

Testimony in Opposition to S.B. 871: A Bill That Would Make Punitive Damages Significantly More Common in Maryland

**Cary Silverman on Behalf of the American Tort Reform Association
Before the Maryland Senate Judicial Proceedings Committee**

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On behalf of the American Tort Reform Association (ATRA), thank you for the opportunity to testify today. ATRA opposes S.B. 871, which would reduce the standard for imposing punitive damages, exposing those who live, work, and do business in Maryland to a significantly higher risk of massive awards.

ATRA is a broad-based coalition of businesses, municipalities, associations, and professional firms that share the goal of having a fair, balanced, and predictable civil justice system. 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.

The first part of S.B. 871 abrogates longstanding Maryland Supreme Court precedent that ensures that punitive damages are reserved for punishing and deterring truly reprehensible conduct.¹ It would replace a requirement that plaintiffs show a defendant's conduct was malicious, meaning it was "characterized by evil motive, intent to injure, fraud, or actual knowledge of the defective nature of the products coupled with a deliberate disregard of the consequences"² with what the bill calls a "gross negligence" standard. For twenty years, between 1972 and 1992, Maryland courts allowed punitive damages for gross negligence. The Maryland Supreme Court found this experience proved to be a mistake – it resulted in inconsistent results, overextended the availability of punitive damages, frustrated their objective of responding to misconduct, and resulted in a "literal explosion" of lawyers seeking, obtaining, and appealing punitive damage awards nationwide.³ The high court overruled this case law and restored the actual malice standard. Now, S.B. 871 proposes going back to the abandoned gross negligence standard.

In addition, the bill includes a definition of "gross negligence" that confusingly mixes high culpability levels such as willful and outrageous conduct, and malicious and fraudulent intent with far lower levels. As a practical matter, since the six different standards included in the bill as "gross negligence" are connected by an "or," only the lowest of these culpability levels matters. As a result, the bill subjects an individual or business that operates in Maryland to punitive damages if its conduct "create[s] a high degree of risk or of harm to others" or suggests "indifference to legal obligations." Many cases will arguably meet that standard, including those involving no more than simple negligence.

The bill's definition of gross negligence is inconsistent with—and lower than—the Maryland Supreme Court's understanding of the standard. In a 2019 decision, the Court explained that "gross negligence" is "an intentional failure to perform a manifest duty in reckless disregard of the consequences [A] wrongdoer is guilty of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly

¹ *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 651 (Md. 1992).

² *Id.* at 461.

³ *Id.* at 456-58.

indifferent to the rights of others that he acts as if such rights did not exist.”⁴ Even with this definition, which sets an “objectively higher threshold” for gross negligence, the Court cautioned that, “in many cases . . . ‘gross negligence will be treated as ‘just big negligence.’”⁵ The bill’s multi-prong definition of gross negligence fails to heed this warning. It is, essentially, a “big negligence” standard.

You will hear from proponents that Maryland’s standard for punitive damages is higher than many other states. This assertion needs to be put into context.

- Unlike Maryland, six states generally do not authorize punitive damage awards or allow them only in certain contexts where specifically authorized by statute. These states include Louisiana, Massachusetts, Michigan, Nebraska, New Hampshire, and Washington.⁶
- Several other states have codified a high standard for punitive damages that is similar to Maryland, reserving them for malicious, fraudulent, or deliberate misconduct.⁷ In other jurisdictions, such as the District of Columbia,⁸ New York,⁹ and Maine,¹⁰ courts have adopted this high standard.
- The vast majority of states that award punitive damages, like Maryland, require clear and convincing evidence to support an award. This aspect of the bill simply codifies existing law.¹¹
- While some states have, over time, relaxed their standards for punitive damages, making such awards highly unpredictable and increasingly

⁴ *Stracke v. Estate of Butler*, 214 A.3d 561, 569 (Md. 2019) (quoting *Barbre v. Pope*, 935 A.2d 699 (Md. 2007)). This decision addressed whether paramedics’ failure, during an emergency call, to diagnose a heart attack subjected them to liability when a statute granted immunity in the absence of a willful or grossly negligent act).

⁵ *Id.* at 569; see also *Beall v. Holloway-Johnson*, 130 A.3d 406 (Md. 2016) (“The distinction between negligence and gross negligence, however, can be a difficult one to establish in practice”).

⁶ See La. C.C. Art. 3546; *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391 (Mich. 2004); *Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975); N.H. Rev. Stat. § 507:16; *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 726 P.2d 8 (Wash. 1986).

⁷ See, e.g., Ala. Code § 6-11-20(a) (“consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff”); Cal. Civ. Code § 3294(a) (“oppression, fraud, or malice”); Idaho Code § 6-1604(1) (“oppressive, fraudulent, malicious or outrageous conduct”); Mont. Code Ann. § 27-1-221(1) (“actual fraud or actual malice”); Ohio Rev. Code Ann. § 2315.21(C)(1) (“malice or aggravated or egregious fraud”); N.D. Cent. Code § 32-03.2-11(1) (“oppression, fraud, or actual malice”); Wis. Stat. § 895.043(3) (when a “defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff”). After court rulings relaxed the standard for punitive damages, Missouri restored a higher standard. See Mo. Rev. Stat. § 510.261(1) (amended 2020) (requiring clear and convincing evidence that a defendant “intentionally harmed the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others”).

⁸ *Dist. of Columbia v. Bamidele*, 103 A.3d 516, 522 (D.C. 2014) (requiring “a state of mind evincing malice or its equivalent”); *Croley v. Republican Nat’l Comm.*, 759 A.2d 682, 695 (D.C. 2000) (requiring a showing of “evil motive or actual malice”).

⁹ *Ross v. Louise Wise Servs.*, 868 N.E.2d 189, 196 (N.Y. 2007) (“Punitive damages are permitted when the defendant’s wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations. . . .”); *Prozeralik v. Capital Cities Commc’n, Inc.*, 82 N.Y.2d 466, 479 (1993) (“Punitive damages are awarded in tort actions ‘where the defendant’s wrongdoing has been intentional and deliberate and has the character of outrage frequently associated with crime.’”).

¹⁰ *Kinderhaus North LLC v. Nicolas*, 314 A. 3d 300, 313 (Maine 2024) (“Under Maine law, punitive damages may be awarded for tortious conduct only if the defendant acted with malice.”); see also *Tuttle v. Raymond*, 494 A.2d 1353, 1361, 1361 (Me.1985) (rejecting gross negligence standard for punitive damages as “too broad and too vague” and having an insufficient distinction from mere negligence).

¹¹ Colorado requires proof “beyond a reasonable doubt” to support a punitive damage award. Colo. Rev. Stat. § 13-25-127(2).

commonplace, keep in mind that half of states that award punitive damages have a statutory limit.¹² Maryland does not. While lowering the standard, this bill continues to allow unlimited awards.

The second part of S.B. 871 proposes a 50% “surcharge” on top of a jury’s punitive damage award, which the state (which is not a party to the litigation) would take and place into the “Blueprint for Maryland’s Future Fund.” This money would apparently go toward improving public education in Maryland.

No other state does this. Just seven states currently allocate a portion of a punitive damage award to the state or a state fund.¹³ A few other states – such as New York and Florida – briefly had such laws and abandoned them,¹⁴ and the Colorado Supreme Court struck down that state’s punitive-damage sharing law as unconstitutional.¹⁵ The few states that continue to have these laws allocate a percentage of the plaintiff’s punitive damage award (which is not compensation for an injury) to the state. They do not impose a state surcharge on top of the jury’s award, as the bill proposes.

Giving a portion of punitive damage awards to the state or, as here, imposing a surcharge on such awards, raises a range of public policy concerns. First and foremost, like other punitive-damage sharing laws, this practice provides an incentive to misuse punitive damages. As discussed, punitive damages are intended to punish and deter wrongful conduct. They are not there to fill budget gaps or fund educational programs. The public will inevitably learn that, in Maryland, punitive damage awards support educational programming. When they serve as jurors, this should not consciously or unconsciously factor into their consideration. Nor should Maryland rely on punitive damage awards to fund public programs or services. Such reliance could create an incentive for the state to further relax the standard for punitive damages, pass new laws

¹² Ala. Code § 6-11-21 ; Alaska Stat. § 9.17.020(f)-(h); Colo. Rev. Stat. § 13-21-102(1)(a); Conn. Gen. Stat. Ann. § 52-240b; Fla. Stat. Ann. § 768.73; Ga. Code Ann. § 51-12-5.1(f), (g); Idaho Code Ann. § 6-1604; Ind. Code Ann. § 34-51-3-4; Kan. Stat. Ann. § 60-3702; 18-C Me. Rev. Stat. Ann. § 2-807(2) (wrongful death); Miss. Code Ann. § 11-1-65; Mont. Code Ann. § 27-1-220(3); Nev. Rev. Stat. Ann. § 42.005; N.J. Stat. Ann. § 2A:15-5.14; N.C. Gen. Stat. § 1D-25; Ohio Rev. Code Ann. § 2315.21; Okla. Stat. Ann. tit. 23, § 9.1 ; 40 Pa. Cons. Stat. Ann. § 1303.505 (healthcare providers); S.C. Code Ann. § 15-32-530; Tenn. Code Ann. § 29-39-104; Tex. Civ. Prac. & Rem. Code Ann. § 41.008; Va. Code Ann. § 8.01-38.1; W. Va. Code § 55-7-29(c); Wis. Stat. § 895.043(6).

¹³ Alaska Stat. § 09.17.020(j) (50% of a punitive damage award to state’s general fund); Ga. Code Ann. § 51-12-5.1(e)(2) (75% of punitive damage awards in product liability actions to the state treasury); Ind. Code Ann. § 34-51-3-6(c) (75% of punitive damage awards to a Violent Crime Victims Compensation Fund); Iowa Code Ann. § 668A.1 (75% of punitive damage awards in certain cases to the Iowa’s Civil Reparations Trust Fund); Mo. Rev. Stat. § 537.675(3) (50% of a punitive damage award, after deducting attorney’s fees and expense, to a tort victim’s compensation fund); Or. Rev. Stat. Ann. § 31.735(1) (60% of a punitive damage award to a Crime Victims’ Assistance Fund and 10% for the State Court Facilities and Security Account); Utah Code Ann. § 78B-8-201(3)(a) (first \$50,000 in punitive damages to the plaintiff and 50/50 split of the remainder); *see also* 735 Ill. Comp. Stat. Ann. 5/2-1207 (permitting a trial court, in its discretion, to apportion a punitive damage award among the plaintiff, plaintiff’s attorney, and the state’s Department of Human Services).

¹⁴ New York had a law requiring 20% of punitive damage award to go to the state’s general fund between 1992 and 1994. N.Y. C.P.L.R. § 8701 (sunset Apr. 1, 1994). Florida law required 60% of punitive damage awards in personal injury and wrongful death cases to go into a Public Medical Assistance Trust Fund and, in other actions, to the General Fund. Fla. Stat. Ann. § 768.73(2) (1986). Florida amended the percentage down to 35% in 1992 and sunset that law in 1995. A Kansas split-recovery law applicable only to medical malpractice cases expired in 1989.

¹⁵ *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 270-72 (Colo. 1991) (finding Colo. Rev. Stat. § 13-21-102 (1989), which sent one-third of punitive damage awards to the state general fund, an unconstitutional taking). Colorado repealed that law in 1995.

providing for punitive damages, or favor plaintiffs in private disputes by intervening or filing amicus briefs to protect the state's share of massive awards.¹⁶

The surcharge approach, which will transform a jury's \$20 million punitive damage award into a \$30 million punitive damage award, is also likely to result in excessive awards. The U.S. Supreme Court requires punishment imposed through punitive damages to be proportional to the harm. Arbitrarily boosting punitive damage awards, which will become more common under this bill, by 50% will, in some cases, breach the constitutional line. The surcharge has no relationship to the degree of reprehensibility of the defendant's actions or the actual harm that resulted from that conduct.¹⁷ It appears geared to ensure that plaintiffs—and their lawyers through a contingency fee—receive the entire punitive damage award, even though a punitive damage award is not compensation for an injury.

For these reasons, ATRA respectfully requests an unfavorable report.

¹⁶ See generally Victor E. Schwartz, Mark A. Behrens, & Cary Silverman, *I'll Take That: Legal and Public Policy Problems Raised by Statutes That Require Punitive Damages Awards to be Shared with the State*, 68 Mo. L. Rev. 525, 538-46 (2003).

¹⁷ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-85 (1996) (establishing constitutional guideposts for evaluating whether punitive damages are excessive including (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of actual damages to punitive damages; and (3) the civil or criminal penalties that could be imposed for the defendant's conduct); see also *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2002) (indicating that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").