



6-15-2019

## A Runaway Judiciary And Legislature: Why Pennsylvania Should Reconsider Its Restriction On Punitive Damages Awards Against The Government

Katherine D. Tohanczyn

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Katherine D. Tohanczyn, *A Runaway Judiciary And Legislature: Why Pennsylvania Should Reconsider Its Restriction On Punitive Damages Awards Against The Government*, 63 Vill. L. Rev. 154 (2019).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol63/iss6/7>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

A RUNAWAY JUDICIARY AND LEGISLATURE: WHY PENNSYLVANIA  
SHOULD RECONSIDER ITS RESTRICTION ON PUNITIVE DAMAGES  
AWARDS AGAINST THE GOVERNMENT

KATHERINE D. TOHANCZYN\*

“American government is based on the fundamental recognition that the government and government officials can do wrong and must be held accountable.”<sup>1</sup>

I. INTRODUCTION

Imagine you are married with children. Late one Sunday night, you put your two children in the back seat of your car, buckle them in, and begin to drive home. During that very short, and all so routine drive up I-95, you are unable to avoid a large pothole, which causes your car to spin out of control and flip over. As a result of the accident, you and your children suffer serious bodily injury.<sup>2</sup> Sometime after the accident you learn that local government officials not only knew of the existence of the pothole but also heavily debated the costs and benefits of fixing it. Despite having the means to fix the road, in order to prevent accidents such as yours, the officials ultimately decided to simply ignore the pothole and use the money elsewhere.<sup>3</sup>

Alternatively, imagine you are on your way to work and you are in a minor traffic accident. You move your car off to the side of the road and, after seeing that the other driver is visibly shaken up, you also move their car off to the side of the road. A local cop arrives and begins to talk with the other driver. As additional officers arrive on the scene, you are asked to sit in the back of a police car. After some time, another local cop approaches the police car and begins to yell at you. He then pulls you out of the car and strikes you multiple times until you are unconscious. You wake up in a hospital with your wrist handcuffed to a bed. While the hospital believes they are treating you for

---

\* Katherine D. Tohanczyn is an Associate at Starfield & Smith, P.C. in Fort Washington, Pennsylvania. She received her law degree from the Villanova University School of Law, where she was a managing editor of student works of the *Moorad Sports Law Journal*. Katherine would like to thank her family and friends for their unwavering support and advice.

1. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001).

2. See *7 Injured when SUV Flips Over on I-95*, 6ABC (May 25, 2014) <http://6abc.com/news/7-injured-when-suv-flips-over-on-i-95/77777/> [<https://perma.cc/2J73-UJ9L>].

3. See Dallas Steele, *How Much Public Money Does Your State Spend on NFL Football?*, MIC (Oct. 2, 2013) <http://mic.com/articles/66077/how-much-public-money-does-your-state-spend-on-nfl-football-check-this-chart> [<https://perma.cc/R5YL-NDV7>] (discussing how taxpayers provide, on average, 70% of costs for NFL stadiums). Taxpayers contributed \$229 million to building Lincoln Financial Field, the home of the Philadelphia Eagles. Jim Panyard, *\$1 Billion and Counting for States' Taxpayer-Funded Stadiums*, PENNSYLVANIA WATCHDOG (Sep. 17, 2010), [https://www.watchdog.org/pennsylvania/billion-and-counting-for-state-s-taxpayer-funded-stadiums/article\\_d5f040af-fd5e-5272-8a5b-aac4b41f1dd4.html](https://www.watchdog.org/pennsylvania/billion-and-counting-for-state-s-taxpayer-funded-stadiums/article_d5f040af-fd5e-5272-8a5b-aac4b41f1dd4.html) [<https://perma.cc/JG7H-N2FX>].

injuries sustained in the car accident, in reality you are being treated for injuries sustained from the trooper's unprovoked beating.<sup>4</sup>

In instances such as these, you would almost certainly bring a lawsuit against the individuals who were directly and indirectly responsible for these actions in order to obtain compensation.<sup>5</sup> Along with your interest in being compensated, the government has an interest in also deterring similar wrongful conduct in the future.<sup>6</sup> Generally, plaintiffs can bring a lawsuit against the wrongdoer and those who inadvertently contribute to the wrong. For example, a plaintiff may bring tort claims against city officials, individual officers, the police department, and the city itself for negligent maintenance of the roads, false arrest, negligent employment, and negligent supervision. A plaintiff may also bring a constitutional claim for a violation of due process. Plaintiffs who are successful in bringing such claims are generally awarded compensatory damages, and in some cases, they may also recover punitive damages.<sup>7</sup>

Nevertheless, this basic premise of civil liability for a private injury has been greatly curtailed by the doctrine of sovereign immunity. Grounded in the fundamental belief that the government should not be subject to costly litigation without its consent, every jurisdiction in the United States has adopted a statute limiting a plaintiff's ability to sue a state, local government, or one of its agencies.<sup>8</sup> In the event that the governmental entity's alleged actions are not protected by sovereign immunity, most jurisdictions have also implemented statutes that limit the type and amount of damages a plaintiff may recover.<sup>9</sup>

4. See Stephen J. Borek v. Ramp, No. 3974, 1992 WL 1071393, at \* 170 (Pa. Com. Pl. Phila. Cnty. May 22, 1992) (discussing how officer instructed plaintiff to sit in back of police car and then hit plaintiff multiple times until he was unconscious).

5. See Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts*, 2005, BUREAU OF JUSTICE STATISTICS (Oct. 2008), <http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf> [<https://perma.cc/H8MG-7FK2>] (compiling and interpreting statistics related to various civil cases and subsequent damage awards in state courts). See generally *Civil Cases*, U.S. COURTS <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CivilCases.aspx> [<https://perma.cc/6EHT-LFSB>] (last visited Nov. 1, 2014) (providing basics of civil suits in U.S. federal courts).

6. See *Tort Actions and Civil Damages*, WISC. BRIEF (Nov. 2001) <http://legis.wisconsin.gov/lrb/pubs/wb/01wb11.pdf> [<https://perma.cc/6YFE-PYYY>] (discussing rationale for tort claims is compensation for victims and punishment and deterrence of future wrongdoing).

7. See *Damages*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/damages> [<https://perma.cc/4LUY-FF2M>] (last visited Oct. 20, 2014) (providing broad definition of compensatory and punitive damages in American civil litigation).

8. See Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?*, 58 OHIO ST. L.J. 175, 197-98 (1997) (discussing administrative and substantive purposes of sovereign immunity including public benefit and administration of justice).

9. See, e.g., ALA. CODE § 6-11-21 (2014) (capping punitive damages at various monetary limits depending on the circumstances of the civil action); ALASKA STAT. § 09.17.020 (2003) (setting evidentiary standard at "clear and convincing evidence"); GA. CODE ANN. § 51-12-5.1 (2010) (capping damages for intentional torts and products liability at \$250,000 but allowing unlimited recovery when defendant's "specific intent to cause harm," or acts "under the influence of alcohol, drugs other than lawfully prescribed drugs"); OKLA. STAT. ANN. tit. 23, § 9.1 (West 2002) (requiring plaintiff to prove defendant acted intentionally and with malice and limiting amount to same amount of compensatory damages awarded).

Notably, these statutes often impact the availability of punitive damages. Punitive damages are a form of monetary relief that may be awarded to a claimant in a civil action when the defendant's actions are particularly egregious.<sup>10</sup> States vary in their allowance of punitive damages awards, ranging from minor limitations to outright bans.<sup>11</sup>

Pennsylvania has taken an overly restrictive approach to both sovereign immunity and punitive damages. More specifically, Pennsylvania's statutes allow a plaintiff to recover for a tort-based cause of action against a government entity only when the case fits into a few specific factual scenarios. However, for plaintiffs who can overcome this threshold issue and are able to bring a lawsuit against the government, Pennsylvania completely bars recovery of any punitive damages regardless of how egregious the defendant's conduct.

This article argues that Pennsylvania's current limitations on punitive damages are inconsistent and illogical and urges the Commonwealth, through legislation and judicial opinion, to allow plaintiffs—who are successful in bringing tort actions against the government—access to such relief. Part II explains the fundamental basis for state sovereign immunity doctrines as well as the current structure of sovereign immunity in Pennsylvania. Part III explores the history and development of punitive damages, which has led to Pennsylvania's current ban on recovery against governmental entities. Part IV analyzes how Pennsylvania's current statute is overly broad and inconsistent with its own precedent and therefore, detrimental to the Commonwealth. Finally, Part V provides Pennsylvania with a solution to its problematic approach.

## II. BEFORE ALL ELSE: BACKGROUND ON STATE SOVEREIGN IMMUNITY STATUTES

It is a generally accepted principle that governmental bodies and their employees and agents are immune from suit, unless the state has expressly consented to such liability.<sup>12</sup> For tort claims, the extent of this immunity varies

---

10. See RESTATEMENT (SECOND) OF TORTS § 908(1) (1977) (“Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct”). Comment a to section 908 of the Restatement (Second) of Torts further provides: “The purposes of awarding punitive damages . . . are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future.” *Id.*

11. Compare ALA. CODE § 6-11-21 (2014) (limiting punitive damages to greater of three times compensatory damages or \$500,000), and GA. CODE ANN. § 51-12-5.1 (2010) (capping damages for intentional torts and products liability at \$250,000 but allowing unlimited recovery when defendant's “specific intent to cause harm,” or acts “under the influence of alcohol, drugs other than lawfully prescribed drugs”), and MONT. CODE ANN. § 27-1-220 (West 2014) (providing that punitive damages may not exceed lesser of \$10 million or 3% of defendant's net worth), with *Burt v. Advertiser Newspaper Co.*, 28 N.E. 1, 5 (Mass. 1891) (“Vindictive or punitive damages are never allowed in this state.”), and *Abel v. Conover*, 104 N.W.2d 684, 690 (Neb. 1960) (refusing to adopt punitive damages).

12. See, e.g., *Palmetto Fire Ins. Co. v. Beha*, 13 F.2d 500, 502 (S.D.N.Y. 1925); *Mills v. Stewart*, 247 P. 332, 334-35 (Mont. 1926) (“It is elementary that a state cannot be sued without its consent . . .”); *Calkins Dredging Co. v. State*, 131 S.E. 665, 668 (N.C. 1926)

by jurisdiction, as can be seen in the stark contrast between Virginia and Pennsylvania.<sup>13</sup> A citizen of any state may seek damages from a local or state government for a violation of due process regardless of that state's specific sovereign immunity statute.<sup>14</sup>

#### A. *Sovereign Immunity as Applied in Tort Cases*

Forty state constitutions provide citizens with an explicit or implied right to access the courts in order to seek a remedy against a defendant for an injury to their person, reputation, possessions, or property.<sup>15</sup> However, the availability of that right is generally limited in some manner if the plaintiff is seeking to bring a claim against a government agency or employee. Each state has enacted a statute that provides the government some form of immunity from liability for tort claims. For example, in Virginia, the government may be sued for a variety of claims including those arising out of intentional torts, which opens the door to a potential recovery of punitive damages.<sup>16</sup> Conversely, Pennsylvania takes a far more stringent view, allowing for suits if two factors are met: (1) the governmental action was the result of negligence, and (2) the governmental action fits into one of the specific factual situations specifically enumerated in the statute.<sup>17</sup> As such, Pennsylvania's sovereign immunity statute generally renders recovery of any kind against the government almost impossible.

##### 1. *Virginia's Commonsense Approach: Allowing Suits for Intentional or Reckless Disregard*

While "the doctrine of sovereign immunity is 'alive and well' in Virginia," the state has provided injured plaintiffs with a variety of opportunities for judicial recovery.<sup>18</sup> Under the Virginia Tort Claims Act, the Commonwealth

---

(explaining state can only be sued when state has consented or if Supreme Court of United States has original jurisdiction). The doctrine of sovereign immunity is based on the archaic premise that "the King can do no wrong" and was therefore immune from all claims. See generally George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953) (outlining history of sovereign immunity in England and its imputation into America).

13. For a comparison of Virginia and Pennsylvania's tort claims statutes, see *infra* notes 16-21 and accompanying text.

14. For a discussion of claims brought under 42 U.S.C. § 1983, see *infra* notes 24-26 and accompanying text.

15. See, e.g., ALA. CONST. art. I, § 13 (1901); ARIZ. CONST. art. II, § 11; DEL. CONST. art. I, § 9 (amended 1999); IDAHO CONST. art. 1, § 18; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST. DECLARATION OF RIGHTS, art. 19; MISS. CONST. art. III, § 24; N.H. CONST. pt. I, art. 14; N.C. CONST. art. I, § 18; OHIO CONST. art. I, § 16; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; TEX. CONST. art. 1, § 13; UTAH CONST. art. I, § 11; WYO. CONST. art. I, § 8. The ten state constitutions that do not provide for this important right are Alabama, California, Hawaii, Illinois, Michigan, Montana, New Jersey, New Mexico, and New York.

16. VA. CODE ANN. § 8.01-195.3 (2007).

17. 42 PA. STAT. AND CONS. STAT. ANN. § 8522 (West 1986)

18. *Messina v. Burden*, 321 S.E.2d 657, 660 (Va. 1984) ("Though this Court has, over the years, discussed the doctrine in a variety of contexts and refined it for application to constantly shifting facts and circumstances, we have never seen fit to abolish it. Nor does the General Assembly want the doctrine abolished.").

government is liable for the acts or omissions of its employees or agents that amount to gross negligence and intentional torts.<sup>19</sup> Another statute similarly prohibits local governmental bodies from claiming protection under sovereign immunity when the actions of their agents and employees constitute “intentional or willful misconduct or gross negligence.”<sup>20</sup> Put differently, both the state and local governments of Virginia could be liable to an injured plaintiff when its agents or employees’ actions are shockingly bad. Thus, unlike their Pennsylvania counterparts, plaintiffs in Virginia have an opportunity to have the merits of their case evaluated rather than dismissed simply because the defendant is an arm of the government.

## 2. *Pennsylvania’s Backwards Approach: Limiting Suits to Negligence Claims*

In keeping with the archaic belief that the state should not be encumbered by civil lawsuits, Pennsylvania’s legislature has adopted two statutes that strictly limit an injured plaintiff’s ability to sue and recover damages against the government: (i) the Sovereign Immunity Act and (ii) the Political Subdivision Tort Claims Act. Under the Sovereign Immunity Act, a Commonwealth entity or employee may only be sued for ordinary negligence.<sup>21</sup> Moreover, under this statute, in order to bring a claim against the Commonwealth, this negligence must arise out of one of nine explicitly provided instances within the statute.<sup>22</sup> Similarly, the Political Subdivision Tort Claims Act preserves the immunity of local governmental agencies, except in instances of ordinary negligence arising out of one of eight specific situations listed in the statute.<sup>23</sup> The Commonwealth and local governments remain completely immune from liability for any injury

---

19. VA. CODE ANN. § 8.01-195.3 (“[T]he Commonwealth shall be liable for claims for money . . . on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment . . .”).

20. VA. CODE ANN. § 15.2-1405 (West 1997) (waiving sovereign immunity of local government and its political subdivision for intentional torts and gross negligence). Whether an employee may claim qualified immunity when sued individually for conduct that occurred within the scope of his or her employment, is to be determined applying a four part factors test. *See* Messina, 321 S.E.2d at 663 (citing *James v. Jane*, 282 S.E.2d 864, 869 (Va. 1980)) (“(1) the nature of the function performed by the state employee; (2) the extent of the state’s interest and involvement in the function; (3) the degree of control and direction exercised by the state over the employee; and (4) whether the act complained of involved the use of judgment and discretion.”).

21. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 8522 (West 1986) (preserving sovereign immunity except for “for damages arising out of a negligent act”).

22. *See id.* (listing nine scenarios in which state may be sued for negligence as (1) vehicle liability; (2) medical-professional liability; (3) care, custody or control of personal property; (4) Commonwealth real estate, highways and sidewalks; (5) potholes and other dangerous conditions; (6) care, custody or control of animals; (7) liquor store sales; (8) National Guard activities; and (9) toxoids and vaccines).

23. *Id.* § 8542 (providing that local government may only be sued for “negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to” (1) vehicle liability; (2) care, custody or control of personal property; (3) care, custody or control of real property; (4) dangerous condition of trees, traffic controls or street lighting; (5) dangerous condition of utility service facilities; (6) dangerous condition of streets; (7) dangerous condition of sidewalks and (8) care, custody or control of animals).

in which an agent or employee's actions are intentional or done with a substantial disregard for potential injury. Thus, so long as Pennsylvania officials take a passive approach to their jobs, they are essentially immune from suit.

#### B. *Sovereign Immunity as Applied to Section 1983 Claims*

In contrast to state tort statutes, under 42 U.S.C. § 1983, a plaintiff can sue the government for violation of due process or other civil rights without applicability of sovereign immunity.<sup>24</sup> While states are generally entitled to Eleventh Amendment immunity in federal court, local governments are not immune from damages resulting from their violation of a citizen's constitutional rights.<sup>25</sup> In addition, state sovereign immunity statutes do not shield local governments from liability for violations of section 1983.<sup>26</sup> Therefore, plaintiffs whose civil rights have been violated have a much easier time initially bringing a claim against a governmental entity or official.

However, like tort-based claims, under section 1983 claims, a plaintiff is not able to recover punitive damages. As a general matter, a violation of section 1983 is likely to involve egregious conduct. Because these claims are brought against a governmental agency or employee, courts have held that recovery of punitive damages is not permitted. As such, the courts again have limited recovery of damages in order to protect the government despite bad behavior by the government's representatives.

### III. BUILDING UP: BACKGROUND ON PUNITIVE DAMAGES

Punitive damages have been awarded for centuries and have been the subject of both support and criticism throughout this period. For example, early American courts wholeheartedly embraced this form of recovery as a valid means to punish and deter reprehensible conduct. However, as the country began to move toward tort reform, punitive damages began to be curtailed in order to protect a defendant's rights. While the current status of punitive damage awards ranges across a continuum, Pennsylvania has taken a hardline approach when it comes to suits against the government. More specifically, Pennsylvania is currently at an extreme end of the continuum completely banning recovery.

---

24. 42 U.S.C. § 1983 (1996).

25. *Compare* Edelman v. Jordan, 415 U.S. 651, 663 (1974) ("Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."), *with* Owen v. City of Independence, 445 U.S. 622, 657 (1980) ("[H]olding that municipalities have no immunity from damages liability flowing from their constitutional violations . . .").

26. *See* Howlett v. Rose, 496 U.S. 356, 377-78 (1990) (explaining that section 1983 preempts state sovereign immunity); *see also* United States v. Georgia, 546 U.S. 151, 158-59 (2006) (noting that Congress intended to abrogate state sovereign immunity when state violates citizen's constitutional rights).

A. *A History of Punitive Damages*

Punitive damages have ancient origins in the legal system, and were even noted in the Babylonian Hammurabi Code, the Hindu Code of Manu, and the Bible.<sup>27</sup> In relatively more modern times, these damages were eventually adopted by the English courts in two companion cases in 1763 as a way to deter and punish the misuse of power and wealth by aristocracy.<sup>28</sup> Like many other English-approved legal doctrines, punitive damages were subsequently adopted by the American legal system.<sup>29</sup>

The early American courts used punitive damages as a means to punish those who willfully abused physically weaker individuals.<sup>30</sup> With this lofty goal underlying courts' decisions, punitive damages were considered a staple of American tort law and almost every state allowed for some form of recovery of punitive damages against private individuals.<sup>31</sup> Recovery of punitive damages was subsequently expanded to allow recovery against corporations in order to punish companies who placed profits above the safety of workers and consumers.<sup>32</sup>

Despite this initially warm embrace of punitive damages, by the end of the nineteenth century, divergent views regarding punitive damages began to emerge. Signs of strong opposition to this form of recovery emerged slowly and were ultimately embraced in the 1980s, as part of nationwide tort reform. As a result, perceived unchecked tort litigation and exuberant damages awards, in particular punitive damages awards, many states implemented statutory limitations on the recovery of punitive damages.<sup>33</sup> While, these statutory restrictions were quickly met with various constitutional challenges, most remain valid today.<sup>34</sup>

27. See Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U.L. REV. 1269, 1285 (1993) (noting existence of punitive damages in early legal codes and quoting specific passages from Bible).

28. See Rustad & Koenig, *supra* note 27, at 1287-88 (citing *Wilkes v. Wood* and *Huckle v. Money* as first instance of express adoption of punitive damages in England). In *Wilkes v. Wood* the publisher of a controversial newspaper sued a member of Parliament for trespass after the publisher was arrested for criticizing his speech. *Id.* at 1287 n.95. In *Huckle v. Money*, a journeyman sued agents of the King for false imprisonment and trespass. *Id.* at 1288-89.

29. See *Genay v. Norris*, 1 S.C.L. 6, 7 (U.S. 1784) (“[V]ery serious injury to the plaintiff . . . entitled him to very exemplary damages, especially from a professional character . . .”). In *Genay* the defendant spiked plaintiff’s wine glass as the two prepared to duel, causing the plaintiff “extreme and excruciating pain.” *Id.* at 6.

30. See Rustad & Koenig, *supra* note 27, at 1292-93 (discussing early cases and the underlying factual premises that contributed to plaintiff’s recovery of punitive damages).

31. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 369-70 (1994) (discussing how every state but Nebraska provided for punitive damages through either common law or statute).

32. See Rustad & Koenig, *supra* note 27, at 1295.

33. See generally *Tort Reform Record*, AM. TORT REFORM ASS’N (December 2014) <http://www.atra.org/wp-content/uploads/2016/11/Record-12-18-14.pdf> [<https://perma.cc/ADJ6-ADAS>].

34. See, e.g., *Henderson v. Ala. Power Co.*, 627 So.2d 878, 884 (Ala. 1993) (discussing plaintiff’s claim that statute limiting punitive damages violates right to trial by jury); *Mack*



Running parallel to this legislative action, the Supreme Court independently sought to reduce the punitive damages awards assessed against defendants. This outcome was accomplished when the Supreme Court held that punitive damages awarded without adequate procedural safeguards could violate the Due Process Clause of the United States Constitution.<sup>35</sup> While the Supreme Court found certain state limitations on punitive damages to be unconstitutional, the presumption is that such limitations on damages are valid as an economic regulation, unless the plaintiff can demonstrate that they are arbitrary or irrational.<sup>36</sup>

Today, almost every jurisdiction recognizes the common law doctrine of punitive damages.<sup>37</sup> In addition, the most prevalent justifications for punitive damages continue to be to punish and to deter the defendant and others from engaging in such wrongful behavior in the future.<sup>38</sup> As such, punitive damages are recoverable generally only where the plaintiff is harmed as the result of particularly egregious and intentional misconduct.<sup>39</sup>

---

Trucks, Inc. v. Conkle, 436 S.E.2d 635, 639 (Ga. 1993) (upholding lower court decision that punitive damages cap does not violate equal protection under state constitution).

35. See *Pac. Mutual Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991) (“As long as the discretion is exercised within reasonable constraints, due process is satisfied.”).

36. Compare *BMW of N.A. v. Gore*, 517 U.S. 559, 572-75 (1996) (holding that while state may impose punitive damages to further its interest in deterring unlawful conduct, grossly excessive damages violated Due Process Clause), and *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430-35 (1994) (finding that Oregon’s common law violated Due Process), with *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83-84 (1978) (holding that Court must “defer to the congressional judgment unless it is demonstrably arbitrary or irrational.”).

37. See Doug Rendleman, *Common Law Punitive Damages: Something for Everyone?*, 7 U. ST. THOMAS L.J. 1, 1 (“All but five [out of fifty states and the District of Columbia] have common law or court-made punitive damages, developed and maintained by the state’s judiciary with legislative oversight and within federal and state constitutional limits.”).

38. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (“Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.”); *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 679 (Ariz. 1986) (“Exemplary or punitive damages are those damages awarded in excess of full compensation to the victim in order to punish the wrongdoer and to deter others from emulating his conduct.”); *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709, 715 (Del. Super. 1967) (noting that punitive damages are intended to punish wrongdoer and prevent others from engaging in similar behavior); *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 221 (Fla. 1936) (discussing how punitive damages serve as deterrent); *Foss v. Maine Tpk. Auth.*, 309 A.2d 339, 345 (Me. 1973) (reasoning that deterrence is adequate rationale but that punishment is not a goal); *Leimgruber v. Claridge Assocs., Ltd.*, 375 A.2d 652, 654 (N.J. 1977) (stating that punitive damages “are awarded upon a theory of punishment to the offender for aggravated misconduct and to deter such conduct in the future”); *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1, 3 (Tenn. 1964) (holding punitive damages serve strong public policy of punishment and deterrence).

39. See, e.g., *Bridges v. Alaska Hous. Auth.*, 375 P.2d 696, 702 (Ala. 1962) (“Punitive or exemplary damages are those awarded in excess of actual loss where the wrongdoer’s conduct can be characterized as outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of another.”); *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709, 715 (Del. Super. 1967) (“Punitive damages may be awarded only if the jury finds by a preponderance of the evidence that the defendants’ actions were motivated by some form of malice; that is, by ill-will, hatred, spite, or a conscious desire to do injury and hurt the plaintiffs.”); *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 221 (Fla. 1936) (stating that

B. *Pennsylvania's Hardline Restriction on Punitive Damages*

Under Pennsylvania law, punitive damages are recoverable in connection with a number of civil causes of action.<sup>40</sup> Pennsylvania has adopted section 908 of the *Restatement (Second) of Torts*, which governs punitive damages.<sup>41</sup> Under the Restatement approach, the goal of punitive damages is to punish and deter a tortfeasor from engaging in similar conduct in the future.<sup>42</sup> Because it is impossible to deter a person from malicious conduct if he is not conscious of the risks associated with his conduct, “[t]he state of mind of the actor is vital.”<sup>43</sup> Specifically, in Pennsylvania, a plaintiff must present enough evidence to demonstrate that “(1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk.”<sup>44</sup> Ultimately, in awarding damages, a jury must look at the defendant’s actions “together with all the circumstances including the motive of the wrongdoer and the relations between the parties . . . .”<sup>45</sup>

---

punitive damages are only awarded “where torts are committed with fraud, actual malice, or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others”); *Huebsch v. Larson*, 191 N.W.2d 433, 435 (Minn. 1971) (noting that plaintiff may only recover punitive damages when defendant’s actions are “malicious, wilful or in reckless disregard of the rights of others”); *Chambers v. Montgomery*, 192 A.2d 355, 358 (Pa. 1963) (holding that punitive damages may only be assessed when defendant actions are malicious, wanton, reckless, willful, or oppressive); *Berberian v. New England Tel. & Tel. Co.*, 369 A.2d 1109, 1112 (R.I. 1977) (explaining that defendant must have acted with malice, wantonness or willfulness in order for plaintiff to recover).

40. See, e.g., *Rizzo v. Haines*, 555 A.2d 58, 69 (Pa. 1989) (upholding punitive damage award for attorney malpractice); *Scampone v. Grane Healthcare Co.*, 11 A.3d 967, 992 (Pa. Super. Ct. 2010) (citing 40 Pa. Cons. Stat. § 1303.505 (2002), which allows recovery of punitive damages for medical malpractice); *Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978, 983 (Pa. Super. Ct. 2005) (noting plaintiff may recover punitive damages for strict products liability); *Am. Future Sys., Inc. v. BBB*, 872 A.2d 1202, 1211 (Pa. Super. Ct. 2005) (discussing requirements for private plaintiff to recover punitive damages for defamation); *McDaniel v. Merck, Sharp & Dohme*, 533 A.2d 436, 448 (Pa. Super. Ct. 1987) (finding punitive damages could be recovered against drug manufacturer for deliberately and negligently failing to communicate knowledge of serious risk of illness and death resulting from drug to medical community); *Frisk v. News Co.*, 523 A.2d 347, 353 (Pa. Super. Ct. 1986) (upholding recovery of public figure for defamation); *Delahanty v. First Pennsylvania Bank, N.A.*, 464 A.2d 1243, 1265 (Pa. Super. Ct. 1983) (finding that jury may award punitive damages for fraud).

41. See *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 802 (Pa. 1989) (adopting section 908 of *Restatement (Second) of Torts*).

42. See RESTATEMENT (SECOND) OF TORTS § 908 (1965) (“Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.”); see also *id.* § 500 cmt. a (“Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of . . . harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.”).

43. See *Feld v. Merriam*, 485 A.2d 742, 748 (Pa. 1984).

44. See *Hutchison ex rel. Hutchison v. Luddy*, 870 A.2d 766, 772 (Pa. 2005).

45. See *Chambers v. Montgomery*, 192 A.2d 355, 358 (Pa. 1963).

Despite a continued acceptance of punitive damages in claims against private individuals and corporations, Pennsylvania has taken the extreme position that punitive damages may never be recovered against a governmental entity in a tort action. Under section 8528 of the Pennsylvania code, a plaintiff bringing suit against the Commonwealth or a local government may only recover one of five specifically listed damages:

(1) Past and future loss of earnings and earning capacity. (2) Pain and suffering. (3) Medical and dental expenses including the reasonable value of reasonable and necessary medical and dental services, prosthetic devices and necessary ambulance, hospital, professional nursing, and physical therapy expenses accrued and anticipated in the diagnosis, care and recovery of the claimant. (4) Loss of consortium. (5) Property losses, except that property losses shall not be recoverable in claims brought pursuant to section 8522(b)(5) (relating to potholes and other dangerous conditions).<sup>46</sup>

While this statute does not specifically bar recovery of punitive damages, courts have interpreted the absence of punitive damages from that statute to mean that such damages should not be assessed against any Commonwealth or local governmental bodies for tort-based actions.<sup>47</sup> This interpretation of the meaning of the absence of punitive damages, as an explicit remedy, is reasonable given that the legislature did explicitly provide for the recovery of punitive damages in certain instances of criminal conduct, meaning the absence of punitive damages was likely intentional.<sup>48</sup>

#### IV. ANALYSIS

Pennsylvania's current statutes create an inequitable approach to punitive damage awards against the government that is overly harsh and has resulted in negative effects that cause more harm than good. Specifically, the Commonwealth's ban on punitive damage awards is based on false perceptions of the frequency and extent of such awards, and therefore, has resulted in an overly strict policy. As such, this approach impacts a government official's cost benefit analysis of how to handle egregious conduct, thus limiting punitive damages most valuable purpose. This approach also impermissibly grants the government an exception from having to pay for its tortious conduct simply because of its governing role, which directly contradicts the basic notion that no man—including the government—is above the law. Finally, the legislature's decision to permit a plaintiff to recover damages and to allow an employee to seek indemnification when the employee's actions amount to negligent behavior, but prohibit recovery and indemnification for intentional misconduct,

---

46. 42 PA. STAT. AND CONS. STAT. ANN. § 8528 (West 1980) (listing damages recoverable against government).

47. *See* Feingold v. Se. Pa. Transp. Auth., 517 A.2d 1270, 1277 (Pa. 1986) (finding punitive damages could not be awarded against SEPTA because it was Commonwealth agency protected by sovereign immunity from such damages).

48. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 9183 (West 1980) (imposing counsel fees, actual damages, and punitive damages in instances where government official's conduct is willful).

is illogical and must be reconsidered.

A. *Pennsylvania's Limitations on Punitive Damages Are Overly Restrictive Given the Current Statistics and Procedural Safeguards*

As discussed below, because excessive punitive damages awards are rare, and both the amount and frequency of punitive damage awards are already significantly limited, it is unnecessary for states to completely bar recovery of punitive damages against the government. “Since 1979 there has been a systematic tort reform backlash against punitive damages in all but a few states.”<sup>49</sup> This “backlash” and subsequent limitations on punitive damages are primarily based upon the media’s sensationalization of the idea that lawsuits consistently result in run-away juries. Part of this media hype also includes the notion that exuberant verdicts could cause companies and investors to shy away from engaging in business within the state or face bankruptcy.<sup>50</sup> Due to this unfavorable media exposure, Pennsylvania initially enacted various limitations on punitive damages awards to protect American corporations.<sup>51</sup>

Nevertheless, Pennsylvania’s legislature subsequently decided to take even more stringent steps in order to protect itself. Specifically, in an effort to protect the Commonwealth and local governments from having to foot a supposedly unwarranted verdict, the legislature enacted the most restrictive limitation possible: a complete ban on punitive damage awards against the government.<sup>52</sup> Pennsylvania courts also added an additional layer of protection by labeling punitive damages awards against the government as contrary to public policy.<sup>53</sup> As a result, Pennsylvania began to severely limit a plaintiff’s recovery for punitive damages against the government.<sup>54</sup> Ultimately, this

49. Michael L. Rustad, *The Closing of Punitive Damages’ Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1311 (2005).

50. See *id.* at 1297 (quoting Richard L. Blatt, *ADR Can Help Fend Off Big Punitive Awards: Tools Such As Mediation Enable Cost-Effective Resolution Of Claims*, 2001 WL 5,101,243, Apr. 23, 2001, at \*10) (“Punitive damages can wreak all kinds of havoc, from damaging corporate financial performance in the short run, to threatening a company’s very existence.”). Despite the perception that punitive damages are awarded by out-of-control juries, a study of judge and jury trial outcomes in forty-five U.S. states uncovered “a higher rate of punitive damages awards in judge trials than in jury trials.” See Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 750 (2002).

51. See Rustad, *supra* note 49, at 1301 (“The story of punitive damages recoil is a familiar one about special legislation to help corporate America.”).

52. See 42 PA. STAT. AND CONS. STAT. ANN. § 8528 (West 1980) (listing damages that are recoverable against state and local governments in Pennsylvania, in which punitive damages is not included); see also *Hoy v. Angelone*, 720 A.2d 745 (Pa. 1998) (noting that punitive damages are not recoverable under the Human Relations Act, which allows suit for discrimination by private and public individuals).

53. See *Feingold v. Se. Pa. Transp. Auth.*, 517 A.2d 1270, 1276 (Pa. 1986) (quoting *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263 (1981)) (“In general, courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised.”).

54. Compare *Mathies v. Mazet*, 30 A. 434 (Pa. 1894) (allowing recovery of punitive damages against spouse for alienation of affection), with *Chambers v. Montgomery*, 192 A.2d 355 (1963) (striking down punitive damages award against defendant who punched plaintiff in

movement—from unlimited recovery to no recovery—was unjustifiably extreme because punitive damages are seldom awarded, and when they are awarded, such recovery is reasonable. To the extent that an award is unreasonable, the Pennsylvania trial judges have discretion to scale back the verdict.<sup>55</sup>

The common perception is that punitive damage awards are frequently and grossly excessive.<sup>56</sup> However, there is little to no empirical evidence supporting this belief. Conversely, numerous studies demonstrate a far more rational pattern to awards for punitive damages. For example, as an initial matter, “[u]nless the case involves an intentional tort or a business-related tort (such as employment claims), punitive damages will almost never be awarded.”<sup>57</sup> And even when they are awarded to an injured plaintiff, punitive damage awards are rarely the excessive verdicts portrayed in the news.<sup>58</sup> Furthermore, verdicts for punitive damages tend to be highly correlated to both the plaintiff’s injury and

---

back of head and continued to punch plaintiff while he was on ground, resulting in serious personal injury).

55. See *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 803-04 (Pa. 1989) (“[A]t some point the amount of punitive damages may be so disproportionate when compared to the character of the act, the nature and extent of the harm and the wealth of the defendant, that it will shock the court’s sense of justice. In those rare instances, the court is given discretion to remit the damages to a more reasonable amount.”). An empirical study found that, in general, judges frequently reverse or remit punitive damages awards in the post-verdict stage. See Michael Rustad, *In Defense of Punitive Damages of Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 51 (1992).

56. See, e.g., Thomas B. Hudson, *Punitive Damages: How Much Is Too Much?*, AUTO DEALER MONTHLY (Nov. 2007), <http://www.autodealermonthly.com/channel/dps-office/article/story/2007/11/punitive-damages-how-much-is-too-much.aspx> [<https://perma.cc/Z9A4-HYW9>] (“The court’s award of punitive damages—less than twice the actual damages award—should help keep Texas jury awards under control.”); Jennifer Kay, *U.S. Tobacco Company Hit With \$23.6B In Punitive Damages After Widow’s Lawsuit*, CTV NEWS (July 19, 2014), <http://www.ctvnews.ca/health/u-s-tobacco-company-hit-with-23-6b-in-punitive-damages-after-widow-s-lawsuit-1.1922027#ixzz3I8ZbOtGY> [<https://perma.cc/7D3U-YDNG>] (discussing various “large jury verdicts awarding tens of millions of dollars” in punitive damages against tobacco companies); Michael Wilt, *California Court: Excessive Punitive Damages Are Fine If You’re Wealthy Enough*, FORBES (Aug. 19, 2011, 1:32 PM) <http://www.forbes.com/sites/wlf/2011/08/19/california-court-excessive-punitive-damages-are-fine-if-youre-wealthy-enough/> [<https://perma.cc/B7ZD-DDA3>] (“If there are no limits to what punitive damages can be levied against a defendant merely because they can afford to pay them, juries would be empowered to bankrupt corporations even though the relative harm to the plaintiff in compensatory damages does not demand such a result.”).

57. Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997).

58. See CAROL DEFRANCES ET AL., U.S. DEPT. OF JUSTICE, CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES (1995), <https://pdfs.semanticscholar.org/4be2/42ed0c1732f47b6537fbfc3a4d0f63457f5.pdf> [<https://perma.cc/KB29-NJGH>] (“Punitive Damages were awarded in 6% of the jury case with a plaintiff winner.”); see also Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not “Moral Monsters”*, 47 RUTGERS L. REV. 975, 1009 (1995) (“The typical (median) punitive damage award [in a medical malpractice claim] was quite modest, \$228,600.”); Rustad, *supra* note 55, 45-50 (finding that out-of-control juries are part of media hype and in reality punitive damage awards in products liability cases are “quite modest” and were roughly “proportional to actual damages”).

the egregiousness of the defendant's actions.<sup>59</sup>

If allowed against the Commonwealth or local governments, it is unlikely that punitive damage awards would become as unreasonable or excessive as the news stories portray due to the extensive procedural safeguards put into place by the Pennsylvania legislature and judiciary. As discussed above, punitive damage awards have a heightened standard and may only be recovered when the plaintiff can demonstrate that the defendant's conduct was malicious or willful.<sup>60</sup> This *mens rea*-like requirement is also extended to strict liability actions, meaning that a defendant may present evidence, which would ordinarily be inadmissible, that his conduct was reasonable and therefore, punitive damages are inappropriate.<sup>61</sup> Moreover, in order to recover punitive damages in a defamation case, and arguably in other tort cases, a plaintiff must provide clear and convincing evidence to support his or her claim, which is more than the general burden of by a preponderance of the evidence.<sup>62</sup>

In addition to heightened burden of proof, Pennsylvania courts also seek to minimize the potential prejudice of the jury in various ways. For example, courts generally require the jury to consider and render separate verdicts for compensatory and punitive damages.<sup>63</sup> Pennsylvania has also developed a special rule of civil procedure governing discovery and admissibility of a defendant's wealth as evidence so as to prevent prejudice the jury.<sup>64</sup> Finally, the courts may also choose to bifurcate verdicts based on compensatory and punitive damages.<sup>65</sup>

---

59. See Rustad & Koenig, *supra* note 58, 1027-29 (finding that in medical malpractice claims resulting in punitive damages, 33% of plaintiffs were killed, 25% of plaintiffs suffered permanent disability, 24% involved severe emotional trauma, and 50% involved sexual abuse or assaults).

60. See Rizzo v. Haines, 555 A.2d 58, 69 (Pa. 1989) ("The act or omission must be intentional, reckless, or malicious."); Chambers v. Montgomery, 192 A.2d 355, 358 (Pa. 1963) ("exemplary damages must be based on "malicious," "wanton," "reckless," "willful," or "oppressive" conduct on the part of defendant") (internal citations omitted). For further discussion of Pennsylvania's state of mind requirement, see *supra* notes 43-45 and accompanying text.

61. Nigro v. Remington Arms Co., 637 A.2d 983, 989-90 (Pa. Super. Ct. 1993) *abrogated on different grounds by* Aldridge v. Edmunds, 750 A.2d 292 (Pa. 2000) ("Compliance with industry standard and custom tends to support the defense that Remington acted with a nonculpable state of mind, and would negate an inference of wanton indifference to the rights of others. Accordingly, such evidence is material and admissible to refute Nigro's claim for punitive damages.").

62. See Bargerstock v. Wash. Greene Cmty. Action Corp., 580 A.2d 361, 366 (Pa. Super. Ct. 1990) (explaining clear and convincing standard, which is higher than ordinary preponderance of evidence, is required in defamation claims); see also Temporaries, Inc. v. Krane, 472 A.2d 668, 674 n.2 (Pa. Super. Ct. 1984) ("Had we heard the case in the first instance we might not have imposed punitive damages, which must be proved by clear and convincing evidence.").

63. See Givens v. W.J. Gilmore Drug Co., 10 A.2d 12, 16 (Pa. 1940) (ordering lower court to instruct jury to indicate amount of compensatory and punitive damages separately).

64. PA. R. CIV. P. 4003.7 ("A party may obtain information concerning the wealth of a defendant in a claim for punitive damages only upon order of court setting forth appropriate restrictions as to the time of the discovery, the scope of the discovery, and the dissemination of the material discovered.").

65. See Mitchell v. Randal, 137 A. 171, 172-73 (Pa. 1927) ("[W]hen punitive as well as compensatory damages are involved in a case like the one now before us, it is entirely

Despite the common assumption that multi-million dollar verdicts are awarded regularly, recovery of punitive damages are proportional to the defendant's conduct and actual damages. To the extent that punitive damages are awarded to injured plaintiffs, Pennsylvania has implemented numerous procedural safeguards at various parts of the litigation process. These procedures help to ensure that both the frequency and amount of punitive damages is not excessive and that the defendant's rights are adequately protected. As such, any outright ban on punitive damages is unnecessary and unjustly restricts a plaintiff's ability to recover additional damages at the benefit of the defendant. This approach also allows the defendant to escape paying for the full extent of his or her misconduct. Thus, such policy only results in defeating the very purpose of such damages: punishment and deterrence of the defendant tortfeasor.

B. *Pennsylvania Is Overlooking the Value of the Electoral Process as a Means of Deterrence Due to Political Cost-Benefit Analysis.*

Under Pennsylvania's approach, punitive damages are intended to punish the tortfeasor and deter similar conduct in the future.<sup>66</sup> In the private arena, these goals are accomplished by determining an amount of damages directly proportional to the defendant's wealth.<sup>67</sup> On the other hand, it is generally argued that when the defendant is the government, it cannot be adequately punished because the government theoretically has unlimited wealth through its taxation authority.<sup>68</sup> In line with this idea of unlimited taxation power, critics also claim that the government cannot be adequately deterred because taxpayers, and not the tortfeasors, bear the costs of a punitive damages award. However, this position ignores the fact that government officials respond to political incentives. Punitive damages offer a form of a "negative incentive" that could deter government employees and agents from acting in an egregious or malicious manner that results in some form of injury to an innocent plaintiff.

As a comparison, a punitive damages award against a corporation is considered to be a successful deterrent of future misconduct because generally corporations are focused on profit-maximization and therefore, will take steps to avoid unnecessary expenses and losses. From an economic standpoint, punitive

---

proper to have separate findings made by the jury when rendering the verdict.").

66. See *G.J.D. v. Johnson*, 669 A.2d 378, 382 (Pa. Super. Ct. 1995) ("An award of punitive damages under Pennsylvania law serves a deterrence function as well as a punishment function.").

67. See *Feld v. Merriam*, 485 A.2d 742, 748 (Pa. 1984) (stating that while defendant's wealth is irrelevant to compensatory damages, it may be used to determining punitive damages).

68. See *Feingold v. Se. Pa. Transp. Auth.*, 517 A.2d 1270, 1277 (Pa. 1986) (quoting *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) ("Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or reduction of public services for the citizens footing the bill.")); *c.f.* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 408 (2000) ("Recognizing that constitutional tort compensation ultimately comes from the pockets of taxpayers further attenuates the connection between moral responsibility and the burden of rectification.").

damages are intended to provide an incentive for private individuals and profit seeking companies to take appropriate steps to “invest in precautions” in order to avoid paying large verdicts.<sup>69</sup> While the government is not interested in profits, the government does engage in a modified form of this cost-benefit analysis.<sup>70</sup> This analysis is focused on responding appropriately to the preferences and complaints of its constituents because votes matter.<sup>71</sup>

The primary goal of an elected official<sup>72</sup> is ultimately to win the next election.<sup>73</sup> To accomplish this objective, an official must act in a manner that will result in the majority of voters choosing to elect him or her. Similarly, an official must also avoid situations that can be used by the political opposition. For example, in their capacity as governmental agents and employees, elected officials must allocate the budget in order to maximize public benefits and to avoid wasteful or unpopular spending.<sup>74</sup> If a governmental agency or employee’s willful and wanton conduct results in a punitive damage award, that judgment and its corresponding litigation costs will be paid with tax money. Because a public budget is unlikely to have a lump sum set aside for this award, the government must raise that money by (1) diverting spending from publically funded programs, (2) incurring debt, or (3) raising taxes.<sup>75</sup>

Overall, none of these options are likely to bestow any benefit on a current government official, but each carries substantial risks. An elected official that chooses to reallocate spending to pay for the litigation expenses and a punitive

69. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 944 (1998) (discussing how judgment-proof contractors “will tend to conduct their activities with less care than will actors with more at stake”).

70. See MICHAEL I. KRAUSS, PRINCIPLES OF PRODUCTS LIABILITY, 343-50 (2d ed. 2011) (discussing the “economics” of products liability law and how companies assess benefits and risks of certain actions).

71. Levinson, *supra* note 68, at 370 (“So long as the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will never deter a majoritarian government from violating constitutional rights, because the majority of citizens will gain more from the benefits of government activity than they lose from the taxes necessary to finance compensation payments to victims.”).

72. While there are plenty of unelected governmental officials, the chain of command above these unelected officials will lead directly to an elected official. As such, if a punitive damages award is handed down, it will impact the elected officials due to their lack of oversight, which will lead the elected official to implement punishments and restrictions down the ladder to prevent further instances.

73. See generally Gary Biglaiser & Claudio Mezzetti, *Politician’s Decision Making with Re-election Concerns* 66 J. PUB. ECON. 425 (1997) (analyzing factors politicians take into account in order to “further their own political interests” and ensure re-election).

74. See Ross Ramsey, *Promising to Redirect Budget Money Spent on Those Pet Projects*, N.Y. TIMES (Oct. 11, 2012), [http://www.nytimes.com/2014/10/12/us/promising-to-redirect-budget-money-spent-on-those-pet-projects.html?\\_r=0](http://www.nytimes.com/2014/10/12/us/promising-to-redirect-budget-money-spent-on-those-pet-projects.html?_r=0) [https://perma.cc/D6F8-ZTMN] (“All they have to do is figure out how to either cut the budget to fit or find \$1.3 billion to pay for the state police and the Department of Motor Vehicles and other items caught in the ‘pet projects’ net.”).

75. See *Feingold v. Se. Pa. Transp. Auth.*, 517 A.2d 1270, 1277 (Pa. 1986) (quoting *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (“Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or reduction of public services for the citizens footing the bill.”)).



damage judgment against a government employee, does so at the peril of facing severe political backlash from the opposing party in the next election.<sup>76</sup> In addition, incurring debt is also a popular topic in political election speeches and television commercials because voters care about having to pay that money back in the future. Furthermore, every politician knows that individuals do not appreciate their own taxes being increased, regardless of the reason.<sup>77</sup> And while taxpayers may not like paying government salaries, they are likely to dislike footing the bill, either now or in the future, for a governmental employee's intentional misconduct even more. Despite potential political apathy, if a punitive damages judgment is entered against a governmental agency or employee, it is likely to make media headlines, and such publicity can be politically damaging.<sup>78</sup>

Ultimately this allocation of political risks is important due to the basic notion that taxpayers who are upset with the government's actions will hold

---

76. See, e.g., Karen Shuey, *Fact Check: Corbett Defends his Education Spending Record amid Criticism*, LANCASTER ONLINE (Sep. 12, 2014), [https://lancasteronline.com/news/local/fact-check-corbett-defends-his-education-spending-record-amid-criticism/article\\_55f511de-3a9f-11e4-aa2b-001a4bcf6878.html](https://lancasteronline.com/news/local/fact-check-corbett-defends-his-education-spending-record-amid-criticism/article_55f511de-3a9f-11e4-aa2b-001a4bcf6878.html) [https://perma.cc/VD9A-EXAT] (reviewing debate between Pennsylvania governor candidate's regarding whether incumbent cut took funding away from education); Jonathan Oosting, *Fact Check: Did Michigan Gov. Rick Snyder Cut \$1 Billion From Education or Add \$660 Per Student?*, MLIVE.COM (Feb. 5, 2014, 8:07 AM), [http://www.mlive.com/politics/index.ssf/2014/02/fact\\_check\\_did\\_michigan\\_gov\\_ri.html](http://www.mlive.com/politics/index.ssf/2014/02/fact_check_did_michigan_gov_ri.html) [https://perma.cc/53Q6-KS93] (quoting candidate as saying his candidate "cut \$1 billion from public schools . . . and taxed retirement funds all to create tax breaks for corporations that aren't creating jobs.") (internal quotation marks omitted).

77. See TIMOTHY BESLEY & ANE CASE, *INCUMBENT BEHAVIOR: VOTE SEEKING, TAX SETTING AND YARDSTICK COMPETITION* 26 (1992) [https://www.princeton.edu/~accase/downloads/Incumbent\\_Behavior.pdf](https://www.princeton.edu/~accase/downloads/Incumbent_Behavior.pdf) [https://perma.cc/ZUA3-QSPY] (arguing that raising taxes tends to hurt politicians' reelection prospects); see also Ken Blackwell & Bob Morrison, *Broken Promises/Broken Presidencies*, HUFFINGTON POST (Nov. 2013, 3:11 PM), [http://www.huffingtonpost.com/ken-blackwell/broken-promisesbroken-pre\\_b\\_4181566.html](http://www.huffingtonpost.com/ken-blackwell/broken-promisesbroken-pre_b_4181566.html) [https://perma.cc/P4HL-Q3RU] (quoting George H.W. Bush) ("Read my lips, no new taxes"); *Greenville County Voters Reject Penny Sale Tax Increase*, (WYFF broadcast Nov. 5, 2014), available at <http://www.wyff4.com/news/greenville-county-voters-reject-penny-sales-tax-increase/29567182> [https://perma.cc/5CH4-D7MZ] (discussing how taxpayers rejected penny increase in taxes during 2014 elections). Taxes are such an important issue to voters that a pledge is currently making its way around Capitol Hill which asks political candidates to put their promise to not raise taxes in writing. See *About the Taxpayer Protection Pledge*, AMERICANSFORTAXREFORM.COM, <http://www.atr.org/about-the-pledge> [https://perma.cc/QF4C-GKNC] (last visited Nov. 5, 2014) (promoting Taxpayer Protection Pledge).

78. See, e.g., Cari Herman, *Dr. King Family's Civil Trial Verdict: U.S. Government Assassinated Martin*, WASHINGTONBLOG.COM (Jan. 16, 2012), <http://www.washingtonsblog.com/2012/01/dr-king-familys-civil-trial-verdict-us-government-assassinated-martin.html> [https://perma.cc/SHP6-7B9Q] (explaining case brought by Martin Luther King's family against U.S. government for wrongful death); John Monk, *Sheriff Lott Says \$1.6 Million Lexington Jury Verdict Against His Department "Excessive," Lacks Evidence*, THESTATE.COM (Aug. 25, 2014), <http://www.thestate.com/2014/08/25/3639967/sheriff-lott-says-16-million-lexington.html> [https://perma.cc/L8YR-R99T] (discussing verdict levied against police department and county for malicious prosecution and abuse of process); Bob Sipchen, *Whines, Cynicism Follow in Wake of LAPD Trial for Beating of Rodney King*, LA TIMES (June 25, 1992), [http://articles.latimes.com/1992-06-25/news/vw-1326\\_1\\_rodney-king](http://articles.latimes.com/1992-06-25/news/vw-1326_1_rodney-king) [https://perma.cc/43M7-BUB9] (reviewing media coverage of infamous trial regarding police brutality against Rodney King).

these individuals accountable through the voting process.<sup>79</sup> Therefore, an elected official who fails adequately supervise or negligently employs an individual who ultimately engages in malicious and wonton conduct is likely to face serious backlash from the voting populous. As a result, political cost-benefit analysis facilitates direct, internal checks on the actions of the government officials, employees, and agents. Specifically, government officials would need to take proactive steps to ensure that all employees acted within the bounds of the law and did not engage in reprehensible conduct. Put differently, these officials would take all necessary steps to ensure that such conduct does not happen again, thereby fulfilling one of the key rationales for punitive damages: deterrence.<sup>80</sup>

*C. Pennsylvania's Approach Creates an Impermissible Exception for the Government that Undermines the Basic Notions of the United States Constitution*

The federal and state courts' analysis of the requisite state of mind requirement for punitive damages varies based on the defendant and in doing so contradicts current Pennsylvania precedent. As previously noted, punitive damages may only be recovered when a plaintiff can demonstrate that the defendant's conduct is intentionally malicious and outrageous.<sup>81</sup> In its analysis of a tort claim, one Pennsylvania state court held that punitive damages may not be imposed upon the government under a theory of vicarious liability.<sup>82</sup> Shortly thereafter, a federal court also shielded a local government from the vicarious imposition of punitive damages in section 1983 cases.<sup>83</sup> These decisions are premised on the argument that because the government is not a living, breathing being, it cannot form the requisite intent.<sup>84</sup>

---

79. Kevin Arceneaux, *The Federal Face of Voting: Are Elected Officials Held Accountable for the Functions Relevant to Their Office?*, 27 POL. PSYCH. 731, 731 (2006) ("By structuring the political system such that '[t]he federal and state governments are in fact but different agents and trustees of the people, instituted with different powers' . . . the framers of the American constitution sought to strengthen accountability and preserve freedom.").

80. In a sense elected officials themselves are deterred; however, this argument is premised more on the belief that punitive damages are intended to deter both the tortfeasor as well as other individuals from engaging in or condoning intentional malicious conduct. *See, e.g., G.J.D. v. Johnson*, 713 A.2d 1127, 1130 (Pa. 1998) (finding purpose of legislature allowing recovery of punitive damages against tortfeasor's estate was to deter others); *Sprague v. Walter*, 656 A.2d 890, 922-23 (Pa. Super. Ct. 1995) ("[P]unitive damages are granted in such cases to punish the defamer's 'actual or apparent ill will' and to deter others from acting from 'evil volition' when engaging in similar conduct.").

81. *See Chambers v. Montgomery*, 192 A.2d 355, 358 (Pa. 1963) (holding that punitive damages may only be assessed when defendant actions are malicious, wanton, reckless, willful, or oppressive). For further discussion of Pennsylvania's state of mind requirement, *see supra* notes 43-45 and accompanying text.

82. *See Bensalem Twp. v. Press*, 501 A.2d 331, 339 (Pa. Commw. Ct. 1985) ("[W]e believe that assessment of such damages against a municipality under a theory of vicarious liability is prohibited.").

83. *See Scott v. Twp. of Bristol*, No. CIV.A. 90-1412, 1990 WL 178556, at \*8 (E.D. Pa. Nov. 14, 1990) (holding that government is not vicariously liable for punitive damages).

84. *Means v. City of McKeesport*, No. CIV.A. 11-1092, 2012 WL 6552835, at \*9

While this position, in and of itself, is logical, it directly contradicts existing Pennsylvania precedent regarding assessing punitive damages against a corporation, which, despite also not being a living, breathing being, has been found to be able to form the requisite intent. In fact, since 1886, Pennsylvania courts have continually held that an injured plaintiff may recover punitive damages against a principal (including a business entity) for torts committed by the principal's agents acting within the scope of their employment.<sup>85</sup> In addition, this liability will exist even if the principal did not specifically order or condone the agent's actions.<sup>86</sup> Despite this established history, Pennsylvania courts created an exception for the government when the issue first came in front of the court almost one hundred years later, in 1985.<sup>87</sup> Even though the courts were willing to engage in a legal fiction to find that a principal corporation may form the requisite intent despite not being a person, the court refused to adopt a similar approach when the defendant principal is a public counterpart. Yet, no reason is offered to explain why the government is any different from a corporation when it comes to forming the requisite state of mind.

Generally, an essential method for ensuring accountability is by assessing damages against the wrongdoer.<sup>88</sup> The potential of having to pay such damages, especially those tied to the egregiousness of one's conduct and one's wealth, provides an incentive to act lawfully. Pennsylvania's sovereign immunity statutes already significantly diminish accountability because officials will rarely have to answer for their actions in court. Similarly, the bar on punitive damages means that even when the government's conduct fits into one of the fact-specific exceptions to sovereign immunity and a lawsuit is brought, the government is exempt from having to pay additional damages as a result of that egregious conduct.

Under Pennsylvania law, this immunity from punitive damages exists even when the government's action amounts to an egregious violation of tort or

---

(W.D. Pa. Nov. 19, 2012) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (U.S. 1981)) ("Because a municipality can have no malice independent of its officials, punitive damages are not sensibly assessed against the government entity itself.").

85. See *Lake Shore & M.S.R. Co. v. Rosenzweig*, 6 A. 545, 553 (Pa. 1886) ("The corporation is liable for exemplary damages for the act of its servant, done within the scope of his authority, under circumstances which would give such right to the plaintiff as against the servant were the suit against him instead of the corporation."); see also *Delahanty v. First Pa. Bank, N.A.*, 464 A.2d 1243, 1265 (Pa. Super. Ct. 1983) (holding private entity vicariously liable for punitive damages); *Dean Witter Reynolds, Inc. v. Genteel*, 499 A.2d 637, 643 (Pa. Super. Ct. 1985) (explaining that imposition of vicarious liability for punitive damages based on actions of agent is consistent with Pennsylvania precedent).

86. See *Shiner v. Moriarty*, 706 A.2d 1228, 1240 (Pa. Super. Ct. 1998) ("In Pennsylvania, there is no requirement that an agent commit a tortious act at the direction of his principal, nor must the principal ratify the act, in order for punitive damages to be imposed on him.").

87. See generally *Bensalem*, 501 A.2d at 331 (describing court-created exception)

88. See generally James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 58 N.Y.U. L. REV. 1862 (2010) (reviewing cases in which government officials were held liable for damages and discussing how these decisions result in government accountability).

constitutional law. As such, citizens have been stripped of an important weapon to ensure that the government complies with either state or federal laws. Furthermore, without the threat of having to pay, there is no incentive for government officials to implement controls or supervise individuals so as to prevent additional violations in the future.

This policy circumvents the basic purposes of punitive damage awards and thereby increases the likelihood that similar misconduct, unchecked and unpunished, will continue to occur. Punitive damage awards provide two important functions consistent with obtaining both government accountability through the punishment and deterrence objectives of punitive damages. First, these awards are a means to ensure that upper level officials are providing adequate oversight of lower level employees. Second, these verdicts are also likely to result in weeding out those who abuse their positions or continually act in a way that is harmful toward others.

It is not surprising that the legislature has promulgated rules in order to protect itself and other aspects of the government. However, this decision is not only short-sighted but is also a blatant disregard for the fact that government officials are intended to be public servants who faithfully fulfill their duties to the citizens, not untouchable figureheads who are beyond the purview of internal or external accountability.

*D. The Legislature's Decision to Limit Indemnification for Intentional Misconduct is Inconsistent and Illogical*

As previously discussed, Pennsylvania's current statutory scheme allows a plaintiff to recover damages when a government's agent or employee's actions amount to negligence. However, a plaintiff is completely barred from recovering damages when that same individual intentionally and maliciously injures the plaintiff. Generally, local municipalities may waive governmental immunity so that an injured party may sue an employee of a local government as an individual for damages when the employee's actions or omissions were the cause of the injuries.<sup>89</sup> For example, the City of Philadelphia has adopted such a waiver provision within their local code that enables suits against a police officer when the officer's conduct results bodily injury or death.<sup>90</sup>

According to one Pennsylvania statute, when a judgment is entered against one of these government employees, that employee may seek indemnification for costs associated with the judgment.<sup>91</sup> Most notably, under the statute, an

---

89. See *Borek v. Ramp*, No. 3974., 1992 WL 1071393, at \*179-80 (Pa. Com. Pl. Phila. Cnty. May 22, 1992) (citing *Borenstein v. City of Phila.*, 595 F. Supp. 853 (E.D. Pa. 1984)) (noting that while Pennsylvania Tort's Claim Act extends immunity to local governments, municipalities may waiver such immunity).

90. See *Williams v. Se. Pa. Transp. Auth.*, No. 5235, 1989 WL 817137, at \*452 (Pa. Com. Pl. Phila. Cnty. July 12, 1989) (quoting § 21-701 of Philadelphia Code) (“(a) The City shall not plead governmental immunity as a defense in any action commenced by any person sustaining bodily injury or death caused by negligence or unlawful conduct of any person sustaining bodily injury or death caused by negligence or unlawful conduct of any police officer while the latter is acting within the scope of his office or employment.”).

91. See 42 PA. CONS. STAT. ANN. § 8548(a) (1980) (“[T]he local agency shall

employee is entitled to recover such amounts *regardless of the type of damages* assessed against the employee, including punitive damages.<sup>92</sup> In order for an employee to successfully obtain such indemnification, three conditions must be met: “[1] the judgment is for damages to person or property, and he [2] has given timely notice of the local agency, and . . . [3] the employee in good faith reasonably believed that such act was, within the scope of his office or duties . . . .”<sup>93</sup> As such, this statute creates the possibility for an injured plaintiff to indirectly recover damages from the government so long as the suit is brought against an intermediary: a government employee. Moreover, under the plain language of this statute, a plaintiff is not limited in what damages may be recovered.

However, a secondary statute eliminates the state’s duty to indemnify an employee if the employee actions constitute a “crime, actual fraud, actual malice or willful misconduct.”<sup>94</sup> The Pennsylvania Supreme Court has held that willful misconduct is the same as an intentional tort.<sup>95</sup> Through this exception, the Pennsylvania legislature not only defeated the plain language of another statute, but also created a situation where the government itself is in a better situation if their employees act with a wonton disregard for the very citizens those employees are intended to protect. Thus, the Commonwealth is essentially incentivized to not adequately supervise its employees or discourage bad behavior because if a government takes such precautions then they are more likely to be liable. Put differently, if a local police officer accidentally injures an individual, then, under the first statute above, the government would be required to indemnify the officer after a judgment was entered against him. However, if that officer intentionally inflicts serious bodily harm on the same individual, the state is immune from a plaintiff’s suit for damages as well as the officer’s suit for indemnification.

On their face, these outcomes are inconsistent with basic notions of what is fair and just. Thus, they are likely to cause feelings of distrust and frustration towards the government for instituting rules that not only favor the government but also condone willful misconduct by the government. By allowing indirect recovery against the government through the indemnification of employees, Pennsylvania began to move toward a more equitable approach. However, by limiting indemnification for willful conduct, the state has created an exception, which defeats the plain language of another statute and that is just plain senseless.

#### V. WHERE PENNSYLVANIA SHOULD GO FROM HERE: AMENDING THE

---

indemnify the employee for the payment of *any judgment on the suit.*”) (emphasis added).

92. *Wiehagen v. Borough of N. Braddock*, 594 A.2d 303, 306 (1991) (“The case *sub judice* is an indemnification action, which is not an action for damages under the Act, and thus, is not subject to the damage limitations set forth in Section 8553.”).

93. See 42 PA. CONS. STAT. § 8548(a) (providing parameters for indemnification of employee of local agency).

94. *Id.* § 8550.

95. *Renk v. City of Pittsburgh*, 641 A.2d 289, 293 (Pa. 1994) (“In other words, the term ‘willful misconduct’ is synonymous with the term ‘intentional tort.’”).

## LAWS TO ALLOW FOR RECOVERY OF PUNITIVE DAMAGES

Pennsylvania's current statutes create an unnecessarily strict and inequitable approach to punitive damage awards. The state's sovereign immunity statutes, in and of themselves, already provide the government with an extreme amount of protection from civil liability generally. In order for Pennsylvania to assure public confidence, it must allow for recovery of punitive damages awards when the government's actions are particularly egregious. To the extent that there is continued concern about the allowance of such recovery, the state may implement additional procedural safeguards so long as they do not amount to excessive limitations.

A. *Pennsylvania Is Adequately Protected by Sovereign Immunity and Does Not Need to Limit Recovery of Damages*

Pennsylvania's legislature has already significantly limited the scope of the government's liability and therefore it is unnecessary to also ban a form of recovery. The common law doctrine of sovereign immunity provides the government with immunity from suit unless such immunity has been specifically waived.<sup>96</sup> The extent to which this immunity is waived to allow injured plaintiffs a means of redress in court varies by jurisdiction.

While Pennsylvania's legislature has taken a restrictive approach to sovereign immunity, Pennsylvania courts have offered plaintiffs in certain situations the possibility of relief by refusing to extend immunity under this statute to include statutory causes of action.<sup>97</sup> Nevertheless, a majority of claims that may be brought against the government in other states are still protected by sovereign immunity in Pennsylvania. Such robust immunity not only frustrates but blatantly prevents the two intended purposes of civil litigation—compensation for the injured party and deterrence of future wrongdoing—from being accomplished.

Therefore, when such immunity can be overcome, the government should allow all avenues to accomplish these objectives, including the availability of punitive damages. As previously discussed, punitive damages may only be recovered in a minute percent of cases generally. Given the statistical likelihood the injured plaintiff will be able to overcome both sovereign immunity and the burden of proof for punitive damages, an outright ban on the recovery of punitive damages is unnecessary.

---

96. See 1 PA. CONS. STAT. § 2310 (1978) (reaffirming state has blanket sovereign immunity unless waived). This immunity also applies to suits brought against states in federal court under the Eleventh Amendment. U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”)

97. See *Meyer v. Cmty. Coll. of Beaver Cnty.*, 606 Pa. 539, 546 (2010) (“We hold that governmental immunity does not extend to all statutory causes of action, regardless of whether they sound in tort or contract.”).

B. *Pennsylvania's Legislature Has Begun to Move the State in the Right Direction*

The Pennsylvania legislature created a statute that indirectly allows an injured plaintiff to recover damages from local governments. However, that recovery has been limited to exclude situations arising out of a defendant's malicious or willful conduct, or put differently, in instances where the plaintiff would be able to overcome the burden of proof to establish a right to recover punitive damages.

To avoid remaining inconsistent with its own precedent, Pennsylvania should alter its sovereign immunity statutes to allow for recovery of punitive damages when governmental agencies and employees act with complete disregard for a person or their property. The purpose of a lawsuit and punitive damages is to deter future misconduct; which Pennsylvania's current waiver of sovereign immunity fails to do. Instead, these statutes continue to protect the state in the most egregious of instances, thereby perpetuating such wrongful behavior.

The Pennsylvania Legislature should examine the potential political costs and benefits that may result from allowing the recovery of punitive damages from the government. After discerning the potential benefits that could result from allowing the democratic purpose to work as intended, the legislature should amend section 8528 of the Pennsylvania Code to allow for recovery of punitive damages in instances when a plaintiff is able to overcome the stringent standards of Pennsylvania's sovereign immunity statute. Because that section is formatted as a list, the legislature would simply need to add a number six to the list as punitive damages.

In allowing this method of direct recovery, the state would not necessarily need to abolish the statute prohibiting indemnification when an employee's actions amount to a "crime, actual fraud, actual malice or willful misconduct."<sup>98</sup> In fact, the preservation of this statute provides an additional incentive for employees to refrain from acting in an egregious manner because those employees can be sued as individuals and would have to pay any potential judgment out of their own pocket.

Nevertheless, this statute alone is not enough to accomplish deterrence. Specifically, individuals who may have indirectly contributed to the harm, such as managers who may have been negligent in hiring and/or supervising the tortfeasor, unless sued individually, would not be answerable for such conduct. On the other hand, if punitive damages were awarded against the government agency as a whole, all individuals involved, either directly or indirectly would have to answer for their conduct. Therefore, it is mandatory that Pennsylvania at the very least changes section 8528 of the Pennsylvania Code to allow for recovery of punitive damages.

---

98. 42 PA. CONS. STAT. § 8550.

C. *To the Extent Concerns Remain, Pennsylvania's Legislature or Judiciary May Also Implement Additional Procedural Safeguards*

Pennsylvania's legislature and judiciary have implemented numerous procedural safeguards to protect massive and unwarranted punitive damages awards. As previously discussed, these safeguards include a heightened burden of proof, bifurcated verdicts, and limited discovery of the defendant's wealth. Pennsylvania could adopt even stricter approaches to these safeguards as well as implement new restrictions. These procedural steps can be used to both limit a plaintiff's ability to recover damages as well as scaling back excessive awards after they have been handed down.

For example, Pennsylvania's legislature could limit the recovery of punitive damages by increasing the evidentiary standard of proof. Pennsylvania has increased the burden of proof for defamation cases to an "intermediate level" of proof in which "clear and convincing evidence" must be presented.<sup>99</sup> If it so chooses, the state legislature could institute this heightened burden of proof to other torts equally. Alternatively, the state could go a step further and require an even higher standard, such as the burden under criminal law, which requires proof "beyond a reasonable doubt."<sup>100</sup> Arguably, this heightened burden is logical because punitive damages fill in the "gaps" in the criminal law by allowing "citizens [to] serve as prosecutors" or "private attorneys general."<sup>101</sup>

If concerns regarding such awards remain, the legislature and judiciary may add additional precautions to ensure that these statistics remain the status quo. For example, in order to prevent juror bias, trial judges could limit what arguments about punitive damages attorneys may raise during trial. Alternatively, the judiciary may prohibit the mentioning of punitive damages at trial until plaintiff's attorney has established a prima facie case allowing such recovery.

Overall, these protections ensure that punitive damages are rarely awarded and highly correlated to the defendant's conduct, as evinced by the various empirical studies noted above. In the event of an uncharacteristic jury award, additional procedural safeguards ensure that such awards can be scaled back after the verdict has been announced. To maximize the effectiveness of these safeguards, post-verdict review could occur at both the trial court level and the appellate court review.

---

99. See, e.g., ALA. CODE § 6-11-20(a) (1987); CAL. CIV. CODE § 3294(a) (West 1992); GA. CODE ANN. § 51-12-5.1(b) (West 2010); MINN. STAT. ANN. § 549.20(1) (West 1990); N.J. STAT. ANN. § 2A:15-5.12 (West 1995); OR. REV. STAT. § 31.730(1) (2003); S.C. CODE ANN. § 15-33-135 (1988); S.D. CODIFIED LAWS § 21-1-4.1 (1986); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (West 2003); UTAH CODE ANN. § 78B-8-201(1)(a) (West 2011).

100. See, e.g., COLO. REV. STAT. ANN. § 13-25-127 (West 1995) ("Exemplary damages against the party against whom the claim is asserted shall only be awarded in a civil action when the party asserting the claim proves beyond a reasonable doubt the commission of a wrong.").

101. See Rustad & Koenig, *supra* note 27, at 1322 (justifying punitive damages).



VI. CONCLUSION

The very premise of the United States' tort system is to provide remedy and redress. In situations like those presented in the introduction above, the injured plaintiff may overcome Pennsylvania's strict sovereign immunity statute in order to recover some form of damages. On the other hand, the government and its employees are neither adequately punished nor deterred for the intentional actions that lead to those plaintiffs' injuries. The basic purpose of punitive damages is to prevent individuals from engaging in similar misconduct again in the future. This goal can be accomplished regardless of who the defendant is, but it cannot be achieved if punitive damages awards are prohibited. Today, Pennsylvania's legislature must propose and adopt new legislation that would allow recovery of punitive damages in order to achieve this goal. It would be wise to look to the statutes of Virginia and similarly situated states for guidance in this process.