

**Wrongful Death and Personal Injury Damages in Nebraska**

[http://cba.unomaha.edu/faculty/mohara/web/NEBA09\\_WDandPI\\_DamagesNeb.pdf](http://cba.unomaha.edu/faculty/mohara/web/NEBA09_WDandPI_DamagesNeb.pdf)

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**ABSTRACT:** *Each USA State has its own techniques for determining damages for personal injury (PI) and for wrongful death (WD). Accordingly, the National Association of Forensic Economists' (NAFE) Journal of Forensic Economics (JFE) is publishing a series of articles on each jurisdiction. The States vary widely on the simplest of issues (e.g., jury awards pre-tax or post-tax) and on the most complex of issues (e.g., hedonic damages for loss of life, itself); as well as vary on the role of expert witnesses. This manuscript addresses how the State of Nebraska calculates those pecuniary damages with the assistance of an economic expert.*

**INTRODUCTION:**

The remedy of damages<sup>1</sup> seeks to provide compensation.<sup>2</sup> That's simple enough. However, what is required and what is allowed as proof of the loss to be compensated? Breach of contract requires benefit of the bargain for compensation. Without the parties' contract to guide the court, tort law relies upon more general conceptions of loss.

There are many issues of economics embedded in the law of damages. This manuscript will ignore many such questions related to damages and risk management. For example, this manuscript will ignore influence of the separate two year statute of limitations for wrongful death actions; separate in the sense that the cause of action for the wrongful action triggering the wrongful death might have a longer statute of limitations, but that underlying cause of action's longer statute does not control the wrongful death cause of action.<sup>3</sup> Similarly there also are many fascinating areas of law embedded in the law of damages that this manuscript will pass by without comment. For example, Nebraska law fundamentally changed on February 8, 1992 from a pure contributory negligence to a modified comparative negligence rubric subject to the complete defense of plaintiff's gross contributory negligence.<sup>4</sup>

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<sup>1</sup> See, *Wood v. Security Mut. Life Ins. Co.*, 112 Neb. 66, 198 N.W. 573, 34 A.L.R. 712 (1924), the term "damage" as ordinarily employed is indemnity recoverable by a person who has sustained injury, either in his person, property, or relative rights, through act or default of another; *Federal Land Bank of Omaha v. Omaha Nat. Bank*, 118 Neb. 489, 225 N.W. 471 (1929), loss must be sustained by reason of unauthorized act or injury in order to recover damages therefore.

<sup>2</sup> See, *Yeggy v. Fidelity Reserve Co.*, 118 Neb. 792, 226 N.W. 444 (1929), compensation is rule of damages in Nebraska; and *Prather v. Eisenmann*, 2200 Neb. 1, 61 N.W.2d 766 (1978), measure of recovery in all civil cases is compensation for injury sustained.

<sup>3</sup> *Miers v. Central Mine Equip. Co.*, 604 F.Supp. 502 (D. Neb. 1985).

<sup>4</sup> Generically, a tort system founded upon contributory negligence imposes liability upon a defendant for the entire chain of causation (i.e., actual causation) following the defendant's wrongful action until that liability is terminated by some intervening cause (e.g., plaintiff's own contributory negligence). Generically, a tort system

Ultimately, this manuscript will evolve to fit within the *Journal of Forensic Economics* series of articles on assessing damages in the various jurisdictions of the United States.<sup>5</sup>

### **PROOF MUST BE REASONABLY CERTAIN BEFORE IT MAY BE PREPONDERANCE OF THE EVIDENCE:**

Judges and lawyers use words as their stock and trade. Unfortunately, not all wordsmiths are as skilled as might be beneficial. Needless to say, confusion can and does result.

Everyone knows that the civil plaintiff bears the burden of providing proof at the level of preponderance of the evidence: that is, more likely than not. Almost as universally recognized is the litigator's contemptuous question to the medical expert "And you can hold that opinion to a reasonable medical certainty?"<sup>6</sup>

Aren't those two the same thing? No. Reasonably certain is a question of law and preponderance of the evidence is a question of fact. Whether the offered proof is reasonably certain proof is a question of law and that decision is made by the trial judge. Proof that is not reasonably certain is speculative, therefore the jury lacks a basis for making a decision. Once reasonably certain proof has been introduced, then the trier of fact decides whether a specific fact is more likely than not (i.e., by a preponderance of the evidence).<sup>7</sup> First the trial judge decides questions of law and then the jury (or judge sitting without a jury) decides questions of fact.

The proof first must pass legal muster as sufficient to allow the finder of fact to avoid making a decision that is speculative.<sup>8</sup> This requires the trial judge to answer the question of law

founded upon comparative negligence truncates a defendant's liability to only that fraction of the entire chain of causation that was reasonably foreseeable to a reasonable person in the defendant's position, and further limits the defendant's liability to only that fraction of the total causation that is the defendants by requiring the plaintiff to bear the losses attributable to the plaintiff's own negligence.

<sup>5</sup> JOURNAL OF FORENSIC ECONOMICS. Special Section: Assessing Economic Damages in Personal Injury and Wrongful Death Litigation in the States. "Introduction" by Robert A. Male and James D. Rodgers in JFE Vol. 15, No. 3, Fall 2002, pages 317-318.

Note, to date for the *JFE* has published articles on twenty-two USA jurisdictions covered so far and their publication issues are: Alabama 19(3); California 17(3); Connecticut 19(1); Florida 15(3); Georgia 17(1); Idaho 17(3); Illinois 20(3); Kansas 18(2-3); Kentucky 17(2); Mississippi 17(1); Missouri 16(1); North Carolina 19(1); Ohio 17(2); Oregon 15(3); Pennsylvania 15(3); Puerto Rico 16(3); South Dakota 20(3); Tennessee 19(3); Texas 20(1); Utah 18(2-3); West Virginia 16(3); Wyoming 16(1). See, [www.nafe.net](http://www.nafe.net).

<sup>6</sup> *Berggren v. Grand Island Accessories, Inc.*, 249 Neb. 609, 107 N.W.2d 727 (1996). For workers compensation claims, medical testimony bases on "reasonable certainty" is same as medical testimony based on "reasonable probability".

<sup>7</sup> See, NEBRASKA JURY INSTRUCTIONS, SECOND EDITION: INCLUDING CIVIL INSTRUCTIONS AND CRIMINAL INSTRUCTIONS. Nebraska. Supreme Court. Committee on Civil Practice and Procedure. 2 volumes in 1. Lincoln, NE.: West Pub. Co., 2000; as well as see, Morris, Daniel A. NEBRASKA TRIALS, THIRD EDITION. Nebraska Practice Series, Volume 2.: Eagan, MN.: Thomson Reuters/West, 2008. KFN 538 .M6 2008.

<sup>8</sup> See, *Burcham v. Griffith*, 31 Neb. 778, 48 N.W. 824 (1891) where court held that failure to instruct on the proper measure of damages is not reversible error when proof fails to show party entitled to recover damages; *Shiverick v. R.J. Gunning Co.*, 59 Neb. 73, 80 N.W. 264 (1899), unless evidence is produced in the trial on an element of damages, then do not submit jury instructions to the jury on that element of damages. But, note below in the text accompanying footnote 32 the discussion concerning presumptions.

The process within the jury room also can be an issue. The jury is to find the facts, and to just split the divergence is not to find the facts. See, *Haarberg v. Schneider*, 174 Neb. 334, 117 N.W.2d 796 (1962), where a "quotient verdict" is rejected since the jurors, for the purpose of arriving at a verdict, agree that each should write on his ballot a sum representing his judgment, that the aggregate should be divided by 12, and that the jurors will be bound by the quotient as their verdict.

"Is the proof is reasonably certain?"<sup>9</sup> Once the proof is sufficient to be reasonably certain, then the trier of fact has a sufficient basis for making a decision of the facts.<sup>10</sup>

### **WRONGFUL DEATH IS NARROWER THAN PERSONAL INJURY:**

The common law provides the primary guidance for the law of damages for personal injury. There is no common law remedy of wrongful death. That is a statutory remedy, commonly known as a Lord Campbell Act.<sup>11</sup> Importantly, a wrongful death statute<sup>12</sup> is fundamentally different than a survival statute.<sup>13</sup>

Note how a wrongful death statute cause of action differs from survival of a cause of action. A survival statute allows some causes of action that came into existence prior to death to survive the plaintiff's death. Accordingly, the decedent's estate is the plaintiff under a survival statute; also, the measure of compensable losses are those losses that were suffered by the decedent prior to death. For example, the pain and suffering of the decedent experienced prior to death are recoverable by the estate but are not recoverable by the next of kin. In stark contrast, a wrongful death statute creates a cause of action for those *next of kin* who suffer pecuniary losses *subsequent to that death*. The losses suffered by the next of kin are the measure of damages in a wrongful death action. While neither the decedent nor the decedent's estate is the plaintiff in a wrongful death suit; the personal representative of the decedent's estate is the sole person with standing to use for the wrongful death. Accordingly, who gets the damages paid by the defendant might not be those whose losses were the measure of those damages. Depending upon whether the decedent died intestate (i.e., without a will) the distinction between wrongful death and survival statutes might be a pure formality or might be fundamentally alter who receives the compensatory damages paid by the defendant.

Only the decedent's personal representative (e.g., executor of the estate) may bring an action for wrongful death. The compensable losses recoverable by the personal representative must be suffered by the next of kin. Thus, the titular plaintiff necessarily recovers for harms not personally suffered. Per the statute, the court apportions the award based upon the losses suffered by the permissible claimants (i.e., next of kin).

Because the wrongful death cause of action is a creature of statute, so too are the recoverable damages.<sup>14</sup> Most importantly the wrongful death statute expressly limits recovery to losses that are pecuniary.<sup>15</sup> The courts define pecuniary as having a monetary value.<sup>16</sup> If the wrongful death claimant pays or is legally obligated to pay, then a pecuniary loss exists.<sup>17</sup> For example, if the next of kin signs a promissory note for funeral services, then that next of kin has suffered a compensable pecuniary loss even though payment on that promissory note is not yet

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<sup>9</sup> *Piechota v. Rapp*, 148 Neb. 442, 27 N.W.2d 682 (1947).

<sup>10</sup> Neb.Rev.Stat. § 25-1142, statute defining when a jury's decision may be over ruled. For a summary of the text of this statutory section, see footnote 29.

<sup>11</sup> *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 314 N.W.2d 19 (1982).

<sup>12</sup> Neb.Rev.Stat. § 30-809 and § 30-810..

<sup>13</sup> Neb.Rev.Stat. § 25-1401. See, *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 314 N.W.2d 19 (1982) wherein the court describes Nebraska's survival statute § 25-1401 allowing a plaintiff's cause of action that came into existence prior to death to survive that plaintiff's death, whereas the Nebraska's wrongful death statute § 30-809 (i.e., a Lord Campbell Act) creates a new cause of action for those next of kin who survived the deceased's death.

<sup>14</sup> *Mabe v. Gross*, 167 Neb. 593, 94 N.W.2d 12 (1959).

<sup>15</sup> *Orgall v. Burlington & Mo. R.R.*, 46 Neb. 4, 64 N.W. 450 (1895).

<sup>16</sup> *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985).

<sup>17</sup> *Weatherly v. Blue Cross Blue Shield Ins. Co.*, 2 Neb. App. 669, 513 N.W.2d 347 (1994).

due; whereas, a next of kin who accepts a gift from a third party of identical funeral services does not suffer a compensable pecuniary loss that the defendant is obligated to make whole.<sup>18</sup>

Since 1873 Nebraska has had a wrongful death statute.<sup>19</sup> As society has changed, so too has the wrongful death statute. A major revision was made in 2003 so as to add unborn child in utero. This legislative amendment of Neb. Rev. Stat. § 30-809 followed a 2002 Nebraska Attorney General Opinion that such statutory action would be necessary to successfully sue for the wrongful death of an unborn child.<sup>20</sup> This Attorney General Opinion clearly was supported by existing case law excluding a stillborn fetus<sup>21</sup> as well as rejecting suing for prenatal injuries either via a personally injury suit brought post-birth or via wrongful death suit.<sup>22</sup>

In addition to the necessity for legislative action to authorize suits regarding unborn children, so too legislative action is required in other specialized contexts beyond the sweep of the common law. For example, see Neb.Rev.Stat. § 48-105 which provides that wrongful death within Workers' Compensation governed by §§ 48-101 to 48-103 which eliminate many of the employer's defenses due to employee negligence; and separately, Neb.Rev.Stat. § 48-422 which provides that wrongful death action for work place safety violations related to machinery. More generally, Nebraska has waived the sovereign immunity for the State and its political subdivisions with the Political Subdivisions Tort Claims Act.<sup>23</sup> Generosity has its limits, however, and the Political Subdivisions Tort Claims Act limits that waiver to a maximum of \$1 million per person and a maximum of \$5 million per occurrence.<sup>24</sup> Defective bridges and roads are included in this limited waiver of sovereign immunity.<sup>25</sup> High speed police pursuits in Nebraska first triggered the legislature removing those \$1 million and \$5 million limits; and, then when a victims' rights advocate was term limited, the 2009 session of the Unicameral witnessed a retreat from that expansion.<sup>26</sup>

In contrast to the constrictions placed upon wrongful death causes of action (e.g., only pecuniary losses; only personal representative may sue; only next of kin suffer compensable losses), the personal injury cause of action is defined expansively.<sup>27</sup>

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<sup>18</sup> Generically, tort law uses the collateral source rule.

BLACK'S LAW DICTIONARY, 7th edition, defines the collateral source rule as follows: "The doctrine that if an injured party receives compensation for its injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay. \* Insurance proceeds are the most common collateral source."

A public policy underlying the collateral source rule is that the defendant ought not benefit from the plaintiff's precautionary actions.

In this context of a wrongful death statute a different public policy is at work. To wit: statutes creating a cause of action which did not exist within the common law, especially statutes which use a definition of recoverable damages that is narrower than that used in the common law, ought to be read narrowly. The statutory constriction to pecuniary damages prompts an additional judicial constriction to payment made or legal obligation incurred.

See text accompanying footnote 28.

<sup>19</sup> See, G.S. 1873, c 15 § 1, p. 272.

<sup>20</sup> 2002 Op. Att'y Gen. No. 02026.

<sup>21</sup> *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977).

<sup>22</sup> *Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 50 N.W.2d 229 (1951).

<sup>23</sup> Neb.Rev.Stat. § 13-901. "Sections 13-901 to 13-926 shall be known as the Political Subdivisions Tort Claims Act."

<sup>24</sup> Neb.Rev.Stat. § 13-922.

<sup>25</sup> Neb.Rev.Stat. § 13-912.

<sup>26</sup> Neb.Rev.Stat. § 13-926. Repeal effective in September 2009.

<sup>27</sup> Neb.Rev.Stat. § 25-1146. "Whenever damages are recoverable, the plaintiff may claim and recovery any rate of damages to which he may be entitled for the cause of action established."

**PECUNIARY LOSSES:**

Above it is noted<sup>28</sup> that only pecuniary losses are recoverable in a wrongful death action. However, a pecuniary limitation also applies, but to a far less extent, to compensable personal injury damages.<sup>29</sup> To be recoverable as pecuniary losses the losses may not be either remote or speculative.<sup>30</sup> Evidence to a reasonable certainty must show the present worth in money of the deprived benefits; and, must be limited to those expenses which are fair and reasonable value.<sup>31</sup>

**PRESUMPTIONS AND NOMINAL DAMAGES:**

A presumption can substitute for evidence.<sup>32</sup> Typically, however, reasonable certain quantity and quality of evidence must be provided to the jury sufficient to support the jury's conclusion of preponderance of the evidence.

The law will not presume a money value loss associated with the loss of companionship, the plaintiff must prove special circumstances exist making it reasonable to conclude a loss of money value.<sup>33</sup> For example, only nominal damages were recoverable when a drunkard sibling with a poor work history who did also not save any earning suffered a wrongful death.<sup>34</sup> Only compensation for pecuniary losses suffered is recoverable: not the value of the life, itself, that is lost.<sup>35</sup>

Nominal damages (e.g., \$1) requires both infringement of a legal right and proof of loss.<sup>36</sup> However, if the finder of fact is unable to place a monetary value on the harm suffered, then "presumed damages" of nominal damages are appropriate as a substitute for actual or compensatory damages that can not be proved.<sup>37</sup> Emotional losses (e.g., pain and suffering prior to death) will not be presumed, are not recoverable via a wrongful death action, but may be recovered via a survival action supported by adequate proof.<sup>38</sup>

A loss must be paid or must be legally obligated to be recoverable.<sup>39</sup> Accordingly, it ought be no surprise that the court was willing to presume pecuniary loss from the wrongful death of a lineal kinsman in the context of an illegitimate child prior determination of paternity

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<sup>28</sup> See text at footnote 15.

<sup>29</sup> See, Neb.Rev.Stat. § 25-1142. A new trial may be obtained upon application by an aggrieved party following an irregularity that materially affects a substantial right of such party. Such irregularities include: (1) irregular proceedings or abuse of discretion; (2) misconduct by juror or prevailing party; (3) reasonably preventable accident or surprise; "(4) excessive damages, appearing to have been given under the influence of passion or prejudice; (5) error in the assessment of the amount of recovery, whether too large or too small, if the action is under a contract or for the injury or detention of property; (6) that the verdict, report, or decision is not supported by sufficient evidence or is contrary to law;" (7) not reasonably discoverable new evidence; and (8) an objected to error of law.

<sup>30</sup> *Nilson v. Chicago, B. & Q.R.R.*, 84 Neb. 595, 121 N.W. 1128 (1909).

<sup>31</sup> *Shields v. County of Buffalo*, 161 Neb. 34, 71 N.W.2d 701 (1955).

<sup>32</sup> *Klinger v. Nebraska Dept. of Correctional Services*, 902 F.Supp. 1036, reverse 107 F.3d 609 (D.Neb. 1995).

<sup>33</sup> *Ensor v. Compton*, 110 Neb. 522, 194 N.W. 458 (1923).

<sup>34</sup> *Anderson v. Chicago, B. & Q.R. Co.*, 35 Neb. 95, 52 N.W. 840 (1892).

<sup>35</sup> See also below text accompanying footnote 56.

<sup>36</sup> *Mathis v. State, Dept. of Roads*, 178 Neb. 701, 135 N.W.2d 178 (1965).

<sup>37</sup> *Klinger v. Nebraska Dept. of Correctional Services*, 902 F.Supp. 1036, reverse 107 F.3d 609 (D.Neb. 1995).

<sup>38</sup> *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989).

<sup>39</sup> *Kroeger v. Safranek*, 165 Neb. 636, 87 N.W.2d 221 (1957).

and prior to the order to pay child support.<sup>40</sup> Similarly, because a widow and minor children are legally dependent upon the deceased spouse/parent, pecuniary losses were presumed.<sup>41</sup> Recall that reasonable certain proof is required for the existence of pecuniary loss, then a less restrictive conceptualization of reasonably certain quantity of damages is required. A presumption can satisfy the existence of damage requirement, and, if there is no further evidence, then the nominal damages specify the quantity of pecuniary loss.

### **EMOTIONAL LOSSES:**

In a wrongful death suit fewer emotional losses (e.g., conscious pain and suffering) are recoverable than in a personal injury suit. First, the decedent's emotional losses (e.g., pain and suffering prior to death) on account of death are not recoverable as pecuniary losses via a wrongful death action. The pain of death is not a loss suffered by the next of kin. Such losses, however, do, via the survival statute, survive death and are recoverable by the estate. Such pre-death emotional losses are not presumed, thus must be proved by the estate.<sup>42</sup> Further, the next of kin's personal emotional losses are far less likely to be sufficiently "pecuniary" to be recoverable.

Generically, Nebraska is hostile to recovery for emotional losses because the loss is necessarily and unavoidably subjective. Whereas, the proof must be objective. When emotional losses can be objectively proved, then recovery is permitted.

Emotional distress to be recoverable under Nebraska law must be emotional distress that is sufficiently severe and medically significant to required medical or psychological treatment.<sup>43</sup> Emotional distress must be so severe that no reasonable person could be expected to endure it; furthermore, emotional anguish or mental harm must be medically diagnosable and must be sufficient severity that it is medically significant. For example, if learning of a traumatic event causes extraordinary psychological or physical effect, then recovery is allowed.<sup>44</sup>

The key is objective loss. Presumptions sometime are created because a loss is inherently objective, but proof might be difficult. For example, proof of a bystander's (e.g., young boy) martial or intimate familial relationship with the decedent (e.g., young sister) can be sufficient to support jury award for bystander's emotional distress from witnessing serious injury and death;<sup>45</sup> or, an adopted three year old child's loss of adopting mother's care, nurture, training, and instruction;<sup>46</sup> or, death of child with great academic and athletic promise deprived parents of the loss of society of the child being a source of great comfort and companionship.<sup>47</sup> Twice, on appeal, the court has rejected jury verdicts of zero damages, as inadequate as a matter of law, for the loss of older teenage children.<sup>48</sup>

However, the court also has expressly rejected the investment theory of raising a child as an improper measure of damages. Mere proof of expenses incurred to the date of child's death does not prove loss following death. The losses following death necessarily deal primarily with

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<sup>40</sup> *Millman v. County of Butler*, 244 Neb. 125, 504 N.W.2d 820 (1993).

<sup>41</sup> *Standard Oil Co. v. Parkinson*, 152 F. 681 (8th Cir. 1907).

<sup>42</sup> *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989).

<sup>43</sup> *Parrish By and Through Parrish v. Omaha Public Power Dist.*, 242 Neb. 731, 496 N.W.2d 914 (1993).

<sup>44</sup> *Aurora v. Burlington Northern R. Co.*, 31 F.3d 724 (C.A. 8 Neb. 1994).

<sup>45</sup> *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985).

<sup>46</sup> *Omaha Water Co. v. Schamel*, 147 F. 502, 78 C.C.A. 68, (1906).

<sup>47</sup> *Vandenberg v. Langan*, 192 Neb. 779, 224 N.W.2d 366 (1974).

<sup>48</sup> *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998); and *Brandon ex rel. Estate of Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001).

a fictitious future life of the deceased, but still must be proved to a reasonable certainty.<sup>49</sup> With respect to inherently less clearly pecuniary losses (e.g., companionship) some monetary value must be shown to have been lost, but exact no dollar value of that loss need be proved. The exact dollar value is for the jury.<sup>50</sup>

But note how this opens the door to ask an otherwise prohibited question. Ordinarily, the defendant may not ask about the estate that the decedent has left to the claimants in a wrongful death suit.<sup>51</sup> However, the claimant must offer some proof of pecuniary loss as an element of the cause of action. That opens the door to show scope of loss of support by asking about other sources of support.<sup>52</sup> If the claimed loss is of lost companionship, then that door will not open wide. But, if the claimed loss is loss of support, then that door will swing open very wide.

### **NON-RECOVERABLE LOSSES: HEDONIC AND PUNITIVE:**

In addition to the caps of \$1 million per person and \$5 million per occurrence for torts by government that are discussed above,<sup>53</sup> Nebraska also has a cap on medical malpractice damages.<sup>54</sup> All States have statutes of limitations and statutes of repose that terminate causes of action for lack of timely prosecution. For personal injury and wrongful death the statute of limitations is two years and the stature of repose is ten years.<sup>55</sup>

Generically, Nebraska exhibits as strong preference for objective evidence of value. Not surprisingly, therefore, Nebraska denies recovery for hedonic damages. "Hedonic damages" are those damages awarded for loss of the enjoyment of life, as measured separately from the economic productive value that an injured person would have had.<sup>56</sup> Nebraska's opposition to accepting objective proof on the value of life itself dates back more than a century.<sup>57</sup>

Depending upon whom you ask, Nebraska does or does not allow for the recovery of punitive damages. However, all agree that the plaintiff does not receive the punitive damages if a suit for punitive damages may be prosecuted. The rub is a provision in the Nebraska *Constitution*.<sup>58</sup> If punitive damages are recoverable, then the K-12 school fund will be the

<sup>49</sup> *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973).

<sup>50</sup> *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998); and *Brandon ex rel. Estate of Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001).

<sup>51</sup> *Chicago, R.I. & P.R. Co. v. Holmes*, 68 Neb. 826, 94 N.W. 1007 (1903).

<sup>52</sup> *Bethel v. Pawnee County*, 95 Neb. 203, 145 N.W. 363 (1914).

<sup>53</sup> See text accompanying footnote 23.

<sup>54</sup> The Nebraska Hospital-Medical Liability Act, chapter 44, article 28, §§ 44-2801 et seq., was adopted in 1976 to address the rising cost of medical malpractice insurance. State Tort Claims Act does not, by itself, exclude University of Nebraska Medical Center (UNMC) from the NH-MLA. See, 1991 Op. Att'y Gen. No. 25. The NH-MLA § 44-2816 requires informed consent. NH-MLA § 44-2819 excludes from evidence of extent of damages payments from collateral sources and requires proof by preponderance of the evidence. NH-MLA § 44-2821 makes its remedies exclusive unless the patient opts out prior to treatment. NH-MLA § 44-2825 set a cap recovery of damages for occurrences before 1985 at \$500,000 and now sets that cap at \$1,750,000 for occurrences after 2003. NH-MLA § 44-2826 prohibits mitigation by the defendant being used as evidence of admission of liability. NH-MLA § 44-2828 established as two year statute of limitations and a ten year statute of repose, which may be tolled one year for reasonable discovery.

<sup>55</sup> *Miers v. Central Mine Equip. Co.*, 604 F.Supp. 502 (D. Neb. 1985).

<sup>56</sup> *Anderson By and Through Anderson/Couvillon v. Nebraska Dept. of Social Services*, 248 Neb. 651, 538 N.W.2d 732, appeal after remand 253 Neb. 813, 572 N.W.2d 362 (1995).

<sup>57</sup> *Anderson v. Chicago, B. & Q.R. Co.*, 35 Neb. 95, 52 N.W. 840 (1892). Claimants may recover compensatory damages only, not the value of the life of the decedent.

<sup>58</sup> Nebraska *Constitution*, Article 7, section 5 provides that all fines and all penalties be paid to the Permanent School Fund.

beneficiary. To date, no one has attempted to sue in the name of the fund and the fund has not joined a suit as an interested party. Some of the judicial phraseology suggests a less and welcome reception awaits any plaintiff seeking punitive damages.<sup>59</sup> Pursuit of punitive damages in Nebraska might be perceived of best as a negotiating tactic; however, the litigator might be taking on unauthorized (and probably uncompensated) representational duties and liabilities in that process.

### **PRESENT VALUE:**

Future losses are to be measured in present value.<sup>60</sup> The moment in time that is the present for calculation of present value is the time of the trial.<sup>61</sup> All future damages are to be reduced to present value, including pain and suffering.<sup>62</sup>

That calculation of present value includes consideration of inflation as well as interest rates.<sup>63</sup> The jury has the discretion of a finder of fact. For example, a 6% discount rate was not clearly erroneous.<sup>64</sup>

### **TAXES:**

Let's end on a happy note. In Nebraska the court excludes as speculative the tax treatment of the award.<sup>65</sup> This greatly simplifies the process. To do otherwise surely makes the calculation more complex. Including tax consequences need not necessarily help the plaintiff nor necessarily help the defendant. An award that is tax neutral with the defendant paying those costs will increase the "damages" paid to compensate the plaintiff for losses suffered and legal obligations to pay. In contrast, the plaintiff might be required to pay the tax after the award was reduced by the amount of anticipated taxes.

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<sup>59</sup> *Fremont, E. & M.V.R. Co. v. Leslie*, 541 Neb. 159, 9 N.W. 559 (1894), the law awards damages, not as a punishment, but as compensation for the pecuniary loss sustained; *Sunderland Bros. Co. v. Chicago, B. & Q.R. Co.*, 104 Neb. 319, 177 N.W. 156, rehearing overruled 104 Neb. 319, 179 N.W. 546 (1920), a statute imposing liability in addition to actual damages for the same act is a fine or a penalty; *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960), a statute which provides for more than compensatory or actual damages to be paid to individual is in excess of legislative authority and unconstitutional; *Lozada for and on Behalf of Lozada v. U.S.*, 140 F.R.D 404, affirmed 974 F.2d 986 (D.Neb. 1991), Nebraska law does not allow for award of damages to punish or true sympathy.

<sup>60</sup> *Shields v. County of Buffalo*, 161 Neb. 34, 71 N.W.2d 701 (1955). Present worth in money of deprived benefits which evidence shows with reasonable certainty is the measure of damages, excluding only probable or conjectural benefits lost.

<sup>61</sup> *Lake v. Southwick*, 188 Neb. 533, 198 N.W.2d 319 (1972).

<sup>62</sup> *Oberhelman v. Blount*, 196 Neb. 42, 241 N.W.2d 355 (1976), the value of future pain and suffering is to be reduced to its present worth as is the value of loss or impairment of future earnings; *Kroeger v. Safranek*, 165 Neb. 636, 87 N.W.2d 221 (1957).

<sup>63</sup> *Kroeger v. Safranek*, 165 Neb. 636, 87 N.W.2d 221 (1957).

<sup>64</sup> *Daniels v. Andersen*, 195 Neb. 95, 237 N.W.2d 397 (1975), negligent prisoner confinement in a drunk tank resulted in injury from other prisoners.

<sup>65</sup> *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984).