future losses, taking the value of leisure into consideration and hedonic damages, is the contingent valuation approach, which is based on finding out how much the victims are willing to pay to avoid certain risks. The problem here is that there is an endowment effect (victims ask for more compensation to take on an increase in risk than they will pay to reduce risk by the same amount).

Damages should be paid in a lump sum to avoid the moral hazard problem created by periodic payments (an incentive to remain disabled).

In the case of death the court should compensate the victim's family for lost earnings minus her living expenses, plus hedonic damages for their pain and suffering.

Punitive damages (a kind of exemplary compensation in excess of actual damages, that is a form of punishment to a malicious or grossly negligent injurer, and additional compensation to the victim) routinely lead to overcompensation and thus to overinvestment in precaution. However, when the cost of precautionary measures is less than the expected cost of the harm, there can be no overinvestment, even if the courts routinely award punitive damages. The same goes when only a fraction of the victims go to court and ask for compensation. Thus, punitive damages promote the goal of minimizing accident costs when injurers systematically escape liability due to imperfect detection, enforcement error, or apathy by the victims. Punitive damages have not been introduced and are not recognized by Greek law since overcompensation is considered to contravene public policy by the Greek courts.

However, there are some additional problems in the determination of damages by the courts, namely: (a) the variations in the level of damages across victims, (b) court errors in assessing compensation, and (c) the judgment-proof problem due to insolvency of the defendant.

(a) The value of a loss (future earnings, hedonic losses) is different with every person. For economic analysis it is better to individualize compensation rather than award victims an average level; otherwise we will have adverse selection and moral hazard effects.

(b) Court error, when it is biased, i.e., when courts systematically set lower (or higher) damage awards than the actual losses, leads (in the case of under-compensation) to inefficient precaution by the patients and moral hazard by the doctors (less than efficient precaution).

(c) When the doctor has insufficient (or no) assets to pay the compensation he/she is considered judgment-proof. In these cases doctors are more negligent (moral hazard) and the victims invest more than is efficient in precaution. A collateral source rule (the patient can ask to be compensated by multiple sources such as the doctor, the hospital, an insurance company) is only efficient when the patient could only recceive from the one source

and the third party has the right of subrogation. Otherwise there is a danger of overcompensation (if the injured party could recovereive from multiple sources more than her damage) or moral hazard (if the hospitals or the insurers do not have the right of subrogation).

5. The Estimation of Damages by the Greek Courts

We surveyed fourteen decisions of the Administrative Court of the Athens District for the period 2003-2008. In all these decisions, the defendant was a public hospital and the plaintiff was a victim of a medical error that was the result of a procedure that took place in this hospital by a physician (or a group of physicians) working in it.

According to the Greek Civil Code (CC), in case of personal injury or death the plaintiff is entitled to damages. These damages cover economic and non-economic harm that can be monetized.

The economic damages include restitution for medical expenses, funeral expenses (in the case of death) and any other kind of expenses directly related to the accident and the hospitalization and ensuing medical treatment. In addition, they include lost wages and future earnings and the increased cost of her living due to the change of circumstances and any special needs (CC 929). The calculation of these damages by the courts is based on the written briefs submitted by the parties. Future earnings are calculated based on the current earnings of the victim and prospects in the particular occupation. The compensation for future damages should be made in monthly installments, and only in special cases may the court award a lump sum (CC 930).

The court can also award damages for “moral” or non-economic injury, which the plaintiff has suffered as a consequence of the unlawful act. These are essentially hedonic damages for pain and suffering (CC 932). The courts should take into consideration the degree of negligence, the existence of contributory negligence, the economic and social status of the two parties, “experience and common sense” in order to award a “reasonable amount” (Areios Pagos 35/1998 and 112/1999).

In these cases claims for compensation also arise in favour of persons related to the victim. Those persons may bring action independently for the loss of maintenance or the performance of services by the victim (CC 928). The court can also award compensation to the victim’s family for emotional distress, which is again based on a number of qualitative factors without any reference to the VSL or any other economic literature.

Our project was to look into these decisions and try to estimate the compensation that the courts should have awarded and then compare it to the actual awards. Unfortunately, due to the Greek privacy legislation, we only had access to the published judicial decisions. These decisions do not include critical information, like doctor and expert opinions about the extent of the injury or estimation of the future losses based on the parties’ briefs. In most cases we could find the amounts claimed by the parties, but not the data that the parties used to calculate the damages

which they asked for. In addition, the calculation for hedonic damages is based entirely on qualitative and not quantitative factors.

In order to organize our findings, we categorize the different types of damages that the plaintiff could claim in case of injury due to medical error such as:

- Monetary damages to the victim for future losses (Damages A1a)
- Monetary damages to the victim for medical and other expenses (Damages A1b)
- Hedonic damages to the victim for pain and suffering (Damages A2)
- Monetary damages for loss of maintenance and services to third parties (Damages B1a)

In case of death due to medical error the defendant is liable for:

- Monetary damages for loss of maintenance and services to third parties (Damages B1b)
- Monetary damages for medical and funeral expenses (Damages B1c)
- Hedonic damages to the family for emotional distress (Damages B2)

For A1b and B1c expenses the court is always asking for the relevant receipts and invoices. In case that the expenses are not justified by the necessary paperwork, the court dismisses the claims as irrelevant.

For A1a and B1b damages (mostly future losses for the victims and their dependents), the court bases its calculation on the data submitted by the parties. These are usually very crude estimations based on current wages, and quite often (and rather easily) are dismissed as inadmissible since the parties cannot prove their income streams due to their failure to report their income to the IRS for the previous years.

Finally, hedonic damages (A2, B2) are always based on the court's arbitrary decision. The parties ask for extravagant amounts of money (for the standards awarded by the Greek courts) and the courts award a small fraction of it.

Table 1: Possible Damage Claims

	Case	A1a	A1b	A2	B1a	B1b	B1c	B2
1	2843/2003	246.515 0	146.735 0	293.426 100.000				
2	6352/2003	466.310 146.776	1.935.118	4.153.652 586.941				
3	388/2004	281.849 0		1.467.351 1.173.881	117.388 117.388			
4	3766/2005							528.246 146.735
5	8566/2005	300.914 0		207.684 50.000	600.000 200.000			
6	4218/2006				n/a 180.000			n/a
7	6811/2006			220.103 80.000				
8	12636/2006							2.000.000 200.000
9	15028/2006		49.530 1.378	200.000 100.000				
10	441/2007					420.000 0		n/a 340.000
11	557/2007					40.161 0		480.00 410.000
12	1117/2008				36.000 4.800		3.000 0	4.402.054 1.060.000
13	5700/2008							4.000.000 330.000
14	6071/2008		106.051 0		17.850 0			

6. Some Preliminary Conclusions

The problem with the estimation of damages by the Greek courts in case of medical error is that they grossly underestimate lost future earnings and hedonic damages. The reason for this is that they base their estimation of loss opportunities on a very conservative estimation of the current wages and tax reporting of the parties and not on their human capital, but this is a general problem of compensation in Greek tort and also in Greek family law (Tsaoussis, 2004). The unpaid household services provided by homemakers are not included in the estimation of their contribution for their dependents.

Hedonic damages are only "reasonable amounts" based on experience and common sense of judges and the ordeal of the victims or their dependents as perceived by the judges.

The only damages that are calculated with some accuracy are restitution damages based on medical, funeral, and any other kind of expenses, if, of course, invoices can prove them.

The Greek courts should urgently introduce more sophisticated methods for the calculation of damages, especially hedonic damages. This can be achieved by the admissibility of economists as expert witnesses and, in the long run, by the introduction of related courses in legal education.

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