



2011

## Tort Law—Hedonic Damages—Arkansas's Application of Hedonic Damages to Wrongful-Death Suits: Is Arkansas's Method Misconceived?

Joshua Michael Robles

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Torts Commons](#)

---

### Recommended Citation

Joshua Michael Robles, *Tort Law—Hedonic Damages—Arkansas's Application of Hedonic Damages to Wrongful-Death Suits: Is Arkansas's Method Misconceived?*, 33 U. ARK. LITTLE ROCK L. REV. 299 (2011). Available at: <https://lawrepository.ualr.edu/lawreview/vol33/iss3/3>

This Note is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

TORT LAW—HEDONIC DAMAGES—ARKANSAS’S APPLICATION OF  
HEDONIC DAMAGES TO WRONGFUL-DEATH SUITS: IS ARKANSAS’S  
METHOD MISCONCEIVED?

I. INTRODUCTION

Undoubtedly, Deck Shifflet, Danny DeVito’s character in John Grisham’s *The Rainmaker*,<sup>1</sup> aptly captured the interests at stake in a wrongful-death case when he said, “Now it’s a wrongful-death suit: gazillions.”<sup>2</sup> Regardless of whether this statement should be criticized or praised, it says something very important about what survivors and their attorneys seem to expect from a jury in a wrongful-death suit: The statement implicitly communicates that the anticipated response from a jury is a large monetary judgment. Where does this notion come from? Is it a product of lore? Is it an allusion to the monetary value lost after a life is wrongfully ended? Or does this notion just reflect basic truths about the procedures and laws that govern damages in wrongful-death cases? Ultimately, all three of these suppositions are likely true, but the last carries significant implications for the reliability and validity of jury awards in wrongful-death suits.

Wrongful-death suits are unique in that they require jurors to place a value on human life.<sup>3</sup> In light of this unique nature, courts have typically given jurors broad latitude in calculating wrongful-death damages awards.<sup>4</sup> Yet, it is precisely this discretion that makes Deck Shifflet’s crass declaration troubling. In circumstances where the nature of damages, like that of hedonic damages, requires jurors to consider notions of intangible loss, there exists a potential for excessive or arbitrary awards.<sup>5</sup> It is roughly axiomatic that a wrongful death engenders certain emotional responses. What is not so certain, however, is what results when those responses come in contact with a legal system that does not provide a principled approach to calculating intangible harms.

In 2001, the Arkansas General Assembly amended Arkansas’s survival statute by adding language that permits an estate or a survivor to recover a decedent’s loss-of-life damages as an “independent element of damages.”<sup>6</sup> Interestingly, the Arkansas Supreme Court has held that loss-of-life damages compensate “for the loss of the value that the decedent would have

---

1. JOHN GRISHAM’S *THE RAINMAKER* (Paramount Pictures 1997).

2. *Id.*

3. STUART M. SPEISER & JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 11:2 (4th ed. 2009). For a definition of “hedonic damages,” see *infra* Part III.B.

4. *Id.*

5. See generally Ronald J. Allen, Alexia Brunet, & Susan Spies Roth, *An External Perspective on the Nature of Noneconomic Compensatory Damages and Their Regulation*, 56 DEPAUL L. REV. 1249 (2007).

6. ARK. CODE ANN. § 16-62-101 (LEXIS Repl. 2005).

placed on his or her own life.”<sup>7</sup> The Arkansas Supreme Court has provided jurors little guidance in determining appropriately a loss-of-life award. At most, the court has said that jurors must find some evidence that the decedent valued his or her life, and that, due to the probable lack of direct evidence, jurors may consider circumstantial evidence to establish this value.<sup>8</sup>

In considering Arkansas’s loss-of-life jurisprudence as a whole, it is clear that there are at least two fatal flaws. First, the Arkansas General Assembly’s 2001 amendment to the Arkansas survival statute cannot be legally justified. Given that the historical purpose behind survival statutes has been to maintain those claims that a decedent would have been entitled to had he or she lived, there is no true connection between a survivor’s claims and a loss-of-life injury. This note suggests that to solve this first problem the General Assembly must move its 2001 amendment language to the text of Arkansas’s wrongful-death statute.

Second, and far more disquieting, is that the cumulative effect of Arkansas’s loss-of-life jurisprudence infringes on defendants’ due process rights. The value that an individual “would have placed on his or her own life” is difficult to establish; how could anyone quote or agree to such a value with any sense that he or she was accurate? Moreover, armed only with the instruction that they should determine some value through direct or circumstantial evidence, Arkansas jurors are left with a less than principled method for establishing loss-of-life damages. Arguably, this lack of guidance leaves Arkansas jurors with enough discretion to expose a defendant to an arbitrary deprivation of property.

The problematic features of Arkansas’s loss-of-life law are merely implications of a broader issue that is inherent in the calculation of non-economic damages in general: the potential for excessive or arbitrary awards.<sup>9</sup> This broader issue, some commentators say, may be remedied by an imposition of safeguards that are in keeping with the limitations recently placed on punitive damages awards by the Supreme Court of the United States. The two specific safeguards that these commentators suggest are (1) informing jurors of a range of non-economic awards given in factually similar cases (otherwise known as comparability review), and (2) a two-tiered standard of appellate review.<sup>10</sup> As applied to Arkansas’s loss-of-life structure, these suggested revisions will not only provide a more principled ap-

---

7. *Durham v. Marberry*, 356 Ark. 481, 492, 156 S.W.3d 242, 248 (2004).

8. See *infra* text accompanying notes 166–70.

9. Allen et al., *supra* note 5, at 1275; Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL’Y 231, 235 (2003). But cf. JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 322 (2003) (arguing that comparability review fails to treat intangible loss as unique to each tort victim).

10. DeCamp, *supra* note 9, at 235. But cf. Lind, *supra* note 9, at 322.

proach to loss-of-life valuation; they will also protect defendants' procedural due process rights.

To be clear, this note argues two things: first, because recovery of post-mortem hedonic damages is inconsistent with the historical purposes of survival statutes, the Arkansas General Assembly needs to move the 2001 amendment language to the text of the Arkansas wrongful-death statute; second, given the Supreme Court's position on the constitutionality of punitive damages awards, it is clear that Arkansas's method for calculating loss-of-life damages poses a real threat to defendants' procedural due process rights; thus, reform is necessary.

This note will first address the location of the loss-of-life statutory language by examining the legal purposes and theories supporting wrongful-death and survival statutes in general and by uncovering the theoretical and practical weaknesses in allowing recovery for loss-of-life damages under Arkansas's survival statute.<sup>11</sup> Second, this note will expose the due process concerns innate in Arkansas's loss-of-life scheme and propose a solution: a two-step remedy that would bring Arkansas's loss-of-life damages calculation within the acceptable bounds of due process.<sup>12</sup> Last, this note will conclude with a summary of these arguments.<sup>13</sup>

## II. THE ARKANSAS GENERAL ASSEMBLY'S 2001 AMENDMENT LANGUAGE IS MISPLACED

In order to understand the implications of the General Assembly's 2001 amendment, it is necessary for one to have a general knowledge of the background and purposes underlying wrongful-death and survival statutes. This section will first trace the development of wrongful-death and survival statutes while focusing on the technical purpose and operation of each type of statute. Following this discussion, this note will discuss the problems behind the current placement of the 2001 amendment language and propose that a sufficient solution would be to move that language to the text of the Arkansas wrongful-death statute.

### A. Wrongful-Death and Survival Statutes

At common law, there were three general rules that governed claims resulting from a wrongful death.<sup>14</sup> First, a victim's claims died with the tortfeasor if the tortfeasor died before the victim could bring his or her cause of action; second, a tort victim's claim was extinguished upon the victim's

---

11. See *infra* Part II.

12. See *infra* Part III.

13. See *infra* Part IV.

14. DAN B. DOBBS, LAW OF REMEDIES § 8.3 (2d ed. 1993).

death; and third, a "victim's survivors had no independent claim of their own against the tortfeasor for the loss of their support or for their grief and sorrow."<sup>15</sup> The combined effect of these three rules meant that "it was cheaper for the [tortfeasor] to kill the plaintiff than to injure him [or her], and that the most grievous of all injuries left the bereaved family of the victim . . . without a remedy."<sup>16</sup> In order to preempt the effect of these common-law rules, British Parliament passed Lord Campbell's Act in 1846.<sup>17</sup> Upon the wrongful death of an individual, this act created a new cause of action that permitted statutorily recognized beneficiaries to recover the losses they suffered as a result of a decedent's death.<sup>18</sup>

Shortly after Parliament passed Lord Campbell's Act, many American jurisdictions followed suit with their own wrongful-death statutes.<sup>19</sup> These states modeled their statutes closely after Lord Campbell's act by incorporating the same underlying theories and purposes.<sup>20</sup> The underlying purpose common to both Lord Campbell's Act and most early American wrongful-death statutes was to protect dependent survivors from a loss of sustenance.<sup>21</sup> It is important to note that these adopting states saw their wrongful-death legislation as a type of "social welfare" that protected survivors' pecuniary interests in the decedent's income.<sup>22</sup> Today, many states have kept their wrongful-death statutes true to form by focusing on the loss to the survivors.<sup>23</sup>

---

15. *Id.*

16. Joseph A. Kuiper, Note, *The Courts, Daubert, and Willingness-to-Pay: The Doubtful Future of Hedonic Damages Testimony Under the Federal Rules of Evidence*, 1996 U. ILL. L. REV. 1197, 1216 (1996) (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984)).

17. Lori A. Nicholson, Note, *Hedonic Damages in Wrongful Death and Survival Actions: The Impact of Alzheimer's Disease*, 2 ELDER L.J. 249, 254 (1994); see also Kuiper, *supra* note 16, at 1216 n.120.

18. BRILL, *supra* note 17, § 34:1.

19. *Id.*

20. *Id.* The Arkansas General Assembly modeled the Arkansas wrongful death act after Lord Campbell's Act. HOWARD W. BRILL, ARKANSAS LAW OF DAMAGES § 34:1 (5th ed. 2008).

21. DOBBS, *supra* note 14, § 8.3(1); see also O. FRED HARRIS, ARKANSAS WRONGFUL DEATH ACTIONS § 1-2 (1984); Andrew Jay McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 NOTRE DAME L. REV. 57, 93 (1990).

22. DOBBS, *supra* note 14, § 8.3(1) ("The initial purpose was undoubtedly more related to a limited version of social welfare than to corrective justice.").

23. SPEISER & ROOKS, *supra* note 3, § 6:3.

## 1. *Wrongful-Death Statutes*

### a. Loss-to-survivor jurisdictions

A large majority of contemporary wrongful-death statutes create new causes of action that survivors may use to recover damages for personal losses sustained as a result of a decedent's death.<sup>24</sup> Today, most states still hold to the traditional understanding that wrongful-death statutes exist to compensate survivors for their losses.<sup>25</sup> These jurisdictions, which are commonly known as loss-to-survivor jurisdictions, calculate survivors' losses by measuring "the present value of probable contributions which the deceased would have made to the survivors, which . . . [may] include[] the value of a parent's training, guidance, nurture and education."<sup>26</sup> Beyond these pecuniary damages, loss-to-survivor jurisdictions also allow recovery of funeral and medical expenses as well as any possible inheritance that the decedent might have left and any administrative expenses or attorney's fees.<sup>27</sup> Furthermore, some loss-to-survivor jurisdictions have permitted recovery of non-pecuniary damages such as loss of companionship or loss of society.<sup>28</sup>

### b. Loss-to-estate jurisdictions

Over time, another approach to calculating wrongful-death damages has developed; namely, the loss-to-estate method of calculation.<sup>29</sup> Rather than focusing on the loss that a decedent's survivors sustained, the loss-to-estate theory of calculation is concerned solely with the injury that the death caused the decedent's estate.<sup>30</sup> Under this approach, courts will calculate the loss in one of three ways: "(1) the present value of decedent's probable future net earnings; (2) the present value of decedent's probable future accu-

---

24. DOBBS, *supra* note 14, § 8.3(1).

25. McClurg, *supra* note 21, at 93.

26. SPEISER & ROOKS, *supra* note 3, § 6:3.

27. *Id.*

28. *Id.* There are roughly five different types of loss-to-survivor wrongful death statutes: (1) those providing only in general terms for fair and just damages; (2) those including a nonexclusive list of available types of damages; (3) those including an exclusive list of available types of damages; (4) those specifically limiting damages to pecuniary losses of the survivors; and (5) those which otherwise make clear that the damages are for injuries suffered by the survivors because of the death. Statutes falling into the first two groups do not preclude judicial recognition of damages for the value of lost life; whereas those falling within the last three categories do. McClurg, *supra* note 21, at 96.

29. DOBBS, *supra* note 14, § 8.3(1).

30. McClurg, *supra* note 21, at 93.

mulations; and (3) the present net worth of decedent's probable future gross earnings."<sup>31</sup>

There are four circumstances under which jurisdictions may incorporate the loss-to-estate method of calculation:

(1) hybrid survival-death statutes, which are essentially survival actions enlarged by statute or judicial decision to include damages in the same action for wrongful death; (2) true wrongful death statutes, construed to measure damages by loss to the estate; (3) wrongful death statutes which measure damages by the loss to the survivors, except where the decedent is not survived by any statutory beneficiary, in which case damages are measured by the loss to the estate; and (4) wrongful death statutes which measure damages by the loss to the survivors, but allow the decedent's personal representative to recover specified items of damages such as medical and funeral expenses on behalf of the estate.<sup>32</sup>

With the exception of a small minority, most states do not allow recovery of loss-of-life damages in a wrongful-death suit.<sup>33</sup> Those that do are typically loss-to-estate jurisdictions, and they generally apply a liberal interpretation of their wrongful-death statutes.<sup>34</sup> At least one commentator has suggested that "[c]ompensating the decedent's estate for all losses inflicted by the wrongful death could logically include compensation for the decedent's loss-of-life itself."<sup>35</sup>

## 2. *Survival Statutes*

Unlike wrongful death statutes, survival statutes do not create new causes of action.<sup>36</sup> Causes of action predicated on a state's survival statute are not based on loss experienced upon or after the death of a decedent.<sup>37</sup> Rather, the historically and modernly typical survival statute limits survival causes of action to recovery for a victim's claims that arose before his or her death.<sup>38</sup> After the death of a tortfeasor, or the wrongful death of a victim, a survival statute will "keep the [victim's] preexisting injury claim[s] alive . .

---

31. SPEISER & ROOKS, *supra* note 3, § 6:52; *see also id.* §§ 6:53--56.

32. McClurg, *supra* note 21, at 93-94.

33. Nicholson, *supra* note 17, at 258.

34. SPEISER & ROOKS, *supra* note 3, § 6:60.

35. McClurg, *supra* note 21, at 97-98 (arguing that the deficiencies in the pecuniary loss rule can justify modification of a wrongful-death statute or at least judicial reconstruction to allow for recovery of loss-of-life damages).

36. HARRIS, *supra* note 21, §§ 1-2.

37. McClurg, *supra* note 21, at 91.

38. *Id.* at 90.

. as an asset of [his or her] estate, and limit damages to those that occurred from the time of injury until death.”<sup>39</sup>

As will be discussed later,<sup>40</sup> courts that have considered the nature of loss-of-life damages have classified such damages as post-mortem hedonic damages, i.e., damages incurred after death.<sup>41</sup> Given the limited scope of survival statutes, claims for post-mortem hedonic damages by definition fall outside the reach of a survival action because a claim for post-mortem hedonic damages is based on the harm sustained as a result of the decedent’s death; the decedent’s death caused or is the injury.<sup>42</sup> A survival statute merely permits recovery for those damages that a decedent would have had had he or she lived.<sup>43</sup> Thus, the paradox in allowing recovery for post-mortem hedonic damages through the provisions of a survival statute is that a decedent would not have a claim for loss of life or a loss of enjoyment had he or she lived.<sup>44</sup>

## B. Amending the Arkansas Survival and Wrongful-Death Statutes

Before 2001, Arkansas did not permit plaintiffs to recover post-mortem hedonic damages on behalf of a decedent.<sup>45</sup> However, in 2001, the Arkansas General Assembly amended the Arkansas survival statute<sup>46</sup> with language

---

39. *Id.* at 91; see also DOBBS, *supra* note 14, § 8.3.

40. See *infra* Part III.B.

41. *Durham v. Marberry*, 356 Ark. 481, 492, 156 S.W.3d 242, 248 (2004) (“[S]ince loss-of-life damages can only begin accruing at the point when life is lost, at death, there is no reason to believe the legislature intended to require the decedent to live for a period of time between injury and death.”).

42. *McClurg*, *supra* note 21, at 91; SPEISER & ROOKS, *supra* note 3, § 6:45.

43. DOBBS, *supra* note 14, § 8.3; *McClurg*, *supra* note 21, at 91.

44. *McClurg*, *supra* note 21, at 91; see also RESTATEMENT (SECOND) OF TORTS § 926 (1979) (“[T]he death of the injured person limits recovery for damages for loss or impairment of earning capacity, emotional distress and all other harms, to harms suffered before the death . . . .”); BRILL, *supra* note 17, § 34:1A (“Apart from the personal injury action, the administrator may assert any claim that the decedent could have asserted if he had lived.”); Cindy Domingue-Hendrickson, *Wrongful Death—New Mexico Adopts Hedonic Damages in the Context of Wrongful Death Actions*: *Sears v. Nissan* (Romero v. Byers), 25 N.M. L. REV. 385, 387–88 (1995) (“[S]urvival statutes probably preclude post-mortem hedonic damages for wrongful death, because loss of the value of life itself necessarily occurs after death.”).

45. *Bailey v. Rose Care Ctr.*, 307 Ark. 14, 20–21, 817 S.W.2d 412, 415 (1991); see also BRILL, *supra* note 17, § 34:1B (“Arkansas has traditionally not permitted damages for the decedent’s loss of enjoyment of life.”).

46. ARK. CODE ANN. § 16-62-101 (LEXIS Repl. 2005). The Arkansas Model Jury Instructions do not have a separate jury instruction for loss-of-life damages. The modification that the Arkansas Supreme Court Committee on Jury Instructions made was to the Measure of Damages—Wrongful Death—Cause of Action instruction. See ARK. MODEL JURY INSTR., CIVIL AMI 2216 (2009); see also *Durham v. Marberry*, 356 Ark. 481, 156 S.W.3d 242 (2004); Ali M. Brady, Note, *The Measure of Life: Determining The Value of Lost Years After Durham v. Marberry*, 59 ARK. L. REV. 125, 132 (2006). Because the 2001 amendment to the



that gave a “decendent’s estate” the ability to “recover for the decedent’s loss of life as an independent element of damages” in addition “to all other elements of damages provided by law.”<sup>47</sup> In a very palpable way, however, such an amendment seems out of place with what is commonly understood as the underlying rationale for survival statutes.<sup>48</sup>

As previously stated, it is commonly understood that the only claims a survivor may assert through a survival cause of action are those that the decedent would have been entitled to had he or she lived.<sup>49</sup> Through its holdings, both before and after the 2001 amendment, the Arkansas Supreme Court has made this general rule the well-established rule in Arkansas.<sup>50</sup> Given the Arkansas Supreme Court’s disposition, then, it should follow that recovery for post-mortem hedonic damages and a survival action are by

survival statute was remedial in nature, the Arkansas Supreme Court has held that it should be applied retroactively. *McMickle v. Griffen*, 369 Ark. 318, 339, 254 S.W.3d 729, 747 (2007).

47. ARK. CODE ANN. § 16-62-101 (LEXIS Repl. 2005). One commentator suggests that the Arkansas General Assembly intended the amendment to assist plaintiffs in recovering damages for the wrongful death of a fetus. Brady, *supra* note 46, at 132 nn.59–60. This commentator notes other 2001 amendments such as the amendment to the Arkansas Wrongful-Death Statute, which included “viable fetus” in the definition of a “person,” and the amendment to the probate code that established the administration, settlement, and distribution of the estate of a viable fetus. *Id.* The Supreme Court of Arkansas has declined to address whether the evidence required for establishing loss-of-life damages for a viable fetus is quantitatively and qualitatively the same as that required for establishing wrongful-death damages for a viable fetus. *One Nat’l Bank v. Pope*, 372 Ark. 208, 214 n.4, 272 S.W.3d 98, 103 n.4 (2008). It would likely be impossible to present evidence on the value that the fetus would have placed on his or her life.

48. See *Sterner v. Wesley Coll., Inc.*, 747 F. Supp. 263, 273 (D. Del. 1990) (“We conclude that plaintiffs in the present action may not recover for the hedonic value of the decedent’s lost life as a distinct basis for recovery under the Delaware survival action statute.”).

49. McClurg, *supra* note 21, at 91; see also BRILL, *supra* note 17, § 34:1A. But see *Durham*, 356 Ark. at 492, 156 S.W.3d at 248.

50. *Estate of Mulkey v. K-Mart Co.*, No. 4:07CV00632 JLH, 2008 WL 2073929, at \*2 (E.D. Ark. May 13, 2008) (unpublished); *Myers v. McAdams*, 366 Ark. 435, 439–40, 236 S.W.3d 504, 507 (2006); see also BRILL, *supra* note 17, § 34:1A; HARRIS, *supra* note 21, § 2-2. In his treatise, Harris notes this point:

In *Davis v. Railway*, [53 Ark. 117, 13 S.W. 801 (1890)], [t]he supreme court held that the action under the survival statute for the benefit of the decedent’s estate was separate and distinct from the action under the wrongful death statute for the benefit of the next of kin. According to the court, the action grounded upon the survival statute was simply the deceased’s cause of action which accrued at the time of injury and covered the period from the injury to the death of the deceased person.

*Id.* (footnotes omitted). One could argue that the Arkansas Supreme Court’s holding in *Myers v. McAdams* with regard to the limitations of the Arkansas survival statute implicitly overruled the court’s contrary holding in *Durham v. Marberry* through inconsistency.

definition simply incompatible. Nonetheless, the Arkansas General Assembly amended the Arkansas survival statute with language that allows for the recovery of loss-of-life damages. It is this note's position that no legal theory supports the current placement of this language and that, if loss-of-life damages are to remain available to Arkansans, the Arkansas General Assembly must move the 2001 amendment language to the text of the Arkansas wrongful-death statute.

Professor Andrew McClurg suggests that while the purposes behind wrongful-death statutes do not easily dovetail with loss-of-life theory, courts willing to broadly construe their respective state's wrongful-death statutes could theoretically allow recovery of loss-of-life damages in a wrongful-death action.<sup>51</sup> Professor McClurg asserts that because loss-to-estate jurisdictions measure loss by determining the loss that the decedent's estate sustained as a result of the decedent's death, they are more predisposed to a construction in favor of loss-of-life recovery.<sup>52</sup> McClurg argues that because loss-to-estate jurisdictions focus the "inquiry . . . towards assessing the injury that the death . . . caused to the decedent's estate, [and] not [that] caused to the survivors," there is room to argue that "losses to the decedent's estate resulting from the death logically should encompass all losses suffered by the decedent from the death—including the value of his [or her] life."<sup>53</sup> In fact, the Arkansas General Assembly itself has already taken one step towards the loss-to-estate method of calculation by couching the theory of loss in terms of loss to the "decedent's estate."<sup>54</sup>

While this solution has the potential to raise separate issues,<sup>55</sup> it is at least the lesser of two evils. The theoretical connection between a decedent's loss-of-life damages and recovery of those damages only stands to benefit from the relocation of the amendment language, and, as long as the Arkansas General Assembly and the Arkansas Supreme Court are accepting of Professor McClurg's suggestions, there is a colorable argument that such a connection is legally justified.<sup>56</sup>

---

51. McClurg, *supra* note 21, at 93.

52. *Id.* at 94.

53. *Id.*

54. ARK. CODE ANN. § 16-62-101(b) (LEXIS Repl. 2005) ("In addition to all other elements of damages provided by law, a *decedent's estate* may recover for the decedent's loss of life as an independent element of damages." (emphasis added)).

55. E.g., what is the theoretical connection between a decedent's loss of life—a loss that is personal to the decedent—and the loss that an estate experiences as a result of the decedent's death?

56. See McClurg, *supra* note 21, at 94.

### III. THE PROCEDURAL DUE PROCESS CONCERNS UNDERLYING ARKANSAS'S LOSS-OF-LIFE JURISPRUDENCE

As previously discussed, this note submits that Arkansas's loss-of-life damages jurisprudence infringes on defendants' due process rights. In an attempt to illustrate the problem, the following section will first discuss the largely common natures of non-economic damages and hedonic damages. Given that loss-of-life damages comprise a subset of hedonic damages, this background is significant because most, if not all, of the unconstitutional proclivities found in Arkansas's procedure for calculating loss-of-life damages parallel those found in the procedures for determining non-economic damages awards. After this discussion, this section will explain how the Supreme Court's recently imposed limitations on punitive damages awards are instructive for forming solutions to the due process problems in non-economic damages in general. Next, this section will provide the background to Arkansas's loss-of-life jurisprudence. Last, this section will analyze the unconstitutional facets of Arkansas's loss-of-life scheme and show how increased guidance for jurors and increased judicial scrutiny may mitigate these issues.

#### A. Non-Economic Damages

In theory, tort damages serve two purposes: deterrence and compensation.<sup>57</sup> Tort law adequately satisfies its compensatory function to the extent that it enables courts to calculate reliably the value of a victim's harm and effectively distribute this amount to the victim or plaintiff.<sup>58</sup> While the deterrent function of tort damages is important and well established, courts typically calculate damage awards on the basis of compensation to the victim.<sup>59</sup>

In most personal-injury or wrongful-death cases, victims suffer economic or special damages that are readily identifiable through monetary amounts such as medical expenses or lost wages.<sup>60</sup> Additionally, in some of those cases, tort victims suffer what are commonly known as general or non-economic damages.<sup>61</sup> Unlike economic damages, non-economic dam-

---

57. Brian Walker, *Lessons that Wrongful Death Tort Law Can Learn From the September 11th Victim Compensation Fund*, 28 REV. LITIG. 595, 596 (2009).

58. *Id.*

59. Kyle R. Crowe, Note, *The Semantical Bifurcation of Noneconomic Loss: Should Hedonic Damage Be Recognized Independently of Pain and Suffering Damage?*, 75 IOWA L. REV. 1275, 1275-76 (1990).

60. *Id.* at 1275.

61. Lars Noah, *Comfortably Numb: Medicalizing (and Mitigating) Pain-and-Suffering Damages*, 42 U. MICH. J.L. REFORM 431, 433 (2009). Though a growing number of commentators consider the nature of non-economic damages to be inconsistent with the compensato-

ages do not find their basis in finite pecuniary figures.<sup>62</sup> Instead, non-economic theory encompasses a wide range of non-pecuniary harm.<sup>63</sup> The types of non-economic loss range from “pain, mental anguish, anxiety, emotional distress, . . . nervous shock,” loss of consortium, and hedonic losses such as loss of enjoyment and loss of life.<sup>64</sup> To establish the value of non-economic harm, courts place the determination of non-economic awards within the “enlightened conscience of impartial jurors.”<sup>65</sup> Ultimately, these jurors must find some substantial evidence on which to base their judgments with regard to non-economic harm.<sup>66</sup>

Not surprisingly, the intangible nature of these types of loss has stirred much debate among legal commentators. Some commentators have gone so far as to describe non-economic damages as “subjective, totally unmeasurable, and wide open to exaggeration and falsification.”<sup>67</sup> These individuals also argue that non-economic damage awards are incapable of serving a compensatory function because no amount of money could ever bring someone back from the dead or cause someone to forget his or her pain and suffering.<sup>68</sup>

## B. Hedonic Damages

### 1. General Definition

Hedonic damages comprise a subset of non-economic damages. They are non-economic in the sense that they compensate plaintiffs for intangible losses that are not derived from readily calculable pecuniary amounts. As

---

ry function of tort damages, a large majority of states have recognized a wide array of non-economic harms. See generally Richard Abel, *General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253 (2006); Mark A. Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DEPAUL L. REV. 331, 352–55 (2006); McClurg, *supra* note 21, at 66–67.

62. Noah, *supra* note 61, at 432–33.

63. *Id.* at 432. Some commentators have found it conceptually difficult to reconcile the compensatory function of tort damages with non-economic theory. Those who do not see a correlation between monetary awards for non-economic loss and the compensatory function of tort damages argue that money is incapable of making whole a personal-injury or wrongful-death victim after they have suffered emotional distress or even death. See Abel, *supra* note 61, at 258–59; Noah, *supra* note 61, at 433–34. This note makes no argument for or against the justification of non-economic or hedonic damages.

64. Noah, *supra* note 61, at 432.

65. SPEISER & ROOKS, *supra* note 3, § 11:2.

66. *Id.*

67. J. T. H. JOHNSON, *OUR LIABILITY PREDICAMENT* 105 (1997).

68. Joseph Sanders, *Reforming General Damages: A Good Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 115, 141–43 (2008) (“[A]warding money for pain and suffering leaves the legal system open to the criticism that it is monetizing something upon which a dollar value cannot be placed, thus violating our well-founded sense of incommensurability.”).

the title suggests, hedonic damages exist to compensate injured parties for their loss of life or loss of enjoyment of life's pleasures.<sup>69</sup> A large distinction between hedonic theory and other theories of calculation is that hedonic theory conceptualizes life's worth as intrinsically and objectively valuable; a value that is independent from net worth, earning potential or any other financial interest.<sup>70</sup>

For instance, in wrongful-death actions, a majority of states limit a survivor's damages to the finite, monetary losses that he or she sustained as a result of the decedent's death.<sup>71</sup> To calculate these types of losses, lawyers and economists use what is commonly known as the pecuniary-loss theory.<sup>72</sup> Under the pecuniary-loss theory, an individual's life is worth his or her earning power or potential.<sup>73</sup> The most common pecuniary loss calculation arrives at the value of an individual life by subtracting that individual's consumption expenses from the value of the individual's expected earnings at the time of his or her death.<sup>74</sup>

Rather than recycling theories of pecuniary loss into its valuation scheme; however, hedonic theory treats life as independently valuable.<sup>75</sup> While pecuniary-loss theory makes the value of life about the measure of financial support an individual provided to his or her family, hedonic theory "account[s] for the value of the decedent's life in its own right."<sup>76</sup> As stated by Stanley V. Smith, the economist credited with coining the phrase "hedonic damages," hedonic value "refers to the larger value of life . . . including economic, including moral, including philosophical, including all the value with which you might hold life."<sup>77</sup>

---

69. Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1041-42 (2004); ("Hedonic,' is from the Greek 'hēdon(ē)' or 'hēdonikós,' meaning 'pleasure' or 'pleasurable.'"); cf. SPEISER & ROOKS, *supra* note 3, § 6:44 (criticizing the use of the phrase hedonic damages); McClurg, *supra* note 21, at 60 n.8 (preferring the phrases value of lost life, lost life damages, or damages for the intrinsic value of life, to describe post-mortem hedonic damages because they do not carry the negative connotation of hedonism).

70. Kuiper, *supra* note 16, at 1204-05.

71. McClurg, *supra* note 21, at 62-63.

72. Jack E. Karns, *Economics, Ethics, and Tort Remedies: The Emerging Concept of Hedonic Value*, 9 J. BUS. ETHICS 9, 707 (1990).

73. McClurg, *supra* note 21, at 63.

74. Kuiper, *supra* note 16, at 1204.

75. *Id.* at 1205-06 (citing RICHARD A. PALFIN & BRENT B. DANNINGER, HEDONIC DAMAGES: PROVING DAMAGES FOR LOST ENJOYMENT OF LIVING 15-16 (1990)); see also Nicholson, *supra* note 17, at 252-53.

76. McClurg, *supra* note 21, at 63.

77. *Sherrod v. Berry*, 629 F. Supp. 159, 163 (N.D. Ill. 1985), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988).

Within this context, it is important to note that “hedonic damages are not individually tailored.”<sup>78</sup> Under hedonic theory, it is not appropriate to calculate the value that a specific individual placed on his or her life because “hedonic estimates are socially focused, seeking to measure the intrinsic value society at large places on the life enjoyment of an average, anonymous human being.”<sup>79</sup> Because hedonic loss involves the value of life in the abstract and not an individual’s pecuniary loss, statistical valuations such as “average, anonymous human being” estimates play an important role in keeping hedonic awards true to their theoretical underpinnings.<sup>80</sup>

## 2. Two Types of Loss

Hedonic theory recognizes two main categories of loss: loss of enjoyment and loss of life.<sup>81</sup> The factor that differentiates these two types of loss is the time at which each respective loss occurs in relation to the decedent’s death.<sup>82</sup> Although a continuity of terms in the universe of hedonic theory is still lacking, most commentators consider loss of enjoyment to pertain solely to hedonic loss experienced before death (ante-mortem).<sup>83</sup>

### a. Loss of enjoyment

A party experiences a loss-of-enjoyment when he or she suffers an injury that limits or completely inhibits his or her ability to derive pleasure from life’s activities and pursuits.<sup>84</sup> The only limit to the type of experience

---

78. Kuiper, *supra* note 16, at 1206; *see also* Thomas R. Ireland & James D. Rodgers, *Hedonic Damages in Wrongful Death/Survival Action: Equitable Compensation or Optimal Life Protection?*, 2 J. FORENSIC ECON. 1, 46 (1992) (“[H]edonic valuation systems are not designed to measure the life values of specific individuals.”). *But see* SPEISER & ROOKS, *supra* note 3, § 6:44 (“Hedonic loss can be divided into two components. The first component is the general loss of enjoyment of life that an average individual would experience as a result of an injury . . . . The second component consists of a specific loss that is unique to a particular individual.”).

79. Kuiper, *supra* note 16, at 1206.

80. *Id.*

81. McClurg, *supra* note 21, at 60 nn.8–9.

82. *See id.* at 60 n.9.

83. *Durham v. Marberry*, 356 Ark. 481, 487–92, 156 S.W.3d 242, 245–49 (2004); *see also* Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 748–49 (2007).

84. Bagenstos & Schlanger, *supra* note 83, at 748–49; *cf.* Nicholson, *supra* note 17, at 273–74 (arguing that full recovery of loss of enjoyment is justified in cases where an individual suffering from Alzheimer’s Disease is wrongfully injured because, despite his or her preexisting condition, medical research shows that those individuals do not necessarily enjoy life any less than individuals who live without the disease). *But see* Bagenstos & Schlanger, *supra* note 83, at 776–78 (arguing that “adaptive preferences” theory indicates that injured parties adapt to their disabilities, that adapted parties do not necessarily see themselves as

that an individual loses the opportunity to enjoy is the "range of human activities."<sup>85</sup> Skiing, painting, reading, hiking, hunting, fishing, dancing, cheerleading and bowling are just a few of the activities for which courts have awarded loss-of-enjoyment damages.<sup>86</sup> In addition, it is important to note that while most states allow plaintiffs to recover loss-of-enjoyment damages, these states' classifications of the loss differ.<sup>87</sup> Some jurisdictions consider loss of enjoyment to be a component or element of general pain and suffering, while others consider this loss as an entirely separate element of damages.<sup>88</sup>

b. Loss of life

Unlike loss of enjoyment, loss of life occurs post-mortem.<sup>89</sup> One learned treatise has noted that loss-of-life damages exist to compensate a decedent "for the destruction of his capacity to carry on and enjoy life's activities in a way he would have done had he lived."<sup>90</sup> A loss-of-life award should "reflect the life expectancy of the decedent, his recreational and social activities, [and] his service to others."<sup>91</sup> The notion that death must precede a claim for loss-of-life damages is apparent in the title: the words indicate that recovery is based on the assumption that death has already occurred.<sup>92</sup> Obviously, an individual cannot experience a loss of life prior to his or her death.<sup>93</sup> At least a few authorities have noted that life between injury and death is not a necessary requisite to sustaining loss-of-life damages.<sup>94</sup>

---

having lost enjoyment of life, and that jury members or policy makers, who may not be disabled, superimpose their own negative associations of an injury on another individual's enjoyment of life).

85. McClurg, *supra* note 21, at 60 n.9.

86. *Id.*

87. *Id.*

88. *Id.*

89. BRILL, *supra* note 17, § 34:1B.

90. *Id.*

91. *Id.*

92. Durham v. Marberry, 356 Ark. 481, 492, 156 S.W.3d 242, 248 (2004).

93. *Id.*

94. BRILL, *supra* note 17, § 34:1B. *But see* Sterner v. Wesley Coll., Inc., 747 F. Supp. 263, 273 (D. Del. 1990) (holding that hedonic damages were only appropriate to measure the amount of pain and suffering that a decedent sustained between the time of injury and the time of death).

C. Solving the Procedural Due Process Issues Inherent in the Calculation of Non-Economic Damages

In recent decades, American courts have seen an increase in the size and availability of both non-economic and hedonic-damage awards.<sup>95</sup> As a result of this increase, a growing portion of the legal community has become concerned with the implications of non-economic theory and the effect of large non-economic awards on defendants' due process rights.<sup>96</sup> Commentators who question the constitutionality of non-economic damage awards have found that these awards are violative of defendants' due process rights to the extent that they are excessive, i.e., beyond the scope of financial liability that the defendant is actually responsible for, and to the extent that they are not the product of an accurate or principled system or procedure.<sup>97</sup>

Those who find due process issues with non-economic damages base their arguments on a simple maxim: "[w]ithout tying liability to facts, any form of 'compensation' [may be] simply an open-ended invitation to transfer wealth from one person to another."<sup>98</sup> These individuals assert that to be legally justified, non-economic awards, or any tort damage award for that matter, must be based on fact.<sup>99</sup> In addition, they also state that, like other forms of damages, "if noneconomic compensatory damages involve facts, one must be able to articulate and establish those facts in a reliable way."<sup>100</sup> Given the intangible, non-factual nature of non-economic damages like pain

---

95. Giovanni Comand , *Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States*, 19 TEMP. INT'L & COMP. L.J. 241, 250-53 (2005); see also DeCamp, *supra* note 9, at 234; Schwartz & Silverman, *supra* note 69, at 1046 n.39; Anthony J. Sebok, *Translating the Immeasurable: Thinking About Pain and Suffering Comparatively*, 55 DEPAUL L. REV. 379, 384-85 (2006). At least one commentator analyzing both American and European non-economic loss systems has attributed this shift to the "response of legal systems' demand for protection of individual interests originating in society[.]" Comand , *supra*, at 247-48. Furthermore, this same commentator has noted that this response "has triggered important modifications in the conceptualization of intangible loss accompanying both physical and emotional harm." *Id.*

96. See DeCamp, *supra* note 9, at 257; see also Geistfeld, *supra* note 61, at 342; 2 DAN B. DOBBS, *THE LAW OF TORTS* 1051 (2001) ("The claim of pain is therefore a serious threat to the defendant since, lacking any highly objective components, it permits juries to roam through their biases in setting an award.").

97. See generally Allen et al., *supra* note 5; DeCamp, *supra* note 9; Geistfeld, *supra* note 61; Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998).

98. Allen et al., *supra* note 5, at 1256.

99. *Id.*

100. *Id.* at 1255.



and suffering or loss of life, however, it is extremely difficult to find a factual basis for non-economic harm.<sup>101</sup>

For example, consider the amount of pain and suffering that two different burn victims endure. During the course of the same fire, one burn victim sustained third-degree burns over eighty to ninety percent of his body; the other received second-degree burns on his right arm. While both likely experienced severe pain, it would be rational to assume that the victim with the more severe burns over a majority of his body experienced more pain and suffering than the other victim in this scenario. Nonetheless, in terms of non-economic damages, how are juries able to quantify the difference?<sup>102</sup> Furthermore, what guidance or instruction, if any, aids jurors' factual determinations as to the amount of these intangible harms?<sup>103</sup>

### 1. *The Supreme Court's Limitations on Punitive Damages Awards*

Recently, the Supreme Court's jurisprudence regarding the constitutionality of punitive damages awards has provided helpful insight into the limitations that due process imposes on intangible damages calculations in general.<sup>104</sup> Over the past twenty years, the Supreme Court has become increasingly discontent with the amount of discretion afforded jurors in calculating punitive damages awards.<sup>105</sup> Specifically, by recently imposing both

---

101. *Id.*; DeCamp, *supra* note 9, at 261–62. Paul DeCamp has noted that

[i]n the end, all that an award of noneconomic compensatory damages is, and all that it can be under current practice, is a dollar amount agreed to by a sufficient number of jurors, through a secret process, based on undisclosed considerations largely divorced from the evidence presented in the case . . . . The jurors debate the matter and arrive at a figure with which the requisite number of jurors can agree. This is the very definition of arbitrariness . . . .

*Id. Contra* Stephan Landsman, *In Praise of Uncertainty: A Response to Professor Allen*, 56 DEPAUL L. REV. 1279, 1282 (2007) ("We live in a world where a great deal cannot be reduced to the certainty of explicit proof. . . . It is not that the jury is perfect—no human system of measurement can be—but rather that it speaks with the authority of our polity.").

102. Allen et al., *supra* note 5, at 1256.

103. In their article concerning the nature and regulation of non-economic damages, Ronald J. Allen, Alexia Brunet and Susan Spies Roth provide a helpful account of the issue concerning the fact of the matter in non-economic damage awards. Allen et al., *supra* note 5, at 1264. These authors argue that in order to truthfully establish the fact of the matter involved in non-economic damages, i.e., the value of the victim's non-economic harm, jurors must rely on objective evidence instead of their subjective notions of what the value should be. *Id.*

104. See generally Allen et al., *supra* note 5; DeCamp, *supra* note 9; Sunstein et al., *supra* note 97.

105. DeCamp, *supra* note 9, at 233.

substantive and procedural limitations on punitive damages awards, the Court has essentially moved away from its previous position of “hands-off approval of common-law practice for awarding and reviewing punitive damages to an express recognition of a right not to be subjected to grossly excessive punitive damage awards.”<sup>106</sup> As a result, regarding this express recognition, the Court has “dramatically increased the scope of judicial involvement in reviewing punitive damages awards for excessiveness.”<sup>107</sup>

Early on in the transition from “hands-off” to more extensive oversight, the Court was hesitant to sustain challenges to punitive damages awards and merely hinted at its underlying concerns.<sup>108</sup> For example, in *Pacific Mutual Life Insurance Co. v. Haslip*,<sup>109</sup> the Court admitted that “unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.”<sup>110</sup> Though it eventually upheld the jury’s award, the Court considered the extent to which jurors were guided in their calculation and whether such guidance “reasonably accommodated Pacific Mutual’s interests.”<sup>111</sup> Ultimately, the Court held that “as long as [a juror’s discretion in calculating punitive damages] is exercised within reasonable constraints, due process is satisfied.”<sup>112</sup>

Later in the shift, the Court considered more seriously the due process implications behind the calculation of punitive damages awards. For instance, in *Honda Motor Co. v. Oberg*,<sup>113</sup> the Court held that Oregon’s standard of reviewing punitive damages awards was unconstitutional because it “ensur[ed] only that there [was] evidence to support *some* punitive damages, not that there is evidence to support the amount actually awarded.”<sup>114</sup> The Court found that this some-evidence standard “abrogat[ed] . . . a well-established common-law protection against arbitrary deprivations of property” and that, by doing so, it “raised a presumption that it violate[d] the Due Process Clause.”<sup>115</sup> In explaining its holding, the Court stated that:

Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in

---

106. *Id.* at 268.

107. *Id.* at 233.

108. *See id.* at 268–78.

109. 499 U.S. 1 (1991).

110. *Id.* at 18.

111. *Id.* at 19–20.

112. *Id.* at 20.

113. 512 U.S. 415 (1994).

114. *Id.* at 429.

115. *Id.* at 430 (“When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process.”).

choosing amounts, and the 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. Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger. Oregon has removed that safeguard without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time. For these reasons, we hold that Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment.<sup>116</sup>

Finally, in the last stages of its shift, the Court particularized the standards that due process required in both the size of punitive damages awards and the amount of guidance give to jurors. First, in *BMW of North America, Inc. v. Gore*,<sup>117</sup> the Court held that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor."<sup>118</sup> Concerning this concept, the Court stated that a punitive damages award is "grossly excessive," and in the "zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment," if it bears no relation to a state's legitimate interests in using punitive damages to punish and deter.<sup>119</sup>

Second, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>120</sup> the Court noted that it had increased "concern[] over the imprecise manner in which punitive damages systems are administered."<sup>121</sup> Specifically, the Court stated that it had heightened concern "when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded."<sup>122</sup> The Court further clarified that "[v]ague instructions, or those that merely inform the jury to avoid 'passion or prejudice' do little to aid the decisionmaker in its task of assessing appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory."<sup>123</sup> In the end, the Court firmly established a de novo standard of appellate review of potentially unconstitutional punitive damage awards.<sup>124</sup> Writing for the majority, Justice Kennedy noted that

---

116. *Id.* at 432.

117. 517 U.S. 559 (1996).

118. *Id.* at 562 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993)).

119. *Id.* at 568.

120. 538 U.S. 408 (2003).

121. *Id.* at 417.

122. *Id.*

123. *Id.* at 418.

124. *Id.*

“[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker’s caprice.”<sup>125</sup>

Third, in *Exxon Shipping Co. v. Baker*,<sup>126</sup> the Court established for the first time a bright-line, mathematical limit on punitive damage awards.<sup>127</sup> While the Court’s decision in *Exxon* is limited to punitive damages claims arising under federal maritime law, a few commentators have considered it to be telling of the Court’s current disposition regarding the limit that due process places on punitive awards in general.<sup>128</sup> For instance, in the majority opinion, the Court reiterated the concerns it had expressed in *Honda Motor Co.* and *State Farm* concerning the arbitrary and unpredictable nature of punitive awards.<sup>129</sup> In doing so, the Court mentioned that for purposes of reviewing punitive awards in general, verbal limitations on jurors deciding the amount of punitive damages are likely insufficient to guard against “unpredictable outlier” awards.<sup>130</sup>

The Court stated that its rationale behind this position was that “[i]nstructions can go just so far in promoting systematic consistency when awards are not tied to specifically proven items of damage (the cost of medical treatment, say).”<sup>131</sup> To explain this rationale, the Court drew from its experience with the federal sentencing system.<sup>132</sup> The Court found this experience instructive and noted that:

in the old federal sentencing system of general standards the cohort of even the most seasoned judicial penalty-givers defied consistency. Judges and defendants alike were “[I]left at large, wandering in deserts of uncharted discretion,” which is very much the position of those imposing punitive damages today, be they judges or juries, except that they lack even a statutory maximum; their only restraint beyond a core sense of fairness is the due process limit.<sup>133</sup>

In the Court’s mind, the development of the federal sentencing system “suggest[ed] that as long ‘as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that

---

125. *Id.*

126. 554 U.S. 471 (2008).

127. Michael L. Brooks, Note, *Uncharted Waters: The Supreme Court Plots The Course to a Constitutional Bright-Line Restriction on Punitive Awards in Exxon Shipping Co. v. Baker*, 62 OKLA. L. REV. 497, 497 (2010).

128. See generally *id.* at 519–25.

129. *Exxon*, 554 U.S. at 497–501.

130. *Id.* at 504.

131. *Id.*

132. *Id.*

133. *Id.* at 505–06.

the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary.”<sup>134</sup>

2. *Finding Solutions in the Supreme Court's Due Process Considerations*

Under a comparative analysis, several commentators have drawn attention to the substantially common background of both punitive and non-economic damages and use phrases such as “largely undifferentiated and . . . interchangeable” to describe the relationship of punitive and non-economic damages during the seventeenth, eighteenth, and nineteenth centuries.<sup>135</sup> In light of this common nature, these commentators have found that the “common history and treatment [of punitive and non-economic damages], the inadequate guidance available to juries, the amorphous nature of the jury’s task, the absence of objective criteria to safeguard against consideration of improper factors, and the lack of clear standards to facilitate meaningful judicial review of verdicts” within the context of awarding non-economic damages obviate the suitability of the Supreme Court’s recent limitations on punitive damages awards for use in crafting procedural safeguards for non-economic damages calculation.<sup>136</sup>

a. Guidance for jurors: comparability review

Ultimately, a method of calculation or procedure that affords jurors the discretion to award non-economic damages awards without relying on any objective criteria is simply not in keeping with the Supreme Court’s due process standards.<sup>137</sup> To the extent that the Supreme Court’s interpretation of the Due Process clause requires guidance for jurors in their non-economic damages calculations, and to the extent that the issue of non-economic damages is an issue of fact, jurors “should be provided with evidence to permit a reasoned valuation of the harms at issue.”<sup>138</sup> Apart from

---

134. *Id.* at 506.

135. DeCamp, *supra* note 9, at 233. Commentator Paul DeCamp observes that American courts followed English decisions regarding this issue and that these courts “eventually settl[ed] into a pattern of reviewing all types of damages for ‘passion or prejudice’ or inquiring whether the verdict ‘shock[ed] the conscience.’” *Id.* at 236. *See generally id.* at 242–48.

136. *Id.* at 291. Members of the Supreme Court have also recognized the correlation between the unconstitutional effects of punitive damages and those of non-economic damages. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 446–47 (2001) (Ginsburg, J., dissenting) (“One million dollars’ worth of pain and suffering does not exist as a ‘fact’ in the world any more or less than one million dollars’ worth of moral outrage.” (citation omitted)).

137. *Id.* at 291–92.

138. *Id.* at 292; *see also* Mark A. Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L.

evidence concerning the nature and severity of a plaintiff's injuries, juries need evidence that will assist them in calculating an accurate amount as to monetary damages.<sup>139</sup> "The only meaningful guide that a jury can have in this regard is to be informed of the range of awards for injuries factually comparable to the harms that the plaintiff claims to have suffered."<sup>140</sup>

Such a process is commonly known as comparability review.<sup>141</sup> Essentially, "[c]omparability review involves comparing the present case to decisions rendered in similar cases."<sup>142</sup> Within the context of calculating non-economic damages awards, comparability review involves a four-step procedure. First, the court orders the parties to submit briefs "regarding the cases they believe establish the appropriate range [of non-economic damages]."<sup>143</sup> Second, the court then "determine[s] as a matter of law which cases are most closely analogous to the set of facts that the plaintiff asserts will be proved at trial."<sup>144</sup> Third, with the help of the parties, the court then "adjust[s] [the range] figures for inflation so that older verdicts do not unduly depress the range."<sup>145</sup> Finally, if the jury ultimately returns a verdict that is above the range, the court then exercises judicial oversight by reviewing the jury's verdict for reasonableness.<sup>146</sup>

Overall, the purpose of this endeavor is to calculate an objectively reasonable range that the jury can consider in its factual determinations regarding the plaintiff's non-economic loss.<sup>147</sup> Because the range serves as an ob-

---

REV.1093, 1103-08 (2005).

139. DeCamp, *supra* note 9, at 292.

140. *Id.*

141. Allen et al., *supra* note 5, at 1258.

142. *Id.*

143. DeCamp, *supra* note 9, at 293. Professors Eric A. Posner and Cass R. Sunstein observe that if juries are to be afforded a strong role in making intangible harm determinations, then courts must provide objective guidance. Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 587-88 (2005). Specifically, Posner and Sunstein argue that courts should present value of statistical life (VSL) studies to juries faced with a loss-of-life determination. *Id.* They too note the tension between Seventh Amendment rights and the need for a more objective measure of damages; this note presents a general discussion of the matter. See *infra* note 147. However, due to the fact that "juries are not well equipped to answer [questions concerning the value of life]," Posner and Sunstein state their preference for "judge-set" awards where judges begin with a VSL figure and then make appropriate adjustments. Posner & Sunstein, *supra*, at 588.

144. DeCamp, *supra* note 9, at 293.

145. *Id.*

146. *Id.* at 295.

147. *Id.* at 294. Any reader finding a distinction between punitive damages and non-economic damages on Seventh Amendment grounds would not be amiss in his or her discovery. Historically, compensatory damages have been treated as issues of fact for the jury. *Id.* at 290. However, in its most recent punitive-damages jurisprudence, the Supreme Court has treated punitive damages awards as matters of law and not matters of fact. *Id.* at 290-91. In reviewing punitive damages awards, the Supreme Court conducts an "exacting" review to

jective standard, jurors may more accurately calculate the monetary value of their damages assessment and avoid imposing completely arbitrary judgments. For instance, "telling jurors that awards for a given kind of injury have tended to range between \$50,000 and \$600,000 provides the jurors with a great deal more context than they" otherwise would have under a no-guidance regime.<sup>148</sup>

b. Two-tiered system of appellate review

Commentators assert that the commonalities between punitive and non-economic damages also justify the application of the Supreme Court's more "exacting" de novo review to non-economic awards.<sup>149</sup> However, these commentators also assert that only a less-strict abuse-of-discretion review is necessary in cases where a jury's award falls within the range of acceptable awards created by comparability review.<sup>150</sup> In cases where a jury returns a verdict within the range of comparable awards, commentators argue for an abuse-of-discretion standard of review; in cases where the jury returns a verdict that exceeds the range, commentators have argued that application of the more exacting de novo standard of review is a necessary requisite to a constitutional non-economic damages calculation.<sup>151</sup>

---

determine whether that award is excessive or otherwise unconstitutional. *Id.* Regardless of this treatment, however, due process issues still exist in the determination of non-economic damages. *Id.* at 291.

The similarities between punitive damages and noneconomic compensatory damages—including their common history and treatment, the inadequate guidance available to juries, the amorphous nature of the jury's task, the absence of objective criteria to safeguard against consideration of improper factors, and the lack of clear standards to facilitate meaningful judicial review of verdicts—logically call for comparable treatment for purposes of procedural due process.

*Id.* Query, however, whether non-economic loss determinations are more "fact-dependent . . . than judicial inquir[ies] into probable cause or reasonable suspicion under the Fourth Amendment, proportionality of criminal punishments under the Eighth Amendment, or excessiveness of punitive damages under the Fourteenth Amendment." *Id.* at 291. Some argue that judicial review of non-economic damage awards is not constrained by Seventh Amendment strictures. *Id.* at 290–92. The premise behind this argument is that the Seventh Amendment's Reexamination Clause does not preclude careful judicial scrutiny of noneconomic compensatory damages verdicts any more than it prevents scrutiny of punitive damage awards. *Id.* Furthermore, others point to pre-Seventh Amendment acceptance of comparability review and reviewing non-economic awards for excessiveness. *Id.*

148. *Id.* at 294.

149. *Id.* at 296–97.

150. DeCamp, *supra* note 9, at 296–97.

151. *Id.*

#### D. Solving the Procedural Due Process Issues Inherent in Arkansas's Loss-of-Life Jurisprudence

By definition, loss-of-life damages are post-mortem hedonic damages.<sup>152</sup> Given this note's previous discussion of the issue,<sup>153</sup> this means that loss-of-life damages fall under the broader category of non-economic damages and that the calculation of these two types of damages create many, if not all, of the same problems, e.g., the intangible nature of both loss-of-life damages and other types of non-economic damages (such as pain and suffering) make it difficult for juries to calculate such damages with any amount of precision.

The combined effect of Arkansas's loss-of-life jurisprudence and the little to no guidance available to jurors in calculating loss-of-life damages is troubling. Such conditions are ripe for reconsideration given the Supreme Court's recent clarification of the due process standards implicated in the calculation of punitive damages awards. In an attempt to address these issues, the following section will accomplish three things: first, it will discuss the development of Arkansas's common-law regarding loss-of-life damages; second, this section will attempt to uncover the components within this common law that have the potential to infringe on defendants' procedural due process rights and third, this section will offer a two-tiered solution to the identified problems.

##### 1. *The Development of Arkansas's Loss-of-Life Jurisprudence*

In 2004, the Arkansas Supreme Court interpreted the 2001 amendment for the first time in *Durham v. Marberry*.<sup>154</sup> After consulting other jurisdictions' holdings,<sup>155</sup> the court distinguished loss-of-life damages from loss-of-enjoyment-of-life damages by stating that loss-of-enjoyment-of-life damages constitute hedonic damages that a decedent experiences before death, whereas loss-of-life damages begin "accruing at the point when life is lost, at death."<sup>156</sup> From this finding, the court reasoned that it was not necessary for the decedent to have lived between the time of injury and death in order for plaintiffs to recover loss-of-life damages under the amendment's language.<sup>157</sup> Additionally, the court provided a method for calculating loss-of-life damages by holding that "[l]oss-of-life damages seek to compensate a

---

152. BRILL, *supra* note 17, § 34:1B.

153. See *supra* text accompanying notes 69–94.

154. *Durham v. Marberry*, 356 Ark. 481, 487–88, 156 S.W.3d 242, 245–46 (2004).

155. The court referenced Connecticut's, Hawaii's, and New Mexico's holdings on post-mortem hedonic damages. *Durham*, 356 Ark. at 488–91, 156 S.W.3d at 245–48.

156. *Id.* at 492, 156 S.W.3d at 248.

157. *Id.*, 156 S.W.3d at 248–49.



decendent for the loss of the value that the decedent would have placed on his or her own life.”<sup>158</sup> As far as evidence of this value was concerned, the court noted that Arkansas had no “hard and fast rule to determine compensatory damages for non-pecuniary losses.”<sup>159</sup>

Three years later, in *McMullin v. United States*,<sup>160</sup> the Eastern District of Arkansas reviewed the Arkansas Supreme Court’s loss-of-life calculation set out in *Durham*.<sup>161</sup> Although the district court recognized that the language of the Arkansas Supreme Court’s loss-of-life calculation appeared to form a subjective standard, it ultimately found that there was no express indication that the method was inconsistent with the majority objective approach.<sup>162</sup> Nonetheless, in calculating the value of the decedent’s life, the district court still sought to determine the value that the decedent would have placed on his life.<sup>163</sup> In addition to its findings on Arkansas’s loss-of-life calculation, the court interpreted the *Durham* decision to indicate that “many types of evidence . . . may properly be admitted and relied upon to establish how to place a value on the deceased’s life.”<sup>164</sup> Interestingly, in

---

158. *Id.*, 156 S.W.3d at 248. In light of the court’s language in *Durham*, it is important to consider how such a determination would be possible in cases involving a viable fetus or an individual who demonstrated a lack of value for his or her own life. Compare Plaintiff’s Trial Brief, *Ford v. United States*, 640 F. Supp. 2d 1065 (E.D. Ark. 2009), No.4:08-CV-00176, 2010 WL 1689329 (arguing that decedent valued his life despite the fact that he committed suicide), with Defendant’s Post-Trial Brief, *Ford v. United States*, 640 F. Supp. 2d 1065 (E.D. Ark. 2009), No.4:08-CV-00176, 2010 WL 1689332 (arguing that estate could not show that decedent placed some value on his life because he committed suicide).

159. *Durham*, 356 Ark. at 493, 156 S.W.3d at 249.

160. *McMullin v. United States*, 515 F. Supp. 2d 914 (E.D. Ark. 2007).

161. *Id.*

162. *Id.* at 926.

163. *Id.* at 926–28. The court used language such as “[n]aturally this child never made any statements purporting to indicate directly how he would value his own life,” and “[c]ertainly Garret would have considered his life most valuable.” *Id.* at 928.

164. *Id.* at 927. On its face, Arkansas’s method for calculating loss-of-life damages asks jurors to imagine the value that a particular decedent would have placed on his or her life. The type of evidence that Arkansas courts have considered consists of the decedent’s relationship to his or her family, the job that the decedent occupied and the opportunities that the decedent had available to him or her. Given the negligible amount of guidance in calculating loss-of-life values, who is to say that loss-of-life valuations will not turn into socioeconomic-based decisions? For instance, the young boy in *McMullin* had a loving, caring family. The court found that the boy would have had many opportunities to live an emotionally and financially successful life. But what about those young boys and girls without a home or opportunities like the *McMullin* boy? Will their loss-of-life awards be comparable? If not, is the Arkansas loss-of-life scheme to suggest that there is somehow a correlation between an individual’s socioeconomic status and his or her capacity to enjoy life or appreciate the value of lost life? Beyond socioeconomic status, consider factors such as family and amount of productivity. The *Pope* court found that the decedent was a mother, that she and her oldest daughter were close, and that she had worked as a waitress for several years. However, what if she had strained relationships with her family members? What if that decedent did not have a

making its own determination, the court considered evidence such as the decedent's parents' concern for the decedent's well-being, the protective and supportive home that the decedent would have likely had, the likelihood that the decedent would have received a good education, and the likelihood that the decedent would have experienced married life and parenthood.<sup>165</sup>

The next year, in *One National Bank v. Pope*,<sup>166</sup> the Arkansas Supreme Court had the opportunity to respond to the district court's findings in *McMullin*. In *Pope*, the court agreed with the *McMullin* court's finding that the method of calculation set out in *Durham* was consistent with the majority's objective approach.<sup>167</sup> According to the court's holding in *Pope*, this meant that plaintiffs had to "present *some* evidence, that the decedent valued his or her life, from which a jury could infer and derive that value and on which it could base an award of damages."<sup>168</sup> Further, it meant that a showing that the decedent lived and died was insufficient to recover loss-of-life damages.<sup>169</sup> In considering the likelihood that there would be limited direct evidence of a decedent's value of his or her life, the court held that circumstantial evidence could also be used to establish loss-of-life damages.<sup>170</sup>

In a manner similar to the Eastern District's approach in *McMullin*, the court in *Pope* looked to circumstantial evidence to determine whether the decedent valued her life.<sup>171</sup> The court found that the trial testimony showed that the decedent was a mother of four as well as a grandmother, that she and her oldest daughter were close, that she was a waitress and that at the time of the car accident that killed her, the decedent was on her way to a family gathering.<sup>172</sup> The court considered this "circumstantial evidence [to

---

family? Moreover, what if she was disabled to the point that she was not capable of being a moderately productive individual? Is the lack of this type of evidence an indication that an individual valued his or her life any less than someone with close family relationships or a high level of productivity? Should the value of lost life be distinguishable on such factors? Remember, although most compensatory damage calculations are based on pecuniary or socioeconomic factors, the underlying purpose of hedonic damages is to compensate individuals for intangible losses that are divorced from economic class or status. See *supra* Part III.

165. *Id.* at 928.

166. *One Nat'l Bank v. Pope*, 372 Ark. 208, 272 S.W.3d 98 (2008).

167. *Id.* at 214, 272 S.W.3d at 102. *But see* Lee v. Overbey, 2009 WL 4829107, at \*1 (W.D. Ark. Dec. 8, 2009) ("Although difficult to place a monetary value on a life, it seems clear that the Court should consider testimonial evidence of the decedent, to include statements made or actions taken by him tending to prove the *subjective* value he placed on his life." (emphasis added) (citing *McMullin v. United States*, 515 F. Supp. 2d 914, 923 (E.D. Ark. 2007))).

168. *One Nat'l Bank*, 372 Ark. at 214, 272 S.W.3d at 102–03.

169. *Id.*, 272 S.W.3d at 102.

170. *Id.*, 272 S.W.3d at 103.

171. *Id.* at 215, 272 S.W.3d at 103.

172. *Id.*, 272 S.W.3d at 103.

be] substantial evidence from which the jury could have inferred the value that [the decedent] would have placed on her life.”<sup>173</sup>

## 2. *A Critique of Arkansas’s Loss-of-Life Law*

Admittedly, as is the case with determining non-economic damages awards, calculating loss-of-life damages is far from an exacting science.<sup>174</sup> Unquestionably, however, given the Supreme Court’s recent punitive damages jurisprudence, due process at the very least requires some semblance of a procedure as well as sufficient guidance for jurors in awarding loss-of-life damages. If Arkansas’s loss-of-life calculation cannot connect a defendant’s liability to facts or some objective criteria, then it is nothing more than a conduit for an arbitrary transfer of wealth from one party to another; thus, in this sense, it is violative of a defendant’s procedural due process rights.<sup>175</sup> For a loss-of-life calculation to pass constitutional muster, it must provide jurors sufficient guidance for returning an award that has some factual basis.<sup>176</sup>

The dangers associated with loss-of-life damages are no different than those associated with punitive damages. Both are intangible in nature. Both can lead to an arbitrary deprivation of property. Both arise in cases where there is a potential for jurors’ emotions and sensibilities to become inflamed and in cases where those emotions can become determinative of the size of damages awards. Yet, while the Supreme Court has set standards for guidance and procedure, Arkansas’s loss-of-life jurisprudence contains no such safeguards. Though Arkansas’s loss-of-life calculation approaches at least a normative ground, it does not offer jurors any real guidance to a factually sound award. The Arkansas Supreme Court’s holdings in *Durham* and *Pope* seem to tell jurors the following:

You need to determine the value that the decedent would have placed on his or her own life. In performing this task, all you have to do is find some evidence of this value. Given the likely absence of direct evidence, you may use circumstantial evidence in your calculation. It is too difficult to formulate a “hard and fast rule” for determining non-pecuniary losses, so just do the best you can.<sup>177</sup>

---

173. *Id.*, 272 S.W.3d at 103.

174. *Durham v. Marberry*, 356 Ark. 481, 493, 156 S.W.3d 242, 249 (2004).

175. *See Allen et al.*, *supra* note 5, at 1256.

176. *See id.* at 1274.

177. *See One Nat’l Bank*, 372 Ark. at 214, 272 S.W.3d at 102–03; *Durham*, 356 Ark. at 492–93, 156 S.W.3d at 248–49. In addition, the Arkansas Model Jury Instructions (Civil) do not provide any guidance on loss-of-life calculation. Ark. Model Jury Instr., Civil AMI 2216 (Dec. 2009).

When considering the current state of Arkansas's loss-of-life law, there are obvious questions. For instance, how is such a standard distinguishable from Oregon's standard of review for punitive damages awards in *Honda Motor Co. v. Oberg*? How does the law in Arkansas do any better than the "desert of uncharted discretion" that the Supreme Court describes in *Exxon Shipping Co. v. Baker*? How is any loss-of-life award resulting from such a legal structure ultimately not arbitrary? Granted, Arkansas jurors must find *some* evidence on which to base their valuations; but, what is there to help them match a monetary figure to the value of lost life? Just like Oregon's abrogation of common-law protections against arbitrary deprivations of property in *Honda Motor*, the lack of guidance for jurors and the lack of procedural safeguards in Arkansas's loss-of-life system raise a presumption of a violation of due process.

Concededly, the intangible nature of loss-of-life damages makes it difficult to fashion a "hard and fast rule" that will ensure that Arkansas juries return awards based entirely on fact: loss-of-life damages of course "involve considerations beyond the facts of a given case."<sup>178</sup> However, despite the challenging nature of this task, no amount of difficulty could ever justify sustaining a procedure that arbitrarily deprives defendants of their property. Though any loss-of-life calculation ultimately deals in approximations, there are methods that yield more accurate results than others. Considering the Supreme Court's primary concern for guiding juries and limiting the potential for excessive awards, it would seem that the most accurate approximation of a decedent's loss of life would be preferable.<sup>179</sup> While it may still

---

178. DeCamp, *supra* note 9, at 257.

179. Allen et al., *supra* note 5, at 1266. Although this concern for accurate fact finding is not clear from the language in the Fifth or Fourteenth Amendments, many scholars have found it implicit in the Supreme Court's three factor test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and in several of the Court's holdings in other cases. *Id.* at 1265–66. Under Arkansas common law, however, there is the well-established rule that "in those instances where damages simply cannot be proven with exactness, when the cause and existence of damages have been established by the evidence, recovery will not be denied merely because the damages cannot be determined with exactness." *Mine Creek Contractors, Inc. v. Grandstaff*, 300 Ark. 516, 522, 780 S.W.2d 543, 545 (1989); *see also* BRILL, *supra* note 17, § 4:5. Recently, in *Agracat Inc. v. AFS-NWA, LLC*, 2010 Ark. App. 458, \_\_\_ S.W.3d \_\_\_, the Arkansas Court of Appeals applied this rule in its review of a directed verdict in a breach of fiduciary duty case. The court stated that "Arkansas law has never insisted on exactness of proof in determining damages, and [that] if it is reasonably certain that some loss occurred, it is enough that damages can be stated only approximately." *Agracat*, 2010 Ark. App. 458, at 7, \_\_\_ S.W.3d \_\_\_, \_\_\_; *see also* *Morton v. Park View Apartments*, 315 Ark. 400, 406, 868 S.W.2d 448, 451 (1993). While providing an example of this rule's application, the court referenced the jury's calculation of loss-of-life damages in *One National Bank v. Pope*, 372 Ark. 208, 272 S.W.3d 98 (2008), and said that "the supreme court reversed [the trial court's directed verdict], holding that the estate produced substantial evidence from which the jury could have inferred or derived the value that the decedent placed on her life." *Agracat*, 2010 Ark. App. 458, at 8–9, \_\_\_ S.W.3d \_\_\_, \_\_\_. In light of the courts' holdings in these cases, it

yield only approximations, an approach that is more principled than Arkansas's loss-of-life calculation is desirable.

### 3. *A Two-Step Solution to the Due Process Issue*

For Arkansas's loss-of-life law to reach a constitutionally acceptable level of accuracy, it must reasonably guide jurors to accurate assessments of hedonic loss.<sup>180</sup> Furthermore, in order to insure that loss-of-life awards are

---

must be said that this note does not argue that a lack of procedural safeguards requires systematic *denial* of loss-of-life damages. Instead, this note assumes that recovery for loss of life is acceptable in cases where jurors have sufficient guidance and where there are limitations on juror discretion. Approximations are a necessary requisite to a determination of loss-of-life damages because there is no market value for lost life. What is also necessary, however, is the addition of procedural safeguards that validate the Supreme Court's recent clarification of due process limitations. It is not that all loss-of-life awards produced under the current system are unconstitutional per se; it is that the current system poses a real threat of producing loss-of-life awards that may offend the Supreme Court's notions of due process.

180. As an aside, there seemingly is justification to vary loss of enjoyment awards to the extent that individuals experience different injuries and corresponding losses in experiencing life's pleasures. For example, not every tort victim that loses an arm or leg enjoys playing sports. Similarly, not every individual that loses his or her sight enjoys watching the movie *Pride and Prejudice*. Under these circumstances, individualized determinations of loss-of-enjoyment awards are justified because these tort victims experience varying levels of loss. See Lind, *supra* note 9, at 322 (arguing that comparability review fails to treat intangible loss as unique to each tort victim). However, individualized calculations of loss-of-life awards may not be justified on the same grounds. With respect to his or her life, every wrongful-death victim experiences the same harm in the same manner: each loses his or her life and the ability to carry on life's activities. Consequently, an alternative solution to Arkansas's due process issues with respect to loss-of-life damages might be to treat each life the same i.e. the Arkansas General Assembly could fix the value of life at a certain amount for purposes of recovery under ARK. CODE ANN. § 16-62-101. Looking to the 9/11 compensation fund for guidance, other commentators have also argued for fixed amounts of non-economic damages. See Walker, *supra* note 57, at 616–27. Under the Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 (2006), Congress created the 9/11 compensation fund. Under the Act, survivors could waive a wrongful-death action and receive an individualized settlement amount. Kenneth Feinberg, Special Master of the fund, created an income-based chart in order to calculate these individualized amounts. However, as far as non-economic damages were concerned, Feinberg unilaterally awarded one sum, \$250,000.00, to each victim. Due to his experience with the 9/11 fund, Feinberg was later asked to design and administer a privately funded compensation system for the victims of the Virginia Tech shootings. Kenneth Feinberg, *What is the Value of A Human Life?*, NPR, May 25, 2008, <http://www.npr.org/templates/story/story.php?storyId=90760725>. In a short internet article, Feinberg described how his experience with the 9/11 fund informed the structure of the Virginia Tech compensation fund. *Id.* (“I felt it would make more sense for Congress to provide the same amount of public compensation to each and every victim—to declare, in effect, that all lives are equal. . . . I believe that public compensation should avoid financial distinctions which only fuel the hurt and grief of the survivors. I believe that all lives should be treated the same.”). Despite the fact that Feinberg considers the equality-of-life notion within the context of public compensation, his arguments are readily transferrable to loss-of-life consid-

not arbitrary or excessive as a matter of law, Arkansas appellate courts should adopt a two-tiered system of appellate review. Because hedonic damages are a subset of non-economic damages, the proposed revisions to non-economic loss calculation are readily applicable to Arkansas's loss-of-life calculation. These proposed revisions are three-fold.<sup>181</sup>

First, in order to ensure that juries return accurate loss-of-life awards, Arkansas courts should inform jurors of a range of loss-of-life awards given in factually similar cases.<sup>182</sup> This remedy could proceed in this manner: to begin, courts could order briefs on the appropriate range of awards. Given that there are only a few Arkansas cases involving loss-of-life damages, parties may have to look to other loss-of-life jurisdictions like Connecticut, Hawaii or New Mexico for factually similar cases.<sup>183</sup> After reviewing the parties' briefs, the court could then determine the appropriate range as a matter of law. However, if the cases used in the range determination are older, the court may permit the parties to assist in making adjustments based on inflation. Once final, the range should be presented to the jury with instructions notifying the jurors that the range shows prior loss-of-life awards from factually similar cases.

Second, trial courts could review loss-of-life awards that exceed the range.<sup>184</sup> Unquestionably, the standard for excessiveness should come from the examples themselves.<sup>185</sup> If there is a deviation from the standard, there must be differentiating facts that justify the deviation.<sup>186</sup> Furthermore, if a court is to justify a deviation, there should be a direct correlation between the extent of the deviation and the significance of the differences.<sup>187</sup> In the event that the factual distinctions do not justify the larger award, the court

---

erations because there is no reason to assume that the value of life would differ when considered in a private suit context as opposed to a public compensation context. Of course, the problem with this solution is Article 5, Section 32 of the Arkansas Constitution, which states that "no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property." ARK. CONST. art. V, § 32.

181. DeCamp, *supra* note 9, at 292–95.

182. *Id.* at 292.

183. Other than Arkansas, the only states that currently allow for recovery of post-mortem hedonic damages are Connecticut, Hawaii, New Hampshire and New Mexico. Brady, *supra* note 46, at 131. However, it should be noted that the New Hampshire Senate recently passed legislation that removes the statutory language providing for the recovery of damages for "the probable duration of life but for the injury" and damages "in connection with other elements allowed by law, in the same manner as if the deceased had survived." S.B. 468, 2010 Leg., 10-2735 Sess. (N.H. 2010) ("This act shall take effect January 1, 2011.").

184. DeCamp, *supra* note 9, at 294–95.

185. *Id.*

186. *Id.* at 295.

187. *Id.*

should consider remittitur.<sup>188</sup> Regardless of whether the verdict falls above or below the established range, the court should review the award for reasonableness.

Third, appellate courts should implement a two-tiered standard of review when reviewing appeals of loss-of-life awards. In cases where the jury returns a verdict within the range of comparable awards, appellate courts should apply an abuse of discretion standard of review. As a means of recognizing the objective reasonableness of within-range awards, this lower standard will provide greater deference. However, in cases where the verdict exceeds the range maximum, appellate courts should apply the more "exacting" *de novo* standard of review.<sup>189</sup> This higher standard will provide less deference to these awards because they could represent a capricious or arbitrary decision.

#### IV. CONCLUSION

The value of lost life occupies both real and philosophical significance in our society. If a state's tort damages system goes so far as to provide independent recovery for loss-of-life damages, then it must also ensure that the awards stay true to their underlying purpose. The effects of Arkansas's current procedure for awarding loss-of-life damages are undesirable and must be remedied. The intellectually honest approach would be to admit that loss-of-life calculation does not lend itself to precision and to attempt a procedure that promotes the best possible level of accuracy. For instance, guiding juries with factually similar examples mitigates the potential for arbitrary decisions. Furthermore, judicial review of potentially excessive loss-of-life awards would further protect the integrity of Arkansas's damages system by reducing the appearance of an arbitrary method of calculation. While not perfect, these provisions promote a more accurate approach than Arkansas's current method of calculation and at the very least represent the lesser of two evils.

Similarly, though the 2001 amendment language is difficult to reconcile with either of the historical purposes behind wrongful death and survival statutes, it is not necessary to completely forgo permitting recovery of loss-of-life damages. The more appropriate way of allowing plaintiffs to recover the value of a decedent's lost life would be to amend the Arkansas wrongful-death statute with language that allowed an estate or beneficiaries to recover wrongful-death damages based on the loss that the estate sustained as a result of the decedent's death. After this revision, Arkansas

---

188. *Id.*

189. *Id.* at 296-97.

courts could construe loss to the estate as including a decedent's loss-of-life damages.

*Joshua Michael Robles\**

---

\* J.D. expected May 2011, University of Arkansas at Little Rock, William H. Bowen School of Law. The author wishes to thank AUSA Daniel Stripling for his valuable assistance in developing the topics covered in this note, AUSA Michael Gordon and AUSA Karen Whatley for their guidance and support over this past year and for the opportunity to do something really big, Professor Frances S. Fendler for her perspective and comments during the early stages of this note, and Professor Lindsey Gustafson for her tremendous help in editing this note. Finally, the author would like to say that the most significant contribution to this note came from his beautiful wife Melani and from his son Noah; their love, patience and support provided the basis for the author's concept of life's worth.



