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# The Worth of a Human Life

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# THE WORTH OF A HUMAN LIFE

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> "In [a wrongful death action], damages may be awarded that, under all the circumstances of the case, may be *just* . . . ."[1]
>
> - California Legislature

## I. INTRODUCTION

Measuring the value of a human life is no easy matter. Courts have been struggling with this difficult task since before wrongful death was even an actionable wrong.[2] More recently, Judge Richard Posner considered this issue in *Arpin v. United States*.[3] In *Arpin*, the plaintiff brought a wrongful death action arising from alleged medical malpractice for the death of her husband.[4] After a bench trial, the district judge awarded the plaintiff damages in excess of $8 million, consisting of some $500,000 for medical care and lost wages, $750,000 for pain and suffering, and $7 million for loss of consortium.[5] Judge Posner criticized the trial court judge for failing to indicate the reasoning process that connects the evidence to the damage award, and remanded the case to the district judge to revisit that award.[6] Furthermore, Judge Posner proposed a legal formula for lower courts to use in determining the worth of a loved one's companionship, which consisted of limiting such damages to a single-digit multiple of the compensatory damages.[7] Judge Posner explained this approach:

> The first step in taking a ratio approach to calculating damages for loss of consortium would be to examine the average ratio in wrongful death cases in which the award of such damages was upheld on appeal. The next step would be to consider any special factors that might warrant a departure from the average in the case at hand. Suppose the average ratio is 1:5—that in the average case, the damages awarded for loss of consortium are 20 percent of the damages awarded to compensate for the other losses resulting from the victim's death. The amount might then be adjusted upward or downward on the basis of the number of the decedent's children, whether they were minors or adults, and the closeness of

1. CAL. CIV. PROC. CODE § 377.61 (West 2004) (emphasis added).
2. *See infra* notes 13–29 and accompanying text.
3. Arpin v. United States, 521 F.3d 769, 775 (7th Cir. 2008).
4. *Id.* at 771.
5. *Id.*
6. *Id.* at 775–77.
7. *Id.* at 777.

> the relationship between the decedent and his spouse and children.[8]

This case is illustrative of the variety of methods that have been proposed for calculating loss of society, or loss of consortium,[9] damages and the issues that arise when calculating such damages. Loss of society damages are noneconomic damages that are awarded to compensate a wrongful death plaintiff for the loss of the decedent's love, companionship, comfort, care, assistance, protection, affection, society, and moral support.[10] The *Arpin* case also delves into the complex topic of awarding lump-sum damages rather than damages based off of evidence specific to the case.[11] The issue regarding what evidence, if any, to use when calculating loss of society or loss of consortium damages is a contentious one.

Today, most courts limit the evidence the jury may consider when measuring loss of society damages to evidence of the relationship between the decedent and beneficiary before the death.[12] As a result, this limitation requires the jury to speculate regarding the plaintiff's loss because it is not able to consider evidence concerning how the death has actually affected the plaintiff.[13] For example, if a plaintiff appeared to have a wonderful and loving relationship with the decedent before the death, but events after the death suggest that the plaintiff did not suffer a great loss because the plaintiff's relationship with decedent was strained, the jury could not consider this evidence to mitigate damages.[14] This article argues, however, that if the jury considered evidence of the decedent-beneficiary relationship as it was before and after the death, the jury could make a more accurate determination of damages. This more nuanced approach would better harmonize with our tort system and the notion of compensatory damages because our tort system typically attempts to award full compensation for a tortious injury. This article further argues that in California and states with similar

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8. *Id.*

9. Krouse v. Graham, 562 P.2d 1022, 1025 (Cal. 1977). Loss of consortium is frequently called the "loss of society." *Id.* The California Supreme Court defines loss of society as the "loss of the deceased spouse's love, companionship, comfort, affection, society, solace or moral support, loss of enjoyment of sexual relations, or any loss of physical assistance in the operation or maintenance of the home." *Id.*

10. Krouse v. Graham, 562 P.2d 1022, 1024-25 (Cal. 1977).

11. *See* discussion *infra* Part IV.D (discussing this dichotomy in depth).

12. *See Krouse*, 562 P.2d at 1024-25 (discussing evidence introduced by the plaintiff to show decedent was a warm and devoted mother); Cook v. Clay St. Hill R.R. Co., 60 Cal. 604, 609 (1882) (allowing testimony regarding decedent's relationship with heirs).

13. Cherrigan v. City & County of S. F., 69 Cal. Rptr. 42, 48 (Ct. App. 1968) ("[E]vidence of conditions occurring after a wrongful death is inadmissible on the issue of damages because the latter are to be determined only by conditions which existed at the time the death occurred.").

14. *See* discussion *infra* pp. 3-4.

wrongful death statutes, courts should adopt a rule that admits most types of evidence showing the effects of the death on the beneficiary when the jury determines the value of the loss of decedent's society. This article does not argue that California should reform its wrongful death statute to allow for damages given specifically for the beneficiary's grief and suffering. Rather, this article addresses the best ways to measure and value loss of society damages and suggests which evidence is best suited to make that valuation.

Part II of this article introduces two hypothetical stories, that of Carolyn and Sophia, to better illustrate the inadequacies of the current approach that governs post-death evidence. As this article progresses, it will consider Carolyn and Sophia's stories in the context of the various solutions that have been proposed. This article will then explore the changes to Carolyn and Sophia's cases if the solution proposed by this article is adopted. Part III briefly surveys the law of loss of society damages in wrongful death cases. It will highlight many of the ways in which courts have traditionally measured and valued loss of society and will show the inherent difficulty of measuring noneconomic loss. Part III will also explain how the courts have attempted to reconcile the problem of categorizing loss of society as a pecuniary loss. Part IV explores the general exclusionary rule, a rule which prohibits the admission of evidence occurring after a wrongful death and only allows for the admission of evidence occurring before the death.[15] Part IV also explores the policies that justify this rule. It then presents a new framework for understanding the goals of the general exclusionary rule and the limited situations to which this rule should apply.

Part V explores the rule that prohibits recovery for grief and suffering damages in a wrongful death action and differentiates the law regarding measurement of loss of society and recovery for grief and suffering. Part VI presents a final recommendation—that courts should adopt a rule providing that most types of evidence showing the effects of the death on the beneficiaries should be admitted to the jury in valuing the loss of decedent's society. This new approach will provide the most accurate measurement of loss of society damages. Part VI then delves into the advantages and disadvantages of the final recommendation, concluding that a highly individuated approach to the tort system, one that is context-specific and focuses on the individual, achieves optimal deterrence and full compensation in an already context-specific tort system using the most efficient means possible.

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15. *Cherrigan*, 69 Cal. Rptr. at 48 ("[E]vidence of conditions occurring after a wrongful death is inadmissible on the issue of damages because the latter are to be determined only by conditions which existed at the time the death occurred.").

## II. TWO HYPOTHETICAL STORIES: CAROLYN AND SOPHIA

The following two cases illustrate the problem this article addresses. Carolyn is a thirty-one year old new mother. She and her husband, Forest, gave birth to Alessandra three years ago. Alessandra is their only child, and is the center of her parents' attention. One day, Carolyn left Alessandra with a babysitter. Alessandra and her babysitter were on a drive when a drunk driver's car collided with the babysitter's car. Alessandra was killed instantly. Carolyn took her only daughter's death very hard. She became quite depressed and attempted suicide in the months after her daughter's death. She started seeing a therapist, who diagnosed her with severe depression. She and her husband, happily married for six years, divorced.

Carolyn and Forest decided to bring a wrongful death action against the drunk driver. Their attorney, however, told them that Alessandra's life was worth very little in the eyes of the law. The attorney explained that in California, courts do not admit evidence of events that happened after Alessandra's death to determine the value of the loss of Alessandra's society or consortium.[16] Not only did Alessandra not contribute household services or provide income to the family, Alessandra's society is seen as minimal in the eyes of the law because a three-year-old cannot provide as much love, comfort, and care as a loving adult can. Thus, the fact that Carolyn was devastated, attempted suicide, and was seeing a therapist is considered irrelevant when determining the value of the loss of Alessandra's society.

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Sophia married Ethan at a young age. She convinced herself that he was a good catch because he cared about her tremendously; however, she never felt that she was in love with him. As the years went by, she became more annoyed with his constant showering of affection, gifts, and love. Even though he was a doctor and was able to take care of her and grant her wildest dreams, she started longing for something more. She began dreaming of having an affair with someone else, although she never acted on her desires. On the surface, however, their marriage seemed perfect. One day, Ethan was involved in a serious car accident with a drunk driver and was pronounced dead shortly thereafter. Sophia reacted strangely upon hearing the news of her husband's death. Doctors were shocked that she showed very little emotion when she arrived at the hospital. One doctor noticed that she had a smile on her face after she identified the body. Relatives noticed that she did not cry at the funeral. Shortly after the funeral, Sophia received

16. *Id.*

a very large check from her husband's life insurance company. She began spending furiously. Three months later, she eloped on her yacht to the Caribbean with a very handsome young man.

Sophia consulted an attorney shortly after Ethan's death to inquire about bringing a wrongful death action against the drunk driver. The attorney recognized immediately that Sophia's case was a gold mine. Ethan was a loving and caring husband, their marriage appeared blissful, no evidence suggested either's infidelity, and Ethan had a very large income. In particular, the value of Ethan's society would be very high because he was such a kind, caring, and devoted husband.[17] When the attorney learned of Sophia's apparent lack of grief after the death, her shopping sprees, and her new marriage, her attorney did not worry. He understood that evidence of events that happened after Ethan's death would be inadmissible at trial.[18] The jury would only receive evidence describing the seemingly perfect marriage that tragically ended with Ethan's death.[19]

The results of each of these stories seem counterintuitive and unjust.[20] Nevertheless, the current law mandates these outcomes.[21] To understand

17. *See, e.g.*, *Krouse*, 562 P.2d at 1024-25 (awarding $300,000 for the wrongful death of a "warm and devoted mother"). *Cf. Cook*, 60 Cal. at 610 (stating that a verdict for $8,000 was just under the circumstances).

18. *Cherrigan*, 69 Cal. Rptr. at 48.

19. Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 29 (2005) ("Embittered persons who were scheduled to file for divorce the day after the accident can recover, while optimistic couples scheduled to get married the same day cannot.").

20. *See* Wright v. Hoover, 329 F.2d 72, 73 (8th Cir. 1964). Indeed, numerous actual cases also illustrate the rule's injustice. *See, e.g., id.* In *Wright*, the plaintiff's two year and three month old son died as a result of fatal injuries sustained in an automobile collision. *Id.* The defendant admitted liability, and the trial court assessed no damages. *Id.* at 74. The Eighth Circuit, applying substantive Nebraska law that limits recovery to the pecuniary value of decedent's life, affirmed the trial court, and noted that:

> the 'presumption of pecuniary loss' only applies to the child's expected contributions or services of monetary value, and it is still for the jury to determine the extent to which such presumed loss is offset by the amount which would have been expended for the deceased child's maintenance and support. Here, undoubtedly, the jury determined that the costs of raising the child would have outweighed the child's monetary contributions to the father.

*Id.* at 75. The courts did not consider the effects of the death on the father. In contrast, in *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, a wife brought a wrongful death action following her husband's death during an airplane bombing. 887 F. Supp. 71, 72 (E.D.N.Y. 1995). The trial court awarded plaintiff $19,059,040, which included a $5 million award for loss of society damages. *Id.* The court noted the decedent's character, his "affectionate relationship" with family and friends, and his "deep and abiding love and affection for his wife." *Id.* at 73. The court did not discuss the plaintiff's feelings towards her husband or how his death affected her. These facts may have been very damaging because he worked as an executive and was often away on business. *Id.* at 72-73.

21. *See infra* notes 72-97.

the current law and the remedy proposed here, one must start at the beginning.

## III. BACKGROUND

### A. WRONGFUL DEATH RECOVERY: IN GENERAL

The wrongful death system in the United States is most aptly summed up in the following statement: "Despite more than 150 years of legislative and common law development, . . . the American wrongful death system remains an illogical and discriminatory one that systematically undervalues human life and the far-reaching grief consequences to those left behind."[22] Today in California, a beneficiary may recover both economic and noneconomic damages in a wrongful death action.[23] A beneficiary may recover economic damages, including financial support the decedent would have contributed to the family during either the life expectancy of the decedent or the life expectancy of the plaintiff, whichever is shorter; the loss of gifts or benefits the plaintiff would have expected to receive from the decedent; funeral and burial expenses; and the reasonable value of household services that the decedent would have provided.[24] A beneficiary may also recover noneconomic damages, including loss of the decedent's love, companionship, comfort, care, assistance, protection, affection, society, moral support, loss of the enjoyment of sexual relations (only if the decedent is the spouse of the plaintiff),[25] and loss of the decedent's training and guidance.[26]

The law governing wrongful death has had a tumultuous upbringing. In the past, common law held that killing a human being was not an actionable wrong.[27] Then the English Parliament passed Lord Campbell's Act, which created a civil cause of action for wrongful death.[28] Eventually, each

22. McClurg, *supra* note 19, at 18.

23. Krouse v. Graham, 562 P.2d 1022, 1025-26 (Cal. 1977); *In re* Air Crash Disaster Near Cerritos, Cal., on Aug. 31, 1986, 982 F.2d 1271, 1274 n.3 (9th Cir. 1992).

24. Quiroz v. Seventh Ave. Ctr., 45 Cal. Rptr. 3d 222, 227 n.2 (Ct. App. 2006) (summarizing the Judicial Council of California Civil Jury Instruction on economic damages).

25. A putative spouse also qualifies and may assert a wrongful death action against a tortfeasor. CAL. CIV. PROC. CODE § 377.60 (West 2005). A putative spouse is "the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid." *Id.*

26. *See Krouse*, 562 P.2d at 1025 (allowing recovery for loss of wife's moral support and physical assistance in maintaining the home).

27. Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1067 (1965) ("[I]t can be observed that Ellenborough's blunt announcement that no civil action can be grounded upon the death of a human being not only lacked historical support at the time but was consistently ignored in America until 1848 . . . ."); McClurg, *supra* note 19, at 19.

28. McClurg, *supra* note 19, at 20 (citing Lord Campbell's Act, 1846, 9 & 10 Vict., c. 93 (Eng.)).

state in the United States adopted a wrongful death statute similar to Lord Campbell's Act, which limited recoverable damages to pecuniary, or economic, losses.[29] Under Lord Campbell's Act, the beneficiary could only recover the decedent's financial contributions, in the form of services and income.[30] This approach resulted in numerous injustices.[31] For example, the lives of children had a negative net worth because the cost of rearing a child exceeded the monetary value and service contributions that children made to their families.[32] In addition, men's lives were generally worth more than women's lives under that wrongful death system because men earned more money than women.[33] Disturbingly, this wrongful death system remains in some states.[34]

Wrongful death law has slowly transitioned to allow recovery of loss of society in a majority of states, most likely as a result of judicial activism and courts' attempts to create a more just wrongful death doctrine.[35] To-

29. *See* STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY § 1:1 (Clark, Boardman, Callaghan 3d ed. 1992) (stating Lord Ellenborough's remarks became the basis for the rule that there was no wrongful death recovery in absence of statute); *see generally* Stuart M. Speiser & Stuart S. Malawer, *An American Tragedy: Damages for Mental Anguish of Bereaved Relatives in Wrongful Death Actions*, 51 TUL. L. REV. 1, 5-8 (1976) (tracing the history and interpretation of Lord Campbell's Act).

30. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 127, at 949-50 (West Publishing Co. 5th ed. 1984) (1941) (discussing the common measure of damages in wrongful death actions).

31. *See* McClurg, *supra* note 19, at 20-22.

32. Selders v. Armentrout, 207 N.W.2d 686, 688-89 (Neb. 1973) (noting that "if the rule was literally followed, the average child would have negative worth").

33. McClurg, *supra* note 19, at 20-22. Men continue to earn more money than women. *See* Genaro C. Armas, *In Most Jobs, It Pays to be a Man*, MIAMI HERALD, June 4, 2004, at F1 (reporting findings from 2000 census data that, out of 505 job categories, women earned as much as, or more than, men in only five job categories; reporting that women on average earn seventy-four cents for every dollar men earn; and reporting the median annual income for women compared to men in the following job categories: lawyers ($66,000 for women compared to $95,000 for men), doctors ($88,000 for women compared to $140,000 for men); chief executives ($60,000 for women compared to $95,000 for men)).

34. *E.g.* ALA. CODE § 6-5-410 (1975) (interpreted in Estes Health Care Ctrs., Inc. v. Bannerman, 411 So. 2d 109, 112 (Ala. 1982) to allow only punitive damages in wrongful death cases); N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney 2002) (interpreted in Bell v. Cox, 388 N.Y.S.2d 118, 118-19 (App. Div. 1976) as not allowing damages for "grief, loss of society or loss of companionship"). Alabama and New York are the only two states that still model the Lord Campbell's Act by denying loss of society damages and allowing recovery only for pecuniary losses.

35. *See, e.g.*, Wycko v. Gnodtke, 105 N.W.2d 118, 121 (Mich. 1960). The Michigan Supreme Court reviewed a case in which a jury returned a verdict for $15,000 on behalf of a father suing for the loss of his fourteen-year-old son, who was negligently killed in an auto accident. *Id.* at 119. Struck by the injustice of the application of Michigan's wrongful death statute to children, the Michigan Supreme Court expanded the meaning of pecuniary loss to include loss of society. *Id.* at 119-122. *See also, e.g.*, Krouse v. Graham, 562 P.2d 1022, 1026 (Cal. 1977). The California Supreme Court, noting the injustice the Lord Campbell's Act model compels, traced the history of California's wrongful death law and its transition to allowing recovery for loss of society. *Id.* at 1024-25.

day, the general rule is that a plaintiff in a wrongful death action may recover the following noneconomic damages in addition to the standard economic damages: loss of the decedent's love, companionship, comfort, care, assistance, protection, affection, society, and moral support.[36] This is frequently referred to simply as loss of society or loss of society and companionship.[37] Various cases and statutes describe loss of society as including "society, companionship, love, affection, consortium, marital services, marital care, aid, tutelage, support, moral upbringing, experience, knowledge, cooperation, solicitude, comfort, pleasure, household services, guidance, advice, counsel, kindly offices, training, education, . . . assistance, attention, care, and protection."[38]

Although California courts allow recovery for loss of society, these courts uniformly hold that a plaintiff can only recover for pecuniary losses.[39] Thus, California courts categorize loss of society as a pecuniary, or economic, loss.[40] This creates a significant problem because a noneconomic loss cannot be measured in the same way as a pecuniary loss.[41]

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36. *Krouse*, 562 P.2d at 1024-25. A plaintiff in a wrongful death action may also recover the following economic damages: the value of the financial support that the decedent would have contributed to the family, the loss of gifts or benefits that plaintiff could have expected to receive from decedent, funeral and burial expenses, and the amount paid to obtain household services that decedent would have provided. Quiroz v. Seventh Ave. Ctr., 45 Cal. Rptr. 3d 222, 227 n.2 (Ct. App. 2006).

37. *See* San Diego Gas & Elec. Co. v. Superior Court, 53 Cal. Rptr. 3d 722, 725 (Ct. App. 2007) (referring to loss of society as "loss of society, affection and sexual companionship").

38. McClurg, *supra* note 19, at 26. *See, e.g.,* Mullen v. Posada Del Sol Health Care Ctr., 819 P.2d 985, 986 (Ariz. Ct. App. 1991) (allowing damages for "loss of love, affection, companionship, consortium, personal anguish and suffering"); Herbert v. District of Columbia, 808 A.2d 776, 778 n.2 (D.C. 2002) (allowing damages for "lost services," which include decedent's "care, education, training, and personal advice"); Hepp v. Ader, 130 P.2d 859, 862 (Idaho 1942) (allowing damages for "loss of society, companionship, comfort, protection, guidance, advice, intellectual training, etc."). Professors Posner and Sunstein argue that courts should consider loss of society beyond that loss sustained by family:

> [m]ost people produce value that they do not fully consume or give to dependents; this value benefits strangers in the larger society. Workers produce goods that consumers value more than the price that they pay; entrepreneurs start new businesses that employ people; people give to charity; inventors invent products whose value is greater than what the inventors can capture through patent law; the same is true of authors of books and the protections of copyright law; there are countless Good Samaritan acts; and many people devote their lives to public service. When these people die, isn't there a loss to society beyond the loss to the person who dies and his immediate family and friends?

Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 578 (2005).

39. *Krouse*, 562 P.2d at 1025; Bond v. United R.Rs., 113 P. 366, 372 (Cal. 1911); Griott v. Gamblin, 15 Cal. Rptr. 228, 230 (Ct. App. 1961).

40. *Krouse*, 562 P.2d at 1025.

41. *Quiroz*, 45 Cal. Rptr. 3d at 227 n.2. A beneficiary may recover economic damages, including financial support the decedent would have contributed to the family during either the life expectancy of the decedent or the life expectancy of the plaintiff, whichever is shorter; the loss of gifts or benefits the plaintiff would have expected to receive from the decedent; funeral and burial

The irony has not been lost on the courts, however, and courts recognize the difficulty of measuring the pecuniary value of noneconomic damages.[42] Numerous courts reason that if damages were truly limited to pecuniary loss, many heirs' would not be able to recover because they would be unable to prove noneconomic losses.[43] The services of children, elderly parents, or nonworking spouses often do not result in "measurable net income" to the beneficiaries, yet "unquestionably the death of such a person represents a substantial injury to the family for which just compensation should be paid."[44] Courts, however, still adhere to some form of the pecuniary loss rule, and states with wrongful death statutes similar to California hold that loss of society damages do not include damages for mental and emotional distress, including grief and sorrow.[45] Few states have adopted a wrongful death system that allows damages for mental and emotional distress.[46] A wrongful death system that recognizes emotional distress remains the farthest legal step away from the unjust pecuniary loss rule of Lord Campbell's Act.

A minority of jurisdictions, including Florida,[47] Louisiana,[48] South Carolina,[49] Virginia,[50] and West Virginia,[51] allow damages for mental an-

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expenses; and the reasonable value of household services that the decedent would have provided. *Id.* Financial support is determined by calculating the present value of the earnings the decedent would have contributed to the family during the period of that person's life expectancy. Riley v. Cal. Erectors, Inc., 111 Cal. Rptr. 459, 460 (Ct. App. 1973). Mortality tables are admissible evidence to show the probable duration of the decedent's life. Powers v. Sutherland Auto Stage Co., 213 P. 494, 495 (Cal. 1923). Beneficiaries in a wrongful death action may submit a copy of the funeral bills to recover the reasonable value of funeral expenses. *In re* Air Crash Disaster Near Cerritos, Cal., on Aug. 31, 1986, 982 F.2d 1271, 1276 (9th Cir. 1992). In contrast, noneconomic damages are not as easily calculable. A reviewing court has no fixed yardstick to measure the value of these elements of damage. It is sufficient if the amount awarded appears to bear a reasonable relation to the elements of loss entitled to be considered by the jury. Fagerquist v. W. Sun Aviation, Inc., 236 Cal. Rptr. 633, 644-45 (Ct. App. 1987).

42. *Krouse*, 562 P.2d at 1026. ("To direct the jury, on the one hand, to limit plaintiff's recovery to pecuniary losses alone while also compensating the plaintiff for loss of such nonpecuniary factors as the society, comfort, care and protection of a decedent is calculated to mislead and invite confusion.").

43. *Id.* ("These cases suggest a realization that if damages truly were limited to 'pecuniary' loss, recovery frequently would be barred by the heirs' inability to prove such a loss."); *Griott*, 15 Cal. Rptr. at 230; Wycko v. Gnodtke, 105 N.W.2d 118, 119-22 (Mich. 1960).

44. *Krouse*, 562 P.2d at 1026.

45. *Id.* at 1028 ("California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action."); Dickinson v. S. Pac. Co., 158 P. 183, 185 (Cal. 1916); Westfield Ins. Co. v. DeSimone, 247 Cal. Rptr. 291, 295 (Ct. App. 1988).

46. *See infra* notes 47-51 and accompanying text (discussing Florida, Louisiana, South Carolina, Virginia, and West Virginia's adoption of wrongful death systems that allow damages for mental and emotional distress).

47. Callison v. Brake, 129 F. 196, 199 (5th Cir. 1904) (quoting a Florida statute that allows a parent to recover for mental suffering following the death of a child).

48. Thompson v. New Orleans Ry. & Light Co., 87 So. 716, 718 (La. 1921).

guish, suffering, bereavement, and solatium.[52] In an action for the wrongful death of a six-year-old daughter, a court in Florida even allowed a father to recover for mental anguish that resulted in his subsequent incompetence.[53] The court noted:

> Those who have not brought a child into the world and loved it and planned for it, and then have it suddenly snatched away from them and killed can hardly have an adequate idea of the mental pain and anguish that one undergoes from such a tragedy. No other affliction so tortures and wears down the physical and nervous system. Psychosomatic illness of a serious nature may follow. The emotions may be unstrung, the nerves put on edge and the end effect may be a period in a rest home, a mental hospital, serious physical derangement and sometimes death.[54]

Although the law appears fairly straightforward in this area, it becomes much more complicated in its practical application. Furthermore, it is not clear how to measure loss of society damages and what evidence the jury is able to consider in determining the value of these damages.

### B. MEASUREMENT OF LOSS OF SOCIETY: LOOKING ONLY TO THE PAST

Accordingly, the means by which courts measure loss of society become not only quite complicated but also subject to a great deal of debate. In addition to the matters usually considered when calculating loss of soci-

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49. Brown v. S. Ry., 43 S.E. 794, 796 (S.C. 1903).

50. Va. Iron, Coal, & Coke Co. v. Odle's Adm'r, 105 S.E. 107, 116 (Va. 1920).

51. Kelley v. Ohio River R. Co., 52 S.E. 520, 523 (W. Va. 1905).

52. *See* McClurg, *supra* note 19, at 6 (explaining recent proposals that would extend wrongful death recovery to include hedonic damages). Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1038 (2004). Hedonic damages are damages for loss of enjoyment of life. *Id.* Hedonic damages are perhaps described most aptly in the Schwartz & Silverman article:

> [i]n 1977, MasterCard launched a successful advertising campaign that pointed out the 'priceless' moments in life. MasterCard's 'Priceless' ads proclaimed, 'There are some things money can't buy. For everything else, there's MasterCard.' The ads emphasized the personal relationship and sentimental, special moments that make life good. It is priceless, for example, for a preschooler to spill most of the milk from her cereal bowl down her shirt, for a mother to take her adult daughter to the place where she first met her husband, or for a child to come home after a night of camping in the neighbor's backyard. The notion of hedonic damages, however, takes the opposite approach. It implies that every positive life experience can and should be converted into a cash equivalent, and asks the jury to do so.

*Id.* at 1043.

53. Coast Cities Coaches v. Donat, 106 So. 2d 593, 594 (Fla. 1958).

54. *Id.* at 597 (quoting Winner v. Sharp, 43 So.2d 634, 636-37 (Fla. 1949)).

ety,[55] courts also consider the nature of the decedent-beneficiary relationship.[56] When inquiring into the nature of the decedent-beneficiary relationship, courts have admitted evidence of the closeness of the family unit, the warmth of feeling between family members, and the character of the decedent as "kind and attentive" or "kind and loving."[57] Courts place an emphasis on the nature of the decedent-beneficiary relationship. Thus, it is important to inquire precisely how the courts consider this relationship.

In valuing loss of society, courts are generally backward-looking as opposed to forward-looking.[58] Courts evaluate the strength of the relationship between the decedent and beneficiary and rarely consider post-death evidence when determining damages.[59] Indeed, most judicial opinions considering loss of society begin with a detailed description of the relationship between the beneficiary and decedent, using that as a basis to determine the value of the loss of society.[60] For example, in a husband and his five children's wrongful death action for the death of their wife and mother, the court described at great length the relationship between the husband, wife and children.[61] The court only considered a description of the relationship when determining the plaintiff's loss of society damages.[62] The court noted that the evidence showed that the wife was a "warm and devoted mother."[63] The court also discussed the wife's age at death, her good health, and her decision to retire as a legal secretary to care for her husband who had a condition that required constant attention.[64] In addition, the court described the wife as having "primary responsibility for maintaining the family home and garden and for attending to a minor son who resided at home."[65] The court placed special emphasis on the minor son's heavy dependence upon

55. Krouse v. Graham, 562 P.2d 1022, 1025 (Cal. 1977) (including loss of the deceased spouse's "love, companionship, comfort, affection, society, solace or moral support, loss of enjoyment of sexual relations, or any loss of her physical assistance in the operation or maintenance of the home").

56. Benwell v. Dean, 57 Cal. Rptr. 394, 398 (Ct. App. 1967) ("It is well established in this state, moreover, that evidence of the nature of the personal relationship that existed between the decedent and the beneficiaries of a wrongful death action has a bearing on the compensation for loss of society, comfort and protection, and is therefore ordinarily admissible in such an action."). *See, e.g.*, Cook v. Clay St. Hill R.R. Co., 60 Cal. 604, 609 (1882); Griott v. Gamblin, 15 Cal. Rptr. 228, 229 (Ct. App. 1961).

57. *See Cook*, 60 Cal. at 609; *Benwell*, 57 Cal. Rptr. at 398; *Griott*, 15 Cal. Rptr. at 229.

58. *See Krouse*, 562 P.2d at 1025.

59. *See, e.g.*, *Cook*, 60 Cal. at 609; *Benwell*, 57 Cal. Rptr. at 398; *Griott*, 15 Cal. Rptr. at 229.

60. *Krouse*, 562 P.2d at 1025.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

his mother.[66] Finally, the court noted that a "high degree of family socializing" existed, including with the grandchildren.[67]

Similarly, in a widow's wrongful death action for the death of her husband, the court described the husband's relationship with his wife and children and noted that the husband was normally home after business hours, that he and his wife were happily married, that the wife was an invalid and unable to leave the house, that the husband was very kind and attentive to her, and that the wife was dependent upon the husband.[68] The court also considered the daughter's testimony that he was a kind father, that the family was happy, and that the husband was kind and loving to his wife.[69]

Thus, courts generally only consider the relationship between the beneficiary and the decedent before the death. The question then becomes whether the courts may look forward to determine loss of society damages and whether courts may consider evidence of circumstances occurring after the death, as well as evidence of the death's effect on the beneficiaries. This question is surprisingly difficult to answer. Very few courts have addressed this issue head-on, and the courts that have considered the issue come to differing conclusions and provide little support for those conclusions.[70] The wrongful death system is based on justice and fairness,[71] and thus courts must utilize a uniform and accurate system for measuring loss of society damages. Thus, courts should address what a jury may consider when determining wrongful death loss of society damages.

Two doctrines tend to result in courts excluding evidence of post-death circumstances and conditions: the general exclusionary rule and the grief and suffering rule. As this article argues, however, neither doctrine should apply to the use of post-death evidence to measure loss of society damages, outside of a few limited types of post-death evidence. Each of these doctrines are considered in turn below.

## IV. THE GENERAL EXCLUSIONARY RULE: THE FUTURE IS IRRELEVANT

The general exclusionary rule is perhaps best described as a rule that prohibits the admission of evidence occurring after the wrongful death in determining loss of society damages. However, the parameters of the rule

66. *Id.*
67. *Id.*
68. Cook v. Clay St. Hill R.R. Co., 60 Cal. 604, 609-10 (1882).
69. *Id.*
70. *See* discussion *infra* Part VI.A.
71. CAL. CIV. PROC. CODE § 377.61 (West 2004) ("In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just . . . .").

are unclear to some California courts. Although the general exclusionary rule initially appears to apply to all post-death evidence used for loss of society damages, this Part will show that the rule is much more complicated, has numerous exceptions, and has not been applied uniformly by courts. Indeed, a great deal of confusion surrounds this rule. Additionally, courts do not agree on how to apply this rule and few courts have undertaken a discussion of this rule that would assist in its interpretation and application.

### A. A BRIEF EXPOSÉ

In California, one court of appeals stated that there is a general exclusionary rule, which provides that "evidence of conditions occurring after a wrongful death is inadmissible on the issue of damages because the latter are to be determined only by conditions which existed at the time the death occurred."[72] Another court stated that damages in a wrongful death action are measured by the situation existing at the time of the act causing death and not by events occurring after the act.[73]

For example, in *Cherrigan v. City and County of San Francisco*,[74] the trial court held that evidence of the plaintiff widow's remarriage was not admissible to mitigate the plaintiff's damages.[75] The court of appeals affirmed and stated that this ruling was consistent with California's legislative policy and the California Supreme Court's analysis in prior cases.[76] First, the court of appeals set forth three policy rationales for the rule: evidence of remarriage as proof of mitigation of damages is speculative, evidence of remarriage or of death benefits unduly profits the defendant, and damages should be determinable at the time of death.[77] Then, the court of appeals cited to the California Supreme Court's decision in *McLaughlin v. United Railroads of San Francisco*,[78] which stated that the exclusionary rule is "more in consonance with justice" than the English rule admitting all post-death evidence because the tortfeasor benefits from the remarriage that resulted from the death the tortfeasor caused.[79] The California Supreme Court explained that the law measures the consequences of the tortfeasor's

72. Cherrigan v. City & County of S.F., 69 Cal. Rptr. 42, 48 (Ct. App. 1968).

73. McLaughlin v. United R.Rs. of S.F., 147 P. 149, 151 (Cal. 1915).

74. 69 Cal. Rptr. 42 (Ct. App. 1968).

75. *Cherrigan*, 69 Cal. Rptr. at 47-48.

76. *Id.* at 48.

77. *Id.* at 47-48. *See also* Benwell v. Dean, 57 Cal. Rptr. 394, 402 (Ct. App. 1967); Steven T. Densley, *Admissibility of Evidence That a Spouse has Remarried in a Wrongful Death Action in Utah*, 3 J.L. FAM. STUD. 145, 145 n.2 (2001) *;see* discussion *infra* Part IV.B (discussing the policy rationales for the exclusionary rule).

78. 147 P. 149, 151 (Cal. 1915).

79. *Cherrigan*, 69 Cal. Rptr. at 48 (citing *McLaughlin*, 147 P. at 151).

act by the situation existing at the time of the act and not by any situation existing after the act.[80] Finally, the California Supreme Court in *McLaughlin* quoted and explained language from the Pennsylvania Supreme Court, as follows:

> The true question is, what had these plaintiffs the right to expect to receive from the parent during his life . . . and for the loss of this are to be compensated. What they got after his death does not enter into the case. The loss spoken of is the taking away of that which they were receiving, and would have received had he lived. It is the destruction of their expectations in this regard that the law deals with, and for which it furnishes compensation. To say, "True it is we have taken from you his benefactions, but you get by law, not from us, but from his estate which we thus make available for you, something better," is to substitute the heirs' legal right under the law for the company's liability. This rule of evidence has its foundation in the refusal of the court to allow the defendant to benefit by his own wrong, to lessen his responsibility in damages for the injury which he has inflicted, by showing that, quite fortuitously, through no contribution of defendant's own, the plaintiffs have received a certain pecuniary benefit.[81]

It is very easy to apply this rule to Carolyn and Sophia's stories. Quite simply, evidence of anything that happened after Alessandra's death and Ethan's death is inadmissible to determine the loss of society damages that Carolyn and Sophia will respectively receive. But, as a result of this rule, Carolyn will receive less in noneconomic damages because the jury will not be allowed to consider Carolyn's devastation resulting from the loss of her daughter; Sophia, however, will receive more because the jury will only be allowed to consider the quality of the marriage and characteristics of Sophia's husband rather than Sophia's lack of grief after his death. Common sense and notions of justice, however, dictate that precisely the opposite should occur, and that Carolyn should receive more damages for loss of society than Sophia.

Although this rule seems bright-line, broad, and applicable to the issue of post-death evidence, upon further examination, it is much more complex than it appears. Indeed, the rule is applied only to limited types of evidence and has many exceptions, which are discussed in more depth below.

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80. *McLaughlin*, 147 P. at 151.

81. *Id.* at 151 (citing Stahler v. Philadelphia & R. Ry. Co., 49 A. 273 (Pa. 1901)).

### B. THE EVOLUTION: WHERE DID IT COME FROM?

The court's use of broad language in *Cherrigan v. City and County of San Francisco* to define the exclusionary rule is not supported by the origins of the rule because the rule was initially used only to exclude evidence of a plaintiff's remarriage or engagement to remarry, a plaintiff's post-death affair, or a plaintiff's receipt of death benefits.[82] Thus, the *Cherrigan* court interpreted the exclusionary rule much more broadly than originally intended.

Although the *Cherrigan* court defined the exclusionary rule broadly, a California appellate court stated in *Benwell v. Dean*[83] that the rule only applies to evidence of remarriage: "the majority rule is that the surviving spouse's remarriage, or the possibility[84] thereof, does not affect the damages recoverable in an action for the wrongful death of the deceased spouse."[85] Courts have widely recognized that a surviving spouse's remarriage is immaterial on the issue of damages for wrongful death when offered only to mitigate damages.[86] Thus, in a wrongful death action, courts have held that a plaintiff's remarriage and all evidence arising from it are inadmissible unless the moving party demonstrates the evidence's relevancy and materiality to an issue in the case.[87]

Still other courts have applied the rule only to evidence of death benefits and inheritance.[88] The fact-finder may not consider whether the beneficiary has received any benefits—such as inheritance or insurance—when assessing damages in a wrongful death action, either as an item of deduction or as a ground for awarding only nominal damages.[89] This rule is premised on the courts' refusal to allow a defendant to benefit from his or her own wrong.[90] It is designed to prevent a defendant from reducing his or her

82. *See McLaughlin*, 147 P. at 149 (excluding evidence of property received by beneficiaries upon death); *Cherrigan*, 69 Cal. Rptr. at 48 (excluding evidence of remarriage).

83. 57 Cal. Rptr. 394 (Ct. App. 1967).

84. *Cherrigan*, 69 Cal. Rptr. at 47-48. The admissibility of the possibility of remarriage versus actual remarriage is a hotly contested issue. *Id.* Litigants argue that while the possibility of remarriage is not admissible because it is speculative, certainty that a surviving spouse has remarried is admissible because it is much less speculative as to the mitigating affects of the new marriage. *Id.*

85. *Benwell*, 57 Cal. Rptr. at 402.

86. *Cherrigan*, 69 Cal. Rptr. at 47; Kimery v. Pub. Serv. Co. of Okla., 562 P.2d 858, 860 (Okla. 1977); Shields v. Utah Light & Traction Co., 105 P.2d 347, 352 (Utah 1940).

87. *Cherrigan*, 69 Cal. Rptr. at 47; Bradfield v. Burgess' Estate, 233 N.W.2d 541, 543 (Mich. 1975); *Shields*, 105 P.2d at 352.

88. McLaughlin v. United R.Rs. of S.F., 147 P. 149, 149 (Cal. 1915); Wilson v. City & County of S.F., 235 P.2d 81, 84 (Cal. Dist. Ct. App. 1951).

89. *McLaughlin*, 147 P. at 151; *Wilson*, 235 P.2d at 84.

90. *McLaughlin*, 147 P. at 151.

responsibility in damages for an injury that he or she has inflicted, "by showing that, quite fortuitously, through no contribution [of his or her own], the [decedent's beneficiaries] have received certain pecuniary benefit."[91] Indeed, this rule is premised on the same rationale underlying the collateral source rule.[92] Thus, a beneficiary's inheritance of assets will not diminish the beneficiary's ability to recover damages in a wrongful death action.[93]

The exclusionary rule developed out of the doctrines regarding the admissibility of evidence of remarriage and death benefits.[94] The *Cherrigan* court cited to numerous cases including *McLaughlin v. United Railroads of San Francisco*, *Benwell v. Dean*, and *Wood v. Alves*[95] to support its argument that the broad exclusionary rule exists,[96] despite the fact that the holdings in those cases were limited to situations in which the defendant sought to introduce evidence of remarriage or death benefits to mitigate damages.[97] Because the exclusionary rule developed out of these doctrines, a wholesale application of the rule to all post-death evidence should be scrutinized very carefully.

### C. THE POLICIES OF THE GENERAL EXCLUSIONARY RULE

California courts set forth three rationales for the application of a broad exclusionary rule: (1) evidence of remarriage as proof of mitigation of damages is speculative, (2) evidence of remarriage or of death benefits unduly profits the defendant, and (3) damages should be determinable at the time of death.[98]

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91. Stathos v. Lemich, 28 Cal. Rptr. 462, 465 (Ct. App. 1963).

92. *See infra* text accompanying notes 102-115; *see generally* Helen Gunnarsson, *Collateral Source Rule and Med Bills: Plaintiff's, Defense Bar Each Win One*, 95 ILL. B.J. 345, 345 (2007) (describing the collateral source rule generally, applying the collateral source rule to medical bills, and critiquing a case that held that a plaintiff can recover the amount a medical provider charges the plaintiff for treatment and is not limited to the lesser amount the plaintiff's insurer negotiated with the provider); Paul H. Rubin & Joanna M. Shepherd, *Tort Reform and Accidental Deaths*, 50 J.L. & ECON. 221, 226, 230 (2007) (describing the collateral source rule generally and arguing that the collateral source rule is associated with higher death rates).

93. *Stathos*, 28 Cal. Rptr. at 464.

94. *See McLaughlin*, 147 P. at 151; Cherrigan v. City & County of S.F., 69 Cal. Rptr. 42, 48 (Ct. App. 1968).

95. 13 Cal. Rptr. 114, 117 (Ct. App. 1961).

95. 13 Cal. Rptr. 114, 117 (Ct. App. 1961).

96. *Cherrigan*, 69 Cal. Rptr. at 48.

97. *See McLaughlin*, 147 P. at 151; Benwell v. Dean, 57 Cal. Rptr. 394, 402 (Ct. App. 1967); *Wood*, 13 Cal. Rptr. at 117.

98. *See Cherrigan*, 69 Cal. Rptr. at 48; *Benwell*, 57 Cal. Rptr. at 402; Densley, *supra* note 77, at 145 n.2. While other policies, such as privacy, distortion, and the social incentives of remarriage also likely play a role in justifying the exclusionary rule, the California courts expressly rely on the three rationales stated above to justify the rule.

The principle rationale for a broad application of the exclusionary rule is that evidence of remarriage as proof in mitigation of damages is speculative.[99] As the *Benwell* court noted, "the surviving spouse's remarriage is highly speculative, because it involves a comparison of the prospective earnings, services, and contributions of the deceased spouse with those of the new spouse."[100] Courts are seemingly reluctant to compare the deceased with the new spouse to determine if the new spouse can replace the old spouse's contributions, financial or otherwise.[101] This rationale, of course, is not applicable to evidence of death benefits, from a life insurance policy for instance, because a monetary amount is easily deductible from an award and is thus not speculative.

Second, courts justify the exclusionary rule because evidence that a plaintiff remarried or received death benefits would provide "undue profit to the defendant."[102] Essentially, courts apply the collateral source rule to exclude evidence of remarriage or of death benefits from the jury.[103] The collateral source rule provides that "if an injured plaintiff [receives] compensation for the injury from a collateral source such as insurance, that payment [is not] deducted from the damages that the plaintiff can collect from the tortfeasor."[104] Courts reason that tortfeasors should not recover a windfall from a plaintiff's thrift and foresight to provide for themselves or their families through having actually or constructively secured insurance, pension or disability benefits in the event of death or injury.[105] A contrary rule, it is feared, would misallocate liability for tort-caused losses and discourage people from obtaining benefits from independent collateral sources.[106]

Several cases illustrate the use of the collateral source rule as a rationale for excluding evidence of remarriage or death benefits.[107] In *Bunda v.*

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99. *See Cherrigan*, 69 Cal. Rptr. at 48; *see also Benwell*, 57 Cal. Rptr. at 402.

100. *Benwell*, 57 Cal. Rptr. at 402.

101. *See Cherrigan*, 69 Cal. Rptr. at 48; *Benwell*, 57 Cal. Rptr. at 402.

102. *Cherrigan*, 69 Cal. Rptr. at 48; s*ee also Benwell*, 57 Cal. Rptr. at 402.

103. Kimery v. Pub. Serv. Co. of Okla., 562 P.2d 858, 859 (Okla. 1977). *See generally* Gunnarsson, *supra* note 92, at 345 (describing the collateral source rule generally, applying the collateral source rule to medical bills, and critiquing a case that stands for the proposition that a plaintiff can recover the amount a medical provider charges the plaintiff for treatment and is not limited to the lesser amount the plaintiff's insurer negotiated with the provider); Rubin & Shepherd, *supra* note 92, at 230 (describing the collateral source rule generally and arguing mathematically that the collateral source rule is associated with higher death rates).

104. Lund v. San Joaquin Valley R.R., 71 P.3d 770, 774 (Cal. 2003).

105. Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 69-70 (Cal. 1970).

106. *Id.*

107. *See, e.g.*, Benwell v. Dean, 57 Cal. Rptr. 394, 402-03 (Ct. App. 1967) (explaining the majority rule that damages are not affected by remarriage); Bunda v. Hardwick, 138 N.W.2d 305, 308 (Mich. 1966).

*Hardwick*,[108] the court overruled five prior cases that had allowed evidence of remarriage to mitigate damages and held that such evidence was irrelevant and should be excluded.[109] The court noted that although the jury would benefit from receiving evidence of remarriage, the possible resultant harm outweighed that benefit.[110] The court also stated that the evidence involved a collateral source which was not a proper jury concern.[111] In *Benwell v. Dean*, the court explained the collateral source rule's application to evidence of remarriage when it stated, "it was more reasonable to say that a defendant should not be allowed to profit by an actual or possible remarriage of the widow, just as he may not profit through monies coming to her from insurance policies purchased by her husband upon his own life, or from some other collateral source."[112]

Thus, courts reason that the tortfeasor should not benefit from his or her own tortious action.[113] The plaintiff only remarries because the decedent died. The plaintiff only receives benefits from the death because the decedent died. Therefore, the plaintiff only remarries or receives death benefits because the defendant caused the death. Courts do not want the defendant to benefit from causing that death by mitigating damages when the plaintiff remarries, receives death benefits, or gives birth to another child.[114] Evidence of remarriage and any type of death benefits, then, is not admissible to mitigate a plaintiff's damages.[115]

The final rationale for the exclusionary rule, according to *Benwell v. Dean*, is that "the cause of action arises at the time of the decedent's death and the damages are determinable as of the same time . . . ."[116] This rationale is embodied in the statement: "[e]vidence of conditions occurring after a wrongful death is inadmissible on the issue of damages because the latter are to be determined only by conditions which existed at the time the death occurred."[117] The court offers little explanation of this policy and most cases focus on preventing the tortfeasor from benefiting from the wrong.[118]

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108. 138 N.W.2d 305 (Mich. 1966).

109. *Bunda*, 138 N.W.2d at 313.

110. *Id.* at 309.

111. *Id.*

112. *Benwell*, 57 Cal. Rptr. at 402-03 (citing Reynolds v. Willis, 209 A.2d 760, 763 (Del. 1965)).

113. *See* Cherrigan v. City & County of S.F., 69 Cal. Rptr. 42, 48 (Ct. App. 1968); *Benwell*, 57 Cal. Rptr. at 403.

114. *See Cherrigan*, 69 Cal. Rptr. at 48; *Benwell*, 57 Cal. Rptr. at 402.

115. *See* McLaughlin v. United R.Rs. of S.F., 147 P. 149, 151 (Cal. 1915); *Cherrigan*, 69 Cal. Rptr. at 48; *Benwell*, 57 Cal. Rptr. at 403.

116. *Benwell*, 57 Cal. Rptr. at 402.

117. *Cherrigan*, 69 Cal. Rptr. at 48.

118. *See, e.g.*, *McLaughlin*, 147 P. at 151; *Benwell*, 57 Cal. Rptr. at 403.

Nevertheless, it appears likely that the courts seek to limit the scope of inquiry for the sake of simplicity, finality, and certainty in damages at the time of death.[119] These three main rationales to exclude at least some post-death evidence are certainly valid and deserve close attention in determining the most fair and just doctrine that should apply to post-death evidence.

### D. THE CONFUSION AND INCONSISTENT APPLICATION OF THE EXCLUSIONARY RULE

As noted above, the exclusionary rule is not applied uniformly, it has many exceptions, and it is confusing.[120] For example, a court may admit evidence of remarriage for purposes other than calculating damages, including the impeachment of witnesses.[121] In *Rayner v. Ramirez*,[122] the court allowed evidence pertaining to the plaintiff's remarriage in order to impeach the plaintiff.[123] In *Rayner*, when the plaintiff was asked on cross-examination whether she had remarried since the death of her husband, she denied it.[124] She denied that she married Mr. Carroll Bennet after her husband's death, and that her sister, Carol Thomas, observed the ceremony as a witness.[125] She also denied having knowledge that both Carroll Bennet and Carol Thomas had lived with her parents since her husband's death.[126] After the marriage certificate was admitted into evidence, she conceded that Ms. Thomas was in fact her sister, but still denied her second marriage.[127] After the minister who married her testified, she finally admitted that she had in fact married a second time and that her sister had been present.[128] On appeal, the plaintiff argued that the court erred in refusing to strike evidence pertaining to the plaintiff's second marriage and for refusing to instruct the jury that all evidence related to the marriage was limited to impeaching her testimony and could not be considered to diminish or divert

119. *See In re* Marriage of Kieturakis, 41 Cal. Rptr. 3d 119, 142 (Cal. Ct. App. 2006); Tracy A. v. Superior Court, 12 Cal. Rptr. 3d 684, 693 n.17 (Cal. Ct. App. 2004).

120. *See, e.g.*, *In re* Air Crash Disaster Near New Orleans, La. on July 9, 1982, 767 F.2d 1151, 1153-54 (5th Cir. 1985); Conway v. Chem. Leaman Tank Lines, Inc., 525 F.2d 927, 929-30 (5th Cir. 1976); Rayner v. Ramirez, 324 P.2d 83, 86-87 (Cal. Dist. Ct. App. 1958); Dubil v. Labate, 245 A.2d 177, 179 (N.J. 1968); *see* Densley, *supra* note 77, at 145 (displaying an excellent discussion of the many different applications and interpretations of the exclusionary rule as applied to remarriage).

121. *See Rayner*, 324 P.2d at 83; *see also* Densley, *supra* note 77, at 153-54 (discussing the use of evidence of remarriage for impeachment purposes).

122. 324 P.2d 83 (Cal. Dist. Ct. App. 1958).

123. *Rayner*, 324 P.2d at 90.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 91.

her claim.[129] The court noted that the plaintiff did not object to the cross-examination until the marriage certificate had been presented.[130] The appellate court found that the marriage certificate was properly admitted, at least for the purpose of impeachment, and did have some bearing on the question of loss of comfort, society, and support.[131]

In addition, a court may admit evidence of remarriage for other limited purposes.[132] In *Conway v. Chemical Leaman Tank Lines, Inc.*,[133] the court recognized that it was obligated to apply the rules of evidence to the question of admissibility of remarriage.[134] The Federal Rules of Evidence have a policy of broadly admitting evidence, and therefore, "[the Federal Rules'] treatment of comparable issues suggests that the evidence [of remarriage] is admissible for background and perhaps various other limited purposes."[135]

Furthermore, evidence of remarriage may also be admissible if the plaintiff opens the door to his or her emotional state.[136] For example, the appellate court in *In re Air Crash Disaster Near New Orleans, Louisiana. on July 9, 1982*[137] upheld the trial court's decision to admit evidence of remarriage later in the trial after the plaintiff offered evidence that he was unable to function emotionally and could not form and maintain relationships with others.[138]

Finally, a court may admit evidence of remarriage if suppression of that evidence would offend the integrity of the judicial process.[139] This may occur if the plaintiff is permitted to misrepresent his or her marital status to the jury.[140] In a case where the trial court ruled that the plaintiff was to be referred to at trial by her former name, the appellate court reversed, stating:

> Though evidence of the plaintiff's remarriage is not relevant to the question of damages, we disagree with the trial court's attempt to suppress any mention of the remarriage. It would be offensive to the integrity of the judicial process if the plaintiff, after taking an

129. *Id.* at 90.
130. *Id.* at 91.
131. *Id.*
132. Conway v. Chem. Leaman Tank Lines, Inc., 525 F.2d 927, 930 (5th Cir. 1976).
133. 525 F.2d 927 (5th Cir. 1976).
134. *Id.* at 930.
135. *Id.*; *see, e.g.,* FED. R. EVID. 407 (discussing admissibility of subsequent remedial measures); FED. R. EVID. 411 (discussing admissibility of liability insurance coverage).
136. *In re* Air Crash Disaster Near New Orleans, La. on July 9, 1982, 767 F.2d 1151, 1154 (5th Cir. 1985).
137. 767 F.2d 1151 (5th Cir. 1985).
138. *Id.* at 1154.
139. *See* Dubil v. Labate, 245 A.2d 177, 181 (N.J. 1968).
140. *Id.*

> oath to be truthful, were permitted to misrepresent her marital status to the jury. Of course, the defendants may not inquire into the details of the remarriage nor may they offer evidence concerning it. However, the desirable exclusion of evidence relating to the remarriage may not be carried to the point of affirmatively misrepresenting the truth to the jury. It seems to us that in the course of the trial of a wrongful death case, it would be virtually impossible to avoid mention of a remarriage without resorting to untruths.[141]

Because the exclusionary rule is couched in such confusion, there is an even greater need to adopt a framework that clearly defines its boundaries, application, and interpretation.

### E. A NEW FRAMEWORK: THE EXCLUSIONARY RULE SHOULD BE LIMITED TO THE POLICIES UNDERLYING THE RULE

*The exclusionary rule should only apply to those situations where the defendant attempts to introduce evidence of conditions that occur after the wrongful death in order to mitigate damages and only when that evidence is either too speculative to mitigate damages or unduly profits the defendant. In all other situations, the rule should admit all post-death evidence, subject to the grief and suffering rule.*

Courts should adopt a new framework for applying the exclusionary rule and should limit the application of the exclusionary rule to only those situations when the defendant attempts to introduce evidence of conditions that occur after the wrongful death in order to mitigate damages and only in those situations when that evidence is either too speculative to mitigate damages or unduly profits the defendant. In all other situations, the new framework would admit all post-death evidence, subject to the grief and suffering rule, as discussed below.[142] Currently, the scope of the exclusionary rule and what it actually excludes is unclear.[143] California courts generally apply this rule when a defendant seeks to offer evidence that a widowed plaintiff has remarried, a widowed plaintiff has had an affair since the death, or a plaintiff has received death benefits or inheritance from the

141. *Id.* at 180.

142. *See* discussion *infra* Parts V and VI. The reader may object at this point, arguing that this proposal seeks to prevent a defendant from mitigating damages while allowing a plaintiff to aggravate damages freely. In Parts V and VI, however, this Article proposes that a plaintiff's damages are also limited by the grief and suffering rule.

143. *See supra* notes 120-141 and accompanying text.

decedent's death in order to mitigate damages.[144] However, the California Supreme Court has left open the question of whether the exclusionary rule applies to all post-death evidence.[145] Many courts appear to take it as an unspoken rule that post-death evidence is not to be used to determine wrongful death loss of society damages.[146] The law should clearly lay out precisely when the exclusionary rule should apply. The new framework offered by this article clearly specifies that the exclusionary rule should only apply to those situations when the defendant attempts to introduce evidence of conditions that occur after the wrongful death in order to mitigate damages and only when that evidence is either too speculative to mitigate damages or unduly profits the defendant. In all other situations, the new framework should admit all post-death evidence, subject to the grief and suffering rule because the law still disfavors awarding damages for grief and suffering.

Tellingly, the policies and rationales that underlie the exclusionary rule are irrelevant to some evidence of the death's effects on the beneficiary when calculating damages for loss of society. Thus, because the rationales do not apply to all post-death evidence, courts should not use the exclusionary rule to exclude that evidence. Courts should only use the exclusionary rule to exclude evidence to which its rationales actually apply. The rationale that evidence of remarriage is speculative is not applicable to the issue of whether the effects of the death should be admissible to determine loss of society. Admitting evidence of the death's effects on the beneficiaries would make the determination of loss of society less speculative and more accurate. A court can more precisely measure a plaintiff's loss by considering the plaintiff's situation before the loss as well as after the loss. Indeed, limiting consideration of the decedent-beneficiary relationship before the death makes the loss of society determination more speculative. Thus, the policy to exclude speculative evidence like remarriage actually requires the admission of post-death evidence of the death's effects to determine loss of society damages.

Similarly, the rationale that the courts should not admit evidence of remarriage and death benefits because it would provide undue profit to the defendant is also not applicable to the issue of whether evidence of the death's effects on the beneficiaries is admissible to determine loss of soci-

144. *See* Cherrigan v. City & County of S.F., 69 Cal. Rptr. 42, 48 (Ct. App. 1968)*; see also* McLaughlin v. United R.Rs. of S.F., 147 P. 149, 151 (Cal. 1915); Benwell v. Dean, 57 Cal. Rptr. 394, 402 (Cal. Ct. App. 1967).

145. *See supra* notes 82-118 and accompanying text.

146. *See* discussion *supra* Part III.B. (explaining that courts are rarely, if ever, forward-looking when determining wrongful death loss of society damages).

ety. First, evidence of the death's effects would not always provide a profit to the defendant. In Carolyn's story, the effects of her daughter's death would aggravate the damages rather than lessen them because the evidence would show the great extent of Carolyn's loss. The defendant would obviously not profit from the admission of this evidence. Evidence of the death's effects would only mitigate damages if the heirs appeared not to suffer great loss, such as in Sophia's story. Second, if evidence of the death's effects would profit the defendant by mitigating damages, as in Sophia's story, such profit is not undue. The evidence of the death's effects does not subtract an amount of money from a pre-determined value for economic losses and loss of society damages; rather, the evidence of the death's effects is used simply to measure the pecuniary value of loss of society. For example, when receipt of death benefits is used to lessen damages, the fact-finder first measures economic losses by considering the decedent's future potential income and life expectancy.[147] Then the fact-finder considers the nature of the decedent-beneficiary relationship to determine the value of the loss of society. Finally, the fact-finder subtracts the value of the death benefits from the sum of economic losses and loss of society. In contrast, when evidence of the death's effects mitigates damages, this evidence is used when the fact-finder values the loss of society itself, and not as a deduction after the loss of society is valued. Thus, the evidence of the death's effects does not bestow an undue profit upon either party because it does not deduct from the beneficiary's pre-determined pecuniary losses. It is used as a tool to determine those pecuniary losses.

Finally, the policy preference that damages should be determinable at the time of death can easily be modified to a policy that damages should be determined at the time of trial. This policy modification is especially beneficial because the effects of the death may be very useful in determining damages for loss of society. Using this approach, the trial judge would be

147. Quiroz v. Seventh Ave. Ctr., 45 Cal. Rptr. 3d 222, 227 n.2 (Ct. App. 2006). A beneficiary may recover economic damages, including financial support the decedent would have contributed to the family during: (1) either the life expectancy of the decedent or the life expectancy of the plaintiff, whichever is shorter; (2) the loss of gifts or benefits the plaintiff would have expected to receive from the decedent; (3) funeral and burial expenses; and (4) the reasonable value of household services that the decedent would have provided). Riley v. California Erectors, Inc., 111 Cal. Rptr. 459, 460 (Ct. App. 1973) (explaining that financial support is determined by calculating the present value of the earnings the decedent would have contributed to the family during the period of that person's life expectancy). Powers v. Sutherland Auto Stage Co., 213 P. 494, 495 (Cal. 1923) (holding mortality tables admissible to show the probable duration of the decedent's life). *In re* Air Crash Disaster Near Cerritos, Cal., on Aug. 31, 1986, 982 F.2d 1271, 1276 (9th Cir. 1992) (noting that beneficiaries in a wrongful death action may submit a copy of the funeral bills to recover the reasonable value of funeral expenses).

authorized to admit evidence of the effects of the death on the beneficiary between the time of the death and the time of the trial.

Therefore, courts should only retain the exclusionary rule in a limited form (in other words, a limited exclusionary rule) and eschew applying it to post-death evidence of the death's effects on the beneficiaries. If the courts apply a limited exclusionary rule instead of a general exclusionary rule, then the exclusionary rule will only exclude evidence of remarriage, death benefits, and other types of evidence that are relevant to the policy rationales behind the exclusionary rule. Other types of post-death evidence will then not be covered by the limited exclusionary rule. The proper treatment of the other types of post-death evidence that are not covered by the exclusionary rule in its limited form requires further exploration of the case law.

## V. THE GRIEF AND SUFFERING RULE

The grief and suffering rule, generally speaking, provides that a wrongful death plaintiff may not be awarded damages for grief and suffering over the loss of the decedent. The grief and suffering rule is another rule that is mistakenly applied to exclude all post-death evidence and evidence of the death's effects on the beneficiary when determining loss of society damages.[148] Although initially the grief and suffering rule appears to exclude post-death evidence because some post-death evidence indicates grief and suffering, a critical difference exists between using evidence to measure loss of society damages and using that same evidence to measure grief and suffering damages.[149] Furthermore, the law currently does not apply the grief and suffering rule to determine admissibility of post-death evidence because the result that would occur does not and never has occurred.[150] Thus, as this Part will show, the grief and suffering rule is inapposite to the issue of whether post-death evidence is admissible.[151]

### A. GRIEF DAMAGES AND LOSS OF SOCIETY DAMAGES CONTRASTED

Although California case law specifically provides that loss of society damages are recoverable in a wrongful death action, California case law also clearly specifies that compensation for grief, sorrow, or mental anguish is not recoverable.[152] In California, there can be no recovery in a wrongful

148. *See infra* notes 165-78 and accompanying text.

149. *See infra* notes 152-63 and accompanying text.

150. *See infra* note 177 and accompanying text.

151. *See infra* notes 165-78 and accompanying text.

152. Krouse v. Graham, 562 P.2d 1022, 1028 (Cal. 1977) ("California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action."); Dickinson v. S. Pac. Co., 158 P. 183, 185 (Cal. 1916); West-

death action of "solatium for wounded feelings."[153] Solatium, sometimes called sentimental loss,[154] is defined as:

> [A] compensation as a soothing to the affections or wounded feelings, and for loss of the comfort and social pleasure there is in the association between members of a family, . . . solatium is sentiment, love, or affection, as distinguished from a property loss . . . and, as such, it is the very thing the law says shall not be allowed.[155]

In other words, a beneficiary's grief or other mental suffering is not a proper element of damages.[156] In *Krouse v. Graham*,[157] the California Supreme Court also instructed that, in order to prevent jury confusion, discussion of grief and suffering and discussion of loss of society and comfort should be separated for the jury.[158]

Although damages for loss of society and damages for grief and suffering seem similar, they are actually quite different. Principally, damages for loss of society are considered pecuniary damages and damages for grief and suffering are considered sentimental damages.[159] The reason each is awarded most clearly distinguishes them: loss of society damages are awarded to compensate the plaintiff for the loss of the decedent's society while grief and suffering damages are awarded to console the plaintiff for the loss.[160] One court aptly described the differences between the two:

> In addition to the direct financial benefits which heirs may reasonably expect to receive from the continuance of the life of the deceased, there is that less tangible, and not so immediate, but nevertheless real, pecuniary benefit which often may reasonably be expected from a continuance of the "society, comfort, and protec-

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field Ins. Co. v. DeSimone, 247 Cal. Rptr. 291, 295 (Ct. App. 1988); *see* Ellen S. Pryor, *Noneconomic Damages, Suffering, and the Role of the Plaintiff's Lawyer*, 55 DEPAUL L. REV. 563, 563-76 (2006) (displaying a comprehensive discussion of grief and suffering damages).

153. *Dickinson*, 158 P. at 185.

154. Quiroz v. Seventh Ave. Ctr., 45 Cal. Rptr. 3d 222, 226-27 ("A plaintiff . . . may not recover for such things as the grief or sorrow attendant upon the death of a loved one, or for his sad emotions, or for the sentimental value of the loss.").

155. Marshall v. Consol. Jack Mines Co., 95 S.W. 972, 973 (Mo. Ct. App. 1906).

156. *Krouse*, 562 P.2d at 1026.

157. 562 P.2d 1022 (Cal. 1977).

158. *Id.*

159. *Compare Krouse*, 562 P.2d at 1025 ("[A plaintiff can recover] 'the pecuniary value of the society, comfort, protection, and right to receive support, if any,' which plaintiffs may have lost by reason of [the decedent's] death."), *with Quiroz*, 45 Cal. Rptr. 3d at 226-27 ("A plaintiff . . . may *not* recover for such things as the grief or sorrow attendant upon the death of a loved one, or for his sad emotions, or for the sentimental value of the loss.").

160. *See* cases cited *supra* note 162.

> tion" of the deceased . . . . But while loss of society, comfort, and protection may be an element of the injury sustained by the statutory beneficiaries, it is only the pecuniary, and not the sentimental, value of such loss which may be taken into consideration in the assessment of damages. Nothing can be recovered as a solatium for wounded feelings. If the society of the deceased was of no financial value to the statutory beneficiaries, no damages can be awarded for its loss.[161]

When a court values loss of society damages, the court focuses heavily on the pecuniary value that the decedent brought to the relationship.[162] For example, one court noted that "the loss of a kind husband may be a considerable pecuniary loss to a wife; she loses his advice and assistance in many matters of domestic economy."[163] As another example, the court noted that "the frugality, industry, usefulness, attention, and tender solicitude of a wife and the mother of children surely make her services greater than those of an ordinary servant, and therefore worth more."[164] This is distinct from awarding damages simply for the beneficiary's sorrow because instead of focusing on the beneficiary's grief, the court focuses on the value that the decedent's services brought to the relationship.

### B. THE GRIEF AND SUFFERING RULE IS INAPPLICABLE TO LOSS OF SOCIETY DAMAGES

The problem arises when it is contended that because post-death evidence will likely include evidence—or the lack thereof—of grief and suffering, post-death evidence is not admissible under the grief and suffering rule. This argument is a fallacy because (1) the grief and suffering rule is not an evidentiary rule, it is a tort rule;[165] (2) the post-death evidence is used to measure loss of society damages, not grief and suffering damages;[166] and

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161. Griffey v. Pac. Elec. Ry. Co., 209 P. 45, 48-49 (Cal. Ct. App. 1922).

162. *See, e.g.*, *Krouse*, 562 P.2d at 1025 (showing that a plaintiff can recover the pecuniary value of society, comfort, protection and the right to receive support); Cook v. Clay St. Hill R.R. Co., 60 Cal. 604, 604 (1882) (explaining that the plaintiff was allowed to testify about the relationship between herself and the decedent); Beeson v. Green Mountain Gold Mining Co., 57 Cal. 20, 38-39 (1880) (displaying that the court focuses on the type of relationship between the party and decedent when determining pecuniary values).

163. *Beeson*, 57 Cal. at 38.

164. *Id.* at 39.

165. *Krouse*, 562 P.2d at 1028; Dickinson v. S. Pac. Co., 158 P. 183, 185 (Cal. 1916); Westfield Ins. Co. v. DeSimone, 247 Cal. Rptr. 291, 295 (Ct. App. 1988). Many California cases specify that grief and suffering is not recoverable in a wrongful death action. *Id.* This is a tort rule because it specifies damages recoverable for a tort and it has been developed through common law. *Id.* It is not a rule of evidence and is not found in any evidence codes. *Id.*

166. *See Krouse*, 562 P.2d at 1026.

(3) the grief and suffering rule does not determine the admissibility of post-death evidence because the result that would occur does not and never has occurred.

First, the grief and suffering rule is not an evidentiary rule, it is a tort rule.[167] The grief and suffering rule provides that damages are not awarded for grief and suffering in a wrongful death action in California.[168] The grief and suffering rule does not prevent evidence of grief and suffering from ever being admissible. There is a difference between a rule that governs the recovery of damages and the admissibility of evidence. A rule that governs the recovery of damages is a substantive rule of law, but a rule that governs the admissibility of evidence, in general, like the rule that excludes hearsay for example, is a rule of evidence. Moreover, if evidence of grief and suffering is admitted, it does not follow that damages for grief and suffering are awarded. The beauty of the Federal Rule of Evidence 105 is that it provides that evidence may be admissible for some purposes and not for others.[169] Thus, it is possible to admit evidence of grief and suffering and other post-death evidence to measure loss of society damages but not allow that evidence to go to grief and suffering damages.

Second, the grief and suffering rule is inapplicable to determine what evidence is admissible to measure loss of society damages because the post-death evidence is used to measure loss of society damages, not grief and suffering damages. Juries can be trusted to use evidence of grief and suffering and other types of post-death evidence to measure loss of society damages while not awarding additional damages for grief and suffering.[170] Indeed, the California Supreme Court in *Krouse v. Graham* implied that a jury may easily use evidence to measure loss of society and still exclude damages for grief and suffering when it stated that "a simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice."[171] Thus, the California Supreme Court appears to believe that a jury will not easily be confused when measuring loss of society and will successfully and justifiably refrain from awarding damages for grief and suffering.[172] As such, the jury would understand the difference

167. *See supra* note 165 and accompanying text.

168. *Krouse*, 562 P.2d at 1028 ("California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action."); *Dickinson*, 158 P. at 185; *Westfield Ins. Co.*, 247 Cal. Rptr. at 295.

169. FED. R. EVID. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

170. *Krouse*, 562 P.2d at 1026.

171. *Id.* at 1026.

172. *See id.*

between awarding damages for grief and suffering and admitting evidence of the death's effects on the beneficiary when measuring and then awarding damages for loss of society. Furthermore, to prevent any residual jury confusion, the judge should be required to instruct the jury on the proper use of the evidence and to explain to the jury the difference between grief and suffering damages and loss of society damages.[173]

Additionally, evidentiary law frequently provides that certain types of evidence are admissible for some uses but not for others.[174] The Federal Rule of Evidence 105 allows the judge to give a limiting instruction to the jury restricting the evidence to its proper scope.[175] For example, evidence of remarriage is admissible in order to impeach a witness, but not to determine loss of society because it is barred by the collateral source rationale.[176] Thus, because the legal system often relies upon juries to competently distinguish between the uses of different types of evidence, it is preposterous to argue that the jury could not do the same when considering post-death evidence.

Third, if the grief and suffering rule did apply to post-death evidence, only post-death evidence of grief and suffering would be inadmissible while other post-death evidence not considered grief and suffering would be admissible. The law, however, has never stated that only certain types of post-death evidence are admissible while other types of post-death evidence are inadmissible.[177] No court has applied a rule that would reach this result. Moreover, if the courts only applied the grief and suffering rule to post-death evidence, any evidence of grief and suffering, which enhances damages, would be inadmissible. Thus, the courts could only admit evidence that mitigates the plaintiff's damages because evidence that would aggravate the plaintiff's damages would most likely relate to grief and suffering. This result would simply be unjust.

For example, recall the story of Carolyn, the young mother who lost her infant daughter. The post-death evidence in Carolyn's story would not

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173. *See* David Schkade, Cass R. Sunstein, and Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1147-48 (2000) (explaining that assigning a dollar value with no standard to guide the awards leads to great variation in jury-determined compensation). There is no substitute for clear advice from a judge regarding coming to a jury verdict. *Id.* When not provided with clear guidance to discipline their judgments, jurors have difficulty monetizing losses. *Id.*

174. *See*, *e.g.*, FED. R. EVID. 404 (stating that although evidence of character may only be used in limited circumstances, it may be used for impeachment).

175. FED. R. EVID. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

176. Rayner v. Ramirez, 324 P.2d 83, 90 (Cal. Dist. Ct. App. 1958).

177. McLaughlin v. United R.Rs. of S.F., 147 P. 149, 150 (Cal. 1915).

be admissible to aggravate her loss of society damages because her reaction to her daughter's death, her depression, her therapy, and her divorce would be considered grief and suffering. In contrast, if the grief and suffering rule were the only rule that applied to post-death evidence, Sophia's reaction to her husband's death would be admissible to mitigate her loss of society damages. Her remarriage, death benefits, shopping spree, and lack of grief and suffering would all be admissible to mitigate her damages. Coupled with a limited exclusionary rule rather than a broad exclusionary rule, the remarriage and the death benefits would not be admissible, while the shopping spree would still be admissible because this evidence does not relate to grief and suffering. Although it would be preferable, based on principles of justice and fairness, to admit the evidence of the shopping spree and lack of grief to mitigate Sophia's loss of society damages, this rule would not admit Carolyn's reaction to her daughter's death. Thus, the grief and suffering rule, if adopted as controlling on this issue, would not fit with notions of justice and fairness.

Admitting post-death evidence, including any evidence that is indicative of the beneficiary's grief and suffering may appear to simply convert loss of society damages into grief and suffering damages. However, this argument strains credulity because the purpose for awarding the damages does not change; its goal remains to compensate, not to console. The court would continue to measure the pecuniary value of the services and society that the decedent offered the beneficiary, using as much evidence as possible to best measure loss of society.

Finally, to reiterate, the grief and suffering rule cannot be applied to the issue of admitting post-death evidence because (1) the grief and suffering rule is not an evidentiary rule, it is a tort rule, (2) post-death evidence is used to measure loss of society damages, not grief and suffering damages, and (3) no courts come to the conclusion that some of Sophia's evidence would be admitted while none of Carolyn's evidence would be admitted, yet this is the practical effect if the grief and suffering rule were the applicable rule.[178]

## VI. ADMISSIBILITY OF THE EFFECTS OF THE DEATH ON THE BENEFICIARIES: CONSIDERING THE FUTURE

Thus, neither the broad exclusionary rule nor the grief and suffering rule apply to post-death evidence of the death's effects when calculating

178. *See* McClurg, *supra* note 19, at 26 (describing the grief that one suffers after death of a loved one).

loss of society damages.[179] Although the exclusionary rule provides ample justification for excluding evidence of remarriage, engagement to remarry, post-death affairs, and death benefits such as social security benefits or property received, post-death evidence of the death's effects on the beneficiaries is not covered under the rule when calculating loss of society. Furthermore, the grief and suffering rule does not exclude post-death evidence because it does not separately award compensation for grief and suffering; rather, the post-death evidence is utilized to determine loss of society damages. Finally, post-death evidence of the death's effects on the beneficiaries may both mitigate and aggravate damages for loss of society, depending on how the death affects the beneficiaries.

Thus, although both the grief and suffering rule and the exclusionary rule appear to apply to the problem under consideration, neither provides guidance. In addition, very little case law discusses specifically whether evidence of the death's effects on the beneficiary is admissible outside of the context of the grief and suffering rule or the exclusionary rule. Indeed, the little case law that does exist comes to conflicting decisions.[180]

### A. THE PROBLEM: LACK OF CONTROLLING AUTHORITY AND A UNIFORM TEST

Because neither the limited exclusionary rule nor the grief and suffering rule apply directly to all types of post-death evidence, it is prudent to search beyond the case law discussing the rules to determine if other controlling authority exists. Very little case law, however, specifically discusses the issue of admissibility of post-death evidence outside of the context of the exclusionary rule or the grief and suffering rule. The following cases are the most relevant, but these cases demonstrate that courts are divided on this issue.

In *Canavin v. Pacific Southwest Airlines*,[181] decedent's wife and children brought a wrongful death action for their husband and father's death in a plane crash.[182] The plaintiffs argued that the court should allow them to present evidence of the effects of their loss.[183] The court refused and gave the following analysis:

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179. *See supra* Parts IV-V.

180. *See, e.g.,* Canavin v. Pac. Sw. Airlines, 196 Cal. Rptr. 82, 106 (Ct. App. 1983); Moniz v. Bettencourt, 76 P.2d 535, 539-40 (Cal. Dist. Ct. App. 1938).

181. 196 Cal. Rptr. 82 (Ct. App. 1983).

182. *Canavin*, 196 Cal. Rptr. at 85.

183. *Id.* at 85-86.

> Rather, the measure of damages [in a wrongful death action] is the value of the benefits the heirs could reasonably expect to receive from the deceased if [he or] she had lived . . . . In other words, it is the probable value of the decedent's life to those for whom the action is brought . . . . *It does not include the value of the independent, non-derivative effects of the loss of the decedent upon the heirs.*[184]

In contrast, in *Moniz v. Bettencourt*,[185] a California appellate court held that evidence of the effects upon a child of the loss of his mother is admissible.[186] In this case, two minor sons brought a wrongful death action for the loss of their mother.[187] During the trial, the judge asked a witness how the mother's death affected one of the sons.[188] The judge overruled the defendant's objection:

> The court feels it does affect the measure of damages, and if the child is grief stricken, which the court does not undertake to say whether he is or is not, but you may state what you observed in regard to the child before and after the death of the mother, if there is any difference, I don't know.[189]

The court noted that the witness' answer "did not go to the mental suffering or grief incurred by the death of the mother" but rather "would tend to show that the children were not so much grief stricken as they missed the care and comfort of their mother during the night."[190] Finally, the court found it persuasive that the jury was instructed properly regarding the elements of damages.[191]

In *Meek v. Department of Transportation*,[192] a wrongful death action similar to *Moniz v. Bettencourt*, another court found post-death evidence admissible.[193] The plaintiff brought a wrongful death action for the loss of her husband in a traffic accident.[194] She alleged that the "defendant failed to design, construct and maintain the highway so that it was reasonably safe and convenient for public travel."[195] The plaintiff prevailed, and the defen-

184. *Id.* at 86 (emphasis added).
185. 76 P.2d 535 (Cal. Dist. Ct. App. 1938).
186. *Moniz*, 76 P.2d at 539-40.
187. *Id.* at 536. The administrator of the estate brought the suit on the sons' behalf. *Id.*
188. *Id.* at 539-40.
189. *Id.* at 539.
190. *Id.* at 539-40.
191. *Id.*
192. 610 N.W.2d 250 (Mich. Ct. App. 2000).
193. *Id.* at 259.
194. *Id.* at 253.
195. *Id.* at 253-54.

dant appealed the damages awarded.[196] The appellate court held that the evidence in totality provided sufficient support for the trial court's award of damages.[197] The court first described the husband and wife's relationship prior to the death.[198] The court noted:

> There was evidence of a close relationship between Suzanne and Meek over a six-year period. The couple traveled together on vacations, bowled in several leagues, fished together, and grocery shopped together. According to Suzanne, they 'were together all the time.' Meek did the larger portion of the household chores for the couple. The family was close.[199]

The court then described the plaintiff's life after her husband's death, and stated, "Suzanne testified about her difficulties since Meek's death, her stress, psychological counseling, medication, work absences, depression, and her sense of personal loss."[200] This court thus found a need to consider both pre-death evidence and post-death evidence in measuring loss of society damages.[201]

Much like the divided case law on the issue, statutory law also fails to provide clear guidance.[202] California's governing wrongful death statute simply provides that "damages may be awarded that, under all the circumstances of the case, may be just."[203] Interestingly, other jurisdictions have found that post-death evidence is admissible when damages are sought under a statute similar to the California statute.[204] For example, an Illinois court found that, in a wrongful death action brought by a widow pregnant at the time the decedent died, it was proper to admit evidence that subsequently the child was born and died.[205] This demonstrates that some post-death evidence is admissible under a wrongful death statute similar to California's.[206]

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196. *Id.* at 259.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *See* CAL. CIV. PROC. CODE § 377(a) (West 2004).
203. *Id.*
204. *See, e.g.*, Preble v. Wabash R. Co., 90 N.E. 716, 717 (Ill. 1909) ("This view is in consonance with the statute that gives the action, and which provides that such damages shall be given as are a fair and just compensation for the pecuniary injuries resulting from the death to the wife and next of kin of the deceased person . . . and it was not error to permit proof of the facts that a child was born and died subsequent to the death of the deceased.").
205. *Id.*
206. *See id.*

Thus, determining the admissibility of post-death evidence to measure loss of society damages is not nearly as simplistic as it might appear. Courts confuse the issue and apply inapposite doctrines to the question of whether post-death evidence is admissible.[207] The courts that do recognize these problems come to conflicting decisions based on policy rationales, fairness, and justice perhaps because no bright-line rule or framework exists to help courts understand these issues.[208] These evidentiary issues are complex and little has been done to address them. A bright-line rule or framework should be created to help courts apply a uniform doctrine governing the admissibility of post-death evidence.

### B. THE BEST WAY TO MEASURE LOSS: A NUANCED RULE THAT LOOKS AT THE WHOLE PICTURE

Courts should adopt a rule that allows measurement of loss of society in a more nuanced approach. Clearly, a hard-line rule that admits no post-death evidence is inconsistent with principles of justice and fairness. The *McLaughlin* court stated that "[i]t is certainly extremely illogical to admit certain evidence and refuse consideration to other evidence of like character tending equally to establish the controverted issue, namely, the amount of damage sustained."[209] However, evidence law frequently distinguishes between different types of evidence tending equally to establish the controverted issue.[210] Considering the complexity of the law, courts inevitably will make these distinctions. However, distinguishing between types of evidence is not the problem. Rather, the problem is that courts distinguish between post-death evidence without the aid of a framework or rule that assists them in reaching consistent decisions on this subject.

When setting forth a new framework, courts should consider several factors. First, the admissibility of post-death evidence of the death's effects on the beneficiaries is a question for the judge.[211] Federal Rule of Evidence 104(a) provides that "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility

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207. *See* Cherrigan v. City & County of S.F., 69 Cal. Rptr. 42, 48 (Ct. App. 1968); Benwell v. Dean, 57 Cal. Rptr. 394, 402-03 (Cal. Ct. App. 1967).

208. *See* Canavin v. Pac. Sw. Airlines, 196 Cal. Rptr. 82, 85 (Ct. App. 1983); *Cherrigan*, 69 Cal. Rptr. at 48; *Benwell*, 57 Cal. Rptr. at 402-03; Moniz v. Bettencourt, 76 P.2d 535, 539-40 (Cal. Dist. Ct. App. 1938).

209. McLaughlin v. United R.Rs. of S.F., 147 P. 149, 150 (Cal. 1915).

210. E.g., FED. R. EVID. 405(b) (provides that opinion evidence and reputation evidence but not specific instances of conduct may be used as character evidence).

211. *See* FED. R. EVID. 104(a).

of evidence shall be determined by the court."[212] The admissibility of post-death evidence is thus a preliminary question for the judge while the post-death evidence's effect on the determination of damages is a question for the jury.[213] Because the judge determines whether the evidence is admissible, the threshold test that determines admissibility may be relatively complex. However, judges can competently apply a nuanced and factor-based rule when determining admissibility of evidence. Thus, the framework governing admissibility of post-death evidence of the death's effects need not focus heavily on ensuring ease in making this determination, as would be the case if the jury made this determination.

Second, the preference for a hard-line rule does not comport with the nuanced approach taken by evidence codes. Rather, the Federal Rules of Evidence and other evidence codes[214] provide standards for courts to apply, but do not generally provide hard-line standards.[215] For example, the Federal Rules of Evidence is replete with language instructing courts to apply nuanced balancing tests.[216] Furthermore, the Federal Rules of Evidence rarely state definitively that a certain piece of evidence is either admissible or inadmissible; rather, the rules describe the evidence and provide rules based on its *character*. For example, evidence is described in terms of whether it is relevant, hearsay, or privileged, and relatively complex legal standards determine whether the evidence qualifies as such.[217]

Third, because all damages awarded must be proximately caused by the tortious conduct, courts will automatically exclude some post-death evidence that was not related to the proximate cause of the harm. This alleviates the criticism that some post-death evidence is too remote and not deserving of consideration when determining damages. In *Simoneau v.*

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212. *Id.* Preliminary questions include any of the following: "[i]s the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client?" FED. R. EVID. 104(a) advisory committee's notes. "In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations." *Id.* (citations omitted).

213. FED. R. EVID. 104(a)-(b).

214. *See, e.g.*, CAL. EVID. CODE; LA. CODE EVID.

215. *See, e.g.*, FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); FED. R. EVID. 609 (recognizing that the admissibility of a criminal conviction is dependent on whether the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness, whether the criminal conviction is being used against a criminally accused, whether the court determines that the probative value of admitting the criminal conviction outweighs its prejudicial effect to the accused, whether a period of more than ten years has elapsed since the date of the conviction or of the release of the witness.).

216. *See* FED. R. EVID. 609.

217. *See, e.g.*, FED. R. EVID. 401; FED. R. EVID. 801; FED. R. EVID. 501.

*Pacific Electric Co.*,[218] the California Supreme Court held that the subsequent misfortunes and impaired physical condition of the widow and children of the deceased had no bearing on the damages recoverable, because several years had elapsed between the death of the deceased and trial.[219] The court reasoned that "[c]hanged conditions in the family of the deceased, adverse circumstances, or misfortunes in the way of sickness, which are in no way connected with or related to the death of the deceased, but occur subsequently thereto, are not matters for which the defendant is responsible and are inadmissible for any purpose."[220] Because the doctrine of proximate cause remains applicable to damage awards, a new proposal need not concern itself with the unjust result that the California Supreme Court avoided in *Simoneau*.

Fourth, loss of society damages are measured differently from pecuniary losses and as such, deserve a more complex method of measurement of these damages.[221] Loss of society is more than a pecuniary loss; instead, it is loss of the society a loved one previously gave to the survivor.[222] It should be compensated as such.[223] As a result of these distinctions, courts should compensate for loss of society differently from the methods in which pecuniary losses are compensated. Pecuniary losses take less time to measure because, for example, it is sufficient to bring into evidence the cost of a funeral, and that cost represents the value that the beneficiary must be com-

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218. 136 P. 544 (Cal. 1913).

219. Simoneau v. Pac. Elec. Co., 136 P. 544, 549-50 (Cal. 1913).

220. *Id.*

221. Quiroz v. Seventh Ave. Ctr., 45 Cal. Rptr. 3d 222, 227 n.2 (Ct. App. 2006). A beneficiary may recover economic damages, including financial support the decedent would have contributed to the family during either the life expectancy of the decedent or the life expectancy of the plaintiff, whichever is shorter; the loss of gifts or benefits the plaintiff would have expected to receive from the decedent; funeral and burial expenses; and the reasonable value of household services that the decedent would have provided. *Id.*; Riley v. Cal. Erectors, Inc., 111 Cal. Rptr. 459, 460 (Ct. App. 1973) (noting that financial support is determined by calculating the present value of the earnings the decedent would have contributed to the family during the period of that person's life expectancy.); Powers v. Sutherland Auto Stage Co., 213 P. 494, 495 (Cal. 1923) (stating that mortality tables are admissible evidence to show the probable duration of the decedent's life.); *In re* Air Crash Disaster Near Cerritos, Cal., on Aug. 31, 1986, 982 F.2d 1271, 1276 (9th Cir. 1992) (explaining that beneficiaries in a wrongful death action may submit a copy of the funeral bills to recover the reasonable value of funeral expenses.); Fagerquist v. W. Sun Aviation, Inc., 236 Cal. Rptr. 633, 644-45 (Ct. App. 1987) (stating, in contrast, that noneconomic damages are not as easily calculable). A reviewing court has no fixed yardstick to measure the value of these elements of damage. *Fagerquist*, 236 Cal. Rptr. at 644-45. It is sufficient if the amount awarded appears to bear a reasonable relation to the elements of loss entitled to be considered by the jury. *Id.*

222. McClurg, *supra* note 19, at 22-23, 26.

223. *In re Air Crash Disaster*, 982 F.2d at 1278. An award for future earnings is a proper component of pecuniary damages. *Id.* As such, the future is taken into consideration to determine pecuniary damages. *Id.* Thus, the future should also be taken into consideration when determining nonpecuniary damages. *Id.*

pensated.[224] But loss of society is more than simply a pecuniary loss and must be measured using more of a nuanced approach.

Lastly, the California statute that governs wrongful death law provides that "in an action under this article, damages may be awarded that, under all the circumstances of the case, may be just . . . ."[225] Thus, the California legislature specifically acknowledges that a hard-line rule should not apply, but rather the courts should consider the most fair and just way to measure wrongful death damages.[226] The broad statutory language suggests that a more nuanced approach is preferable. Furthermore, the law on this matter would benefit from a nuanced approach and framework outlining the court's various considerations when determining a question of admissibility of post-death evidence.

### C. PROPOSAL: THE NEW POST-DEATH EVIDENCE RULE

The courts should consider adopting the following rule. First, courts should generally admit all post-death evidence if it is relevant to determine loss of society damages. The courts should primarily consider the issue of relevance when making this preliminary admissibility determination. Second, three exceptions to this rule should be articulated. The first exception is the collateral source exception: the defendant may not use post-death evidence to benefit from his or her tortious conduct. For example, remarriage, a new birth, or a post-death affair is inadmissible under this exception. The second exception is the speculation exception: if the defendant offers evidence to mitigate damages and that evidence requires the fact-finder to speculatively compare the replacement of the beneficiary's loss, the evidence is inadmissible. The *Benwell* court noted that "the surviving spouse's remarriage is highly speculative, because it involves a comparison of the prospective earnings, services, and contributions of the deceased spouse with those of the new spouse."[227] If the defendant seeks to admit post-death evidence involving a similar speculative comparison, the court should not admit this evidence. The third exception is the grief and suffering exception: if the fact-finder is considering post-death evidence related to the grief and suffering of the beneficiaries, the court should apply a balancing test and should not admit the evidence if its probative value of the beneficiary's grief and suffering is substantially outweighed by unfair prejudice to the tortfeasor.

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224. *Id.* at 1276. Beneficiaries in a wrongful death action may submit a copy of the funeral bills to recover the reasonable value of funeral expenses. *Id.*

225. CAL. CIV. PROC. CODE § 377.61 (West 2004).

226. *See id.*

227. Benwell v. Dean, 57 Cal. Rptr. 394, 402 (Ct. App. 1967).

The court should admit all relevant post-death evidence unless excludable under these exceptions because this evidence provides a more accurate determination of loss of society damages. The principle goal of tort law is to provide compensation.[228] "The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party."[229] Indeed, one court noted:

> The true question is: what had these plaintiffs the right to expect to receive from the parent during his life? And for the loss of this they are to be compensated. What they got after his death does not enter into the case. The loss spoken of is the taking away of that which they were receiving, and would have received had he lived. It is the destruction of their expectations in this regard that the law deals with, and for which it furnished compensation.[230]

The courts should consider as much evidence as possible in order to provide the most accurate compensation as possible.[231]

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228. Strebel v. Brenlar Invs., Inc., 37 Cal. Rptr. 3d 699, 706 (Ct. App. 2006) ("Tort damages are awarded to fully compensate the victim for all the injury suffered."); Barrett v. Superior Court, 272 Cal. Rptr. 304, 308 (Ct. App. 1990) ("There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.'" (internal citation omitted)). Whether the tort system accurately compensates for losses or wrongs, however, is hotly debated. Because the goal of tort law is compensation, the law has focused on making the plaintiff whole. Some argue that the legal system has achieved this goal remarkably well. However, many still question whether the legal system compensates plaintiffs accurately. Some argue that because the transactional costs of litigation (e.g. attorneys' fees) are so high that plaintiffs sometimes only receive fifty percent of their reward, the system has failed to compensate accurately. *See* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 449-50 (2006) (discussing litigation as an expensive way to spread loss). Some argue that the result of the collateral source rule results in plaintiffs receiving more than sufficient compensation, sometimes even double compensation. *Id.* at 486-87. Some argue that the legal system should abolish recovery for pain and suffering because there is no way to accurately measure and quantify a plaintiff's pain and suffering. *See* Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 164-65 (2004) (proposing an elimination of recovery for pain and suffering). Still others argue that the law of wrongful death should allow recovery for hedonic damages (damages for loss of enjoyment of life)). *See* Erin Ann O'Hara, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away With Murder?*, 78 GEO. L.J. 1687, 1687-88 (1990) (arguing hedonic damages would deter negligent behavior more adequately). *Contra* Schwartz & Silverman, *supra* note 51, at 1044-70 (discussing the problems associated with hedonic damages). This is by no means an exhaustive list; there are many arguments for and against tort reform. What is important is that the tort system is under momentous change and debate every day.

229. United States v. Hatahley, 257 F.2d 920, 923 (10th Cir. 1958).

230. McLaughlin v. United R.Rs. of S.F., 147 P. 149, 151 (Cal. 1915) (citation omitted).

231. For example, many argue that if a decedent dies while in prison, the beneficiaries suffer less of a loss of society. The courts may admit this evidence to go to loss of society. Thus, the courts should also admit other evidence that will accurately depict loss of society.

Generally, logic and experience determines relevance.[232] As one court has commented, "[n]o precise or universal test of relevancy is furnished by law. The question must be determined in each case according to the teachings of reason and judicial experience."[233] The test of relevancy is "whether . . . the evidence tends logically, naturally, and by reasonable inference" to prove or disprove a material issue.[234] The courts should consider whether the post-death evidence has any bearing on the decedent's "society, companionship, love, affection, consortium, marital services, marital care, aid, tutelage, support, moral upbringing, experience, knowledge, cooperation, solicitude, comfort, pleasure, household services, guidance, advice, counsel, kindly offices, training, education, . . . assistance, attention, care, and protection."[235] The standard of relevance is a very broad standard in evidence law.[236] As such, most post-death evidence is relevant, and thus preliminarily admissible under this framework.

The exceptions will then limit the types of admissible post-death evidence. The exceptions are divided by whether they tend to mitigate or aggravate damages. The first two exceptions, collateral source and speculation, are fairly simple to understand given the policy considerations set forth for the exclusionary rule.[237] The last exception, grief and suffering, is more contestable. Courts should admit most evidence of grief and suffering, however, in order to aggravate loss of society damages.[238] This evidence is relevant because it indicates the society that the decedent provided to the beneficiary. As one professor has noted, "[w]e grieve what we value . . . . We grieve in proportion to our affection."[239] A person who has provided more comfort, care, society, and companionship will be grieved more than a person who has provided less.[240] Furthermore, the fact-finder should consider evidence of the relationship before the loss and then after the loss to determine damages. Similarly, in determining economic loss, the fact-finder must both consider the amount the plaintiff possessed before

232. Moody v. Peirano, 88 P. 380, 382 (Cal. Dist. Ct. App. 1906).

233. *Id.*

234. People v. Slocum, 125 Cal. Rptr. 442, 456 (Ct. App. 1975).

235. McClurg, *supra* note 19, at 26.

236. *See* FED. R. EVID. 401 (stating that evidence is relevant if it aids in weighting the evidence).

237. *See supra* Part IV.C.

238. *See, e.g.*, FED. R. EVID. 403 advisory committee's note (explaining the exception that provides that most evidence of grief and suffering will be admissible under this rule because this standard errs on the side of admissibility).

239. McClurg, *supra* note 19, at 14.

240. *See id.* (suggesting that the amount of grief a person feels is directly proportionate to the amount of care that person has invested in the one he or she is grieving for).

the loss and after the loss, because only then can the fact-finder truly determine the amount of damages to be awarded.

This context-specific rule, however, invites the criticism that it lacks coherence because people deal with grief over loss of a loved one in different ways, much to the chagrin of courts and juries attempting to measure wrongful death damages. Perhaps it is surprising to some that grief sufferers have more in common than they might imagine.[241] Grief experts can detail the many stages of grief, which are experienced in a very particular manner.[242] Moreover, a person grieves in proportion to his or her affection, making this a much more worthwhile and much less difficult determination.[243] Even still, denying consideration to all post-death evidence only exacerbates the problem because, without adequate evidence, the fact-finder cannot make an accurate measurement. Finally, the beneficiary usually describes his or her grief experience while on the stand, thus making the beneficiary's description of his or her loss a credibility determination. This credibility determination is best given to the jury or other finder of fact that has the opportunity to view and form an opinion about the witness.[244]

Anecdotally, this proposal yields the most just results for Carolyn and Sophia.[245] All of the evidence relevant to Carolyn's story will be admissible, unless the trial judge finds that the probative value of the evidence is substantially outweighed by unfair prejudice. The analysis of Carolyn's case will start with the general rule that any relevant evidence is admissible.[246] The trial judge will find that the evidence of Carolyn's depression, suicide attempts, divorce, and therapy related to her daughter's death is relevant to a determination of loss of society damages. The trial judge will exclude any evidence that the driver of the car did not proximately cause. The driver's tortious conduct proximately caused Carolyn's depression, suicide attempts, divorce, and therapy, and thus they are relevant to determining loss of society. Then, because this evidence will aggravate damages,

241. McClurg, *supra* note 19, at 17.

242. *Id.* at 14. *See* ELIZABETH KÜBLER-ROSS, ON DEATH AND DYING 34-99 (1969) (discussing the five stages of coping in terminally ill patients). Kübler-Ross focused on grief stages in dying people, but the same multiple-stage analysis is also applied to survivors of lost loved ones. *See* BROOK NOEL & PAMELA D. BLAIR, I WASN'T READY TO SAY GOODBYE: SURVIVING, COPING & HEALING AFTER THE SUDDEN DEATH OF A LOVED ONE 47-57 (2000) (discussing the grief stages in people who have lost loved ones to sudden death and attributing the analysis to Kübler-Ross).

243. McClurg, *supra* note 19, at 14.

244. People v. Upsher, 66 Cal. Rptr. 3d 481, 490 (Ct. App. 2007) ("[T]he credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact.").

245. *See supra* Part II (discussing the hypothetical stories of Carolyn and Sophia).

246. FED. R. EVID. 402.

the remaining determination centers on whether the evidence is substantially outweighed by unfair prejudice. Under the proposed guidelines, the trial judge will likely find that this evidence is not substantially outweighed by unfair prejudice because it is a typical form of grief and directly resulted from the defendant's tortious conduct.

Sophia's story is slightly different. The judge will admit Sophia's lack of grief and heavy spending but will not admit evidence of the death benefits she received or her new marriage. The trial judge will first determine whether the evidence is relevant.[247] The broad relevance standard will dictate that the trial judge find evidence of Sophia's behavior following the death of her husband relevant. Then the trial judge will apply the speculation exception and the collateral source exception to the evidence. The judge will not admit evidence of Sophia's remarriage under the speculation exception. The judge will also not admit evidence of Sophia's death benefits under the collateral source exception. The judge will admit the rest of the evidence relevant to loss of society. The results in both Carolyn and Sophia's stories comport with standards of fairness and justice and are the most desirable outcomes because they accurately compensate Carolyn and Sophia for their respective noneconomic losses.

### D. COSTS AND BENEFITS OF A HIGHLY INDIVIDUATED APPROACH

There is no doubt that this post-death evidence rule is very context-specific and focuses heavily on the individualized facts of the case. This is the favorable approach to take, however, because it achieves optimal deterrence to potential tortfeasors as well as full compensation to the plaintiff in an already context-specific tort system using the most efficient means possible.[248]

The post-death evidence rule achieves optimal deterrence while providing just compensation to the beneficiaries. Professors Posner and Sunstein note that in tort law and administrative law, "a pervasive question is how to combine accuracy with administrability."[249] They explicate:

> A simple and uniform number, accompanied by blanket exclusions of values that are hard to calculate, might well be simplest to administer—and regulatory policy generally takes this approach. In addition, an effort at greater accuracy might invite interest-group maneuvering; a uniform number provides a degree of insulation against special pleading. But if full compensation and optimal de-

247. *See* FED. R. EVID. 401-402.
248. Posner & Sunstein, *supra* note 38, at 540.
249. *Id.*

> terrence are the goals, then *a high degree of individuation should be expected*, tailoring dollar amounts to the precise circumstances of mortality risks. Suppose for example, that both regulators and courts possessed "hedometers," costlessly able to calculate the anticipated or actual loss, to all, from every human death. If hedometers were available, courts could ensure perfectly accurate compensation, and both courts and regulators would bring about optimal deterrence, attuned to individual circumstances.[250]

The proposed post-death evidence rule functions like the hedometer in Professor Posner and Sunstein's hypothetical because it ensures just compensation by measuring the loss as accurately as possible. It also accurately measures the loss of society the beneficiaries suffer using the most efficient means possible. Furthermore, the proposed post-death evidence rule takes an individuated approach in a system that already takes the particular characteristics of an individual into account when contextualizing the cost of life.[251] It does not alter the foundations of the current tort system; rather, it furthers the policies and goals of a system with which it is already consistent. The beauty and simplicity of the proposed post-death evidence rule is this consistency. Professors Posner and Sunstein have conducted research on wrongful death awards,[252] and have discovered that "in principle, the law calls for a highly individuated approach, one that recognizes a wide range

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250. *Id.* at 540-41 (emphasis added); *see* F.Y. EDGEWORTH, MATHEMATICAL PSYCHICS: AN ESSAY ON THE APPLICATION OF MATHEMATICS TO THE MORAL SCIENCES 101 (London, C. Kegan Paul & Co. 1881) (comparing the idea of a hedometer with the idea of a hedonimeter and assuming throughout that utility can be measured scientifically with such a device). For those who are skeptical of utilitarian approaches, substitute the term "eudaimeters," based on the Greek notion of eudaimonia, establishing a more complex notion of well-being. *See also* MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 343-72 (Cambridge Univ. Press 1986) (discussing eudaimonia).

251. Posner & Sunstein, *supra* note 38, at 548-49.

252. *Id.* at 545-46. Professors Posner and Sunstein used verdict and settlement data to attempt to predict what wrongful death damages will be in any particular case. *Id.* They "examined data from two data sets: (1) an unscientific Jury Verdict and Settlements (JVS) data set that provides a wealth of information about the characteristics of the cases; and (2) a more scientific Civil Justice Survey (CJS) data set that contains little information about the characteristics of cases, and does not isolate damages on account of death." *Id.* at 546. They "took the original award, and then deducted amounts that appeared to reflect punitive damages, damages for pain and suffering of the victim prior to death, medical expenses, and funeral expenses . . . in order to isolate the implicit valuation of the loss of life itself." *Id.* "The remainder is thus chiefly after-death losses to dependents, both economic and noneconomic." *Id.* In the Jury Verdict and Settlements data set, the mean award for loss of life was $3.1 million, and the median was $1.1 million. *Id.* at 548. This was consistent with the findings of the Civil Justice Survey data set, in which the mean was $3,759,000 and the median was $961,000 for a sample of cases from 2001. *Id.* Professors Posner and Sunstein concluded that "the tort system generally values lost lives at well under $3 million, and about half the time under $1 million." *Id.* They also concluded that the considerable variance in both data sets supports the general proposition that damages awards have a degree of arbitrariness. *Id.*

of factors that bear on the degree of loss to dependents."[253] Nevertheless, many oppose an individuated tort system. Hence, the benefits of an individuated tort system must be examined.

The opposition to an individuated tort system advances the following arguments: (1) an individuated system prevents ease of administration, and thus, the tort system should adopt the regulatory-like process that assigns a uniform value to lives in lieu of the current individuated tort system;[254] (2) an individuated approach has high transaction costs and thus lacks judicial efficiency; and (3) the individuated approach of the proposed post-death evidence rule is too context-specific and lacks coherence.

First, the opposition may argue that an individuated system prevents ease of administration, and thus, the tort system should adopt the regulatory-like process that assigns a uniform value to lives in lieu of the current individuated tort system.[255] Regulatory agencies attempt to reduce statistical risks of death.[256] To do so, agencies reduce human lives to monetary equivalents by calculating the risk someone is willing to pay to avoid a risk and then by performing a cost-benefit analysis.[257] Essentially, agencies award hedonic damages, i.e. damages for loss of life's pleasure.[258] But Professors Posner and Sunstein argue instead that the regulatory system's use of a uniform value for loss of life makes little sense as a deterrence function and that agencies instead should adopt the tort system's inclusion of emotional distress and other welfare losses that the dependents incurred in measuring damages.[259] They give two reasons for this argument. The first is that people will assign very different values to statistically identical risks.[260] In other words, people assign different risk values and thus have

253. *Id.* at 548-49.

254. *Id.* at 540-41 ("A simple and uniform number, accompanied by blanket exclusions of values that are hard to calculate, might well be simplest to administer – and regulatory policy generally takes this approach.").

255. *Id.*

256. *Id.* at 538. Those agencies use a cost benefit analysis to do so. *See also* STEPHEN G. BREYER, ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 125-27, 135 (Aspen Law & Bus. 5th ed. 2002) (describing President Clinton's Executive Order 12866, which requires agencies to analyze both quantitative and qualitative costs and benefits of any new regulations that might be pursued).

257. Posner & Sunstein, *supra* note 38, at 538.

258. *Id.* at 544 (recognizing that courts do not award hedonic damages, "[p]laintiffs suing on behalf of a victim who has no future income, no dependents, no spouse, and who dies without feeling pain, should ordinarily receive zero damages or damages sufficient only to cover funeral expenses.").

259. *Id.* at 542.

260. *Id.* at 566; *see* Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 962-74 (1999) (noting that factors such as whether the risk is voluntary or involuntary, the nature of the death risked, and whether the death is slow and lingering or instantaneous will all affect the value of the statistical life for

different values for a statistical life for risks such as death from lung cancer, car crashes, plane crashes, strokes, and Alzheimer's disease.[261] The second reason is that individuals assign different values of a statistical life based on the individual's nature, an individual's differences in risk aversion or inclination, and differences in wealth and income.[262] Professors Posner and Sunstein conclude that variable values make far more sense than uniform ones.[263] Thus, contrary to the opponent's position, adopting a system that awards uniform values for loss of life, while making a tort system more administrable, fails to provide deterrence, which is the principle goal of tort law along with compensation.[264]

Second, although the proposed method of measuring damages is not costless because it still requires judicial time and public funds, our current tort system already requires judicial time and public funds. This undermines the criticism that the proposed post-death evidence rule usurps court time. Thus, the post-death evidence rule is almost costless because it does not necessitate a cost that does not already exist. The post-death evidence rule does not change the efficiency of our current judicial system with respect to wrongful death cases. Therefore, because this individualized post-death evidence rule is most favorable given public policies of deterrence, compensation, and efficiency, the transaction costs of an individualized tort system need not be given great weight.[265]

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equally likely risks); s*ee* James Hammitt and Jin-Tan Liu, *Effects of Disease Type and Latency on the Value of Mortality Risk*, 28 J. RISK & UNCERTAINTY 73, 82-90 (2004) (finding an "almost significant" tendency toward higher willingness-to-pay to avoid cancer rather than noncancerous diseases).

261. Posner & Sunstein, *supra* note 38, at 566-67.

262. *Id.*

263. *Id.* at 566-68.

264. Strebel v. Brenlar Invs., Inc., 37 Cal. Rptr. 3d 699, 706 (Ct. App. 2006) ("Tort damages are awarded to fully compensate the victim for all the injury suffered."); Barrett v. Superior Court, 272 Cal. Rptr. 304, 308 (Ct. App. 1990) ("There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct, and (3) limitation, or lack thereof, upon the damages recoverable.'" (internal citation omitted)).

265. *See* George W. Conk, *Will the Post 9/11 World Be a Post-Tort World?*, 112 PENN ST. L. REV. 175, 183 (2007) (discussing the creation of the fund). In certain exceptional situations, efficiency has become more important than accuracy in determining damages. Particularly in times of national crisis and times in which voluminous tort actions result from one event, efficiency dominates when measuring damages. *Id.* For example, after the events of September 11, 2001, Congress created the "September 11th Victim Compensation Fund of 2001" through the enactment of the Air Transportation Safety and System Stabilization Act (ATSSSA). The Act is codified in 49 U.S.C. § 40101 (2006). *Id.* The Act provided for noneconomic losses, and defined "noneconomic" broadly to including pain and suffering, disfigurement, impairment, mental anguish, loss of society and consortium, hedonic damages, injury to reputation and "all other nonpecuniary losses of any kind or nature." *Id.* at 184 n.34. The Act set the minimum presumptive award at $250,000 for each death. *Id.* at 184. It guaranteed an additional $50,000 for each dependent. *Id.* Consistency was sufficiently important in this case that victims need to show special

Third, another counter argument may be that the individuated approach of the proposed post-death evidence rule is too context-specific and lacks coherence. Those that seek greater coherence will likely argue that plaintiffs should not receive noneconomic damages in wrongful death actions. They would contend that noneconomic damages create greater variability in wrongful death awards, and as such, are unfavorable. This argument strains credulity. The history of the wrongful death system is replete with instances in which courts have sought to alleviate the injustices that the failure to award noneconomic damages creates.[266] Denying recovery for noneconomic damages today would only recreate that injustice. Proponents of greater coherence might also argue that measurement of loss of society damages should not be modified and that no post-death evidence should be used to measure that loss of society. However, preserving loss of society damages as measured currently actually does nothing to achieve greater coherence in wrongful death damages. Loss of society damages are still measured using individual-specific evidence. Considering an even greater amount of evidence does not make the inquiry less consistent. The proposed post-death evidence rule simply makes the inquiry more nuanced.

Proponents of greater coherence, including this author, would be best served to seek coherence in wrongful death damages through other methods. For example, Professors Posner and Sunstein argue that in a wrongful death action, instead of paying lost income, the tortfeasor should pay the value that the victim is willing to pay to avoid the risk that was imposed on him by the tortfeasor's conduct, divided by that risk.[267] This value will be relatively similar across the board, with adjustments reflecting individual factors such as the defendant's risk preference, life expectancy, wealth, and quality of life.[268] This approach provides a great deal of coherence in the wrongful death system, but still allows additional recovery of the harm done to survivors, i.e. their welfare loss for grief, mental distress, and loss

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circumstances to depart from the norm. *Id.* Non-national crisis situations, even when tort claims could inundate the system and impede the functioning of the courts, however, should not qualify for such fixed-sum damages. Because deterrence remains a goal of the tort system, efficiency cannot trump accuracy; it must be balanced with accuracy. Posner & Sunstein, *supra* note 38, at 548-49.

266. *See supra* text accompanying notes 31-34. For example, the lives of children had a negative net worth because the cost of rearing a child exceeded the monetary value and service contributions that children make to their families. Selders v. Armentrout, 207 N.W.2d 686, 688-89 (Neb. 1973) (noting that "if the rule was literally followed, the average child would have negative worth"). In addition, men's lives were generally worth more than women's lives under that wrongful death system because men continued to earn more in our society. McClurg, *supra* note 19, at 20-22; *see also* Genaro C. Armas, *In Most Jobs, It Pays to be a Man*, MIAMI HERALD, June 4, 2004, at F1, available at 2004 WL 79853670.

267. Posner & Sunstein, *supra* note 38, at 566-68.

268. *Id.* at 587.

of companionship.[269] Thus, the argument for greater coherence in wrongful death damages lacks weight in its claim against the proposed post-death evidence rule.

All things said, although several objections to an individuated tort system exist and the debate continues, the law calls for a highly individuated approach.[270] The proposed post-death evidence rule is consistent with this approach and provides an even more nuanced method for measuring loss of society damages. Furthermore, it does so while efficiently providing maximum deterrence and just compensation.

## VII. CONCLUSION

A compelling need exists to adopt an approach for determining admissibility of post-death evidence that provides a clearer framework for the courts.[271] The law in this area is disjointed and lacks clarity.[272] Neither the exclusionary rule nor the grief and suffering rule apply to post-death evidence.[273] Although the exclusionary rule provides ample justification for excluding evidence of remarriage, engagement to remarry, post-death affairs, and death benefits such as social security benefits or property received, post-death evidence of the death's effects on the beneficiaries, as it goes to loss of society, is not excluded under the rule.[274] Furthermore, the grief and suffering rule does not bar post-death evidence because it does not relate to a separate award for grief and suffering; rather, it relates to determining the damages for loss of society.[275]

The California statute that governs wrongful death law provides that "in an action under this article, damages may be awarded that, under all the circumstances of the case, *may be just* . . . ."[276] Courts should adopt a framework for considering the admissibility of post-death evidence that comports with the tort system's notions of justice and fair compensation.[277] First, courts should generally admit all post-death evidence that is relevant to determine loss of society damages. Second, three exceptions to this rule should be articulated. The first exception is the collateral source exception: the defendant may not use post-death evidence to benefit from his or her

269. *Id.* at 590.
270. *Id.* at 548-49.
271. *See* discussion *supra* Parts I, II, and VI.A.
272. *See* discussion *supra* Parts IV, V, and VI.A.
273. *See* discussion *supra* Parts IV and V.
274. *See* discussion *supra* Part IV.
275. *See* discussion *supra* Part V.
276. CAL. CIV. PROC. CODE § 377.61 (1991) (emphasis added).
277. *See* discussion *supra* Part VI.C.

tortious conduct. The second exception is the speculation exception: if the defendant offers evidence to mitigate damages and that evidence requires the fact-finder to speculatively compare the replacement of the beneficiary's loss, the evidence is inadmissible. The third exception is the grief and suffering exception: if the fact-finder is considering post-death evidence related to the grief and suffering of the beneficiaries, courts should apply a balancing test and should not admit the evidence if its probative value is substantially outweighed by unfair prejudice. This is precisely the type of rule that will be "more in consonance with justice." [278]

Additionally, the proposed post-death evidence rule offers a nuanced and individuated approach because it examines many personal factors and considers the result to the complainant in depth.[279] This is the most accurate method to measure noneconomic wrongful death damages. As such, it achieves optimal deterrence and full compensation in an already context-specific tort system using the most efficient means possible.[280]

278. Cherrigan v. City & County of S.F., 69 Cal. Rptr. 42, 48 (Ct. App. 1968).
279. *See* discussion *supra* Part VI.D.
280. *See* discussion *supra* Part VI.D.