TESTIMONY BEFORE THE MARYLAND HOUSE JUDICIARY COMMITTEE

In Opposition to H.B. 1037
A Bill That Would Eliminate Maryland's Limits on Noneconomic Damages

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ON BEHALF OF THE AMERICAN TORT REFORM ASSOCIATION

On behalf of the American Tort Reform Association ("ATRA"), thank you for providing me with the opportunity to testify today. ATRA opposes H.B. 1037, which would eliminate the Maryland's statutory limits on noneconomic damages in personal injury cases and specifically in medical malpractice actions.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources with the goal of ensuring fairness, balance, and predictability in civil litigation. I am a Maryland resident, a member of the Maryland Bar, and a partner in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P. As part of my practice, I have actively studied the issue of noneconomic damage awards. I have authored law review articles examining noneconomic damage awards and helped prepare *amicus* (friend of the court) briefs to submit to appellate courts supporting the authority of legislatures to enact statutory limits on such awards, including this body.[1] I have had the privilege of testifying before this Committee when it considered legislation to raise or repeal Maryland's limits on noneconomic damages in past sessions.

There is no true way to place a monetary value on the pain and suffering associated with an injury. The instinct to permit large awards for pain and suffering to those who have suffered serious injuries, on top of what is already likely to be a large award for medical expenses, lost income, and other economic losses, must be balanced against the adverse effects that rising damage awards have on the cost of insurance and healthcare, the economy, and the civil justice system. Maryland's current limits on noneconomic damages in personal injury, medical malpractice, and wrongful death cases contribute to a predictable and stable business and healthcare environment in Maryland. They are within

[1] *See, e.g., DRD Pool Servs., Inc. v. Freed*, No. 104 (Sept. Term 2009) (*amicus* brief filed on behalf of the Maryland Chamber of Commerce, Chamber of Commerce of the United States of America, NFIB Small Business Legal Center, American Tort Reform Association, Maryland Motor Truck Association, American Trucking Association, American Chemistry Council, Property & Casualty Insurers Association of America, National Association of Mutual Insurance Companies, and American Insurance Association).

the mainstream of how other states have treated noneconomic damages and should not be altered.

H.B. 1037 would disturb this careful balance that the General Assembly has set by exposing Maryland residents, doctors, hospitals, and businesses to unpredictable and potentially extraordinary liability. Passing this legislation would lead to higher, unreasonable settlement demands and more costly litigation.

Damages Available Under Maryland Law

In considering the limit on noneconomic damages, it is helpful to consider the full picture of damages in personal injury and wrongful death cases.

Economic Damages. Maryland residents who suffer an injury as a result of the negligence or other wrongful conduct of others are entitled to be made whole for their losses. They can seek and recover compensation for their medical expenses, lost wages, and other costs. Recoveries for these types of expenses—economic damages—are *not* limited by Maryland law. In cases of severe permanent injuries or death, economic damages can reach into the millions of dollars. For example, in a case charging that doctors at Johns Hopkins Hospital negligently failed to timely perform a caesarian section, a jury awarded $4 million for lost wages and $25 million for future medical expenses.[2]

Noneconomic Damages. Plaintiffs can also recover noneconomic damages, the subject of H.B. 1037. Noneconomic damages provide plaintiffs with compensation for types of harms that cannot be documented with a dollar value, such as pain, suffering, inconvenience, and loss of consortium.[3] Traditionally, noneconomic damage awards were relatively small in amount and high awards were uniformly reversed.[4] For various reasons,[5]

[2] The jury also awarded $26 million for pain and suffering, which was reduced by the trial court pursuant to the statutory limit to $680,000. The Maryland Court of Special Appeals rejected a challenge to the constitutionality of the statutory limit and reversed the award on the ground that the trial court improperly excluded evidence offered by the hospital on the standard of care and improperly admitted prejudicial evidence offered by the plaintiff. *See Martinez v. Johns Hopkins Hosp*., 70 A.3d 397 (Md. Ct. Spec. App. 2013).

[3] Md. Cts. & Jud. Code Ann. § 11-108(a)(1).

[4] *See* Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Non-economic Compensatory Damages in the Nineteenth Century*, 4 J. Empirical Legal Studies 365, 396-87 (2007) (finding that prior to the Twentieth Century, there were only two reported cases affirmed on appeal involving total damages in excess of $450,000 in current dollars, each of which may have included an element of noneconomic damages); *see also* Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 Colum. L. Rev. 408, 411 (1959) (observing that an award in excess of $10,000 was rare).

[5] Scholars largely attribute the rise in noneconomic damage awards to: (1) the availability of future pain and suffering damages; (2) the rise in automobile ownership and personal injuries resulting from

the size of pain and suffering awards increased exponentially between the 1950s and 1980s.[6] By that time, pain and suffering awards had become the largest single item of recovery in personal injury cases, exceeding medical expenses and lost wages.[7] This prompted state legislatures to enact limits on these inherently subjective damage awards.

Punitive Damages. Finally, when an injury or death is caused by malicious conduct, a plaintiff can also recover punitive damages in Maryland. About half of the states limit punitive damages to an amount set by statute or a multiple of compensatory damages. A half dozen other states generally do not authorize punitive damage awards. In Maryland, punitive damages are available and *uncapped*. Such awards are permissible so long as they are supported by the evidence of malicious conduct and are not unconstitutionally excessive.

Maryland's Limit on Noneconomic Damages

The General Assembly first limited noneconomic damages in 1985 in response to a medical liability insurance crisis and initially set the cap at $350,000. There are now separate limits applicable to general personal injury and medical malpractice cases that rise to account for inflation by $15,000 per year.[8]

Today, there is an $875,000 limit on noneconomic damages in personal injury actions. This amount rises to $1,312,500 (150% of the individual limit) in wrongful death actions involving two or more beneficiaries. In wrongful death cases, pain and suffering can

automobile accidents; (3) the greater availability of insurance and willingness of plaintiffs' attorneys to take on lower value cases; (4) the rise in affluence of the public and a change in attitude that "someone should pay"; and (5) a campaign to increase such awards by the organized plaintiffs' bar. *See* Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Responses*, 34 Cap. U. L. Rev. 545, 553-68 (2006); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 170 (2004); *see also Melvin M. Belli, The Adequate Award*, 39 Cal. L. Rev. 1 (1951) (seminal article arguing for higher noneconomic damage awards).

[6] According to one study, in inflation adjusted terms, the average pain and suffering award was about $38,000 in the 1940s and 1950s, $48,000 in the 1960s, $81,000 in the 1970s, and $143,000 in the 1980s. *See* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 301 (1989).

[7] *See Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971); *see also* Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update, Trends and Findings on the Costs of the U.S. Tort System 17 (2003) (finding that noneconomic damages are the greatest portion of tort costs). Judge Paul Niemeyer, a former Maryland federal judge who currently serves on the U.S. Court of Appeals for the Fourth Circuit, observed, "Money for pain and suffering . . . provides the grist for the mill of our tort industry." Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1401 (2004).

[8] The noneconomic damage limit increases each year for medical malpractice actions on January 1 and for personal injury actions on October 1. Md. Cts. & Jud. Code Ann. §§ 3-2A-09 (b)(ii), 11-108(b)(2)(ii).

also be recovered on behalf of the person who died as a result of negligent conduct in addition to beneficiaries, such as a spouse or children. In those actions, the limit on noneconomic damages is also $875,000. Thus, in actions alleging that a person died as a result of negligence, total noneconomic damaged can reach $2,187,500 ($875,000 for the decedent plus $1,312,500 for his or her family). These limits will automatically increase again in October 2020.

The limit in medical malpractice cases is set slightly lower at $830,000 cases alleging negligent care. In wrongful death cases involving two or more beneficiaries, the limit on noneconomic damages rises to $1,037,500 (125% of the individual limit). There is no separate cap allowing for additional recovery of noneconomic damages in survival actions in medical malpractice cases.

These limits preserve "the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public."[9] Limiting noneconomic damages "may lead to greater ease in calculating premiums, thus making the market more attractive to insurers, and ultimately may lead to reduced premiums, making insurance more affordable for individuals and organizations performing needed services."[10] The lower limits in medical malpractice litigation reflect the additional public interest in ensuring access to doctors, especially in high-risk specialties. There is strong evidence that limits on noneconomic damages have significantly lowered and kept stable medical liability insurance premiums, helped states retain physicians, and reduced the pressure on doctors to engage in defensive medicine or avoid high-risk areas of care.[11]

The General Assembly's foresight in enacting a reasonable limit on noneconomic damages is an important, rational measure that continues to control outlier awards and provide predictability in Maryland's civil justice system today.

[9] *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45 (Md. 2010) (quoting *Murphy v. Edmonds*, 601 A.2d 102, 115 (Md. 1992); *see also Oaks v. Connors*, 660 A.2d 423 (Md. 1995).

[10] *Id.*

[11] *See* Mark A. Behrens & Cary Silverman, *The Constitutional Foundation for Federal Medical Liability Reform*, 15 J. Health Care L. & Pol'y 173, 192-95 (2012) (examining studies); *see also* Mark A. Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118:2 Obstetrics & Gynecology 335 (Aug. 2011).

The Proposed Legislation

H.B. 1037 would eliminate both the limit on noneconomic damages that applies in general personal injury cases and the separate limit that applies in medical liability cases effective October 1, 2020. The bill eliminates all limits on noneconomic damages in cases in which there is a jury finds a defendant acts in a willful, wanton, malicious, reckless, or grossly negligent manner. It may be tempting to eliminate the cap in these circumstances, but here are three problems with this approach.

First, to the extent that a defendant causes an injury as a result of malicious conduct, the proper response is to impose punitive damages. Punitive damages are meant to punish. In Maryland, they are uncapped.

Second, with respect to the other standards that would allow the statutory limit to be set aside, one must focus on their lowest level of culpability—gross negligence. What is gross negligence? As the Maryland Court of Appeals observed just last year, "Issues involving gross negligence are often more troublesome than those involving malice because a fine line exists between allegations of negligence and gross negligence."[12] While the Court recognized that gross negligence is not "just big negligence," it also understood that the distinction between ordinary and gross negligence in Maryland has historically been "muddy" and an "unclear area of law."[13]

That case involved whether Baltimore City paramedics who responded to a man who was having a heart attack and later died were entitled to immunity under the Fire and Rescue Company Act.[14] That law protects fire departments, ambulance, and rescue squads and their employees and volunteers from liability except for willful or grossly negligent acts. After the case was tried in early 2016, a jury found the paramedics were grossly negligent and returned a $3.7 million verdict. The trial court judge then found there was insufficient evidence of gross negligence and threw out the verdict. The Court of Special Appeals reversed the trial court judge in October 2018, finding the medics were grossly negligent.[15] Then the Court of Appeals reversed the Court of Special Appeals a year later, in August 2019, finding the standard for gross negligence had not been met. That's at least four years

[12] *Stracke v. Estate of Butler*, 214 A.3d 561, 568 (Md. 2019) (quoting *Barbre v. Pope*, 935 A.2d 699, 717 (Md. 2007).

[13] *Id*. at 569.

[14] Md. Cts. & Jud. Proc. Code § 5-604(a).

[15] *Estate of Butler v. Stracke*, No. 238, 2018 WL 4761044 (Md. Ct. Spec. App. Oct. 1, 2018).

of litigation over whether or not there was gross negligence – with the answer being yes, no, yes, and ultimately no.

Decades ago, the "irrational and inconsistent application" of the very standard included in this bill led the Court of Appeals to abandon it as the test for punitive damages.[16] The Court expressed concern that a test requiring "wanton" conduct or "reckless disregard" as "a test which may be so flexible that it can become virtually unlimited in its application."[17]

A limit on noneconomic damages that applies or does not apply based on this standard will not work. A statutory limit only facilitates reasonable settlements and keeps insurance rates stable if its application is predictable and consistent. If H.B. 1037 is enacted, plaintiffs will allege that a defendant has acted with gross negligence in nearly every case. As the Baltimore paramedic case shows, reasonable jurors and judges can and will disagree over whether a person's conduct was plain negligence or "big negligence." The chance of an unlimited noneconomic damage verdict will lead to a significant rise in settlement demands. Years of litigation—and its cost—will result.

How Maryland's Noneconomic Damage Limit Compares to Other States

There is no need to create an exception to Maryland's noneconomic damage limit. Maryland is not alone in trying to restrain rising pain and suffering awards. When Maryland enacted its statutory limit in 1986, it was the first state to adopt a limit generally applicable to personal injury cases.[18] Now, nearly two thirds of states have statutory limits on noneconomic damages that apply to all personal injury cases,[19] medical malpractice cases,[20] or both.

[16] *See Owens-Illinois, Inc. v. Zenobia*, 601 A. 2d 633 (Md. 1992).

[17] *Id*. (quoting *Smith v. Gray Concrete Pipe Co*., 297 A.2d 721, 731 (Md. 1972)).

[18] *See Maryland Legislature Puts Ceiling on Personal Injury Awards*, N.Y. Times, Apr. 13, 1986.

[19] *See* Alaska Stat. § 09.17.010; Colo. Rev. Stat. § 13-21-102.5; Haw. Rev. Stat. § 663-8.7; Idaho Code § 6-1603; Md. Cts. & Jud. Proc. Code § 11-108; Miss. Code Ann. § 11-1-60(2)(b); Ohio Rev. Code Ann. § 2315.18; Okla. Rev. Stat. tit. 23, § 61.2; Tenn. Code Ann. § 29-39-102; *see also* Mich. Comp. Laws § 600.2946a (noneconomic damage limit applicable to product liability actions).

[20] *See* Alaska Stat. § 09.55.549; Cal. Civ. Code § 3333.2; Colo. Rev. Stat. § 13-64-302; Ind. Code § 34-18-14-3; La. Rev. Stat. Ann. § 40:1299.42; Md. Cts. & Jud. Proc. Code § 3-2A-09; Mass. Gen. Laws ch. 231 § 60H; Mich. Comp. Laws Ann. § 600.1483; Miss. Code Ann. § 11-1-60(2)(a); Mont. Code Ann. § 25-9-411; Neb. Rev. Stat. § 44-2825; Nev. Rev. Stat. § 41A.035; N.M. Rev. Stat. § 41-5-6; N.C. Gen. Stat. § 90-21.19; N.D. Cent. Code § 32-42-02; Ohio Rev. Code Ann. § 2323.43; S.C. Code Ann. § 15-32-220; S.D. Codified Laws § 21-3-11; Tex. Civ. Prac. & Rem. Code Ann. § 74.301; Utah Code § 78B-3-410; Va. Code Ann. § 8.01-581.15; W. Va. Code § 55-7B-8.

Maryland's current limits on noneconomic damages are well within the mainstream and offer greater recovery than most states with statutory constraints on awards:

- Maryland's current limits on noneconomic damages are among the highest amounts in the country.
  - A few states limit noneconomic damages to $250,000.
  - Most states with caps have limits in $350,000 to $500,000 range.
- Six states, unlike Maryland, limit total recovery (economic and noneconomic) in medical malpractice cases.[21]
- Maryland is one of only seven states that automatically adjust the limit on noneconomic damages on a regular basis to account for inflation.[22]
- While some states adjust or lift the cap for catastrophic injuries or wrongful death, many are still at levels that are lower than Maryland's limit.[23]

The broad standard for lifting the statutory limit on noneconomic damages included in H.B. 1037 is not common. I am aware of only one state that currently lifts the statutory cap using a standard similar to that proposed in H.B. 1037—South Carolina.[24] Another state, North Carolina, applies a similar standard, but only in cases that involve catastrophic injuries or death.[25]

[21] *See, e.g.*, Colo. Rev. Stat. § 13-64-302 (limiting total recovery to $1 million of which $300,000 can be for noneconomic damages); Ind. Code Ann. § 34-18-14-3 (limiting total recovery to $1,650,000 adjusted for inflation); La. Rev. Stat. Ann. § 40:1299.42 (limiting total recovery to $500,000 plus interest); Neb. Rev. Stat. § 44-2825 (limiting total recovery to $1.75 million); N.M. Stat. Ann. § 41-5-6 (limiting total recovery outside of damages for medical care to $600,000); Va. Code Ann. § 8.01-581.15 (limiting total recovery to $2.3 million, adjusted for inflation as of July 2017).

[22] Other states with inflation adjusters include Colorado (adjusted to $613,760 in 2020 and to $1.2 million in cases of clear and convincing evidence), Idaho (adjusted to $372,865 in 2019), Michigan (set at $471,800 in medical and product liability actions, rising to $842,500 in catastrophic injury cases, in 2020); North Carolina (adjusted to $562,338 in 2020 with adjustments taking place every third year), South Carolina (adjusted to $462,070 in medical malpractice cases against a single health care provider in 2019, and $1.4 against all health care institutions in 2019); and West Virginia (adjusted to about $340,000 in ordinary cases and about $680,000 in catastrophic injury cases in 2019, but adjustments may not exceed $375,000 and $750,000, respectively).

[23] *See, e.g.,* Alaska Stat. § 09.55.549 (increasing limit from $250,000 to $400,000 in wrongful death medical liability cases); Mich. Comp. Laws §§ 600.1483, 600.2946a(1) (increasing limit from $489,400 to $832,000, adjusted for inflation in 2019, in product liability and medical liability cases resulting in death or permanent loss of a vital bodily function,); W. Va. Code § 55-7B-8 (increasing limit from $350,000 to $80,000 in 2019 adjusted for inflation in medical liability cases resulting in death or certain permanent and substantial injuries).

[24] *See* S.C. Code Ann. § 15-32-220(E).

[25] *See* N.C. Gen. Stat. § 90-21.19(b). A handful of other states lift their noneconomic damage cap in cases involving higher levels of culpability than gross negligence. Alaska's statutory cap for medical liability cases does not apply in cases involving "reckless or intentional misconduct." Alaska Stat. § 9.55.549(f).

In addition, about sixteen states, and the federal government place more money in the hands of those who are injured by limiting attorneys' fees in medical malpractice cases to a specific percentage or establish a sliding scale.[26] Maryland does not do so.

Conclusion

Eliminating the statutory limit on subjective noneconomic damages in cases of "gross negligence" will result in unpredictability that will negate the benefits of setting an upper limit. The inability to predict when the limit will apply and when it will not will increase insurance rates for Maryland doctors, drivers, homeowners, and businesses. The change will also complicate the ability to settle lawsuits, since plaintiffs' lawyers will demand significantly higher amounts for immeasurable harm. The current law strikes a reasonable balance between unlimited subjective awards and the consistency and predictability that contribute to a stable civil justice and health care system in Maryland. It should be retained.

Idaho's generally applicable limit ($372,865, 2019 inflation adjusted) similarly does not apply to "willful or reckless misconduct or conduct that would constitute a felony." Idaho Code § 6-1603(4). Iowa lifts its $250,000 cap only in cases of "actual malice." Iowa Code § 147.136A(3). Tennessee lifts its generally applicable $750,000 limit where a defendant had "a specific intent to inflict serious bodily injury," intentionally falsified or destroyed records, was substantially impaired by alcohol or drugs, or his or her conduct resulted in a felony conviction. Tenn. Code Ann. § 29-39-102(h).

[26] These states include California, Connecticut, Delaware, Florida, Illinois, Indiana, Maine, Massachusetts, Michigan, New Jersey, New York, Oklahoma, Tennessee, Utah, Wisconsin, and Wyoming. New York, for example, provides that attorneys' fees in medical malpractice cases may not exceed: 30% of the first $250,000 of the sum recovered; 25% of the next $250,000 of the sum recovered; 20% of the next $500,000 of the sum recovered; 15% of the next $250,000 of the sum recovered; 10% of any amount over $1,250,000 of the sum recovered. N.Y. Jud. Law § 474a. In cases involving the United States as a defendant, including medical malpractice cases associated with care at government hospitals in Maryland, the Federal Torts Claims Act limits attorneys' fees to 20% of any award or settlement if resolved at the administrative phase and 25% of any judgment entered in cases that proceed to federal court. *See* 28 U.S.C. § 2678.