

ALABAMA'S WRONGFUL DEATH ACT:¹ THE JURISPRUDENCE OF ACCOUNTING

I. INTRODUCTION

In forty-nine states, the estates of those wrongfully killed begin the calculation of damages with calculation of the victim's lost income.² This practice privileges the lives of those with high incomes.³ In essence, it values the lives of the well-educated and financially successful above others.⁴ One state—Alabama—has a different scheme, which provides compensation based on the culpability of the wrongdoer, instead of the harm to the victim's estate.⁵ This Comment examines (1) the origins of Alabama's unique approach to damages for wrongful death; and (2) the current functioning of that rule and its basis (or lack thereof) in economic and moral justifications of reducing accidents, treating persons as of equal worth, and compensating for losses. It also compares the Alabama scheme to other states' practices.

1. Alabama's Wrongful Death Act is codified at ALA. CODE § 6-5-410 (1975). It provides:

(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused death.

(b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission, or negligence.

(c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.

(d) Such action must be commenced within two years from and after the death of the testator or intestate.

Ala. Code § 6-5-410 (1975).

2. 2 DAN B. DOBBS, LAW OF REMEDIES 430 (2d ed. 1993).

3. See generally *id.* at 430-38 (explaining methods of calculating strictly economic losses).

4. *Id.*

5. *Id.*

II. ORIGINS OF THE ALABAMA WRONGFUL DEATH ACT

The Industrial Revolution and the concomitant increase in fatal accidents led to society's rejection of the long-standing rule⁶ that death of the victim extinguished the liability of the wrongdoer.⁷ In order to give a remedy to the surviving dependents of a deceased who was killed by the wrongdoing of another, all fifty states adopted wrongful death statutes.⁸ Like the wrongful death statutes of most other states, Alabama's statute was modeled after the English example—Lord Campbell's Act.⁹

The statute authorized actions for wrongful death where the death of a person was "caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action." Such actions, the statute further provided, "shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused," and were to be brought "by and in the name of the executor or administrator of the person deceased."¹⁰

Lord Campbell's Act was enacted by the English Parliament as the Fatal Accidents Act of 1846 in order to alleviate the harsh results from the practice of a cause of action dying with the victim.¹¹ Such a practice resulted in the tortfeasor's immunity when injuries were serious enough to cause the death of the victim.¹² The advent of this English act—after which American wrongful death statutes were modeled—"allowed relatives of a victim [whose death was caused by the tortfeasor] to recover damages from the tortfeasor in a civil action."¹³ The English courts limited the remedy under Lord Campbell's Act to purely financial loss.¹⁴

6. See, e.g., *Geohagan v. Gen. Motors Corp.*, 279 So. 2d 436, 444 (Ala. 1973) (Jones, J., dissenting) ("The legal conclusion that an individual action for personal injuries abated with the death of an individual is based on the ancient maxim: *Actio personis moritur cum persona*—a personal action dies with the person.").

7. *Id.* at 445.

8. *Id.*

9. Bert S. Nettles & Forrest S. Latta, *Alabama's Wrongful Death Statute: A Problematic Existence*, 40 ALA. L. REV. 475, 478-79 (1989) ("Lord Campbell's Act of 1846 allowed the jury to award to the surviving beneficiaries 'such damages as they may think proportioned to the injury.'"). This was soon after interpreted to restrict recovery to pecuniary losses suffered by the survivors of the deceased. 1 STUART M. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 3-3 (3d ed. 2002).

10. John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 734 (2000) (internal quotations omitted).

11. Mamta K. Shah, *Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life*, 29 HOFSTRA L. REV. 931, 933 (2001).

12. *Id.*

13. *Id.*

14. JOHN MUNKMAN, *DAMAGES FOR PERSONAL INJURY & DEATH* 130 (1996).

The Alabama state legislature adopted the state's first wrongful death statute in 1852.¹⁵ "As was true in most other American states, Alabama's first wrongful death statute was a virtual copy of Lord Campbell's Act."¹⁶ The statute was amended in 1859, giving it what the Alabama Supreme Court later determined to be its punitive nature—"which contrasted with the compensatory feature of Lord Campbell's Act."¹⁷ The punitive feature was not retained by the Code Commissioner in the 1867 Code, but it was included when the act was re-amended in 1872.¹⁸ An additional 1872 version of the Wrongful Death Act also created "a cause of action for the deceased minor child against corporations."¹⁹ This, however, was held unconstitutional in 1883 on the ground that it denied equal protection to corporations.²⁰ The wrongful death statute was again enacted in 1885—this time without "the unconstitutional feature of the previous statute."²¹ This wrongful death statute created causes of action against persons and corporations and is the one on which the present statute²² is based.²³

The first judicial interpretation of Alabama's wrongful death statute—*Savannah & Memphis Railroad Co. v. Shearer*²⁴—read the damages awarded by the act to be punitive in nature.²⁵ "Reading the act without the aid of judicial opinions, it appears like a typical wrongful death act. But, in application, the Alabama Wrongful Death Act is different from all other jurisdictions."²⁶ Because of this unique judicial interpretation, in Alabama, "the nature of the wrongful act or omission" and the "circumstances attending to" the accident are the basis of a wrongful death action.²⁷ Early cases in the state read the legislature's intent to value all human life.²⁸ The court then established a rule which reflected a defendant's culpability in causing death "regardless of the financial status of the victim."²⁹ Such an interpretation has received criticism from many different sources,³⁰ including some of the

15. Nettles & Latta, *supra* note 9, at 480.

16. LESLIE A. JEFFRIES, *WRONGFUL DEATH ACTIONS: THE LAW IN ALABAMA* § 1-6 (1979).

17. *Id.*

18. *Id.* (citing 1871-72 Ala. Acts No. 62, at 83).

19. *Id.*

20. *Id.* (citing *Smith v. L. & N. R.R. Co.*, 74 Ala. 449 (1883)).

21. *Id.* (citing 1884-85 Ala. Acts No. 36, at 99).

22. ALA. CODE § 6-5-410 (1975).

23. JEFFRIES, *supra* note 16, at § 1-6.

24. 58 Ala. 672 (1877).

25. *See id.* at 678.

26. Jonathan Toby Dykes, *Alabama's Wrongful Death Act: A Time for Change*, 21 AM. J. TRIAL ADVOC. 617 (1988) ("Alabama now is the only American jurisdiction with a punitive-only wrongful death statute after Massachusetts abandoned that approach in 1974 in favor of a system of compensatory damages."). *See* Nettles & Latta, *supra* note 9, at 485 (citing MASS. GEN. LAWS ANN. ch. 229, § 1-11 (West 1985); Albert P. Zabin & Thomas E. Connolly, *The New Wrongful Death Act in Massachusetts Steps into the Twentieth Century*, 58 MASS. L.Q. 345 (1972)).

27. *Geohagan v. Gen. Motors Corp.*, 279 So. 2d 436, 449 (Ala. 1973).

28. *Id.* at 450.

29. *Id.* (citing *Daniel Constr. Co. v. Pierce*, 120 So. 2d 381 (Ala. 1959); *L. & N. R.R. Co. v. Perkins*, 56 So. 105 (Ala. 1911); *Richmond v. Danville R.R. Co. v. Freeman*, 11 So. 800 (Ala. 1892)).

30. *See generally* Dykes, *supra* note 26, at 617 (criticizing the judicial interpretation of wrongful death statute in the context of its treatment of joint and several liability). Alabama applies joint and

state's own Supreme Court Justices.³¹ Justice Houston of the Alabama Supreme Court has even likened the court's interpretation of the state's wrongful death scheme to Johnny's mother, "who while watching the parade exclaimed, 'Look, everyone is out of step except my Johnny.'"³²

III. JUDICIAL INTERPRETATION OF ALABAMA'S WRONGFUL DEATH STATUTE

Over one hundred years ago, the Alabama Supreme Court held that the wrongful death statute passed by the legislature in 1872 authorized the recovery of punitive damages only.³³ The court interpreted the intent of the state legislature to be one valuing the "sanctity of human life, the noble goal of preserving human life, and society's desire to punish those whose conduct results in the loss of human life."³⁴ At the time the Alabama Supreme Court interpreted the act to award only punitive damages for wrongful death, Massachusetts followed such an interpretation also.³⁵ Massachusetts, however, "has recently opted for a compensatory statute as well."³⁶

In interpreting the statute to say that only punitive damages are appropriate in actions for wrongful death, the Alabama Supreme Court wrote:

Lacerated feelings of surviving relations, and mere capacity of [the] deceased to make money if permitted to live, do not constitute the measure of recovery under the act of Feb. 5, 1872. Prevention of homicide is the purpose of the statute, and this it proposes to accomplish by such pecuniary mulct as the jury "deem just." The damages are punitive, and they are none the less so, in consequence of the direction the statute gives to the damages when recovered.³⁷

In a later decision,³⁸ the court reiterated the punitive nature of damages in a wrongful death action against "the person or corporation by which the wrong is done" in order to "stimulate diligence and to check violence, in

several liability in the context of punitive damages for wrongful death, but a defendant forced to pay the entire damages award may not seek repayment from other defendants. *Id.* See also Nettles & Latta, *supra* note 9 (criticizing the interpretation of wrongful death statute for punishing simple negligence in violation of the Fourteenth and Eighth Amendments); John Whitaker, *Wrongful Death and Double Jeopardy*, 26 CUMB. L. REV. 231 (1995) (criticizing the judicial interpretation of the Alabama Wrongful Death Act for violating the constitutional guaranty of no double jeopardy when punitive damages are allowed after a criminal prosecution for causing the death of another).

31. See *King v. Nat'l Spa & Pool Inst., Inc.*, 607 So. 2d 1241, 1253-54 (Ala. 1992) (Houston, J., dissenting); *Olympia Spa v. Johnson*, 547 So. 2d 80, 88-90 (Ala. 1989) (Houston, J., dissenting); *Tatum v. Schering*, 523 So. 2d 1042, 1047-63 (Ala. 1988) (Houston, J., dissenting); *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1060-62 (Ala. 1987) (Houston, J., concurring).

32. *Tatum*, 523 So. 2d at 1055.

33. *Merrell v. Ala. Power Co.*, 382 So. 2d 494, 496-97 (Ala. 1980).

34. *Cent. Ala. Elec. Coop. v. Tapley*, 546 So. 2d 371, 376 (Ala. 1989).

35. JEFFRIES, *supra* note 16, at § 2-2.

36. *Id.* (citations omitted).

37. *Savannah & M.R. Co. v. Shearer*, 58 Ala. 672, 680 (1877).

38. *Merrell*, 382 So. 2d at 496 (quoting *S. & N. Ala. R.R. Co. v. Sullivan*, 59 Ala. 272 (1877)).

order thereby to give greater security to human life; 'to prevent homicides.'"³⁹ Thus, the statutory interpretation announced by the court in these early decisions—awarding only punitive damages in wrongful death actions—"conserv[ing] the expressed legislative purpose, 'to prevent homicides.'"⁴⁰ The punitive nature of the wrongful death statute serves an important purpose. As the court wrote, "Punishing the tort-feasor dissuades others from engaging in life-endangering conduct."⁴¹

When assessing the damages to be awarded in a wrongful death action, the state of Alabama does not consider the "worth" of the life of the deceased individual.⁴² Such a consideration goes against the purpose of the punitive damages scheme, which "rests upon the Divine concept that all human life is precious."⁴³ Thus, no one human life is more precious than another. Because "human life is incapable of translation into a compensatory measurement," the Alabama Supreme Court has interpreted the state's Wrongful Death Act to permit the award of only punitive damages.⁴⁴ "[O]ne may be adequately compensated for his injuries, but the value of a human life has no measure."⁴⁵ Thus, the court has found punishment of a wrongdoer to be a more measurable quantity than the value of the life of a deceased individual.⁴⁶ "The measurement of recovery must be referable to the quality of the wrongful act and the degree of culpability involved."⁴⁷

In order to punish and deter the tortfeasor and ensure that the amount of recovery for the survivors of the deceased is related to the culpability of the defendant, the court has offered guidance for trial courts in determining whether a verdict is appropriate.⁴⁸ First, the punitive damages awarded in any case "should bear a reasonable relationship to the harm that is likely to occur . . . [and] the harm that actually has occurred."⁴⁹ The "degree of reprehensibility of the defendant's conduct" is another consideration.⁵⁰ Under this factor, courts should find relevant "the duration of this conduct, the degree of the defendant's awareness of any hazard[s] . . . and any concealment . . . of that hazard."⁵¹ Other factors to consider in determining the award of punitive damages include whether "the wrongful conduct was profitable to the defendant," "the financial position of the defendant," and whether "other civil actions against the same defendant, based on the same

39. *Id.* (quoting *S. & N. Ala. R.R. Co. v. Sullivan*, 59 Ala. 272 (1877)).

40. *Id.* at 497.

41. *Cent. Ala. Elec. Coop. v. Tapley*, 546 So. 2d 371, 376 (Ala. 1989).

42. *See Estes Health Care Ctrs. v. Bannerman*, 411 So. 2d 109, 112 (Ala. 1982) (citing *Hardin v. Sellers*, 117 So. 2d 383 (Ala. 1960)).

43. *Id.* at 113 (citing *Geohagan v. Gen. Motors Corp.*, 279 So. 2d 436 (Ala. 1973)).

44. *Id.*

45. *Tapley*, 546 So. 2d at 376.

46. *Id.*

47. JEFFRIES, *supra* note 16, at § 2-1.

48. *Tapley*, 546 So. 2d at 377.

49. *Id.* (quoting *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989)).

50. *Id.*

51. *Id.*

conduct” have been commenced.⁵² “The amount [of punitive damages awarded] rests largely in the discretion of the jury.”⁵³

IV. WRONGFUL DEATH ACTS OF OTHER STATES

In general, other states measure the loss in a wrongful death action by the loss to the estate of the deceased or the “pecuniary loss to the family survivors.”⁵⁴ “Traditional Lord Campbell’s Act-type wrongful death statutes almost universally allow damages in the amount of the economic losses resulting from the decedent’s death and nothing more.”⁵⁵ Today, however, many states allow more liberal recovery for things other than economic damages, such as services, society, and mental anguish;⁵⁶ however, economic damages remain the main recovery in most wrongful death cases.⁵⁷ “In general, economic damages are measured either by (a) the loss of support and amenities suffered by designated dependents, or (b) the loss to the estate of the decedent suffered because the decedent’s shortened life cut short savings and investments that otherwise would have been possible.”⁵⁸

Under the first type of statute:

[D]amages are awarded for the present value of probable contributions which the deceased would have made to the survivors had he lived, and for the pecuniary value of the services decedent would have rendered to the survivors, which, in many states, includes the value of a parent’s training, guidance, nurture and education.⁵⁹

Under many of these statutes, courts allow apportionment of damages for “medical expenses, funeral expenses, and the amount of the probable inheritance the deceased would have left to the survivors . . . had he lived out his normal life span.”⁶⁰ Some jurisdictions also permit recovery of the monetary value of the “society, companionship, counsel, protection and attention” of the deceased.⁶¹

The second type of wrongful death statute measures the loss to the estate of the deceased.⁶² The loss-to-estate measure of recovery is different from the loss-to-dependents measure of recovery in that it protects

52. *Id.* (quoting *Hornsby*, 539 So. 2d at 223-24).

53. JEFFRIES, *supra* note 16, at § 2-2.

54. *Geohagan v. Gen. Motors Corp.*, 279 So. 2d 436, 445 (Ala. 1973).

55. C. Frederick Overby & Jason Crawford, *The Case for Allowing Punitive Damages in Georgia Wrongful Death Action: The Need to Remove an Unjust Anomaly in Georgia Law*, 45 MERCER L. REV. 1, 10 (1993).

56. 2 DOBBS, *supra* note 2, at 440.

57. *Id.* at 430.

58. *Id.*

59. 1 SPEISER, *supra* note 9, at § 3-12.

60. *Id.* (citations omitted).

61. *Id.*

62. *Id.*

not dependents, but those who would inherit or take from the victim's estate at his death.⁶³ The loss to the estate measure thus allows a recovery for what the victim would have saved from earnings during a normal lifetime and thus what he would have left as an estate for heirs or legatees.⁶⁴

Most states using the "loss to estate" measure of recovery in wrongful death cases "calculate the loss by determining the deceased's probable lifetime earnings and then deducting the expenses the decedent would have had . . . [for] himself."⁶⁵

Damages for dependents are typically "measured by the support . . . lost by the victim's dependents . . . rather than by inheritance rights lost."⁶⁶ Contributions made by the deceased from earnings or even from pension income reflect the loss under this measure.⁶⁷ In this way, compensatory damages seek to compensate the dependents of the victim for what they have lost in losing a supporting family member. This, of course, presents problems in determining how long the deceased would have lived.⁶⁸ It also presents problems in determining how long the deceased would have worked had he lived.⁶⁹ One man may keep his health and work until he is seventy,⁷⁰ while another man may cease working at fifty. When the dependents are children who have lost both parents, the court must also take into consideration when the children will marry because at that point, dependency—at least in part—would cease.⁷¹ Additional concerns arise when the deceased is a son who will one day likely support his parents.⁷² In determining recovery, juries are generally told to consider the income the deceased would have earned had he lived.⁷³

Although traditional wrongful death statutes allowed only for recovery to protect the "pecuniary interests of survivors,"⁷⁴ many states today provide for recovery of non-economic damages as well. States began to allow for recovery of non-economic damages in order to mitigate the harsh results of a purely economic recovery scheme. Such harsh results were perhaps most obvious in a case where a non-productive family member was tortiously killed.⁷⁵ In such a case, "the tortious defendant [in terms of damages] might be better off to kill than to injure . . . [the] non-productive" family mem-

63. 2 DOBBS, *supra* note 2, at 434.

64. *Id.*

65. *Id.* at 435.

66. *Id.* at 431.

67. *Id.*

68. See MUNKMAN, *supra* note 14, at 148.

69. *See id.*

70. *Id.*

71. *See id.* at 150.

72. *See id.*

73. 1 SPEISER, *supra* note 9, at § 3-22.

74. 2 DOBBS, *supra* note 2, at 439.

75. *Id.* at 440.

ber.⁷⁶ Thus, states began to allow for recovery for non-economic damages for loss of “services, society or mental anguish.”⁷⁷ Under these measures of non-economic recovery, courts recognize the value of intangible things.⁷⁸ “Most jurisdictions now recognize the ‘consortium’ recovery for lost companionship, society, love, advice and guidance, either because those elements are considered ‘pecuniary loss,’ or because the statute specifically permits their recovery, or because the court has judicially discarded the ‘pecuniary loss’ limitation.”⁷⁹ Also, “[b]y 1990[,] about one-third of the states had moved on to the next step . . . [providing further] recovery for grief or mental anguish” of the survivors.⁸⁰

“In claims against private defendants, some wrongful death statutes expressly permit [recovery of] punitive damages based on . . . [the degree of] misconduct of the tortfeasor.”⁸¹ In states that allow for recovery of punitive damages—in addition to compensatory damages—in wrongful death actions either by statutory provision or by judicial interpretation of a broadly framed statute, “[n]o punitive damages are recoverable if the defendant’s misconduct is not serious enough to warrant punitive damages in an injury case.”⁸² “Courts sometimes permit punitive recoveries for gross negligence, but usually add that it must be so gross as to indicate a reckless disregard for the rights of others, thus requiring a bad state of mind as well as bad conduct.”⁸³ Further, most public entity defendants are immune from punitive damages in wrongful death cases.⁸⁴

V. A COMPARISON OF PUNITIVE DAMAGES VS. COMPENSATORY DAMAGES FOR WRONGFUL DEATH

In a purely punitive damages scheme such as the one in Alabama, damages are awarded to the family of the deceased *not* for the value of the life of the deceased or the loss in income that they will sustain due to the death of the deceased.⁸⁵ Rather, the amount awarded to the family of the deceased relates to the degree of wrongdoing on the part of the defendant and the necessity of preventing similar actions in the future.⁸⁶ Thus, the wrongful death scheme fits with the general purposes of punitive damages—to punish and deter.⁸⁷ Thus, “the purpose of the statute . . . [is] ‘the protection of hu-

76. *Id.*

77. *Id.*

78. *Id.* at 440-41.

79. *Id.* at 441 (citations omitted).

80. *Id.* at 442.

81. *Id.* at 446.

82. *Id.* at 447.

83. *Id.* at 447 n.20

84. *Id.* at 447.

85. *Md. Cas. Co. v. Tiffin*, 537 So. 2d 469, 471 (Ala. 1988) (citing *Airheart v. Green*, 104 So. 2d 687 (Ala. 1958)).

86. *Id.* at 471.

87. Nathan C. Prater, *Punitive Damages in Alabama: A Proposal for Reform*, 26 CUMB. L. REV. 1005, 1030 (1995).

man life and the prevention of homicides by wrongful act[s], omission[s] or negligence," thereby punishing wrongdoers and providing a remedy for the family of the deceased.⁸⁸

A wrongful death statute that awards punitive damages is in some ways more fair than and even more appropriate than a wrongful death statute that awards compensatory damages for several reasons. First, a punitive damages scheme treats all human life as equal in value. A statute such as the one in Alabama does not prefer a wealthy business entrepreneur over a wage-worker. In other words, a punitive damages scheme such as the one in Alabama does not treat the deceased as a stream of income. Instead, the focus is on the wrongdoer and his degree of culpability.⁸⁹ Conversely, a wrongful death statute awarding compensatory damages places the focus on the deceased, his current earnings, and his potential earnings.⁹⁰ Wrongful death statutes awarding compensatory damages, therefore, value the life of one individual over the life of another individual. Some considerations include the wealth or poverty of the deceased, the occupations held by the deceased or those qualified to be held prior to death, reasonable expectations of promotion, potential earning capacity, and prospects of a student or trainee.⁹¹ Unlike a wrongful death statute awarding punitive damages, a wrongful death statute awarding compensatory damages would provide a greater remedy to the family of a physician killed by a drunk driver than it would the family of a social worker killed by a drunk driver. Under Alabama's statute it is possible and even likely that the two families would receive the same remedy because the focus is on the degree of culpability of the drunk driver, with no consideration given to the incomes of the deceased.

Further, the judicial interpretation of the Alabama Wrongful Death Act is quite logical in the theory behind the interpretation. Advocates of a compensatory wrongful death statute purport that the purposes of these statutes are to compensate the family of the deceased in order to make them whole.⁹² It is true that compensatory damages are most appropriate in cases involving personal injuries,⁹³ where the victim of misfeasance can be compensated for his medical bills, lost wages, and pain and suffering. Although one can never be compensated fully for the loss of health, compensatory damages can, in a personal injury case, come closer to placing the victim in the same place financially that he would have been had the accident not occurred. The main difference in the theories is that punitive damages serve to punish and deter undesired conduct, while compensatory damages serve to compensate the injured party for the injury incurred,⁹⁴ thereby attempting to

88. *Indus. Chem. & Fiberglass Corp. v. Chandler*, 547 So. 2d 812, 818 (Ala. 1988) (quoting *Mattison v. Kirk*, 497 So. 2d 120 (Ala. 1986)).

89. *See* Prater, *supra* note 87, at 1030.

90. *See generally* MUNKMAN, *supra* note 14, at 129-69.

91. *See* 1 SPEISER, *supra* note 9, at § 3-16.

92. *Id.*

93. *See* Barnes v. Oswalt, 579 So. 2d 1319, 1322 (Ala. 1991).

94. *Roberts v. Alabama*, No. CC-00-329, 2002 WL 31628642 at *9 (Ala. Crim. App. Nov. 22,

make the victim whole. Clearly, the concept of making the victim whole cannot apply in a case where death is involved. It is impossible to make whole one who has lost a loved one through the fault of another. Instead, the goal should be to deter the defendant and others from acting similarly in the future.⁹⁵ States should make any conduct causing death expensive—regardless of to whom the conduct is directed. As the court wrote:

The judicial interpretations of our wrongful death statute have developed this principle: While human life is incapable of translation into a compensatory measurement, the amount of an award of punitive damages may be measured by the gravity of the wrong done, the punishment called for by the act of the wrongdoer, and the need to deter similar wrongs in order to preserve human life.⁹⁶

One area in which Alabama's wrongful death scheme is problematic is when death of a victim is caused by simple negligence.⁹⁷ Normally, when punitive damages cross over from the world of criminal law into the realm of torts, something more than mere negligence is required.⁹⁸ Usually, then, when punitive damages are awarded for a tort, "[t]here must be circumstances of aggravation or outrage, such as spite, 'malice,' . . . fraudulent . . . motive, [or a characterization as] willful or wanton" behavior.⁹⁹ In response to this criticism, however, it is important to note that any action causing death constitutes an aggravating circumstance. When mere negligence is extreme enough to cause the death of an individual, punitive damages should serve to punish the tortfeasor and deter him and others from acting similarly in the future. Moreover, as the court through Justice McClellan wrote:

It is as clearly within legislative competency, of course, to punish negligence as it is to punish wantonness, willfulness or intentional wrong doing [A]nd we conceive no basis for the distinction between the power to punish in this way for negligence and such power in respect of wantonness¹⁰⁰

Of course, in states where compensatory damages are awarded for wrongful death, there is always the problem of proof of loss.¹⁰¹ Proving the

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95. Prater, *supra* note 87, at 1032.

96. Estes Health Care Ctrs., Inc. v. Bannerman, 411 So. 2d 109, 113 (Ala. 1982).

97. See Nettles & Latta, *supra* note 9, at 493-97.

98. Indus. Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812, 827-28 (Ala. 1988) (Maddox, J., concurring in part, dissenting in part) (quoting PROSSER & KEETON, CASES AND MATERIALS ON TORTS 8-11 (6th ed. 1976)).

99. *Id.* at 828 (quoting Colonial Pipeline Co. v. Brown, 365 S.E.2d 827, 829-33 (Ga. 1988)).

100. Merrell v. Ala. Power Co., 382 So. 2d 494, 496 (Ala. 1980) (quoting Richmond & Danville R.R. Co. v. Freeman, 11 So. 800, 802 (Ala. 1892)).

101. Joseph A. Page, *Damages for Wrongful Death—Broadening View of Pecuniary Loss*, in

loss of services and the types of losses for which survivors might be compensated is often arbitrary. As one author put it, "There is probably no limit to the type of service for which value may be recovered, and the imagination and ingenuity of trial counsel can be given full rein."¹⁰² In awarding compensatory damages in a wrongful death action for loss of paternal services, some courts have gone so far as admitting photographs of family gatherings to show that a father was "devoted to the upbringing of his family."¹⁰³ In the majority of jurisdictions, the "plaintiff must prove the existence of services which the survivors would have enjoyed, but not the money value, which is left to the discretion of the jurors."¹⁰⁴

Although Alabama's interpretation of wrongful death damages seems to be more fair and just in some ways because it focuses on the defendant's culpability rather than the deceased victim as a stream of income, some states have achieved similar results by allowing for the recovery of punitive damages alongside economic and non-economic compensatory damages. In states that award both punitive and compensatory damages for wrongful death, surviving dependents are able to recover for lost income, and tortfeasors are punished for their wrongful conduct. Such a result discourages "aggravated antisocial conduct that results in death" and allows the survivors to continue to maintain their standard of living—thereby achieving the goals of both punitive and compensatory damages.¹⁰⁵ Thus, in such a scheme, defendants are not rewarded by limiting their ultimate exposure to damages for inflicting death, rather than injury, on the victim.¹⁰⁶ Also, because Alabama does not at all take into account the loss of income suffered by the survivors when the victim is killed, some results are harsh. For example, if a physician is killed by the defendant's actions but the defendant's degree of culpability is low, the surviving dependents may receive little recovery by way of punitive damages even though they have suffered a substantial loss of income. This is because in Alabama, the more wrongful the antisocial conduct, the more expensive the conduct becomes.¹⁰⁷ Thus, it is easy to see how such a scheme—though morally fair—may often have economically inequitable results.

Further criticisms of a wrongful death statute like Alabama's include those determined by a Massachusetts commission set up to study the method of assessment of damages in that state.¹⁰⁸ Some of the reasons stated in support of the commission's recommendation to change the wrongful death statute to compensatory were:

DAMAGES IN PERSONAL INJURY & WRONGFUL DEATH CASES 383, 386 (Sol Schreiber ed., 1965).

102. *Id.* at 387 (citations omitted).

103. *Id.* (citing *N.Y. Cent. R. Co. v. Wyatt*, 184 N.E.2d 657 (Ind. App. 1962)).

104. *Id.*

105. See Overby & Crawford, *supra* note 55, at 16-17.

106. *Id.* at 17.

107. *Id.*

108. JEFFRIES, *supra* note 16, at § 2-3. As previously mentioned, Massachusetts is the only other state that had a purely punitive wrongful death statute; it "has recently opted for a compensatory statute." *Id.* §§ 2-2, 2-3.

(1) [P]redicating damages upon the extent of the defendant's wrongful action is not within the theory or rule of Lord Campbell's Act; (2) the basing of a plaintiff's recovery on the relative guilt of the defendant is at variance with the theory of damages, which is to make one whole again so far as money can accomplish that task; (3) inequities have a greater tendency to be produced with a degree of culpability basis; (4) a civil action is not the proper vehicle for enforcing penal statutes; and (5) several states have refused to permit recovery in their own courts in an action based on the original Massachusetts statute on the ground that it was against their public policy to enforce the penal statutes of another state.¹⁰⁹

VI. CONCLUSION

Alabama's wrongful death statute providing for only punitive damages is different from the wrongful death statutes of the other forty-nine states. Despite its oddities and the criticisms thereof, the interpretation of Alabama's wrongful death statute is morally justified. It values all human life as equal and recognizes that, in practice, one cannot be made whole for the loss of life. Further, the more culpable the activity, the more expensive the result. However, economically, the consequences of Alabama's wrongful death statute are often harsh. Such is the case when the tortfeasor's actions are less culpable. Thus, the moral justifications for Alabama's wrongful death statute are sound, while the economic justifications are questionable.

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109. *Id.* (citations omitted).