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ARTICLE

PUNITIVE DAMAGES IN MARYLAND: RECONCILING FEDERAL LAW, STATE LAW, AND THE PATTERN JURY INSTRUCTIONS

By: Professor Stephen J. Shapiro *

I. INTRODUCTION

The ability of juries to award punitive damages in addition to compensatory damages dates back to British common law, and is a firmly entrenched part of the jurisprudence of most states.¹ Juries have had the power to award punitive damages both to punish the defendant for particularly heinous or reprehensible conduct and to deter the defendant and others from similar conduct. The wide discretion given to juries to punish defendants by awarding punitive damages to individual plaintiffs has always been controversial.² In the 1980's, an increase in the number and size of such awards resulted in an intensification of this debate. Although some empirical studies showed that punitive damage awards were infrequent and modest,³ there was a perception among many, including some United States Supreme Court Justices and some members of the Court of Appeals of Maryland, that such awards were "skyrocketing"⁴ in both number and amount.⁵ It is clear, however, that in at least some cases, juries gave

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¹ In *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 14 (1991) the United States Supreme Court noted that, "punitive damages have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Blackstone appears to have noted their use. 3 W. BLACKSTONE, COMMENTARIES 137-38. See also *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (C.P. 1763).

² *Haslip*, 499 U.S. at 8 n.4 (for arguments dating back to 1872 for and against the propriety of allowing juries to award punitive damages).

³ See Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 159 (2002) ("Archival research examining overall patterns of awards find that punitive damages are infrequently awarded, moderate in size, awarded in response to outrageous conduct, and often reduced post-trial.").

⁴ *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., dissenting).

⁵ "As noted in the opinion of Judges Eldridge, Cole and Chasanow in *Schaefer v. Miller*...322 Md. at 312-332, 587 A.2d at 498-509, in recent years there has been a proliferation of claims for punitive damages in tort cases, and awards of punitive

astronomical awards of millions, hundreds of millions and in one infamous case, twenty-eight billion dollars in damages.⁶ Although trial judges and appellate courts in most jurisdictions have the power and duty to reduce excessive awards and regularly do so, some courts did approve some very large awards, sometimes many times larger than the amount of the plaintiff's compensatory damages.⁷

Starting in the early 1990's, both the United States Supreme Court and the Court of Appeals of Maryland addressed the issue of jury discretion in awarding punitive damages. The two courts addressed the perceived problem in two different ways. The United States Supreme Court focused their attention mainly on the excessive amount of such awards. It held that the Due Process Clause regulates both the procedures used in awarding punitive damages and the amounts of such awards.⁸ The Court required that juries be given sufficient instructions to enable them to make awards based on the purpose of punitive damages, and required state trial judges and appellate courts to reduce the amount of such awards if they were "grossly excessive."⁹ The Court provided state judges with guideposts for determining the appropriate amount of punitive damage awards and required that the amounts be proportionate to the amount of compensatory damages.¹⁰

The Court of Appeals of Maryland focused its attention instead on the proof required for a jury to make a punitive damages award in the first place.¹¹ It held that punitive damage awards could only be made if the defendant's conduct rose to the level of actual malice (evil motive or intent to do harm, or knowing that its actions would be harmful) and not just implied malice (gross negligence, recklessness, or should have known of the harm).¹² In addition, the Court of Appeals of Maryland held that juries should be instructed that they

damages have often been extremely high." *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 450, 601 A.2d 633, 647-48 (1992) (internal citations omitted).

⁶ The twenty-eight billion dollar award was reduced on appeal to twenty-eight million dollars. *See Bullock v. Philip Morris USA, Inc.*, 42 Cal. Rptr. 3d 140-41 (Cal. Ct. App. 2006).

⁷ *See Haslip*, 499 U.S. at 62 (O'Connor, J., dissenting) ("As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. . . . Since then, awards more than 30 times as high have been sustained on appeal.") (internal citations omitted).

⁸ *See infra* section II.

⁹ *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 585 (1996); *see also infra* section II.

¹⁰ *See infra* section II.

¹¹ *See infra* section III.

¹² *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460-69, 601 A.2d 633, 653-57 (1992).

must find that actual malice had been proved by “clear and convincing evidence,” and not just a preponderance of the evidence.¹³

For the most part, federal law, state law, and the Maryland Civil Pattern Jury Instructions based on those laws, are clear and consistent with each other. There are, however, some areas where the pattern jury instructions should be changed so that juries can be given more guidance in applying Maryland law on the question of whether to award punitive damages. In addition, there are several areas where both Maryland law and the pattern jury instructions need to be changed or clarified to comply with Supreme Court mandates relating to the amount of punitive damage awards.

This article will suggest several changes to Maryland law and the Maryland Civil Pattern Jury Instructions, so that the instructions more accurately reflect Maryland law, and that Maryland law complies with the Due Process Clause. The proposed changes include:

- providing a clearer standard in the instructions for when punitive damages should be awarded;¹⁴
- clarifying that the “clear and convincing” standard applies only to the finding of “actual malice” and not to the broader question of whether and in what amount to award punitive damages;¹⁵
- changing the law, the procedure and the jury instructions relating to whether and when a jury may consider evidence of the defendant’s financial condition in calculating the amount of a punitive damage award;¹⁶ and
- providing more guidance to juries as to the appropriate amount of punitive damage awards.¹⁷

II. DUE PROCESS LIMITATIONS IMPOSED BY THE UNITED STATES SUPREME COURT

In response to several constitutional challenges to large punitive damages awards, the Supreme Court had, on a number of occasions expressed “doubts” and/or “concern” about the constitutionality of

¹³ *Id.* at 460-69, 601 A.2d at 653-57.

¹⁴ *See infra* section V. A.

¹⁵ *See infra* section V. B.

¹⁶ *See infra* section V. C.

¹⁷ *See infra* section V. D.

excessive awards.¹⁸ Until 1990, however, the Court had rejected all constitutional challenges to punitive damages. In 1989, the Court held, in *Browning-Ferris Industries of Vt. v. Kelco Disposal Inc.*,¹⁹ that the excessive fines clause of the Eighth Amendment did not apply to a punitive damage award in a civil case between private parties. The Court declined to address the question of whether the Due Process Clause acts as a check on jury discretion to award punitive damages, putting off that inquiry to “another day.”²⁰

That day came sooner, rather than later. In *Pacific Mutual Insurance Co. v. Haslip*,²¹ the defendant challenged a punitive damage award greater than \$800,000, which was more than four times the amount of compensatory damages. The Court in *Haslip* first reviewed the history and purposes of punitive damages awards. The Court noted that “the common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted.”²² It also determined that “every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process.”²³ The Court, therefore, held that the common-law method of assessing punitive damages was not “so inherently unfair as to deny due process and be *per se* unconstitutional.”²⁴

The Court stated, however, that this was not “the end of the matter,”²⁵ recognizing that the imposition of punitive damages could, at least in some cases, be unconstitutional. The Court proceeded to review the constitutionality of the punitive damages award in that case under the Due Process Clause, and ultimately, it determined that the award in question was constitutional.²⁶

In upholding the award, the Court cited numerous factors. One factor was that the jury had been given instructions as to the nature

¹⁸ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 9 (1991) (“This Court and individual Justices thereof on a number of occasions in recent years have expressed doubts about the constitutionality of certain punitive damages awards. In *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), all nine participating Members of the Court noted concern.”).

¹⁹ 492 U.S. 257 (1989).

²⁰ *Id.* at 276-77.

²¹ 499 U.S. 1 (1991).

²² *Id.* at 17.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 18.

²⁶ *Id.* at 23-24.

and purpose of punitive damages.²⁷ Another was that the Alabama appellate courts examined individual awards to ensure that they did “not exceed an amount that will accomplish society’s goals of punishment and deterrence.”²⁸ While the Court concentrated on the procedures used by the Alabama courts and not the size of the awards, it noted that a punitive damages award four times the amount of the compensatory damages “may be close to the line” of being unconstitutional.²⁹

The real revolution in the Court’s jurisprudence on the subject came several years later in the cases of *TXO Production Corp. v. Alliance Resources Corp.*³⁰ and *BMW of North America, Inc. v. Gore*,³¹ in which the Court held that the Due Process Clause applied not only to the procedures used to award punitive damages, but to the amount of the award itself, prohibiting awards that were grossly excessive. In *BMW v. Gore*, the plaintiff, the buyer of a new BMW, had obtained a two million dollar award against the car maker for not notifying him of pre-delivery repairs to the car, even though his compensatory damages had been set at only \$4,000.³² The Court established three “guideposts” for determining the constitutionality of an award: (1) the reprehensibility of defendant’s conduct; (2) the relationship between the harm or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between the punitive damages award and the “civil penalties authorized or imposed in comparable cases.”³³ The Court refused to establish a “simple mathematical formula”³⁴ or “bright line”³⁵ test for determining the constitutionality of any specific award, but held that given the facts of that specific case and the extent of BMW’s culpability, the award in that case, which was 500 times larger than the actual damages, was “grossly excessive.”³⁶

The Court came much closer to establishing that “bright line” in 2002 when it decided *State Farm Mutual Automobile Insurance Co. v.*

²⁷ *Haslip*, 499 U.S. at 19 (1991).

²⁸ *Id.* at 20-22 (quoting *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989); *Wilson v. Dukona Corp.*, 547 So. 2d 70, 73 (Ala. 1989)).

²⁹ *Id.* at 23.

³⁰ 509 U.S. 443 (1993).

³¹ 517 U.S. 559 (1996).

³² *Id.*

³³ *Id.* at 574-75.

³⁴ *Id.* at 582.

³⁵ *Id.* at 582 (quoting *Pac. Mut. Ins. Co. v. Haslip*, 499 U.S. 1, 18).

³⁶ *Gore*, 517 U.S. at 585-86.

Campbell.³⁷ In that case, it reversed the Supreme Court of Utah, which had reinstated a 145 million dollar punitive damage award against State Farm for bad faith and fraud, when compensatory damages had been set at one million dollars.³⁸ Applying the *Gore* guideposts, the United States Supreme Court held that an award at or near the compensatory damage amount would have been justified, and therefore an award of 145 times that amount was clearly excessive.³⁹ The Court stated that in most cases, punitive damages should not exceed four times the amount of compensatory damages, and that very few awards exceeding a single-digit ratio⁴⁰ would satisfy due process.⁴¹ The Court noted that when “a particularly egregious act has resulted in only a small amount of damages,” a higher award ratio might occasionally be acceptable.⁴² But the Court went on to state that the “converse is also true.”⁴³ In cases similar to *State Farm*, where compensatory damages were quite substantial, “a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”⁴⁴

Although *State Farm* was primarily addressed to the limits to be applied by trial and appellate courts when reviewing jury verdicts for excessiveness, the Court also revisited, for the first time since *Haslip*, the requirements for jury instructions concerning punitive damages.⁴⁵ The Court specifically held that it was unconstitutional to use evidence of out-of-state-conduct that was lawful in the jurisdiction in which it occurred to punish the defendant, and that the jury in such cases must be so instructed.⁴⁶ The Court, in dicta, also criticized “vague instructions,”⁴⁷ as giving the jury too much discretion in the awarding of damages.

The Court’s most recent decision concerning punitive damage awards involved appropriate jury instructions when the jury has been presented with evidence of harm done by the defendant to persons other than the plaintiff.⁴⁸ The Court held that the jury could hear such

³⁷ 538 U.S. 408 (2003).

³⁸ *Id.*

³⁹ *Id.* at 429.

⁴⁰ *Id.* at 425 (i.e., greater than 9 to 1).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

⁴⁶ *Id.* at 422.

⁴⁷ *Id.* at 418.

⁴⁸ *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

evidence and use it to determine the extent of reprehensibility of the defendant's conduct.⁴⁹ The Court went on to hold, however, that in such cases, the trial judge must instruct the jury that the defendant may not be punished "on account of harms it is alleged to have visited on nonparties."⁵⁰

III. THE MARYLAND LAW OF PUNITIVE DAMAGES

As do other states, Maryland allows, but does not compel, the jury to award punitive damages "to punish the defendant for egregiously bad conduct toward the plaintiff, [and] also to deter the defendant and others contemplating similar behavior."⁵¹ As with federal law, Maryland law has also undergone some changes, also starting in the early 1990's. In reviewing punitive damage awards for excessiveness, Maryland trial and appellate courts have, of course been required to comply with recent Supreme Court cases in this area. In addition, however, the Court of Appeals of Maryland has heightened the state-of-mind requirement and burden of proof necessary to award punitive damages in the first place.⁵² These are more stringent requirements of Maryland law not required by the United States Constitution.

In 1992, the Court of Appeals of Maryland reversed a line of cases which had allowed punitive damages in cases of implied malice,⁵³ and held in *Owens-Illinois, Inc. v. Zenobia*,⁵⁴ that in all cases, plaintiff must prove "actual malice" on the part of the defendant. The requirement of actual malice has different meanings with different torts. For example, the Court of Appeals of Maryland announced in *Zenobia* that in products liability cases, defendant must have "actual knowledge" of a defect and then must show conscious or deliberate disregard of the foreseeable harm resulting from the defect.⁵⁵ It does not suffice for defendant to have "constructive knowledge," *i.e.* "should have known" of the defects.⁵⁶

We...emphatically state that negligence alone, no matter how gross, wanton, or outrageous, will not satisfy this standard.

⁴⁹ *Id.* at 1064-65.

⁵⁰ *Id.* at 1064.

⁵¹ *Bowden v. Caldor, Inc.*, 350 Md. 4, 22, 710 A.2d 267, 276 (1998) (quoting *Owens-Corning Fiberglas Corp. v. Garrett*, 343 Md. 500, 537-38, 682 A.2d 1143, 1161 (1996); *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 454, 601 A.2d 633, 650 (1992)).

⁵² See *infra* notes 51-60 and accompanying text.

⁵³ *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 297 A.2d. 721 (1972).

⁵⁴ 325 Md. 420, 560, 601 A.2d 633, 652 (1992).

⁵⁵ See *infra* notes 56-58 and accompanying text.

⁵⁶ *Id.* at 462-63, 601 A.2d at 653-54.

Instead the test requires a bad faith decision by the defendant to market a product, knowing of the defect and danger, in conscious or deliberate disregard of the threat to the safety of the consumer.⁵⁷

The *Zenobia* court went on to hold that the plaintiff must establish malice on the part of defendant by “clear and convincing evidence.”⁵⁸

Several years later, in *Montgomery Ward v. Wilson*,⁵⁹ the Court of Appeals of Maryland made clear that the requirement of actual malice applied to all torts, including the intentional torts of false imprisonment or malicious prosecution. In the above case, the Court of Appeals of Maryland reversed the Court of Special Appeals of Maryland, which had distinguished *Zenobia* as applying only to non-intentional torts⁶⁰ and had erroneously held that punitive damages could be awarded in a malicious prosecution or false imprisonment case “where malice may be implied from wantonness or from lack of probable cause.”⁶¹

In later cases the Court of Appeals of Maryland has gone on to hold that the “clear and convincing” standard applies to the burden of production as well as persuasion.⁶² This means that a trial court, in evaluating whether a case should go to the jury, must find that the plaintiff has presented sufficient evidence that a reasonable jury could find by clear and convincing evidence that the defendant had acted maliciously.⁶³ In addition, Maryland courts have consistently held that juries may not award any punitive damages unless they have awarded compensatory damages in at least a nominal amount.⁶⁴

Both before and after the Supreme Court’s recent decisions applying due process standards to the procedures and size of punitive damage awards, Maryland courts (both trial and appellate) have exercised the power to reduce the amounts of awards which, under state law, were found to be “excessive.”⁶⁵ Before the Supreme Court’s

⁵⁷ *Id.* at 463, 601 A.2d at 654.

⁵⁸ *Id.* at 465-69, 601 A.2d at 655-57.

⁵⁹ 339 Md. 701, 664 A.2d 916 (1995).

⁶⁰ 101 Md. App. 535, 549, 647 A.2d 1218, 1225 (1994).

⁶¹ *Id.* at 549, 647 A.2d at 1225.

⁶² *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 267-68, 841 A.2d 828, 839 (2004).

⁶³ *Id.* at 268-69, 841 A.2d at 839-40.

⁶⁴ *Caldor, Inc. v. Bowden*, 330 Md. 632, 661-62, 625 A.2d 959, 973-74 (1993).

⁶⁵ *Bowden v. Caldor, Inc.*, 350 Md. 4, 25, 710 A.2d 267, 277 (1998) (citing *Ellerin v. Fairfax Sav., F.S.B.*, 337 Md. 216, 242, 652 A.2d 1117, 1130 (1995)). The Court in *Bowden* announced nine factors (some of them previously established and some new,

recent line of decisions, Maryland courts had not recognized a necessary relationship between the amount of an award of compensatory damages and the amount of the award for punitive damages,⁶⁶ and had, in at least a few cases, allowed punitive damage awards many times larger than the compensatory awards.⁶⁷ In the 1990's, however, the Maryland courts, pursuant to Supreme Court mandate, began using Supreme Court guidelines as to the relationship between compensatory and punitive damages. In *Alexander & Alexander, Inc. v. B. Dixon Evander and Associates, Inc.*,⁶⁸ the Court of Special Appeals of Maryland vacated a punitive damage award fifty times larger than the compensatory award, based upon the Supreme Court's dicta in *Haslip* that punitive damages of four times the compensatory damage award came close to the constitutional line.⁶⁹ In addition, the Court of Appeals of Maryland has developed a set of nine, non-exclusive factors to be used by trial and appellate courts when reviewing punitive damage awards for excessiveness.⁷⁰ While these factors are somewhat different than the factors listed by the Supreme Court in *Gore*, they do include the *Gore* factors. In addition, the Maryland factors are actually more extensive than the *Gore* factors and should satisfy the Supreme Court's requirements.⁷¹

some of them required by Supreme Court holdings and some of them independent requirements of Maryland law), by which courts should review punitive damage awards for excessiveness. 350 Md. at 27-41, 710 A.2d at 278-85.

⁶⁶ The Court of Appeals noted in 1998 that it had earlier indicated that whether "a punitive damages award [should] bear some relationship to the compensatory damages" was an open issue for "exploration ... another day." *Id.* at 38, 710 A.2d at 283-84 (citing *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 472 n.28, 601 A.2d 633, 658 n.28 (1992)).

⁶⁷ See *Franklin Square Hosp. v. Laubach*, 318 Md. 615, 569 A.2d 693 (1990) (\$700,000); *Potomac Elec. Power Co. v. Smith*, 79 Md. App. 591, 558 A.2d 768 (1989) (\$7,500,000); *Exxon Corp. v. Yarema*, 69 Md. App. 124, 516 A.2d 990 (1986) (\$910,000).

⁶⁸ 88 Md. App. 672, 596 A.2d 687 (1991).

⁶⁹ *Id.* at 720, 596 A.2d at 711, *rev'd on other grounds*, 336 Md. 635, 650 A.2d 260 (1994).

⁷⁰ See *Bowden*, 350 Md. 4, 710 A.2d 267.

⁷¹ The Court of Appeals of Maryland purposely made the Maryland standards at least as stringent and encompassing as the constitutional requirements in order to adhere to the principle "that a court should decide constitutional issues only when necessary." *Id.* at 26, 710 A.2d at 278. "Consequently, the legal principles discussed below, applicable to judicial review of punitive damages awards for excessiveness, are set forth as principles of Maryland common law. Although some of these principles may be the same as requirements imposed by other courts as a matter of constitutional law, we have no reason at this time to consider minimum constitutional requirements in this area." *Id.* at 26-27, 710 A.2d at 278.

IV. THE MARYLAND CIVIL PATTERN JURY INSTRUCTIONS

The first edition of the Maryland Civil Pattern Jury Instructions was drafted in 1977 by a committee of the Maryland State Bar Association.⁷² They are currently in their fourth edition, published in 2002, and are supplemented annually.⁷³ The pattern jury instructions “are not mandatory on the court,” and “are subject to objection and reversal.”⁷⁴ They are, however, influential upon and used by many Maryland judges, and the instructions on punitive damages have recently gotten implicit approval in a Court of Appeals of Maryland decision.⁷⁵

The general instructions for punitive damages in the Maryland Civil Pattern Jury Instructions are contained in chapter ten, section thirteen (“10:13”), which provides:

If you find for the plaintiff and award damages to compensate for the injuries (losses) suffered, you may go on to consider whether to make an award for punitive damages. An award of punitive damages must be proven by clear and convincing evidence.

An award for punitive damages should be:

- (1) In an amount that will deter the defendant and others from similar conduct.
- (2) Proportionate to the wrongfulness of the defendant’s conduct and the defendant’s ability to pay.
- (3) But not designed to bankrupt or financially destroy a defendant.⁷⁶

In addition, sections 10:14 – 10:19 provide instructions for what constitutes “actual malice,” for various kinds of torts.⁷⁷ A judge’s

⁷² See MD. CIV. PATTERN JURY INSTRUCTIONS ix. (4th ed. 2002 & Supp. 2007) (noting that the jury instructions are actually drafted by the Civil Subcommittee of the Standing Committee on the Maryland Pattern Jury Instructions of the Maryland State Bar Association, Inc.).

⁷³ *Id.*

⁷⁴ MD. CIV. PATTERN JURY INSTRUCTIONS xiii-xiv (4th ed. 2002 & Supp. 2007) (where the “General Explanatory Notes on Use” indicate that “[t]hese instructions are not mandatory on the Court”).

⁷⁵ In *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 841 A.2d 828 (2004), the Court of Appeals of Maryland affirmed an award of punitive damages after noting that the jury had been instructed “according to Section 10:[13] of the Maryland Pattern Jury Instruction.” *Id.* at 277, 841 A.2d at 845.

⁷⁶ MD. CIV. PATTERN JURY INSTRUCTIONS § 10:13 (4th ed. 2002 & Supp. 2007).

instruction in a case in which a plaintiff had requested punitive damages would normally consist of the general instructions (10:13) and one of the more specific instructions as to state of mind, depending on the kind of tort.⁷⁸

V. WHAT CHANGES ARE NEEDED?

There are, however, some problems with the pattern instructions which should be addressed: some because they do not accurately or adequately explain current Maryland law; some because the Maryland substantive law itself needs clarifying; and some because they might lead to punitive damages being awarded in a manner that would violate the United States Constitution.

A. Lack of a Clear Standard for Deciding Whether to Award Punitive Damages

The instructions describe the two basic requirements under Maryland law for all awards of punitive damages (an award of compensatory damage and actual malice) and also give directions to the jury on how to set the amount of the damages.⁷⁹ They also indicate that the award of punitive damages is discretionary by stating: "...you may go on to consider whether to make an award of punitive damages."⁸⁰

What is missing, however, is a clear statement of how the jury should exercise that discretion, *i.e.* what is the standard (beyond the minimum requirements of a compensatory damage award and a finding of actual malice)⁸¹ for making such an award. In other words, there needs to be an instruction that will help the jury decide whether or not to award punitive damages when the basic prerequisites have been met. That statement should be something like the following:

You may, but are not required to make an award of punitive damages if you believe that defendant's conduct was so reprehensible as to deserve punishment or if you believe

⁷⁷ MD. CIV. PATTERN JURY INSTRUCTIONS §§ 10:14 (Misrepresentation/Fraud), 10:15 (Product Liability), 10:18 (Malicious Prosecution), 10:19 (Operation of a Motor Vehicle) (4th ed. 2002 & Supp. 2007).

⁷⁸ See generally *id.* (noting that there are specific jury instructions for punitive damage awards as to particular torts).

⁷⁹ MD. CIV. PATTERN JURY INSTRUCTIONS § 10:13 (4th ed. 2002 & Supp. 2007).

⁸⁰ *Id.* § 10:13.

⁸¹ See generally *id.* (providing general guidance for awarding punitive damages).

punishment is warranted to deter defendant or others from similar conduct.

Now, it could be argued that this statement is superfluous because it is very similar to the instructions for determining the amount of the punitive damage award, but there is a difference. Under the current instruction, juries are told that the amount of the award must be proportionate to the defendant's wrongfulness⁸² and in an amount that will provide deterrence.⁸³ However, the jury is not told that even if they believe that the defendant's conduct was "wrongful" to a certain degree and that an additional award would deter such future conduct, they may still decide not to award any damages at all unless they believe that the defendant's conduct was so wrongful (or more accurately heinous or reprehensible)⁸⁴ as to deserve punishment.⁸⁵

It could also be argued that this statement is not necessary because one of the more particularized instructions of sections 10:13-19 (depending on the kind of tort) that will accompany the general instructions to the effect that the defendant's actions must be based on malice or intent, and not just negligence, will suffice to provide this guidance. For example, in motor vehicle cases, the jury is told that the defendant's conduct "must be characterized by evil motive, intent to injure, or ill will."⁸⁶ But whether the defendant acted with such a malicious state of mind is only a minimum requirement to award punitive damages, not the standard.⁸⁷ In some cases, the jury could find that the defendant's conduct was characterized by evil motive or ill will, but still not believe that it was so reprehensible that it deserved an award of damages in addition to those necessary to compensate the plaintiff.

B. Clarification and Limitation of the "Clear and Convincing Evidence" Requirement

The part of the general instructions which states: "An award of punitive damages must be proven by clear and convincing evidence"⁸⁸

⁸² *Id.* § 10:13(2).

⁸³ *Id.* § 10:13(1).

⁸⁴ *See supra* section III.

⁸⁵ "[A] plaintiff has no right or entitlement to punitive damages under Maryland law. '[T]he trier of fact has discretion to deny punitive damages even where the record otherwise would support their award.'" *Bowden v. Caldor, Inc.*, 350 Md. 4, 25, 710 A.2d 267, 277 (quoting *Adams v. Coates*, 331 Md. 1, 15, 626 A.2d 36, 43 (1993)).

⁸⁶ MD. CIV. PATTERN JURY INSTRUCTIONS § 10:19 (4th ed. 2002 & Supp. 2007).

⁸⁷ *See id.* § 10:13.

⁸⁸ *Id.* § 10:13.

was added in response to the 1992 Court of Appeals of Maryland decision in *Owens-Illinois, Inc. v. Zenobia*.⁸⁹ It is true that the court made such a statement at one point in the opinion, where it stated: “a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages.”⁹⁰ It is clear, however, given the context of the court’s statement and the issue it was deciding, that it intended the clear and convincing standard to apply only to the finding of actual malice.⁹¹ The “clear and convincing” standard should not apply to the other aspects of the plaintiff’s burden: *i.e.*, to prove that the defendant’s conduct was reprehensible enough to deserve punishment and to require deterrence. Yet the placement of the “clear and convincing” language in the general instructions, instead of with the instructions on state of mind, and the fact that it refers to the burden of proof for “an award of punitive damages” rather than “a finding of actual malice”⁹² could confuse the jury into thinking that the plaintiff also had this heightened burden as to reprehensibility and need for deterrence.

It must be remembered that the main issue and holding in the *Zenobia* case was not the burden of proof, but rather: “what should be the correct standard under Maryland law for the allowance of punitive damages in negligence and products liability cases, *i.e.* [sic], gross negligence, actual malice, or some other standard.”⁹³ The court devoted the great majority of the portion of the opinion directed to punitive damages to this issue.⁹⁴ In the end, the court reversed the 1972 case of *Smith v. Gray Concrete Pipe, Co.*,⁹⁵ which had allowed punitive damages to be based on implied, rather than actual malice. It was only after determining that an award of punitive damages in a products liability case required a finding of actual malice that the *Zenobia* court went on to discuss the secondary issue of the proper standard of proof required for this finding.⁹⁶

At the beginning of the section dealing with burden of proof, the court clearly stated the issue, “[t]he defendant Owens-Illinois and some amici have argued that, in order for a jury to consider a punitive damages award, a plaintiff should be required to establish by clear and

⁸⁹ 325 Md. 420, 469, 601 A.2d 633, 657 (1992).

⁹⁰ *Id.* at 469, 601 A.2d at 657.

⁹¹ *See id.* at 469, 601 A.2d at 657.

⁹² MD. CIV. PATTERN JURY INSTRUCTIONS § 10:13 (4th ed. 2002 & Supp. 2007).

⁹³ *Zenobia*, 325 Md. at 450, 601 A.2d at 647.

⁹⁴ *See supra* note 93 and accompanying text.

⁹⁵ 267 Md. 149, 297 A.2d 721 (1972).

⁹⁶ *Zenobia*, 325 Md. at 465, 601 A.2d at 655.

convincing evidence that the defendant's conduct was characterized by actual malice."⁹⁷

The entire section of the opinion devoted to the question of standard of proof discusses the issue in terms of how it affects the state-of-mind requirement.⁹⁸ It is quite likely, therefore, that the court's broader statement that the plaintiff must establish "the basis for an award of punitive damages"⁹⁹ by clear and convincing evidence referred only to the actual malice portion of their decision.

Not only is this narrower reading of the holding more consistent with the court's intent, it is also the one that makes the most sense. It does make sense to discuss the burden of proof required on what are clearly issues of fact, such as whether the defendant showed the required state of mind. It does not really make any sense to discuss it when examining issues of judgment, such as whether a defendant's conduct is so reprehensible as to require punishment, or what is the appropriate amount necessary to punish the defendant and to deter the defendant and others from similar conduct.

The United States Supreme Court recognized this distinction in the case of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,¹⁰⁰ in which it held that states must provide *de novo* appellate review of punitive damage awards. The Court recognized that while *de novo* review of compensatory damages might violate the Seventh Amendment, such review of punitive damage awards does not, because they do not constitute "findings of fact."¹⁰¹ The Court stated: "A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation."¹⁰²

For these reasons, both the placement and wording of the instructions on clear and convincing evidence should be changed. The "clear and convincing" language should be removed from the general instruction in section 10:13,¹⁰³ and moved to the various instructions for each tort on the particular definition of "actual malice" for that tort. For example, the instruction for cases of injuries by operation of a motor vehicle (10:19) now reads: "For punitive damages to be

⁹⁷ *Id.* at 465, 601 A.2d at 655.

⁹⁸ *Id.* at 469, 601 A.2d at 657.

⁹⁹ *Id.* at 469, 601 A.2d at 657.

¹⁰⁰ 532 U.S. 424 (2001).

¹⁰¹ *Id.* at 437.

¹⁰² *Id.* at 432.

¹⁰³ MD. CIV. PATTERN JURY INSTRUCTIONS § 10:13 (4th ed. 2002 & Supp. 2007).

recoverable as a result of injuries suffered from the wrongful operation of a motor vehicle, the wrongful conduct must be characterized by evil motive, intent to injure, or ill will.”¹⁰⁴ That should be followed by the sentence: “Such evil motive, intent to injure, or ill will must be proved by clear and convincing evidence.”

C. Defendant's Net Worth and Ability to Pay

The general instructions contain two references to the financial condition of the defendant and how that should affect the amount of a damage award. They state that the award should be proportionate not only to the wrongfulness of the defendant's conduct but also to “the defendant's ability to pay.”¹⁰⁵ In addition, the award should “not [be] designed to bankrupt or financially destroy a defendant.”¹⁰⁶

It is clear that the latter of these two instructions is designed purely as a limitation on the amount of damages in some cases. The former instruction that the award be proportionate to the defendant's ability to pay, however, seems designed to allow the jury both to increase or decrease the amount of the award for the same conduct, based on the ability to pay (or at least might make the jury think so). There are several problems with the current instructions, some relating to the substance of the instructions (which may run afoul of recent Supreme Court pronouncements) and some relating to the timing of when the instructions are given.

As to the timing, the current instructions seem to be designed to be given to the jury at the conclusion of the evidence, and to instruct the jury both as to whether to award punitive damages and in what amount. The biggest problem with this approach, however, is that Maryland law, by statute, prohibits admission of any evidence of the defendant's financial means, “until there has been a finding of liability and that punitive damages are supportable under the facts.”¹⁰⁷ Therefore, in cases where the jury is deciding both the appropriateness of any award and the amount at the same time, they must necessarily be doing so without having heard any evidence about the defendant's ability to pay.

At the very least, it must be confusing to a jury to be instructed to take the defendant's ability to pay into consideration while being given

¹⁰⁴ *Id.* § 10:19.

¹⁰⁵ *Id.* § 10:13(2).

¹⁰⁶ *Id.* § 10:13(3).

¹⁰⁷ MD. CODE ANN., CTS. & JUD. PROC. § 10-913(a) (LexisNexis 2006).

no factual predicate upon which to make this determination. It may also be unfair to either the plaintiff, if the jury wrongly assumes that a high award might bankrupt a defendant and thereby limits the award, or unfair to the defendant, if they wrongly assume that a defendant is very wealthy and therefore proportionately increase the amount of the award.

The Maryland courts have developed a bifurcated procedure to deal with this problem.¹⁰⁸ When using such a procedure, the court instructs the jury to determine whether or not there should be an award of punitive damages at the same time that they are deciding liability and compensatory damages.¹⁰⁹ If and only if they return with a finding that punitive damages are called for, are the parties allowed to present evidence of defendant's financial condition and the jury is instructed on how to set the amount of the award, which they do in a second deliberation.¹¹⁰ For some reason, however, the Maryland appellate courts, while recognizing the benefits of such an approach, have made it discretionary with the trial judge as to whether to use it or not.¹¹¹ If the instructions on the defendant's ability to pay are to remain at all,¹¹² then this procedure should be mandatory. Since the courts have recognized that there is no real impediment or downside to the bifurcated approach,¹¹³ there is absolutely no reason for the jury ever to be told to consider the defendant's financial condition unless the parties have had the opportunity to present evidence on this issue.

¹⁰⁸ "[T]he trial court will instruct the jury on the compensatory claims and on the defendant's potential liability for punitive damages. Then, once the jury has made a finding of liability...for punitive damages, the trial court will further instruct the jury concerning the calculation of a punitive damages award." *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 473 n.29, 601 A.2d 633, 659 n.29 (1992).

¹⁰⁹ *Id.* at 473 n.29, 601 A.2d at 659 n.29.

¹¹⁰ *Id.* at 473 n.29, 601 A.2d at 659 n.29.

¹¹¹ "We stated plainly in *Zenobia*, however, that the bifurcated procedure is not mandatory." *Darcars Motors of Silver Spring v. Borzym*, 397 Md. 249, 274, 841 A.2d 843 (2004) (citing *Zenobia*, 325 Md. at 465, 473, 601 A.2d at 659). The *Zenobia* court was apparently worried about the presentation of duplicative evidence at the compensatory and punitive damage stages of the trial. The court in *Darcars Motors*, however, seemed to dispel that problem. See *infra* note 113.

¹¹² See *infra* note 124 and accompanying text.

¹¹³ The court in *Darcars Motors*, while recognizing that the bifurcated procedure is not required, did note that the "general practice has been to withhold evidence of a defendant's ability to pay punitive damages 'until and unless the jury awards compensatory damages and decides to award punitive damages.'" 379 Md. at 274, 841 A.2d at 843 (quoting *Montgomery Ward v. Wilson*, 101 Md. App. 535, 551, 647 A.2d 1218, 1226 (1994)). The court went on to say "[t]here is but one jury and one trial, although the presentation of financial evidence is delayed until the appropriate time. Thus, the trial truly is not divided into two parts, and witnesses need not be recalled." *Id.* at 274-75, 841 A.2d at 843.

In addition to the problem of the timing of the instructions on financial condition, there is also a problem with the substance of the instructions. To the extent that they instruct a jury that punitive damages should be proportionate with the defendant's ability to pay, they are in violation of the Due Process Clause under current Supreme Court doctrine.¹¹⁴ Further, the instruction limiting the amount of damages so as not to financially destroy a defendant, although designed to protect a defendant from excessive awards, *may* also violate a defendant's due process rights if given without his or her request or consent.

The United States Supreme Court first expressed concern about providing juries with evidence of the defendant's ability to pay in *Haslip*.¹¹⁵ In holding that the award in that case did not violate the Constitution, the Court first noted that: "Any evidence of Pacific Mutual's wealth was excluded from the trial in accord with Alabama law."¹¹⁶ While not commenting on whether a jury could receive such evidence, it did require that "the factfinder must be guided by more than the defendant's net worth."¹¹⁷ The Court was concerned that a plaintiff "not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket."¹¹⁸

In *BMW v. Gore*, in which the Court laid out its three guideposts for determining whether the award of punitive damages was excessive, none of those guideposts had anything to do with the defendant's net worth or ability to pay.¹¹⁹ In *Honda Motor Co. v. Oberg*,¹²⁰ the Court noted that "presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."¹²¹ While the Court has not (at least yet) held that evidence of a defendant's wealth must be withheld from the jury, such evidence must be used very carefully. It is likely that the Court would disapprove any instruction which would indicate that the amount of

¹¹⁴ See *infra* notes 119-22 and accompanying text.

¹¹⁵ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

¹¹⁶ *Id.* at 19.

¹¹⁷ *Id.* at 22.

¹¹⁸ *Id.*

¹¹⁹ 517 U.S. 559, 560 (1996).

¹²⁰ 512 U.S. 415 (1994).

¹²¹ *Id.* at 432.

the award could be used to increase, as opposed to limit, defendant's liability.¹²²

The current Maryland pattern instructions seem to do just that by instructing the jury to make the award proportionate to the defendant's ability to pay.¹²³ This language should be removed. The further instruction that the award not be "designed to bankrupt or financially destroy a defendant" is constitutional and can remain.¹²⁴ It should, however, only be given at the request of the defendant. In fact, if evidence of a defendant's wealth can be used only to limit and not increase the amount of damages, then such evidence should only be introduced, at least in the first instance, by the defendant. Current Maryland law allows, but does not require, a plaintiff to present evidence of a defendant's financial situation.¹²⁵ That should be changed so that a plaintiff may only introduce such evidence after the defendant has opened the door on this issue by doing so.

In practice, the combination of the two new rules being proposed (no evidence of and instruction about defendant's financial condition unless requested by defendant, and then only in the second part of a bifurcated deliberation process) would work as follows:

1. If the defendant decides, before the case goes to the jury, that it wants to exclude such evidence (as would, normally, a very large corporation) then no such evidence is allowed, and the case goes to the jury on liability, compensatory damages and punitive damages at one time, with no instruction given as to the defendant's financial condition.
2. If the defendant decides that it will (or may) want such an instruction, then the jury first determines liability, the amount of compensatory damages and whether punitive damages are called for, without any instruction on how to set the amount of such damages. If the jury finds that punitive damages are called for, the parties may then present evidence of the defendant's financial condition and will be instructed on the factors to consider in setting the amount of the award, including the fact that the jury

¹²² Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. PA. J. CONST. L. 423, 520 (2004).

¹²³ See MD. CIV. PATTERN JURY INSTRUCTIONS § 10:13(2) (4th ed. 2002 & Supp. 2007).

¹²⁴ MD. CIV. PATTERN JURY INSTRUCTIONS § 10:13(3) (4th ed. 2002 & Supp. 2007).

¹²⁵ See *supra* notes 110-13 and accompanying text.

should not set them at an amount that would “bankrupt or financially destroy a defendant.”¹²⁶

D. Additional Instructions to Help the Jury Set the Amount of Damages

The current Maryland Pattern Jury Instructions tell the jury, in setting the amount of the damages, to do so “[i]n an amount that will deter the defendant and others from similar conduct,” and that is “[p]roportionate to the wrongfulness of the defendant’s conduct.”¹²⁷ These are two of the most important factors for the jury to consider. They satisfy the standards established for jury instructions by the Supreme Court in 1989 in the *Haslip* case.¹²⁸ More recent Supreme Court opinions, however, may require additional guidance to the jury in setting the amount of the awards.

1. No Punishment for Wrongful Conduct Toward Non parties

There is one additional instruction that is clearly needed, at least in certain cases, relating to the jury’s use of evidence of the defendant’s wrongful conduct towards persons other than the plaintiff. In *Philip Morris USA v. Williams*, the Court held that evidence of defendant’s conduct leading to harm to others could be admissible to help prove the reprehensibility of that conduct.¹²⁹ It stated: “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.”¹³⁰ The Court went on to say, however, that “a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.”¹³¹

Therefore, on all occasions when a court admits evidence of harm suffered by others due to defendant’s misconduct, it must include an instruction to the effect that the jury may not “punish the defendant for

¹²⁶ *Id.* § 10:13(3) (noting the current Maryland jury instruction).

¹²⁷ MD. CIV. PATTERN JURY INSTRUCTIONS § 10:13(1)-(2) (4th ed. 2002 & Supp. 2007).

¹²⁸ “Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct.” *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991).

¹²⁹ 127 S. Ct. 1057 (2007).

¹³⁰ *Id.* at 1064.

¹³¹ *Id.*

the impact of its alleged misconduct on other persons [than the plaintiff or plaintiffs].”¹³²

2. *Factors to be Considered by the Jury in Setting the Amount of Punitive Damages*

Perhaps the hardest question to decide is what, if any, additional guidance the jury should be given about the three guideposts that the Court requires trial and appellate judges to use in determining whether an award is excessive. These are:

1. The degree of reprehensibility of defendant’s conduct,
2. the relationship between the harm to the plaintiff (as measured in most cases by amount of compensatory damages) and the amount of punitive damages, and
3. the relationship between the damages award and civil penalties authorized or imposed in other cases.¹³³

On the first guidepost, the Court has given additional guidance to appellate courts as to the factors to consider when evaluating the reprehensibility of the defendant’s conduct.¹³⁴ On the second guidepost, the Court has announced the kind of ratios between compensatory and punitive damages that it would find reasonable, at least in most instances.¹³⁵ The Maryland Pattern Jury Instructions tell the jury to consider the wrongfulness of the defendant’s conduct (first guidepost), but do not list additional factors to be considered when making this determination. The instructions do not contain any mention of the second guidepost (the relationship between harm to the plaintiff and the amount of damages), or to the third (comparing the award of damages to other civil remedies). It should be examined whether the instructions should provide guidance on the second and third guideposts.

On the one hand, just because a factor is listed by the Court to be used by judges in reviewing the reasonableness of a jury award does not mean that the jury should be informed of it in most cases.¹³⁶ On

¹³² *Id.*

¹³³ *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).

¹³⁴ See *infra* note 140 and accompanying text.

¹³⁵ See *infra* notes 146-148 and accompanying text.

¹³⁶ “In addition, simply because a principle should be considered by the court in reviewing a punitive damages award for excessiveness does not mean that the same principle should give rise to an appropriate issue for a ... jury instruction.” *Bowden v. Caldor, Inc.*, 350 Md. 4, 41, 710 A.2d 267, 285 (1998); accord *Franze & Scheuerman*, *supra* note 122, at 522-23.

the other hand, it makes sense, to the extent possible, to have the jury applying the same standards in making an award that the courts will apply in reviewing them, since this will result in fewer verdicts being reduced by trial or appellate judges.¹³⁷

Of the three guideposts, the one looking to comparable civil penalties should not be communicated to the jury. It would make no sense to instruct the jury on comparing its award to other civil penalties which the courts could impose. This is a judicial decision, which the jury has neither the knowledge nor expertise to make.¹³⁸ No courts have expressed an interest in communicating this factor to the jury.

As to the guidepost on the wrongfulness of the defendant's conduct, the jury is already instructed to consider this.¹³⁹ The question with that guidepost is whether the instructions should include more detailed factors for the jury to consider in determining the wrongfulness of the defendant's conduct. As to the guidepost requiring a reasonable relationship between compensatory and punitive damages, the issue is first, whether this should even be mentioned to the jury, and if so, should they be given any additional numerical information about this relationship.

a. Reprehensibility Factors

The Supreme Court has listed five factors that courts should consider in determining the reprehensibility of the defendant's conduct. They are whether:

1. the harm was physical as opposed to economic;
2. the tortious conduct evinced an indifference to or reckless disregard of the health or safety of others;
3. the target of the conduct had financial vulnerability;
4. the conduct involved repeated actions or was an isolated instance; and

¹³⁷ Relying on post-verdict review as a check on arbitrary awards is both strikingly inefficient and undermines the jury's role in the process. Franze & Scheuerman, *supra* note 122, at 524.

¹³⁸ "Specifically, the jury should not be informed about the availability of comparable penalties ... these factors are better suited for judicial review, rather than consideration by the jury." Franze & Scheuerman, *supra* note 117, at 523.

¹³⁹ See *infra* note 140 and accompanying text; see also MD. CIV. PATTERN JURY INSTRUCTIONS § 10:13(2) (4th ed. 2002 & Supp. 2007).

5. the harm was the result of intentional malice, trickery, or deceit, or mere accident.¹⁴⁰

Courts in Maryland do not need to be concerned with the fifth factor, since only behavior evincing intentional malice qualifies for punitive damages in this state.¹⁴¹ The other four factors, at least in some cases, are questions that a reasonable jury might, or even should, consider in making a punitive damage award. Since the Supreme Court has criticized the use of “vague” jury instructions¹⁴² in state courts, the Maryland Pattern Jury Instructions should suggest that the judge instruct the jury on whichever of these factors may be relevant to the case.

This may not, however, be either necessary or wise. Taking the third factor (vulnerability of plaintiff) as an example, if the case involved a large corporation taking advantage of the vulnerability of a poor, single parent, then one would expect the plaintiff’s attorney to argue this factor to the jury when arguing reprehensibility. By the same token, if the case involved harm done by one large business to another, one would expect the defendant’s attorney to use this factor in their argument so the jury will not be left without any guidance on what might constitute reprehensible conduct. Since this (reward) is not really a legal standard, but merely a common-sense factor, it is not necessary for the judge to instruct the jury that it is more reprehensible to take advantage of the weak than of the strong. Even without such an instruction, the lawyers will be able to argue, and juries will be able to consider, this in their determination of reprehensibility.

In addition, there is a disadvantage to the judge listing one or more of these factors. On the one hand, the jury might feel that they are not entitled to consider any other factors not listed by the court (which they clearly may, if relevant), and on the other, they may take the judge’s listing of a particular factor as evidence that he or she believed the factor should play an important role in their decision. Therefore, at this time, unless the Supreme Court, in a future case, requires juries to be instructed on these factors, judges can continue to instruct the jury merely to consider the extent of the defendant’s wrongfulness or reprehensibility.

This leads to the related issue of whether the instructions should continue to use “wrongfulness” as the standard, as opposed to

¹⁴⁰ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

¹⁴¹ *See supra* notes 53-61 and accompanying text.

¹⁴² *State Farm*, 538 U.S. at 418.

“reprehensibility,” which is the term more often used by the Supreme Court. While “wrongfulness” might be a somewhat simpler word understood by more jurors,¹⁴³ it probably does not clearly convey the kind of conduct that warrants punitive damages. All tortious behavior is, to a certain extent, wrongful in some way (even if not intentional). Punitive damages, however, are reserved for particularly wrongful, *i.e.* “reprehensible” conduct, and this is probably the better term to use in the jury instructions.

b. Proportionality of Amount of Punitive Damages to Amount of Harm to Plaintiff

The last issue that must be discussed is whether, and in how much detail, the jury should be informed that the amount of punitive damages must be proportionate to the harm done to the plaintiff (which in most, but not all, cases is defined by the Supreme Court as the amount of compensatory damages).¹⁴⁴ With each opinion, the Supreme Court has become clearer that this is an important factor in appellate review, and has come closer to establishing a mathematical formula for making this determination in most cases.¹⁴⁵

The Court has opined that (1) “few awards exceeding a single-digit ratio between punitive and compensatory damages”¹⁴⁶ will satisfy due process; (2) that in most cases, “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety,”¹⁴⁷ and (3) that in some cases involving very large compensatory damages, a ratio of no more than one-to-one would be allowed.¹⁴⁸

First of all, even if the jury is to be informed that the punitive damage award must be proportionate to the plaintiff’s harm, they should not be informed of the presumptive ratios established by the Supreme Court. For one thing, these ratios are just that; presumptions,

¹⁴³ The Pattern Jury Instructions Committee has stated their bias for using simple language whenever possible. “Difficult legal concepts were replaced with simple language...”. MD. CIV. PATTERN JURY INSTRUCTIONS xiii-xiv (4th ed. 2002 & Supp. 2007). This approach makes sense. However, “reprehensible,” while a longer and somewhat less common word than “wrongful,” is not a “difficult legal concept” and should be understood by most jurors. It is clearly more descriptive of the kind of conduct which deserves punitive damages.

¹⁴⁴ See *supra* notes 37-44 and accompanying text.

¹⁴⁵ See *supra* notes 37-44 and accompanying text.

¹⁴⁶ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

¹⁴⁷ *Id.* at 425.

¹⁴⁸ *Id.*

which should apply in most, but not all, cases. The Court has noted that the ratios should not apply in cases in which the plaintiff's damages were small, but the potential for harm had been very great.¹⁴⁹ More importantly, since the ratios function in some ways as a cap on damages, they should be treated like most other caps on damages, and that is, applied after the fact by the court if necessary, but not communicated to the jury.¹⁵⁰ It is not fair to the plaintiff to inform the jury that a damage award should not exceed a certain amount (or ratio), since they may be disinclined to make an award at or near the cap, even if the facts warrant it. Although not informing a jury of the presumptive ratios may result in somewhat more cases in which a jury's verdict needs to be reduced by the court, neither party is unfairly put in a worse situation than if the jury had been informed of the ratios in advance.¹⁵¹

It probably does make sense, and may even be required by the Supreme Court cases, to inform the jury that there should be some relationship between harm (or potential harm) to the plaintiff and the amount of punitive damages. The instruction should refer to proportionality between the harm to the plaintiff and the amount of punitive damages, and not between the amount of compensatory damages and the amount of punitive damages. Instructing the jury that punitive damages must be proportionate to compensatory damages may lead them to believe wrongly that the punitive damages must not exceed the amount of compensatory damages. It also would not allow them to consider the potential harm to the plaintiff in appropriate cases.

Therefore, while the Maryland Pattern Jury Instructions now instruct the jury that the punitive damage award should be

¹⁴⁹ “Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages’...[or] ‘a higher ratio *might* be necessary where ‘the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.’” *Id.*; accord *Bowden v. Caldor, Inc.*, 350 Md. 4, 40, 710 A.2d 267, 285 (1998).

¹⁵⁰ In other areas where there is a legislative damage cap (*i.e.* medical malpractice actions), the Maryland Pattern Jury Instructions do not contain a reference to the cap; *see also* Franze & Scheuerman, *supra* note 122, at 523 (“[T]he jury should not be informed about...statutory caps on punitive awards.”).

¹⁵¹ Unlike the granting of a remittitur of compensatory damages, a reduction in the amount of a punitive damage award will not sometimes result in a new trial. In the compensatory damage case, the court must offer the plaintiff the choice between a remittitur or a new trial. The court does not give the plaintiff such a choice when reducing a punitive award. *See Bowden*, 350 Md. at 43-63, 710 A.2d at 286-97.

“proportionate to the wrongfulness of the defendant’s conduct,” they should be amended to include proportionality to the harm (or potential harm) done to the plaintiff.

VI. CONCLUSION

In line with the suggestions made throughout this article, the Maryland Civil Pattern Jury Instructions on punitive damages should be amended to read as follows:

Section 10:13 (A)

(To be given if Defendant waives the right to present evidence of its financial condition)

“If you find for the plaintiff and award damages to compensate for the injuries (losses) suffered, you may, but are not required to, make an award of punitive damages. You may do so if you believe that the defendant’s conduct was so reprehensible as to deserve punishment or if you believe punishment is warranted to deter defendant or others from similar conduct.

An award for punitive damages should be

1. Proportionate to the reprehensibility of defendant’s conduct
2. In an amount that will deter other defendants and others from similar conduct, and is
3. Proportionate to the harm (or potential harm) to the plaintiff.”

Section 10:13 (B)

(To be given if defendant requests the jury be instructed that the amount of the damage award not be designed to bankrupt or financially destroy it.)

Part 1

(Given when the case goes to the jury)

“If you find for the plaintiff and award damages to compensate for the injuries (losses) suffered, you may, but are not required to, make an award of punitive damages. You may do so if you believe that the defendant’s conduct was so reprehensible as to deserve punishment or if you believe punishment is warranted to deter defendant or others from similar conduct.

Indicate whether you believe such an award is called for, but do not set a monetary value for this award.”

Part 2

(Given if jury returns with a finding that punitive damages should be awarded, and given after the parties have had the opportunity to present evidence of defendant’s financial condition.)

“You have returned a verdict that defendant’s conduct deserves an award of punitive damages be made. You must now set the amount of damages based on all the evidence you have heard in this case.

An award for punitive damages should be

1. Proportionate to the wrongfulness of defendant's conduct;
2. in an amount that will deter defendant and others from similar conduct;
3. proportionate to the harm (or potential harm) to the plaintiff;"
4. but not designed to bankrupt or financially destroy the defendant."

Sections 10:14 – 10:18

In each of these sections, after the statement of the appropriate state-of-mind required to award punitive damages in that case, an instruction should be inserted that:

“You must find that such malice (or knowledge, or evil motive, etc., depending on the wording of the section) was proved by clear and convincing evidence.”