

Appropriate Limitation for Mental Damage Compensation in Liability for Medical Damage

Yilin Hu

Sydney Law School, The University of Sydney, Sydney, Australia

Email address:

yihu7216@uni.sydney.edu.au

To cite this article:

Yilin Hu. Appropriate Limitation for Mental Damage Compensation in Liability for Medical Damage. *International Journal of Law and Society*. Vol. 5, No. 3, 2022, pp. 305-318. doi: 10.11648/j.ijls.20220503.17

Received: July 21, 2022; **Accepted:** August 8, 2022; **Published:** August 17, 2022

Abstract: Since the 19th century, the compensation system for mental damage has been established in many countries. Unlike the general damage compensation, mental damage compensation refers to the non-property damage that requires the infringer to make the corresponding compensation by means of money. The mental damage compensation in the medical damage liability refers to the situation that the patient suffers serious mental damage due to the medical negligence of the medical staff, and then seek compensation from the medical institutions. The mental damage compensation in medical damage liability is both comforting and punitive. The comforting function is the main function, the punitive function is the auxiliary function. But so far, the determination of the principle and amount of compensation for mental damage in the medical damage liability is still controversial. This paper takes the restrictions on the amount of mental damage compensation in Germany and the United States as examples, introduces the relevant Chinese law and regulations as well as different views of scholars, combines relevant cases in China, and discusses the principle that the mental damage compensation should be appropriately limited. As for the amount of the compensation, this paper introduces the principle of proportional compensation, and further proves its rationality and feasibility by discussing relevant cases in China. Setting a maximum limit for mental damage compensation has always been the heart of tort reform which aims to reduce the cost of medical malpractice litigation. By setting a maximum limit, the amount of compensation is appropriately limited. Thus, while protecting the rights and interests of patients, the development of social and medical undertakings can be further promoted.

Keywords: Medical Damage Liability, Mental Damages Compensation, Appropriate Limitation Principle, Proportional Damages

1. Introduction

Compensation for mental damage refers to situation when the civil subject's personal rights are illegally infringed upon and suffers mental pain, thus requiring the infringer to remedy and protect the civil subject by means of property compensation, so as to punish the wrongdoer and comfort the victim [1]. Legislation and judicial cases of some developed countries such as France and Germany have already confirmed the compensation system for mental damage in medical accidents [2].

In the medical damage compensation, when the doctor's behavior infringes upon the patient's right to life and health, and causes the damage to the patient, the patient is the direct undertaker of these pain. As a result, the patient can claim compensation for mental damages in his own name. If the

patient is a person without or with limited civil capacity, the guardian may claim the rights in the name of the ward. When the doctor's behavior leads to the patient's death, the patient's close relatives can ask for compensation for mental damages in their own name [3].

In addition to having the characteristics common to compensation for mental damage, compensation for mental damage in medical damage liability also has its unique characteristics. First, medical institutions are the subject of compensation. Article 2 of China's "Detailed rules for the implementation of the Regulations on the Administration of medical Institutions" (amended in 2017) makes clear provisions on the definition and specific categories of medical institutions. According to the provisions of Article 54 of the Tort Liability Law (now article 1218 of the Civil Code) and Article 55 (now Article 1219 of the Civil Code), medical

institutions shall bear the liability for the damage caused to patients by medical negligence. In real life, we will see that individual medical staff eventually bear the compensation for the medical damage suffered by patients. This is because, when medical institutions bear the corresponding compensation liability, they will often recover from the relevant medical staff at fault. However, the subject of external liability for damages can only be the medical institutions. Second, mental damage should occur in the diagnosis and treatment activities. In the process of medical treatment, patients can claim mental damage compensation from medical institutions when serious mental damage occurred due to the medical negligence of medical staffs. If the patient's mental damage is not caused during the diagnosis and treatment activities, the medical institutions are not liable for compensation, as there is no causal relationship between the two [4]. Therefore, the patient's mental damage must be caused by the diagnosis and treatment activities and due to the medical negligence of the medical personnel. This is the key to determine whether the medical institutions would bear the liability for mental damage in medical damage.

This paper introduces the nature and constitutive elements of mental damage compensation in medical damage disputes, as well as the development of its relevant system. By focusing on the principle of appropriate limitation, combining with relevant cases, this paper mainly discusses the issue of principle and amount of compensation for mental damage.

2. Development of the Compensation System for Mental Damage in Medical Disputes in Various Countries

German civil jurist Munson's "interest theory" [5] and German Otoman's "organization theory" [6] are the more popular western theories about damage. In the world, the academic community generally believes that the damage is divided into two types – those related to property is called property damage, those unrelated to property is called non-property damage. Mental impairment belongs to the latter one. It is an identifiable physical or mental actionable impairment formed by the brain through what is seen, heard or other experiences.

Initially, in the drafting process of the German Civil Code, Article 847 limited the application scope of the compensation system for mental damage. The reason is that the penalty systems in criminal law and contract law can provide sufficient protection [7] for the compensation for mental damage under specific circumstances. As a result, the compensation system for mental damage should not have a wide scope of application. But in fact, it is difficult for penalty system in the contract law to provide sufficient protection for mental damage in practice. The reason for this phenomenon, from the perspective of the sociology of law, was that the number of mental damage compensation cases during establishment process of the German Civil Code was still quite small, and the German society was still in the early days

of an industrialized society. However, with the popularity of motor vehicles and the increase of medical risks, the number of mental damage compensation cases had increased sharply, which required the law to follow the current trend and made a timely adjustment [8]. After the promulgation of the German Civil Code, although there were some cases of compensation for mental damage in the judicial practice of the German courts, overall the courts were still trapped by the negative attitude of the legislators of the German Civil Code towards the compensation for mental damage. After World War II, Germany's Supreme Court had upheld claims for mental damage in many cases, arguing that compensation is the right of money to soothe bad feelings. In the reform of the German Damages Compensation Law in 2002, the system of compensation for mental damage had changed. One of the important changes was to upgrade the original provisions of article 847 to article 253, paragraph 2, and to expand the scope of application of compensation for mental damage. According to Article 253, "Non-property damages can be sought only in circumstances prescribed by law." After this reform, the German Civil Code has completely got rid of the original legal state of deciding whether to enjoy the compensation for mental damage according to the specific infringement act. This marks the first time that the compensation system of mental damage in modern civil law has been established in the form of legislation. This law clearly stipulated the protection of the right to body, health, freedom and chastity in the right of personality. In principle, Article 847 of the original German Civil Code only applied to fault infringement, but according to the new law, the right to claim for mental damage is not based on fault, and dangerous liability can also cause compensation for mental damage. Moreover, based on the liability for breach of contract, one can also claim compensation for mental damage. This makes the right to claim for mental damage completely get rid of the specific cause of infringement, and obtains the same status as property damages in the system of damage compensation law [8].

In many other countries during the same period, the compensation system for mental damage had also gained development.

In the French Civil Code 1804, compensation for mental damage emerged as a legal system. Article 49 of the Swiss Civil Code 1907 states that victims whose personality rights are wrongfully infringed upon have the right to claim compensation. If insufficient, they can also be protected through other types of remedies. This is the bourgeois civil code that gives legal recognition to the public protection of the general personality rights. All the mental damage suffered by the infringement of personality can be compensated. Article 710 of the Japanese Civil Law stipulates that, when the body, freedom or reputation, or the property rights of others are infringed, the infringer is responsible for compensation of the damage incurred thereby, no matter by purpose or negligently (Article 709).

The UK-US law system believes that any act that can cause mental damages can be called 'mental damage'. In judicial practices, both criminal proceedings and civil proceedings

have relevant precedents, being specific to the infringement of life, body, health, freedom, but also the infringement of others' land, false accusation and interference in marriage. The "Reinstatement of the Law, Third, Torts by the American Law Institute" stipulates that a person who intentionally or recklessly causes serious mental pain to others through extreme and bad acts shall be liable for such mental pain; and if the mental pain causes bodily injury to others, the actor shall also be liable for such physical injury."

Victorian Railways Commissioner v. Coultas [9] was the first Australian case of mental shock. In 1886, James and his wife Mary Coultas went home from Melbourne by wagon. Due to the negligence of the keeper of the railway crossings, they were allowed to cross the railways while a train was coming. Although James escaped the collision in time, his nearby wife was extremely shocked and suffered severe mental damage as a result. In that case the court denied the plaintiff's claim for mental damages. The reason was that the plaintiff was not physically injured, and that the mental damage was too remote, and was not reasonably foreseeable. The case of *Dulieu v. White & Sons* [10] was a great step for judicial practices on the issue of mental strike. Plaintiff, as the primary victim, was entitled to recover for mental damage arising from concern for his own safety. The *Dillon v. Legg* case [11] in 1968 laid the foundation for the predictability standard of "mental strike", which was recognized as the "Dillon standard". To recover the mental damage, the standard requires that (1) the plaintiff is near the scene of the accident; (2) the plaintiff knows of injuries or threats incurred to the victim; and (3) the plaintiff is the relatives of the victim.

China's regulations on the compensation system for mental damage started relatively late. For a long period of time after the founding of the People's Republic of China, the judicial held a negative view on the mental damage compensation in domestic personal damage compensation cases. The General Principles of the Civil Law, which was formulated and implemented by the Standing Committee of the National People in 1987, made clear that the compensation for mental damage can only be claimed where there was infringement of the right to name, portrait, reputation, honor of the citizens and right to name, reputation and honor of legal persons. It did not involve the mental damage compensation in the case of infringement of the right of life, right of health and right of body. On February 26, 2001, the Supreme People's Court formulated the "Interpretation on Several Issues concerning the Determination of Liability for Mental Damage Compensation in Civil Tort", confirming that natural persons have the right to file a lawsuit with the people's court for the illegal infringement of their right to life and health for compensation for mental damage. This is the first time that China's highest judicial organ has made a relatively complete judicial interpretation of the compensation for mental damage. On December 26, 2003, the Supreme People's Court's "Interpretation of Several Issues concerning the Application of the Law to the Trial of Personal Injury Compensation Cases" once again stipulated that the victims of personal injury compensation cases could claim compensation for mental

damage, and the amount of compensation is to be determined according to six factors [12].

3. The Constitutive Requirements of Mental Damage Compensation in the Medical Damage Liability

The compensation for medical damage liability is a kind of civil liability. However, since the medical behavior is a special civil behavior, the compensation for medical damage liability is not a general tort civil liability. Defining the components of mental damage compensation in medical damage liability is the premise of medical institutions to bear the compensation for mental damage. These include the following four components:

3.1. Establishment of Medical Malpractice

The first constitutive element is the medical damage behavior, namely, the establishment of medical malpractice. The medical damage behavior here mainly refers to the illegal diagnosis and treatment behavior of medical institution and staffs during the diagnosis and treatment activities. Illegal diagnosis and treatment behavior refers to the behavior of the medical institution and staffs which violates the legal or agreed obligation [13]. This is one of the indispensable and important components of medical institutions to bear the liability for medical damage. Legal obligations mentioned refer to the obligations generated by medical institutions and staffs for violating the existing laws and regulations of protecting the rights and interests of patients. For example, medical institutions and medical staffs have illegally infringed on the patients' right to life and health, body right, reputation right and privacy right in the diagnosis and treatment activities. Agreed obligations mainly refer to the obligations arising from the medical institutions and the medical staffs in violation of the agreement of the medical service contract reached between the patients and the doctors based on their voluntary and true intentions.

For the medical behavior to constitute tort, it must violate relevant law and regulations. Specifically speaking, the medical behavior must constitute medical accident. That is to say, when the medical behavior is said to be a medical accident by the appraisal of the Medical Malpractice Appraisal Committee, the mental damage compensation can be claimed. Only when the medical malpractice is constituted can the medical behavior be illegal [14].

3.2. Existence of Mental Damage

The second constitutive element is the existence of mental damage. Taking China as an example, according to Article 22 of the Tort Liability Law (now Article 1,183 of the Civil Code), compensation for mental damage can be requested only when "serious mental damage" has been caused. For example, in the case of "Dispute over Medical Damage Compensation between Wang Shunling v. Zhenjiang First

People's Hospital", the Supreme People's Court held that, according to the paragraph 1 of article 8 of the "Interpretation of the Supreme People's Court on Several Issues concerning the Determination of Liability for Mental Damages Compensation in Civil Tort", If the infringement causes mental damage, but causes no serious consequences, the victim's request for compensation for mental damage is generally not supported. The people's court may, based on the circumstances, order the infringer to stop the infringement, restore the victim's reputation, eliminate the influence and make an apology." In this case, Wang Shunling did not prove the fact that the medical behavior of Zhenjiang First People's Hospital caused mental damage to him, and the outpatient records of Wang Shunling in many hospitals did not record the serious consequences of mental damage, so it was not improper for the retrial judgment to not support Wang Shunling's claim for mental damage compensation [15]. In the case of "Dispute over Liability of Medical Damage between Mr. Wu and a hospital in Wenzhou", the intermediate People's Court of Wenzhou held that, Mr. Wu's dry eye disease or dry eye symptoms after surgery did bring him some mental pain. But the occurrence of mental pain, does not necessarily lead to compensation for mental damage. According to Article 8 of the "Interpretation of the Supreme People's Court on Several Issues concerning the Determination of Liability for Mental Damages Compensation in Civil Tort", if the infringement causes mental damage but without serious consequence, the compensation for mental damage is generally not awarded. Since the mental damage caused by Mr. Wu's dry eye disease is not serious, and the damage consequences were not directly caused by the hospital in Wenzhou, it is not improper for the original judgment to not support compensation for mental damage [16]. In the case of "Dispute over Liability of Medical Damage between Jia Chunsheng and Peking University Shougang Hospital", Shougang Hospital Shougang Hospital stitched the patient's wound compulsively without any communication with the patient's family and without local anesthesia. The patient Jia Yanxi's shouted loudly because of the pain. This caused huge psychological shadow to the patient and caused great mental damage to the patient's family. Beijing High people's high held that, Jia Chunsheng failed to provide sufficient and effective evidence to prove that Shougang Hospital had caused practical damage to Jia Yanxi's treatment, and there was no evidence to suggest that the treatment process was enough to cause mental damage to Jia Chunsheng in the legal sense. There was lack of basis for Jia Chunsheng to ask Shougang Hospital for a written apology and compensation for transportation, photocopying and mental damage [17].

However, what is "serious mental damage"?

At present, in the judicial practice, when the material personality interests are infringed upon, the disability standard is mainly used as the main basis for determining whether there is serious mental damage. For example, whether the patient's physical and health damage caused "serious mental damage" mainly depends on the degree of physical and health damage.

When the mental personality interests are infringed upon, since this type of personality interests is difficult to externalize, in determining whether there is serious mental damage, we should comprehensively consider the various aspects of specific circumstances. For example, the infringer's subjective fault, behavior, infringement means, occasion and the mental damage consequences of the victim [18]. In the case of "Dispute over Liability of Medical Damage between Zhang Huihui and Jinshui Beauty Cube Beauty Clinic", Zhang Huihui claimed for mental damage compensation. The High People's Court in Henan held that, based on the actual situations, since Zhang Huihui's conditions did not reach the disability level, it was not improper for the court to not support the mental damage compensation in the first trial [19].

Similarly, in the case of "Dispute over Liability of Medical Damage between Wang Shuzhi and Jilin Central Hospital", the High People's Court in Jilin held that the damage suffered by Wang Shuzhi did not reach the disability level. Based on the facts of the case, the court did not support Wang Shuzhi's claim for mental damage compensation [20].

3.3. Existence of Fault (Negligence)

The third constitutive element is the existence of fault. For the medical institution to bear the liability, the fault must be negligent rather than intentional. Medical damage arising from intentional conduct would constitute criminal liability, and this is not within the scope of the discussion of this paper. If the medical staff is not negligent, it does not constitute medical damage liability. In other words, if a medical accident occurs, and the medical institutions and medical staffs have no subjective negligence in relation to patients' mental damage, they shall not be liable for mental damage compensation [14].

3.4. Causation Between the Medical Negligence and the Mental Damage

The fourth constitutive element is the causation between the medical negligence and the mental damage. It refers to the fact that the patient's mental damage is caused by medical negligence. The existence of a causal relationship between medical negligent behavior and the consequence of mental damage is one of the preconditions for medical institutions to bear the liability for mental damage [21].

4. The Nature of the Mental Damage Compensation in Medical Damage Liability

Adhering to the "principle of filling" of civil liability in the continental legal system, scholars around the world generally recognize that mental damage compensation has the function of filling the victims' sadness and despair. As the German jurist Gierke said, although money cannot restore the damage to material and physical spiritual interests of patients to the original state, it can make patients regain confidence and obtain spiritual enjoyment in other aspects [22]. Secondly, the

compensation for mental damage has a certain comforting function. As French jurist Sourdat said, using a certain amount of money to compensate patients for the mental damage is not to make up for the property losses, nor to let them to have the opportunity to gain unjust enrichment. It is to make patients have a sense of psychological balance, comfort their emotional injury, and try to make up for the negative influence on the internal psychological, physical and mental damage through external factors compensation, restore physical and mental health, so that the victims can get rid of the pain as soon as possible [23].

However, there is some controversy over the idea on whether the mental damage compensation has a punitive function. The objectors argue that the function of damages is to fill in the damage that has occurred and it does not have punitive characteristics. As a result, the mental damage compensation is not of punitive functions [24]. The supporters believe that mental damage compensation is both comforting and punitive. Its punitive function can play a role of civil punishment for the tortfeasor, and also serve as a the warning role for others [25]. At the present stage, the interest measurement of tort liability law mainly involves the balance protection of civil rights and behavior freedom. The punitive function of mental damage compensation is an important part of the balance protection mechanism [26]. In judicial practice, since the mental damage is not like property damage and its degree is difficult to be clearly determined, together with the great burden of proof on victims, the amount of compensation for mental damage should be more clearly related to the realization of its dual functions. However, in judicial practice, judges have great uncertainty in determining the amount of compensation for mental damage [27]. In other words, although the mainstream views of the academic agree that the compensation for mental damages has a punitive function. However, due to the large discretion of judges, it is still uncertain whether the amount of compensation for mental damages can actually reflect the punitive function in judicial practices [28].

Theoretically speaking, in order to realize the purpose of punitive function, judges will consider the degree of fault of the infringer in the process of determining the specific amount of compensation for mental damage. Specifically, judges first distinguish the degree of fault of the infringer based on individual factors, that is, intentional or negligence. On this basis, judges then distinguish between malice, general intentional, gross negligence, general negligence and minor negligence, and then decide the amount of mental damage compensation that the infringer should bear [4]. At the same time, based on the distinction between intentional and negligence, when determining the amount of mental damage compensation for the purpose of punishment, if it is intentional, the main consideration is the subjective malice of the infringer. If it is negligence, the consideration should focus on other factors. One of the typical examples is that the infringer should bear "duty of care" [29].

One study took the civil judgments published on the Chinese Judicial Documents website as the analysis sample,

and extracted 2,084 civil judgments from the "medical damage liability dispute" through the stratified random sampling method. With the help of descriptive statistical analysis, variable correlation analysis, linear regression analysis and hypothesis testing, the study took the medical level as the entry point to explore the punitive function of compensation for mental damage. Specifically, on the basis of examining whether the factors of medical level of a specific case has an impact on the amount of mental damage compensation, using the logical correlation between medical level and the level of fault of medical institutions, realizing the examination of correlation between the level of fault and amount of mental damage compensation, so as to realize the test of punitive function of compensation for mental damage. The results of the study indicated that, when the patient damage outcome type is permanent disability, there is a positive relationship between the level of the medical care institution and the determination of mental damage compensation. Based on the logical correlation between the medical level and the duty of care, it can be learned that the higher the level of medical institutions, the higher the medical resources and technical level they have correspondingly. The higher-level medical institutions should fulfill a higher duty of care than the lower-level medical institutions when performing the same medical behavior. Therefore, when the patient is damaged due to the same medical behavior, the higher the level of the medical institutions, the higher the degree of fault in the occurrence of the damage result. As a result, the positive correlation between the level of medical institutions and the determination of mental damages compensation suggests that the judge considers the degree of fault of medical institutions in the process of determining mental damage compensation, and the judge's consideration of the degree of fault meets the external requirements of the punitive function of compensation for mental damages.

Therefore, according to the results of the study, it can be learned that in the trial of medical infringement disputes, when the patient's damage result type is disability, the judge's determination of the compensation for mental damage reflects the punitive function of the compensation for mental damage. But at the same time, both the disability compensation coefficient and the material damage compensation can reflect the physical and property damage consequences suffered by the patients due to the medical faults, both of which are related to the realization of the comforting function of the mental damage compensation. The regression analysis results show that the impact of the disability compensation coefficient and the material damage compensation on the identification of the mental damage compensation is much greater than the level of medical institutions. This shows that the punitive function embodied in the compensation for mental damage is far less than the comforting function, which is in line with the theoretical consensus that the comforting function should be the main function of mental damage compensation. This further confirms the reliability of the research conclusion [28].

In practice, the punitive function of mental damage

compensation is especially reasonable. The purpose of punishing the tortfeasor includes the realization of vigilance against others. Based on the particularity of the subject of medical infringement, giving appropriate punishment to the medical institutions while compensating the losses of the victims can play an educational and warning role in the whole medical service industry to a certain extent. This can improve the standardization of medical service behavior and further achieve the social effect of alleviating the doctor-patient relationship [30].

In the case of “Appeal on Dispute over Liability of Medical Damage between Zhu Jianhua and Hospital of Traditional Chinese Medicine in Ningbo Zhenhai District”, the Intermediate People’s Court in Ningbo wrote in its civil judgement:

“In this case, the biggest dispute between two parties is the amount of compensation for mental damage. Mental damage is a kind of invisible damage, and it is essentially impossible to be measured by money. Nor does money fill the victim’s mental damage as it does for material damage. Asking the infringer to bear the liability for mental damage compensation is mainly based on the subjective evaluation of the attributable liability and moral condemnation of the infringement, so as to give appropriate comfort to the injured party and give corresponding punishment to the infringing party. The nature of mental damage determines that the damage consequences are caused by a combination of multiple factors. The seriousness of the consequences of mental damage is closely related to the subjective state of the victim, especially its psychological endurance. The amount of mental damage compensation determined by the judgment must take into account the factors such as the degree of fault of the infringer, the consequences of the tort, the actual compensation ability of the infringer and the social living standard overall rather than just based on the subjective state of the victim. On the basis of taking into sufficient account of the legal and social effect, the original court ordered that Hospital of Traditional Chinese Medicine in Zhenhai district to compensate Zhu Jianhua and Li Chunshu 30 thousand yuan as mental damage compensation. This judgement had demonstrated the proper comfort to the victim and the punishment to the tortfeasor. This is consistent with the local judicial practices. Zhu Jianhua and Li Chunshu claimed that the court in the first trial did not fully consider the fault and the severity of the mental damage of the party and the mental damage compensation determined was too low. The appeal court held that this claim lacked factual and legal basis and was difficult to adopt [31].

To sum up, the compensation for mental damage is both comforting and punitive. First, the amount of mental damage compensation can be used as a physical entity to appease the victim’s mental pain in a physical way. Even if it is difficult to suture the mental gap, the pain of the person concerned can be reduced or eliminated by the economic compensation. Secondly, the compensation for mental damage also enables the medical institutions to be punished as individuals in the form of collective formulation, which achieves the formal justice in the medical field due to the reasonable practice of the legal system [32].

5. Principles of Compensation for Mental Damage in Medical Damage Liability —— Appropriate Limitation Principle

In countries of continental legal system, along with the continuous expansion of the scope of specific personality rights, the new trend of proposing the general concept of personality right and strengthening the protection of the personality rights and interests of the deceased, the scope of mental damage compensation has gradually expanded. Some countries have not only compensated for mental damage to non-property rights and interests, but also provide relief for the infringement of property rights. The scope of mental damage in UK-US legal system has also gradually expanded, and has given compensation for the simple mental damage caused by the infringement of the rights and interests of personality, and continues to expand the scope of mental damage compensation through specific precedents.

However, determining the amount of mental damage compensation in medical damage liability has long been a controversy issue. Take China as an example, there were a total of 18,670 medical damage liability disputes in 2020, of which 3,096 were decided in the second instance. The focus of the dispute in the second trial is reflected in three aspects, namely, the fault participation of the medical diagnosis and treatment behavior, the compensation items and the calculation standards, and the dissent of the appraisal opinions. Compared with 2019, the issue of compensation items and calculation standards topped the list with 1,044 cases, accounting for 29%. The disputes about the compensation items and the calculation standards mainly focuses on medical expenses, lost work expenses, funeral expenses, death compensation, mental damages and so on. Among them, the standard of mental damage compensation and medical expense are the most controversial issues [33]. The same mental damage compensation case in the different stages of the lawsuit, or the same type of case in the different places of the lawsuit, could lead to quite different results of the compensation. In recent years, the compensation for mental damage in some cases has become higher and higher, with some reaching hundreds of thousands yuan.

In 2005, Tongtong, an 8-year-old girl in Urumqi, Xinjiang province, suffered from acute appendicitis and died in a coma after surgery at the First People’s Hospital. The medical identification result was that the girl died of ischemia and hypoxic encephalopathy due to the cessation of respiratory circulation after surgery, which caused multiple organ failure. Tongtong’s parents thought that the accident was caused by the First People’s Hospital as they were irresponsible, not correctly performing their duties, using medicine without authorization, and not rescuing Tongtong timely. Tongtong’s parents sued the Hospital to the Tianshan District People’s Court, requesting the court to order the defendant to compensate more than 1.46 million yuan, including medical expenses, death compensation, living expenses and so on.

Among them, the mental damage compensation alone reached 1 million yuan.

During the trial, Tongtong's parents applied for a medical malpractice identification. The Tianshan District Court entrusted the Urumqi Medical Association to conduct medical malpractice identification. However, when the Medical Association asked the defendant to provide the medical record of the patient, the hospital said that Tongtong's medical records were stolen, making the Medical Association unable to conduct medical malpractice identification. Later, based on the application of Tongtong's parents, the court entrusted the People's Procuratorate of the Xinjiang Uygur Autonomous Region to identify the cause of Tongtong's death. The forensic medical appraisal letter of the People's Procuratorate of Xinjiang Uygur Autonomous Region finally concluded that Tongtong directly died due to many serious and irresponsible mistakes of her doctors. Many hospital medical records were not authentic. After hearing of the court, the judges held that the cause of Tongtong's death was that the staff of the First People's Hospital was seriously irresponsible. The death of Tongtong caused serious physical and mental injury to the plaintiff. Therefore, the defendant should bear the appropriate amount of compensation for mental damage. The court in the first instance ordered the First People's Hospital to compensate the plaintiff more than 80 0,000 yuan for various expenses, including 35 0,000 yuan for mental damage.

The 35 0,000 yuan of mental damage compensation was the highest amount for such civil cases in Xinjiang, and was even rare in China. The case caused widespread local controversy [12].

Since mental damage cannot be directly calculated in money, the calculation of mental damage compensation has always been a difficult problem. In 1906, the German scholar Kohler once proposed a formula for calculating mental damage: the victim should receive the compensation for mental damage to the extent of compensating his pain in property and letting him to enjoy the alternative comfort. The specific amount of compensation is based on the magnitude, extent, and duration of pain, distress, and mental distortion. However, the scope of specific mental damages compensation does not depend entirely on the victim's personal subjective feelings. The difficulty of calculating the compensation for mental damage is caused by its characteristics, that is, mental damages cannot be accurately calculated in an objective quantitative way by money. Therefore, determining the amount of mental damages in a fair discretion becomes the legal rule stipulated in Article 253, paragraph 2, of the German Civil Code. By using a fair discretion to determine the final amount of compensation, the task of determining the final amount of compensation fall on to the judge. But that doesn't mean that the judge can determine the amount of compensation without restriction [34].

Since the calculation of compensation for mental damage is at the fair discretion of the judge, and the German civil law has no complete and easily operational calculation method, the following elements are usually considered in judicial practice.

The first and most important reference factor is the degree, endurance and duration of mental damage. The second factor is

the degree of subjective fault of the perpetrator and whether the victim is jointly liable. In a 1955 decision, the German Supreme Court determined the amount of mental damage compensation based on the different subjective states of the perpetrator. For example, in a traffic accident, if the victim himself does not fasten the seat belt, the amount of damages should be appropriately reduced in the case of calculating the mental damage compensation based on the fault of the other party. The third is the gender, family status and occupation of the victim. This also includes the financial situation between the parties, whether there is insurance, and even the duration of the litigation. However, some scholars believe that when determining the specific amount of compensation in the judgment, the property status of both parties is contrary to the purpose of the damages. Fourth, the judges should also consider the circumstances of the case itself, such as whether the perpetrator is based on the interests of the victim. For example, if an employee drives for his employer and an accident incurred, which causes serious physical injury to the employer, the amount of compensation should be appropriately reduced. The same is true in the case of agency [35].

In order to determine the amount of compensation for mental damage, we must first clarify the principle of compensation for mental damage.

Empirical studies have found that the determination of compensation for mental damage follows the principle of "vertical equity" fairly well (i.e., damages often increase with the severity of injuries), but poorly in achieving "horizontal equity" (similar compensation for similar severity). Take the United States as an example, in the judgement of medical malpractice in California, the severity of patient's injuries was graded at nine levels, with a 12 times difference in compensation for mental damage. The unpredictability and instability of compensation for medical mental damage weaken the deterrent effect of tort law. Deterrence depends on the ability of a potential tortfeasor to judge economic sanctions related to negligent conduct. Where the cost is not reasonably well known, reasonable cost-effective calculations of different levels of prevention cannot be made, which may result in excessive deterrence or insufficient deterrence. Excessive deterrence is manifested as a "defensive medical treatment" — arranging medical examinations, procedures, or rejecting high-risk patients or surgery, mainly to reduce the risk of medical liability for medical malpractice. Defensive medical treatment increases medical costs and may even cause physical harm to the patient because there is no medical treatment that is without risk. On the other hand, insufficient deterrence may also occur, which means that medical staffs pay less than socially appropriate attention to preventing medical damage and improving patient safety. Less resources will be invested. The laissez-faire approach to determining mental damage compensation may also result in the unfair treatment of the plaintiff [36].

Considering the uncertainty of mental damage, in order to avoid excessive litigation and increase the burden of the infringer, some countries choose to appropriately limit the amount of compensation of mental damage, making it lower

than the compensation of general civil tort, and set the maximum limit [37]. The principle of appropriate limitation is manifested in two aspects. First is to limit the scope of compensation. If the mental damage caused by infringement does not lead to serious consequences, the infringer may be ordered to bear the civil liability of non-property nature; if the mental damage caused by infringement leads to serious consequences, the compensation for mental damage shall be ordered. Second is to limit the amount of compensation. The amount of compensation for mental damage shall be determined in a regional basis, taking into account the affordability of the infringer and the local average living standard [38].

The reasonableness of this principle are as follows.

First, medical infringement has the particularities. Those include the limitations of medical technology level, the defects of medical products, and uncertainties of the medical results have uncertainties. Any medical technology and medical means are risky. Medical technology and medical means are advancing with time and are developing continuously. Even mature medical technology and medical means are developed on the basis of risk accumulation. The initial adoption of any medical technology is defective. In fact, accepting a certain medical technology is actually equivalent to accepting its medical risk. Considering the risk factors for medical advances and medical technology, we should limit the liability for medical negligence [39].

Second, the fault of medical staff's diagnosis and treatment behavior is medical negligence rather than subjectively intentional. Although there could be asymmetry between treatment effect and patients' expectations, the severity of medical negligence is relatively low compared with intentional or negligence in other tort liabilities [40].

Third, the operation of the hospital is non-profitable. Hospitals do not adopt the general market operation mode. The vast majority of medical institutions in various countries are public hospitals and are supported by the government. Therefore, hospitals must bear the appropriate liability for compensation for medical accidents [37].

Forth, the medical behavior is not the only cause for the occurrence of medical damage, the causative potency is complex. In general, the occurrence of medical damage is not caused by a single act of medical negligence, rather, it has multiple causes. Even if the patient dies during the process of medical treatment and the medical staff is negligent, the patient's own disease is still one of the causes. In this regard, some people call it "disease participation", others in the forensic community called it "injury participation". It is when the damage consequences of medical malpractice and the patient's own disease jointly exist, the degree of involvement of the former factor in the patient's current disease state. The main significance of studying "injury participation" is that when determining the amount of medical damage compensation, the impact of the patient's primary disease on the current disease status should be fully noticed [39]. This is the principle of causative potency in the medical negligence. It is reasonable as it mitigates the liability of medical negligence

and limit the scope of liability by referring the degree of causative potency [39].

The relationship between the damage consequences of medical accidents and the patient's original disease condition is complex, and it is unfair for medical institutions to bear excessive liability for compensation. Liu Yu of Peking Union Medical College Hospital made a further explanation of the particularity of medical accidents. He believes that medicine is a technology with its own defects, and that the use of medical technology brings the desired effect as well as the undesired side effects. Sometimes medical technology may not bring the desired effect but has significant harmful consequences. Due to the technical difficulty of the medical technology, the possibility of technical operators making mistakes is increased. However, medicine is a defective technical service provided to victims based on the interests of victims, so it has the characteristics of identity between victims and beneficiaries. Patients are both victims and beneficiaries. They tolerate technical defects in pursuit of their own interests. Therefore, there is no "sacrifice", nor do they need to get legal care [41].

Moreover, as mentioned above, the main function of mental damage compensation in medical damage cases should be both comforting and punitive. Mental damage compensation is mainly to give the victims a certain amount of money, whose purpose is to comfort their emotional damage and mental trauma. Since the main function of mental damage compensation is to comfort the victim, the amount cannot be too high. At the same time, the mental damage compensation is a kind of punishment for the infringer. On the one hand, the punitive function should be considered in order to prevent the occurrence of mental damage behavior. On the other hand, the punitive function should not be emphasized unilaterally, because most medical and health institutions mainly focus on public welfare. If the maximum amount of compensation for mental damage is not limited, it is easy to increase the appeal burden of the patients and the court. The medical institutions and doctors might ignore the treatment, the normal practice environment would be disturbed, and ultimately damaged the interests of the patients themselves seriously [42]. As mentioned above, given that the medical industry itself is of a high risk, excessive compensation is not conducive to the development of the medical industry [14].

Another purpose of implementing the principle of appropriate limitation in determining the amount of mental damage compensation is to overcome the adverse factors of the principle of free discretion and prevent people's tendency to blindly pursue high compensation. If a uniform amount of compensation is given to the victims without having regard to their degree of infringement and losses, especially giving high compensation in today's people-oriented background, it will not only not make the medical institutions hard to accept the judgment, but may also erase the internal rationality of this system. It will even make doctors to take self-protection measures, not recognize the cases of illness and examination information in other hospitals, and add a comprehensive general examination, which will not only cause a waste of

medical resources, but also increase the cost of medical treatment for patients. The former will make the already scarce medical more scarce, while the latter will make the already painful patients worse. All the above consequences will have to be born by the patients ultimately.

The United States is one of the representing countries to set the maximum limit for the amount of mental damage compensation. This is mainly because juries in the United States tend to be more generous in awarding compensation for mental damage. For the same injuries, the amount recognized by United States courts is usually ten times the amount awarded by other countries [43]. The legislative strategies to limit the amount of compensation in medical litigation cases vary in each state, but they can be roughly divided into three states. First is only limiting the amount of compensation for non-property damage. Second is to limit the amount of all compensation for damages except for medical expenses. Third is to limit the amount of all damages [44]. For example, The law in the state of Alaska limits the amount of compensation for non-property damages to \$500 thousand; the law in the state of Minnesota limits the amount of compensation for non-economic damages to \$400 thousand [45].

Outside the United States, there are other countries which limits the amount of compensation for mental damage. For example, Article 2116 of the Ethiopian Civil Code stipulates that the maximum amount of mental damage compensation shall not exceed 1,000 Ethiopian yuan; Article 95 of the Columbia Criminal Code of 1963 provided that the compensation amount shall not exceed 2,000 pesos; Article 2116 of the Mexican Federal Civil Code of 1928 stipulates that the maximum amount of compensation for personality damage shall not exceed one-third of the property loss of the victim [46]. The extreme situation in which the law limits the amount of compensation for mental damage is to set a fixed amount, excluding any factor at the discretion of the judge. For example, in the United Kingdom, under the provisions of the Death Accident Act 1976, the spouse of the deceased is entitled to compensation of £7,500. This practice of fixing the amount of mental damages should be an exception. It is reasonable to stipulate the same amount of compensation for mental damage for bereavement [47]. However, in other circumstances it may not be appropriate.

Although these limitations face challenges to constitutional fairness and due process principles, because this practice unreasonably treats the different victims differently according to the extent of the injury and may cause great adverse effects to the seriously injured person [48]. However, in general, the compensation for limitation of non-property damage can pass constitutional examination and is denied only in rare cases. For example, in the *Smith v Department of Insurance* [49] case, the Florida Supreme Court denied the limitation rule for non-property damages of up to \$450,000 based on the reason of constitutional violations.

The Chinese government also insist on limiting the compensation liability for medical negligence. As for the determination of the specific amount of mental damage compensation, article 50, paragraph 11 of the “Regulations on

the Handling of Medical Accidents” stipulates that: the compensation for mental damage shall be calculated according to the average annual living expenses of the residents where the medical accident occur. if the patient is dead, the maximum period of compensation shall not exceed 6 years; if the patient is disabled, the maximum period of compensation shall not exceed 3 years. When determining the compensation for mental damage, besides making full consideration of the basic factors listed in Article 49 of the “Regulations on the Handling of Medical Accidents”, the decision maker should also refer to the degree of fault of the doctor, means, occasions, behavior and other specific circumstances, the consequences caused by the medical negligence, the actual capacity of the civil liability of the infringer, and annual average living expenses in the place where the medical accidents occur, and so on. The “Regulations on the Handling of Medical Accidents” stipulates the calculation of the specific number of years, for each case it can be less than 6 or 3 years. However, it must not exceed the specified number of years. Therefore, it can be seen that China adopts the principle of appropriate limitation when determining the compensation for the mental damage in medical infringement.

According to Article 5 of the “Interpretation of the Supreme People's Court on Several Issues concerning the Determination of Liability for Mental Damages Compensation in Civil Tort” (2020 Revision), the amount of compensation for mental damage is determined according to the following factors.

First, the degree of fault of the infringer. As one of the constitutive elements of civil liability, fault is crucial to whether to bear civil liability for tort. Fault includes both intent and negligence. Intent refers to the psychological state in which the actor wishes or allows the adverse consequence to occur with knowledge of the impact of his behavior. Negligence refers to the psychological state that the actor should have foreseen his behavior may have adverse consequences but fail, or has foreseen the consequence but trust that it would not happen. It is of great importance to distinct between intent and negligence in medical damages compensation. Generally speaking, when an infringing act is conducted intentionally or grossly negligent, the victim would produce deeper resentment, greater pain, and more serious mental damage; when an infringing act is conducted under the control of ordinary or minor negligence, it will cause less mental damage to the victim, and it is easy to obtain the forgiveness or understanding from the victim after the ideological work.

Second, the means of infringement, the occasion, the behavior and other specific circumstances. Different circumstances of the infringement can reflect the different degree of subjective malice and the magnitude of social harm of the infringer. And these could lead to different degree of mental damage suffered by the victim.

Third, the consequences caused by the infringement. The consequences of the tort are also an important factor affecting the amount of compensation for mental damage. If there is clear

evidence that the infringement causes serious mental injury to the victim, as a result the victim suffered great mental pain, then, it is necessary to consider this factor and a higher amount of compensation needs to be determined. On the contrary, if the mental damage caused by the infringement is relatively minor, then the amount of compensation for mental damage can be determined lower accordingly. However, as stated above, the mental damage compensation can only be claimed in the medical damage liability when there is "serious mental damage".

Forth, the profitability of the infringer. Given that hospitals are generally non-profit institutions, this factor would not be specifically discussed in mental damage compensation in medical damage liability.

Fifth, the economic capacity of the infringer. Compensation for mental damage is not only a kind of comfort to the victim, but also a kind of punishment and education for the infringer. The ideal effect can only be achieved if the scale of the punishment is well mastered. Therefore, in determining the amount of compensation, the economic ability of the infringer to bear the liability should be considered.

Sixth, the average standard of living in the place where the court is located. This is mainly due to China's broad territory and extremely unbalanced economic development. Where the local living standard is relatively high, giving the victim a low compensation for mental damage can obviously not achieve the purpose of comforting the victim and punishing the infringer. It therefore does not meet the purpose of compensation for mental damage; where the local living standard is low, giving the victim excessive compensation for mental damage also ignores the economic ability of the infringer to bear the liability, and does not conform to the purpose of mental damage compensation as well. In the "Summary of the National Symposium on the Quality of the Trial of Civil Cases" promulgated on November 29, 1999, when speaking about mental damage compensation, the Supreme People's Court said that the order of the amount and standard of mental damage compensation should refer to the economic, social and cultural development situation of the country and the actual local situation at that time. The amount of compensation should not be too high, but different regions with different economic development conditions are allowed to determine different compensation parameters according to its local conditions, so as to punish the behavior of the infringer, comfort and compensate the mental pain of the victims, and give correct guidance to the society. Accordingly, it is clear that the Supreme Court does not favor excessive compensation for mental damage.

In accordance with the provisions of laws and judicial interpretations, different provinces in China have stipulated the amount of compensation for mental damage in combination with the practice of their provincial civil trials and the level of local economic development [38]. Some provinces determine the specific amount of mental damage compensation by dividing the damage consequences into minor injury, general injury, disability and death, such as Anhui Province. Article 25 of the "Guiding Opinions of Anhui Provincial High People's Court on Several Issues concerning

the Trial of Compensation Cases for Personal Injury" stipulates that, when the citizen's physical right and health right suffer only minor injury, it does not support the mental damage compensation claim of the right holder. When the physical right and right of health suffer general injury and does not constitute a disability level, the amount of mental damage compensation is generally RMB 1000 to RMB 5000. When the injury has constituted disability, the amount of mental damage compensation can be determined based on the disability level of the victim, generally not less than RMB 5000 yuan, but not more than RMB 80000 yuan. When the victim is dead, the amount of mental damage compensation is generally not less than RMB 50000 yuan, but not more than RMB 80000 yuan. If there are other special infringement in the case, the amount of mental damage compensation may not be determined according to the above standards [38].

Some provinces determine the specific amount of mental damage compensation by dividing the infringement behavior into general infringement, serious infringement, especially serious infringement based on the degree of fault, means of infringement and consequences of the infringement, such as Fujian Province. Some provinces determine the maximum amount of mental damage compensation based on the degree of disability, the degree of fault of the infringer, and the infringement consequences (death, disability, general injury), such as Beijing. Other provinces such as Shanghai set the maximum compensation for mental damage to 50,000 yuan, while Guangdong set the starting point of mental damage compensation to 50,000 yuan [50].

In Shandong Province, Article 85 of the "Opinions of Shandong High People's Court on Several Issues concerning the Trial of Compensation Cases for Personal Injury" stipulates that if the natural person's right to life, health right, body right and other physical personality rights and natural person's reputation right, name right, portrait right, honor right, personal dignity right, personal freedom right, privacy right and other spiritual personality rights are illegally infringed and lead to mental damage of the victim, the victim can claim for mental damage compensation. The specific compensation standard is as follows: (1) if the infringer is a natural person, the general mental damage compensation standard is between 1000 yuan to 3000 yuan; for serious mental damage, the amount is between 3000 yuan to 5000 yuan; (2) if the infringer is a legal person or other social organization, the amount of mental damage compensation is generally five to ten times of the citizen compensation standard. If the infringer's infringement behavior is particularly bad, the injury degree of the victim is particularly serious or the social impact is particularly great, the above compensation standard may be appropriately raised according to the actual needs, but it must be submitted to the provincial court for review before making the judgment [38].

However, once the district court has determined the standard of compensation for mental damage, it is rarely adjusted in time with the development of society. Therefore, the court will encounter difficulties in the actual judgment [51].

It should be noted that in China, not all claims for mental damage compensation in medical damage liability disputes

can be supported. According to Article 8 of the “Interpretation on Several Issues concerning the Determination of Liability for Mental Damage Compensation in Civil Tort” issued by the Supreme People’s Court (Now Article 1,183 of the Civil Code), in order to get compensation, the consequences of mental damage must be serious. Without serious consequences caused, the mental damage of the right holder can be compensated by stopping the infringement, restoring the reputation, eliminating the influence and apologizing, and there is no need to give compensation for the mental damage. As for what is the “serious consequences of mental damage”, this paper has already discussed above.

Nevertheless, there are still objections at the social level to the appropriate limitation principle of compensation for mental damage in medical negligence behavior. There are two main kinds of objections: one is that medical infringement has no particularity. Since it is infringement, it should bear the same compensation liability as other torts. If personal injury is caused, the standards stipulated in the judicial interpretation of compensation for personal injury shall be followed, and no special provisions restricting compensation shall be formulated. The other one is that medical infringement does have particularity, and it is wrong not to admit it. However, as one of the types of infringement, even if medical infringement has particularity, the general personal injury compensation items must be guaranteed, and the legitimate rights and interests of the injured patients cannot be infringed upon. It should be noted that as general patients, the masses would prefer the first opinion because the medical infringement compensation is related to their own interests. But in the field of medical profession, Practitioners stand more in the position of the “Regulations on the Handling of Medical Accidents”, adhere to the particularity of medical infringement, advocate less or even no compensation, such as Liu Yu’s view as mentioned above [39].

Overall, the principle of appropriate limitation for mental damage compensation has always been at the heart of tort reform designed to reduce the cost of medical accidents litigations. Theoretically, the appropriate limitation should “represent a societal judgment about what constitutes reasonable but not excessive compensation for noneconomic loss. That judgment is made at a particular point in time. If the social-valuation judgment is to have any enduring meaning, the appropriate limitation should at least be adjusted annually for inflation in order to maintain its real value. [36]”

Most of the limiting principles discussed above are fixed caps. Some scholars believe that there are legal defects in the fixed caps, and they have put forward alternative plans to improve the consistency and rationality of the mental damage compensation rules [52], one of which is the damages schedules [53]. Damages schedules are better than fixed caps as a response to political demands for greater proportionality in damages awards. They essentially build on the existing model of the tiered cap, but differ from it in several respects: the number of tiers, the basis of the tiering, and the establishment of a floor as well as a ceiling for noneconomic damages in each tier. The scholars believe that the damages schedules are more sophisticated, principled, and reasonable [36].

6. Calculation of the Amount of Mental Damage Compensation in Medical Damage Liability

Medical infringement has its own particularity. The subjectivity of medical behavior, high risk, the complexity and diversity of the disease itself, the imperfection of diagnosis and treatment, patient’s physical condition, susceptibility, unavoidable complications, natural recurrence of the disease, the deterioration of the disease and the atypical characteristics of the disease symptoms themselves have to be taken into account in determining the amount of compensation. In particular, the court has to consider the risk and public welfare of the medical behavior itself. If the medical staff itself is without fault or negligence, and the medical infringement occurs due to the patient’s physical reasons or complications, then it is obviously unfair and unreasonable for the medical institutions bear the burden of compensation. Therefore, whether there is any negligence in medical behavior is particularly necessary to determine the liability of in medical infringement, which is what we call “medical negligence participation”. In other words, the degree of liability of medical negligence in the consequences of medical infringement. The liability of compensation borne by the medical institutions shall be consistent with the role of its fault contributing to the damage consequences. Only in this way can the “fault principle” of medical infringement compensation be reflected. That is, the medical institutions will bear the compensation liability only if medical negligence leads to the consequences of medical infringement. Of course, the responsibility borne by the hospital depends on the degree of liability for the damage result of medical negligence to patients. However, there is no express relevant provisions in the existing legislation.

But in Chinese legal practices, there are many judicial cases’ judgements that reflect this liability proportional compensation.

In the case of “Dispute over Medical Damage Compensation between Chen v. Wuhan Caidian District Maternal and Child Health Care Hospital”. When calculating the compensation for mental damage, Wuhan Intermediate People’s Court of Hubei Province considered the degree of liability of the medical fault behavior to the patient damage result. The court determined the amount of compensation based on the liability participation, and ordered the Wuhan Caidian District Maternal and Child Health Care Hospital to bear 30% of the liability for its medical fault behavior. Chen requested the mental damage compensation of 100,000 yuan. Based on the comforting and punitive function of the mental damage compensation, the court combined with the fault behavior of the Hospital in the medical process and the local living standard, made the conclusion that Caidian Women and Child Hospital should gave Chen mental damage compensation of 30,000 yuan [54].

In the case of “Dispute over Medical Damage Compensation between Xia Minghong etc v. Liyuan Hospital

Affiliated to Tongji Medical College of Huazhong University of Science and Technology”, Wuhan Intermediate People’s Court took into account the forensic opinion made by Hubei Zhongzhen Judicial Appraisal Institute, held that Liyuan Hospital had some medical negligence in the treatment activities of Liu Feng, and the medical negligence had a causal relationship with Liu Feng’s death, and its negligence participation ratio is between 40% to 60%. The court finally decided that Liyuan Hospital should bear 60 percent of the compensation liability for Liu Feng’s death. The Appellant requested 50,000 yuan for mental damage compensation, and the court ordered Liyuan Hospital to pay for 30,000 yuan [55].

In the case of “Dispute over Medical Damage Compensation between Zhai Mingwu and Cixi People’s Hospital”, the Intermediate People’s Court of Ningbo wrote in the verdict that the victim, Ma Yanling, suffers from advanced and poorly differentiated adenocarcinoma with a very high malignant degree. Even if it can be diagnosed in time, it may be difficult to cure by the surgery and chemotherapy. Therefore, although the diagnosis and treatment behavior of Cixi People’s Hospital is negligent, and there is a legal causal relationship between its negligence and the damage consequence of Ma Yanling’s death. However, for the damage consequence of Ma Yanling’s death, the liability degree of Cixi People’s Hospital is relatively minor. Considering the degree of responsibility of the negligence of Cixi people’s hospital in the consequences of medical damage, the relationship between the consequences of medical damage and the patient’s original disease, the qualification level of medical institutions and the medical risk, the court held that Cixi People’s Hospital should bear 10% of the damage suffered by Zhai Mingwu and others for the death of Ma Yanling, and the mental damage compensation is determined to be 10,000 yuan [56].

7. The Deficiency of the Current Mental Damage Compensation System in the Medical Infringement Cases

Currently, Although China’s “Regulations on the Handling of Medical Accidents” involves the provision in relation to the mental damage compensation, however, Article 50 only stipulates that the compensation should be paid only in the cases of disability or death. There is no specific provision in relation to whether the mental damage compensation should be paid in the medical infringement cases where the patient does suffer mental damage but was not disable or dead. As a result, for medical accident cases which cause no disability or death, based on the relevant provisions, it is difficult for the patients to claim for mental damage compensation.

8. Conclusion

Compensation systems for mental damage have long been recognized in legislative and judicial precedents in some developed countries since 19th century. However, in China,

the regulations on the mental damage compensation started relatively late.

Mental damages compensation in medical damages liability has its unique characteristics. First is the existence of medical damage behavior. Second is the existence of mental damage. Third, medical institutions need to be subjectively at fault (negligence). Finally, there should also be a causal relationship between medical negligence behavior and the consequences of mental damage. Only when the four elements are met simultaneously can they constitute the mental damage in the liability for medical damage. According to Article 1,183 of the China Civil Code, compensation for mental damage can be requested only when there is “serious mental damage”.

Scholars around the world generally recognize that mental damage compensation has the function of filling the victims’ sadness and despair. However, there is some controversy over the idea about whether the mental damage compensation also have a punitive function. The results of the study cited by this paper indicates that when the patient damage outcome type is permanent disability, the judge’s determination of mental damage compensation reflects its punitive function. However, the punitive function reflected in the mental damage compensation is far less than the compensation function. Therefore, the compensation for mental damage in the medical damage liability is both comforting and punitive. Comforting function is the main function, punitive function is the auxiliary function.

In order to avoid excessive litigation and increase the burden of the infringer, some countries choose to take appropriate restrictions on the amount of compensation of mental damage and set the maximum limit. This paper mainly focuses on the principle of appropriate limitation for mental damage. The United States is one of the representing countries to set the maximum limit for the amount of mental damage compensation. Outside the United States, there are other countries which limits the amount of compensation for mental damage, such as Columbia. The Chinese government also insist on limiting the compensation liability for medical negligence. In accordance with the provisions of the law, local living standard and the unbalanced economic development, each province in China has specifically stipulated the amount of compensation for mental damages.

Based on the particularities of medical infringement behavior, it is reasonable to adopt the appropriate limitation principle of compensation for mental damages. In addition, given that the main function mental damage compensation in medical damage cases should be comforting function, excessive compensation is not conducive to the development of medical undertakings, which also supports the view that the amount of mental damage compensation should not be too high. However, it is worth noting that there are still objections at the social level to the principle of appropriate limitation on compensation for mental damage in medical negligence behavior.

The calculation of the mental damage compensation has always been a difficult problem in the system. This paper introduces the principle of liability proportional compensation, and further demonstrates the application of this principle in

judicial practice in China with the help of Chinese judicial cases.

Finally, it should be noted that the current compensation system for mental damage in medical damage liability is still insufficient. The relevant laws still need to be further improved.

References

- [1] Teng, Y., Jiang, B., (2009). Research on Compensation for Mental Damage in Medical Damages – Discussion of the Referential Significance of Japanese Civil Law and American Medical Damage Compensation System. *Chinese Health Service Management*, 9, p619.
- [2] Pang, K., (2015). Legal Consideration on Compensation System for Mental damage in Medical Accidents. *Journal of Liaoning Medical College (Social Sciences Edition)*, 8 (2), p22.
- [3] Teng, Y., Jiang, B., (2009). Research on Compensation for Mental Damage in Medical Damages – Discussion of the Referential Significance of Japanese Civil Law and American Medical Damage Compensation System. *Chinese Health Service Management*, 9, p620.
- [4] Wang L. (2010). Study on Tort Liability Law. China Renmin University Press. P699.
- [5] Damage is the victim's interest in a specific damage accident, that is, the interests of the victim damaged by a specific accident.
- [6] Damage is the harm of interest suffered by the subject of law for being deprived or damaged of the composition of its property or being physically injured.
- [7] Motive, Mugdan Band II, S. 12.
- [8] Zhang, X. (2020). Study on the Compensation System for Mental Damage. Law Press China. P407.
- [9] Victorian Railways Commissioner v. Coultas (1886) 12 VLR 895.
- [10] Dullieu v. White & Sons (1901) 2 KB 669.
- [11] Dillon v. Legg 68 Cal. 2d 728 (1968).
- [12] Pan, C., Wu, Y., (2006). The Girl Died in the Hospital, A Huge Amount of Compensation Was Ordered in the First Trial, Different Parties in the Case Held Different View – Why 350,000 yuan Mental Damage Compensation Was So Controversial. *Legal Daily*, 18 / Dec / 2016 (008).
- [13] Xu, Y., (2014). Discussion of Tort Damage Compensation. China Legal Publishing House, p208-p210.
- [14] Pu, C., (2001). Issue of Mental Damage Compensation in Medical Damage Cases. *China Health Law*, 9 (1), p19.
- [15] Jiangsu Provincial High People's Court, (2009). “Dispute over Medical Damage Compensation between Wang Shunling v. Zhenjiang First People's Hospital”. Su Civil Retrial Final Judgement No. 0015.
- [16] Zhejiang Province Wenzhou Intermediate People's Court, (2008). “Dispute over Liability of Medical Damage between Mr. Wu and a hospital in Wenzhou”. Wen Civil Froth Trial Final Judgement No. 230.
- [17] Beijing High People's Court, (2020). “Dispute over Liability of Medical Damage between Jia Chunsheng and Peking University Shougang Hospital”. Jing Civil Appeal No 5336 Civil Judgement.
- [18] Chen, X., (2010) Detailed Analysis of the Provisions of Tort Liability Law of the People's Republic of China and Cases. China Legal Publishing House, p73.
- [19] Henan provincial High People's Court, (2020). “Dispute over Liability of Medical Damage between Zhang Huihui and Jinshui Beauty Cube Beauty Clinic”. Yu Civil Appeal No 2977 Civil Judgement.
- [20] Jilin Provincial High People's Court, (2020). “Dispute over Liability of Medical Damage between Wang Shuzhi and Jilin Central Hospital”. Ji Civil Appeal No 2521 Civil Judgement.
- [21] He, S., (2002). New interpretation of medical disputes and Damages Compensation. People's Court Press, p251.
- [22] Bryan, G., (2004). Black's Law Dictionary, Thomson West 2004, Eighth Edition, p. 1336.
- [23] Robert, R. (2009). Emotional Distress In Tort Law: Themes Of Constraint, *Wake Forest Law Review* 44, p 1197.
- [24] Zhai, L., (2016). Criticism of Punitive Function of Mental Damage Compensation and the Comforting Function of Punitive Damages – Discussion on legislation perfection of the mental damage compensation and punitive damaged. *Oriental Law*, 2 p 32-44.
- [25] Yang, L., (2000). Discussion on Tort Law. Jilin People's Press, p680-683.
- [26] Zhang, X., (2009). Interest Measurement of Legislation on Tort Liability Law. *China Legal Science*. 4, p179.
- [27] Chang, A., (2008). The Analysis of the Compensation Standard for Mental Damage in China. *Journal of Political Science and Law*, 04, p179.
- [28] Qu, M., Wang, Z., (2020). Analysis of Punitive Function of Mental Damage Compensation -- An Empirical Study Based on Compensation for Mental Damages in Medical Torts. *Journal of Shandong University (Philosophy and Social Sciences Edition)*, 05, p31-41.
- [29] Li, H., (2016). Study of Legal Application of Personality Rights Infringement on Punitive Damages - Based on the Analysis of Article 55, Paragraph 2, of the New Consumer Rights Protection Law. *Study and Practice*, 01, p74.
- [30] Jiang, B., (2009). Seek social effects within the law. *China Legal Science*. 03, p6.
- [31] Zhejiang Provincial Intermediate People's Court, (2006). “Appeal on Dispute over Liability of Medical Damage between Zhu Jianhua and Hospital of Traditional Chinese Medicine in Ningbo Zhenhai District”. Yong Civil First Final Judgement No 1425.
- [32] Zhao, Y., (2015). Brief Discussion on the Determination of the Amount of Mental Damage Compensation in Medical Accidents. *Rule bylaw and the society*, 04, p69.
- [33] Healthcare. (2021). Big Data Report on National Medical damage liability Dispute Cases in 2020. Retrieved from <https://new.qq.com/omn/20210220/20210220A0DRL300.html>

- [34] Zhang, X. (2020). Study on the Compensation System for Mental Damage. Law Press China. P432.
- [35] Zhang, X. (2020). Study on the Compensation System for Mental Damage. Law Press China. P433.
- [36] Studdert, D., Kachalia, A., Salomon, J., and Mello, M., (2011). Rationalizing Noneconomic Damages: A Health-Utilities Approach. Law and Contemporary Problems, 74, 57-101.
- [37] The Civil Law Office of the Commission for Legislative Affairs of the NPC Standing Committee, (2010). The Complete Works of Legislative Background and Opinion of Tort Liability Law. Law Press China, p833.
- [38] Li, Y., (2007). Calculation Standard for Mental Damage Compensation. China Legal Publishing House, p9.
- [39] Yang, L., (2008). Discussion on Appropriate Limitation Principle on Liability of Damage Compensation for Medical Negligence. Journal of Political Science and Law, 06, p30.
- [40] Wang, L., (2010). Judgment essence and Trial Practice of Tort Law. People's Court Press, p371.
- [41] Liu, Y., (2008). Discussion on Medical Uniqueness and Principle of Imputation of Medical Tort Liability. Written speech at the "Medical Infringement Seminar" held by Chinese Hospital Association on 25 July, 2008.
- [42] Jiang, F., (2013) A Comparative Study on the Medical Damage Liability System. Law Press China, p169.
- [43] Sugarman, S., (2005) A Comparative Law Look at Pain and Suffering Awards. DePaul Law Review, 55, p399.
- [44] Hyman, D., Silver, C., (2012). Medical Malpractice And Compensation In Global Perspective: How Does The U.S. Do It? 87 Chi.-Kent L. Rev. 163, 175.
- [45] Henderson, J., Richard, P., (2007). The Torts Process. Aspen Pub.
- [46] Hu, P., (2003). Study on the Mental Damage Compensation System. China University of Political Science and Law Press, p274.
- [47] Magnus, U., (2009). Unification of Tort Law. Translated by Xie, H. Law Press China. P97.
- [48] Vincent, J., (2004). American Tort Law. Translated by Zhao, X. China Renmin University Press, p61.
- [49] Smith v Department of Insurance, 507 So. 2d 1080 (Fla. 1987).
- [50] Teng, Y., Jiang, B., (2009). Research on Mental Damage Compensation in Medical Damages – Discussion of the Referential Significance of Japanese Civil Law and American Medical Damage Compensation System. Chinese Health Service Management, 9, p621.
- [51] Yang, L., (2002). Personal Right Law. People's Court Press, p289.
- [52] Sanders, J., (2006). Why Do Proposals Designed to Control Variability in General Damages (Generally) Fall on Deaf Ears? (And Why This Is Too Bad), DEPAUL L. REV. 55, p489, 496-507.
- [53] Allen, R., (2007), An External Perspective on the Nature of Noneconomic Compensatory Damages and Their Regulation, DEPAUL L. REV. 56, p1249, 1257-58, 1275.
- [54] Wuhan Intermediate People's Court. (2017). Dispute over Medical Damage Compensation between Chen v. Wuhan Caidian District Maternal and Child Health Care Hospital. Wuhan Intermediate Second Civil Final Judgement No 00213.
- [55] Wuhan Intermediate People's Court. (2017). "Dispute over Medical Damage Compensation between Xia Minghong etc v. Liyuan Hospital Affiliated to Tongji Medical College of Huazhong University of Science and Technology". Hubei Civil Final Judgement No 2625.
- [56] Ningbo Intermediate People's Court. (2013). "Dispute over Medical Damage Compensation between Zhai Mingwu and Cixi People's Hospital", Zhe Yong Civil First and Final Judgement No 186.