

**Testimony Before the Maryland House Judiciary Committee
in Opposition to H.B. 862
A Bill That Would Allow Unlimited Pain & Suffering Awards
in Personal Injury and Wrongful Death Cases**

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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. 862, which would eliminate Maryland’s statutory limits on noneconomic damages in personal injury cases. As a result, the bill would 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.

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 studied the issue of noneconomic damage awards, authoring law review articles and research papers on the topic. 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 for homeowners, drivers, and businesses, the economy, and the civil justice system. H.B. 862 would disturb the careful balance that the General Assembly has set, which has positively contributed to a stable civil liability environment in Maryland for decades.

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 experience 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.

Noneconomic Damages. Plaintiffs can also recover noneconomic damages, the subject of H.B. 862. 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.¹ Traditionally, noneconomic damage awards were relatively small in amount and high awards were uniformly reversed.² For various reasons,³ the size of pain and suffering awards increased exponentially between the 1950s and 1980s.⁴ 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.⁵ 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

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

² 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).

³ Scholars largely attribute the initial 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 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).

⁴ See David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 301 (1989).

⁵ 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).

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 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. As the Governor's Task Force concluded:

[T]he civil justice system can no longer afford unlimited awards for pain and suffering.

The ceiling on noneconomic damages will help contain awards within realistic limits, reduce the exposure of defendants to unlimited damages for pain and suffering, lead to more settlements, and enable insurance carriers to set more accurate rates because of the greater predictability of the size of judgments. The limitation is designed to lend greater stability to the insurance market and make it more attractive to underwriters.

A substantial portion of the verdicts being returned in liability cases are for noneconomic loss. The translation of these losses into dollar amounts is an extremely subjective process as these claims are not easily amenable to accurate, or even approximate, monetary valuation. There is a common belief that these awards are the primary source of overly generous and arbitrary liability claim payments. They vary substantially from person to person, even when applied to similar cases or similar injuries, and can be fabricated with relative ease.

A cap on allowable pain and suffering awards will help reduce the incidence of unrealistically high liability awards, yet at the same time protect the right of the injured party to recover the full amount of economic loss, including all lost wages and medical expenses.

Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1328 (D. Md. 1989), (quoting report of the Governor's Task Force to Study Liability Insurance issued Dec. 20, 1985).

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.⁶ The Maryland

⁶ The noneconomic damage limit in personal injury cases increases each year on October 1. Md. Cts. & Jud. Code Ann. § 11-108(b)(2)(ii).

Supreme Court has repeatedly upheld the limit on noneconomic damages as constitutional.⁷

Today, the inflation-adjusted limit on noneconomic damages in personal injury actions is \$920,000. This amount rises to \$1,380,000 (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 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 \$920,000. Thus, in actions alleging that a person died as a result of negligence, total noneconomic damaged can reach \$2.3 million (\$920,000 for the decedent plus \$1,380,000 for his or her family). These limits will automatically increase to \$935,000/\$1,402,500/\$2,337,500 in October 2023.

The statutory limit is accomplishing its goal. It has prevented outlier awards and provided for greater consistency and predictability in Maryland’s civil justice system. It has ensured that those who are injured as a result of another party’s tortious conduct can receive full compensation for economic losses plus a reasonable, though not unlimited, amount for pain and suffering. It has also provided consistency for plaintiffs by precluded widely varying noneconomic damage awards for similar injuries.

The Proposed Legislation

H.B. 862 would eliminate the limit on noneconomic damages that applies in general personal injury cases effective October 1, 2023. This bill goes even further than prior proposals that the General Assembly chose not to enact, which proposed increasing the limit or eliminating it only in certain cases.

Implications for Maryland for Eliminating the Statutory Limit

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

⁷ *Martinez v. The John Hopkins Hosp.*, 70 A.3d 397, 410 n.19 (2013); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45, 63 (Md. 2010); *Oaks v. Connors*, 660 A.2d 423, 430 (Md. 1995); *Murphy v. Edmonds*, 601 A.2d 102, 118 (Md. 1992).

⁸ *DRD Pool Serv.*, 5 A.3d at 67 (Md. 2010) (quoting *Murphy*, 601 A.2d at 115).

to reduced premiums, making insurance more affordable for individuals and organizations performing needed services.”⁹

As we see a resurgence of massive pain and suffering awards nationwide, now is certainly not the time to eliminate this limit. Awards in excess of \$10 million, known as “nuclear verdicts,” are rising in frequency and size in personal injury and wrongful death cases.¹⁰ The largest component of these awards are noneconomic damages.¹¹ While about one quarter of nuclear verdicts are reached in medical liability cases, auto accident, product liability cases, and premises liability cases make up similar shares.¹² In other states, we have seen juries, prompted by plaintiffs’ lawyers, award amounts for past and future pain and suffering for \$12 million, \$33 million, \$40 million, even \$85 million or more.¹³ These verdicts are sometimes improperly prompted by a push by the plaintiffs’ lawyer for the jury to “send a message,” even if a defendant’s conduct does not rise to a level that warrants punitive damages.

In states that lack limits on noneconomic damages, personal injury lawyers have long understood that the more you ask for, the more you get,¹⁴ and they have become increasingly bold in their requests to juries for extraordinarily high pain and suffering awards. This tactic, known as “anchoring,” implants in the minds of jurors an arbitrary sum or a mathematical formula (such as an amount per day or hour, referred to as a “per diem” argument) designed to lead to an excessive award. An “anchor” creates a psychologically powerful baseline for jurors struggling with assigning a monetary value to pain and suffering. Once a lawyer provides an anchor, jurors accept the suggested amount or “compromise” by negotiating it upward or downward. Studies show that both use of a specific sum or mathematical formula leads juries to reach a substantially higher award—double¹⁵ or quadruple¹⁶ the amount they would have if left to determine a just and reasonable award on their own.

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).

¹¹ *Id.* at 10-11.

¹² *See id.*

¹³ *See* Mark A. Behrens, Cary Silverman & Christopher E. Appel, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages*, 44 *Am. J. of Trial Advoc.* 321, 327-29 (2021) (providing examples from several states).

¹⁴ Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 *Applied Cognitive Psychology* 519, 534 (1996).

¹⁵ *See* Bradley D. McAuliff & Brian H. Bornstein, *All Anchors are Not Created Equal: The Effects of Per Diem Versus Lump Sum Requests on Pain and Suffering Awards*, 34 *L. & Human Behavior* 164, 167 (2010).

Fortunately, Maryland is not on the list of the top states for nuclear verdicts. While anchoring is permissible in Maryland,¹⁷ this type of manipulation and the potential for excessive awards has been constrained by the statutory limit on noneconomic damages. I'll give you one recent example that is a preview of what is to come if the statutory limit is eliminated. In a case arising from a Maryland inmate who fractured his wrist during a fight, the plaintiffs' attorney requested that the jury award his client \$100 per day for pain and suffering for his remaining life expectancy of fifty years. That doesn't sound like much, but it adds up to nearly \$2 million. The defendant's counsel objected to the arbitrary amount as highly prejudicial, noting that he had never seen this done before, but the trial court allowed it. Prompted by that high figure, the jury ultimately returned a \$3 million verdict. The trial court reduced that \$3 million award pursuant to the noneconomic damage limit in place at the time, \$770,000. That judgment was affirmed on appeal.¹⁸ Without a statutory limit, these types of arguments, and awards at significantly higher levels, will become the norm in Maryland.

How Maryland's Noneconomic Damage Limit Compares to Other States

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.¹⁹ Now, it is among several states that have done so outside of healthcare liability. For example:

- 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 \$25,000.²⁰

¹⁶ See John Campbell, et al., *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 Wash. U. L. Rev. 1, 22 (2017).

¹⁷ *Bauman v. Woodfield*, 223 A.2d 364, 373 (Md. 1966); *E. Shore Pub. Serv. Co. v. Corbett*, 177 A.2d 701, *adhered to sub nom.*, 180 A.2d 681 (Md. 1962); *Giant Food Inc. v. Satterfield*, 603 A.2d 877, 881 (Md. Ct. Spec. App. 1992).

¹⁸ *Rivera-Ramirez v. Hall*, No. 756, 2023 WL 1987860, at *4 (Md. Ct. Spec. App. Feb. 14, 2023). This case was brought against a contractor that provided medical services to correction facilities, alleging that its physician provided inadequate care for the inmate's injury. The same tactics, however, can occur in any personal injury case.

¹⁹ See *Maryland Legislature Puts Ceiling on Personal Injury Awards*, N.Y. Times, Apr. 13, 1986.

²⁰ Alaska Stat. § 09.17.010;

- 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 \$1,284,370.²¹
- Hawaii limits noneconomic damages in personal injury actions to \$375,000 with certain exceptions.²²
- Idaho’s current inflation-adjusted limit on noneconomic damages in personal injury cases is \$430,740.²³
- Michigan’s inflation-adjusted limit for noneconomic damages in product liability actions is \$537,900, rising to \$960,500 in catastrophic injury cases in 2023.²⁴
- Mississippi limits noneconomic damages in personal injury cases outside of healthcare liability to \$1 million.²⁵
- 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.²⁶
- Tennessee limits noneconomic damages in personal injury cases to \$750,000 or \$1 million in cases involving specified catastrophic injuries.²⁷

As these state laws shows, 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.

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

²² Haw. Rev. Stat. § 663-8.7.

²³ Idaho Code § 6-1603, as adjusted <https://iic.idaho.gov/wp-content/uploads/2022/06/Benefits-Non-economic-caps-thru-2022.pdf>.

²⁴ 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.

²⁵ Miss. Code Ann. § 11-1-60(2)(b).

²⁶ Ohio Rev. Code Ann. § 2315.18.

²⁷ Tenn. Code Ann. § 29-39-102.

Conclusion

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 nuclear verdicts that we have seen in other states.

The bill's proposal to allow unlimited pain and suffering awards outside of healthcare liability claims will have adverse effects. It will:

- Complicate the ability to reach reasonable settlements, since plaintiffs' lawyers will demand significantly higher amounts for immeasurable harm. Some may hold out for the chance of a jackpot verdict.
- Lead to more frequent excessive verdicts for a wide range of businesses and nonprofit organizations and lengthy appeals.
- Result in higher insurance costs for Maryland drivers, homeowners, and businesses.