



American Tort Reform Association

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March 25, 2024

Delegate Luke Clippinger
Chair, House Judiciary Committee
101 Taylor House Office Building
6 Bladen Street
Annapolis, MD 21401

Re: Opposition to S.B. 538 – An Unsupported Doubling of the Maximum Noneconomic Damage Award, March 27, 2024 Hearing Before House Judiciary Committee

Dear Chairman Clippinger and Members of the Committee:

I am writing on behalf of the American Tort Reform Association (ATRA), 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, to express our opposition to S.B. 538 as amended. If enacted, this bill would nearly double the maximum noneconomic damage award in personal injury cases, even as the statute’s automatic escalator has kept pace with inflation. As a result, the bill will lead to unreasonable settlement demands and unpredictable awards in a wide range of cases, which will be felt by Maryland’s drivers, homeowners, and businesses in the form of higher insurance rates.

Maryland residents who experience an injury due to the negligence or other wrongful conduct of others are entitled to be made whole for their losses. They can recover compensation for medical expenses, lost income or earning capacity, and expenses incurred or expected. These economic damages are *not* limited by Maryland law. Those who oppose a statutory maximum on noneconomic damages often contend that a limit favors higher income earners over those who have lower income. This is misleading because, as the Maryland Supreme Court has ruled, unlimited noneconomic damages are available for the monetary value of the inability of an injured person to perform a wide range of tasks, which may include “cooking, cleaning, and gardening” and can range from “polishing the family silver to pulling up weeds from the garden.”¹ Hauling out the garbage, mowing the lawn, and making repairs are other examples recognized by Maryland courts as having an economic price.² A plaintiff can recover the cost of hiring someone to perform these services, which can add up to hundreds of thousands of dollars. In cases of severe permanent injuries or death, economic damages can reach into the millions of dollars.

Plaintiffs can also recover noneconomic damages, the subject of S.B. 538. 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 In wrongful death cases, Maryland law allows for an especially broad range of noneconomic damages – more expansive than most other states (but which are constrained by the statutory limit).⁴

¹ See *Murphy v. Edmonds*, 601 A.2d 102, 118 (Md. 1992) (affirming \$245,000 award for past and future loss of household services); see also *Choudhry v. Fowlkes*, 219 A.3d 107 (Md. Ct. Spec. App. 2019) (reaffirming that loss of household services are recoverable as uncapped *economic* damages so long as the plaintiff supports the request by identifying the tasks, providing their market value, and showing a reasonable expectation that a decedent would have performed those tasks).

² *Choudhry*, 219 A.3d at 113-14 (citing *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 633 (6th Cir. 1978)).

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

⁴ Md. Cts. & Jud. Proc. Code Ann. § 3-904(d) (providing that damages in wrongful death actions are not limited to pecuniary losses and may include “damages for mental anguish, emotional pain and suffering, loss of society,

Traditionally, noneconomic damage awards were relatively small in amount and high awards were uniformly reversed.⁵ The size of pain and suffering awards increased exponentially over time⁶ and became the largest single item of recovery in personal injury cases.⁷ This prompted state legislatures to enact limits on these inherently subjective damage awards. The General Assembly first limited noneconomic damages in 1985 in response to an insurance crisis and initially set the cap at \$350,000. It did so after Maryland Governor Harry Hughes and the General Assembly established two task forces, the Governor’s Task Force to Study Liability Insurance and the Joint Executive/Legislative Task Force on Medical Insurance, both of which, after hearings, meetings, and substantial research, recommended statutory limits.

Today, the adjusted limit on noneconomic damages in personal injury actions is \$935,000. This amount rises to \$1,402,000 (150% of the individual limit) in wrongful death actions involving two or more beneficiaries. In wrongful death cases, pain and suffering can also be recovered on behalf of the person who died in addition to beneficiaries, such as a spouse or children. In those actions, the limit on noneconomic damages is also \$935,000. Combined, in actions alleging that a person died due to negligence, total noneconomic damages can reach \$2,337,500 million (\$935,000 for the decedent plus \$1,402,000 for his or her family). Without the need for legislation, these limits will automatically increase to \$950,000/\$1,425,000/\$2,375,000 in October 2024.

The Maryland Supreme Court has recognized that the General Assembly enacted the statutory limit to preserve “the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public.”⁸ 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.”⁹ The statutory limit is accomplishing these goals. As we see a resurgence of massive pain and suffering awards nationwide, now is certainly not the time to double this limit.¹⁰

S.B. 538, as amended, would nearly double the cap on noneconomic damages that applies in personal injury cases effective October 1, 2024. If enacted, the statutory maximum will rise from \$935,000 to \$1,750,000 (87%). In wrongful death cases involving two or more beneficiaries, the statutory maximum will jump from \$1,402,000 to \$2,625,000. Combined, in wrongful death actions, the total noneconomic damages that may be awarded will reach \$4,375,000 million (\$1,750,000 for the decedent plus \$2,625,000 for his or her family). These amounts, as discussed, are in addition to be substantial, unlimited economic damages and the potential for a punitive damage award. In addition,

companionship, comfort, protection, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education”). As the American Law Institute’s (ALI) tentatively approved new Restatement of the Law Third Torts: Remedies recognizes in examining Wrongful Death Acts, “most states do not compensate grief or emotional distress,” unlike Maryland.

⁵ 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).

⁶ 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). 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 *DRD Pool Serv.*, 5 A.3d at 67 (Md. 2010) (quoting *Murphy*, 601 A.2d at 115).

⁹ *Id.*

¹⁰ Cary Silverman & Christopher E. Appel, *Nuclear Verdicts Trends, Causes, and Solutions*, at 8-10 (U.S. Chamber Inst. for Legal Reform 2022) (examining 1,376 reported personal injury and wrongful death verdicts over \$10 million between 2010 and 2019 and finding noneconomic damages were largest portion of such awards).

the bill will increase the maximum noneconomic damage award automatically by \$20,000 every October, an additional \$5,000 per year.

There is no economic basis supporting this jump in the statutory maximum. The \$15,000 automatic escalator has largely ensured that the cap has kept pace with inflation, even as inflation has spiked in recent years. For example, \$350,000 in 1986, the amount when the limit first went into effect, has a value of approximately \$991,000 today. As you may know, in 1994, the legislature reset the cap to \$500,000 and added the escalator. That level, \$500,000 in 1994, is approximately \$1,060,000 today when adjusted for inflation. From either point, the current level is very close to the inflation-adjusted amount.

The current statutory maximum is also in the mainstream. 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.¹¹ Now, Maryland is among several states that have done so outside of healthcare liability. For example:

- Colorado’s inflation-adjusted limit on noneconomic damages in any civil action other than medical malpractice actions is \$642,180, which may increase upon clear and convincing evidence to \$1,284,370.¹²
- Idaho’s current inflation-adjusted limit on noneconomic damages in personal injury cases is \$458,729.¹³
- Ohio limits noneconomic damages in personal injury cases to \$250,000, or three times economic loss, up to a maximum of \$350,000, which does not apply to certain permanent and substantial physical injuries.¹⁴
- Michigan’s inflation-adjusted limit for noneconomic damages in product liability actions is \$537,900, rising to \$960,500 in catastrophic injury cases in 2023.¹⁵
- Mississippi limits noneconomic damages in personal injury cases outside of healthcare liability to \$1 million.¹⁶
- Tennessee limits noneconomic damages in personal injury cases to \$750,000, which rises to \$1 million in cases involving specified catastrophic injuries.¹⁷
- Alaska limits noneconomic damages in personal injury cases to the greater of \$400,000 or injured person’s life expectancy in years multiplied by \$8,000. In cases involving “severe physical impairment or severe disfigurement,” the limit increases to the greater of \$1 million or injured person’s life expectancy in years multiplied by \$25,000.¹⁸
- Hawaii limits damages for pain and suffering in personal injury actions to \$375,000 with certain exceptions.¹⁹

¹¹ See *Maryland Legislature Puts Ceiling on Personal Injury Awards*, N.Y. Times, Apr. 13, 1986.

¹² Colo. Rev. Stat. § 13-21-102.5, as adjusted, https://www.sos.state.co.us/pubs/info_center/files/damages_new.pdf.

¹³ Idaho Code § 6-1603, as adjusted, https://iic.idaho.gov/wp-content/uploads/2023/07/Benefits-Non-economic-caps-effective-07_01_23.pdf.

¹⁴ Ohio Rev. Code Ann. § 2315.18.

¹⁵ Mich. Comp. Laws § 600.2946a, as adjusted, State of Michigan, Dep’t of Treasury, *Limitation on Noneconomic Damages and Product Liability Determination of Economic Damages*, Jan. 31, 2023.

¹⁶ Miss. Code Ann. § 11-1-60(2)(b).

¹⁷ Tenn. Code Ann. § 29-39-102.

¹⁸ Alaska Stat. § 09.17.010.

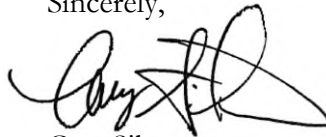
¹⁹ Haw. Rev. Stat. § 663-8.7.

As these state laws show, Maryland's current limit on noneconomic damages – at nearly a million dollars in personal injury cases, significantly more in wrongful death cases, and adjusted upward each year – is well within the mainstream. Indeed, it is at the higher end of these limits.

In sum, the General Assembly's foresight in enacting a reasonable limit on noneconomic damages is an important, rational measure that continues to control outlier awards. It provides consistency and predictability in Maryland's civil justice system. It has avoided the rise of awards to the astounding levels that we have seen in other states. The bill's proposal to nearly double the maximum noneconomic damage award overnight does not meet any economic or public policy need. It will primarily benefit lawyers, who will take one third or more of higher settlement and judgments as their contingency fee. For Maryland drivers, homeowners, and businesses, the substantial increase in the statutory maximum will mean higher insurance costs.

Thank you for considering our concerns. We respectfully ask that you not favorably report this bill.

Sincerely,

A handwritten signature in black ink, appearing to read 'Cary Silverman', with a large, stylized flourish extending from the end of the signature.

Cary Silverman

Counsel to the American Tort Reform Association

Cc: Members of the House Judiciary Committee