2015

Presuming Damages for Unemployment Distress

Sachin Pandya

University of Connecticut School of Law

Follow this and additional works at: https://opencommons.uconn.edu/law_papers

Part of the Labor and Employment Law Commons

Recommended Citation
https://opencommons.uconn.edu/law_papers/521
PRESUMING DAMAGES FOR UNEMPLOYMENT DISTRESS

BY

SACHIN S. PANDYA*

I. INTRODUCTION

A person is illegally fired and, as a result, becomes unemployed for a period of time. If that person wins a lawsuit based on that illegal firing, she can typically recover what she would have earned in wages during that time, as well as reasonable expenses she incurred to search for a new job. Involuntary unemployment, however, also causes people to lose psychological well-being, because they are forced to suffer the experience of being unemployed while they look for a new job. That loss ("unemployment distress") can range in severity from feelings of anxiety and humiliation to severe depression. Accordingly, if a defendant should pay the plaintiff enough to put her in the position she would have been in absent the defendant’s illegal firing, that may imply also awarding the plaintiff damages in an amount proportionate to the unemployment distress that the illegal firing caused her to suffer.

* Professor of Law, University of Connecticut School of Law. For comments on prior drafts, thanks to Rafael Gely and Peter Siegelman.

This paper argues that when a defendant's illegal conduct caused the plaintiff to be unemployed, judges and juries can and should presume that the plaintiff suffered an amount of unemployment distress specified by a dollar amount (the "presumed amount"). This presumed amount is the product of (1) the average unit cost for "unemployment distress," that is, a constant dollar amount for every unit of time that the person is unemployed, as estimated based on past awards for unemployment distress and (2) the amount of time the plaintiff actually spent unemployed.

By definition, a legal presumption is a rule of law that, given certain evidence (the proven fact), a judge or jury must accept another fact (the presumed fact) as true, unless the other party at least produces enough evidence that the fact to be presumed is actually not true (and thereby rebuts the presumption). Accordingly, once the unemployment distress presumption triggers, the burden of production would shift to the defendant and the plaintiff to provide enough evidence that the plaintiff suffered less or more than the presumed amount, respectively. If no party rebuts the resumption, then the judge must award the presumed amount for the plaintiff's unemployment distress.

This unemployment distress presumption has three relative advantages over other broader proposals to guide or restrict how much judges and juries award noneconomic damages generally. First, it is simpler for judges and juries to understand and apply. Second, it will likely have an anchoring effect on juries, and thereby make unemployment distress awards more predictable. This effect partly addresses worries that if the law changes to make it easier for illegally fired plaintiffs to receive emotional distress damages, including damages for unemployment distress, employers would face more legal uncertainty. Third, the unemployment distress presumption can better fit federal and state constitutional law than other attempts to constrain jury discretion to award damages.

The paper proceeds as follows. Part II describes how existing common law makes it difficult for plaintiffs to obtain damages for unemployment distress and what might partly explain such judicial resistance. Part III explains the unemployment distress presumption. Part IV identifies the presumption's relative advantages.

II. BACKGROUND

This section motivates the unemployment distress presumption
in light of existing obstacles in contract and tort law to recovering damages for unemployment distress. Contract law disfavors emotional distress damages in general as a remedy for contract claims, while tort law – which generally allows for emotional distress damages – does not make it easy to win a tort claim for wrongful discharge. This section also distinguishes the unemployment distress presumption from other broader proposals for making jury awards for noneconomic damages more uniform and predictable.

Under existing state contract and tort law, it is difficult for illegally fired workers to recover emotional distress damages generally, and thus damages for unemployment distress in particular. First, consider contract law. In the early twentieth century, McCormick speculated that courts "might expand" damages for a breach-of-employment-contract claim by recognizing that "deprivation of a job, if more than a casual one, not only affects usually a man's reputation and prestige, but ordinarily may so shake his sense of security as to inspire, even in men of firmness, deep fear and distress."  

Eighty years later, that has not happened. Today, many state appellate courts still read state contract law to deny emotional distress damages for claims that an employer breached the plaintiff's employment contract. This is consistent with general judicial declarations that emotional distress damages shall not be awarded for contract claims generally unless the parties expressly agree otherwise. Legal commentators, however, have long complained that, in fact, the actual case law is equivocal and admits of many exceptions, such as for when the breach is willful and wanton, when emotional distress is a foreseeable consequence or particularly likely result of the breach, or when the contract implicates "personal" or "family" interests.

Meanwhile, appellate judges rarely explain why contract law should bar emotional distress damages for employment contract claims in particular. When they do, the reasoning is largely opaque or conclusory.\textsuperscript{5}

Second, the existing common law of tort makes it difficult to win a wrongful discharge tort, and thus recover damages for unemployment distress. Unlike eighty years ago, today over thirty-five states recognize a common law tort action for retaliatory or wrongful discharge in violation of public policy.\textsuperscript{6} If the plaintiff establishes liability under such a tort claim, current law seems to let that plaintiff receive the types of damages generally available in tort actions, including but not limited to damages for emotional distress.\textsuperscript{7} Thus, in theory, such tort claims, if successful, could let plaintiffs recover damages for unemployment distress in particular. The obstacle: Depending upon the state, the tort law for wrongful discharge claims can be fairly stringent as to what kinds of employer conduct qualify as “wrongful”; how hard it is to show that an employer’s firing contravened “public policy”; or whether a parallel statutory remedy is deemed adequate enough to preclude the tort claim, even if that statutory remedy provides less than the remedies available for the tort claim.\textsuperscript{8}

Judges may persist in maintaining these contract and tort doctrinal barriers to recovering unemployment distress damages in

\textsuperscript{5} E.g., Valentine, 362 N.W.2d at 631; Gaglidari, 815 P.2d at 1370-74.
\textsuperscript{6} LEX K. LARSON, UNJUST DISMISSAL §§ 10.1-10.52 (2014).
\textsuperscript{8} LARSON, supra note 6.
part because they have this worry: There is a large set of potential illegal firing lawsuits (with or without merit), because about twenty million people in the US are fired or laid off by private employers every year.\footnote{For the period 2004-2014, the annual number of “layoffs and discharges” reported by all private employers in the Job Openings and Labor Turnover Survey was on average about 20.7 million. Bureau of Labor Statistics, U.S. Dep’t of Labor, Job Openings and Labor Turnover Survey Database, <http://www.bls.gov/jlt/data.htm> (Series Id: JTU1000000LDD) (last visited May 4, 2015).} That is about four times the annual number of motor vehicle crashes.\footnote{National Highway Traffic Safety Administration, Traffic Safety Facts 2012: A Compilation of Motor Vehicle Crash Data from the Fatality Analysis Reporting System and the General Estimates System 17 tbl. 1 (2014).}

Accordingly, judges may worry that if they make it easier for illegally fired plaintiffs to receive emotional distress damages, they will thereby cause a lot more legal uncertainty for employers. In particular, since the true emotional distress level is hard to verify, judges may believe that pre-existing juror sympathies and prejudices cause jury awards for noneconomic damages to vary considerably. As that variance increases, it becomes harder for employers and their lawyers to estimate their liability risk. To be sure, in personal injury cases, noneconomic damages awards are substantially influenced by more predictable case characteristics, including case type, the severity of any accompanying physical injury, and the size of any economic damages award.\footnote{Herbert M. Kritzer et al., An Exploration of “Noneconomic” Damages in Civil Jury Awards, 55 WM. & MARY L. REV. 971 (2014).} In contrast, in illegal firing cases, physical injury is rare, and thus distress damages in those cases may be harder to predict.\footnote{Judges may also believe that if a change in law (as to either liability or damages) makes it easier for fired plaintiffs to get distress damages, more meritless legal claims that would not have otherwise been filed will be filed as a result, because that legal change increases the expected value of those otherwise unfiled claims. This assumes that these otherwise unfiled claims must themselves be mostly meritless — a strong yet testable premise of overclaiming arguments generally. Sachin S. Pandya & Peter Siegelman, Underclaiming and Overclaiming, 38 LAW & SOC. INQUIRY 836 (2013). If not, we might welcome the more claims filed as correcting for systematic underclaiming.}

In response to similar concerns about noneconomic damages generally, many have offered proposals for making jury awards for noneconomic damages more uniform and predictable, albeit usually for noneconomic damages that accompany physical injury.\footnote{For example, the hedonic damages approach depends in part on a lost-pleasure-of-life scale to measure the severity of that harm, which in turn was developed based on how mental health clinicians responded to hypothetical vignettes concerning loss of pleasure of life resulting from physical injuries. Paul Andrews et al., Development of the Lost Pleasure of Life Scale, 20 LAW & HUM. BEHAV. 99 (1996). Similarly, the health utilities approach to non-economic losses...} Some
propose guiding juries by giving them information on past jury awards for noneconomic damages.\textsuperscript{14} For example, Chase suggested providing juries with a grid that sorts prior jury awards for non-economic damages in the same state by a nine-category injury-severity scale and by plaintiff-age brackets, and then reports, for each cell on the grid, the median, maximum, and minimum past award.\textsuperscript{15} Bovbjerg et al. suggested using past awards for noneconomic damages to create a matrix of dollar values based on plaintiff age and severity of injury in two dimensions ("permanent" vs. "temporary" and "major" vs. "minor").\textsuperscript{16} They also suggested creating, as nonbinding guides for juries, nine hypothetical vignettes of physical injuries and their corresponding noneconomic damage awards.\textsuperscript{17}

Far fewer proposals suggest using past jury awards to \textit{constrain} jury discretion to award noneconomic damages in a particular case. For example, Blumstein et al. proposed using the 25th and 75th percentiles of a distribution of prior noneconomic damage awards (conditional on injury severity) to set \textit{presumed} minimum and maximum noneconomic damage awards.\textsuperscript{18} Juries would be instructed as to amounts at the 25th and 75th percentiles for the level of injury severity that matched the plaintiff’s injury. Then, for any jury verdict above or below these "boundary points," the jury would have to justify the deviation to the judge, or alternatively the "[e]xtreme values should constitute a prima facie case" for additur or remittitur.\textsuperscript{19}

\textsuperscript{14} Some jurisdictions, such as England and Northern Ireland, publish guidelines for \textit{judges} for awarding damages in personal injury cases by reporting damage award ranges, indexed by injury type and severity, based on past awards. 11 JUDICIAL COLL., GUIDELINES FOR THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY CASES (2012); 4 THE JUDICIAL STUDIES BD. FOR N. IR., GUIDELINES FOR THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY CASES IN NORTHERN IRELAND (2013).


\textsuperscript{17} Id. at 953-56.


\textsuperscript{19} Id. at 182.
III. DISCUSSION

A. The Unemployment Distress Presumption

This section proposes the unemployment distress presumption and explains how it operates. In particular, it shows how the proposed presumption accounts for the fact that we cannot directly measure the plaintiff's unemployment distress and that there is no uniform distress-to-dollars exchange rate, that is, no uniform way to monetize the total distress suffered.

To start, imagine that you become unemployed because of an illegal firing. Now, imagine your unemployment distress level while you are unemployed, that is, the distress suffered because you are unemployed at that time. This distress level may vary by person and over the time spent unemployed. Maybe you felt the same distress level the whole time you were unemployed (Figure 1(a)). Or maybe your distress level increased as your unemployment persisted, despite your best efforts to get a new job (Figure 1(b)). Or maybe after a certain period of feeling worse over time, you began to adjust, which is why your level of distress increased at first but then slowly waned (Figure 1(c)).

Figure 1: Hypothetical Change in Unemployment Distress over Time

To get the total unemployment distress you suffered, whatever that is, we would simply sum the units of distress you suffered at each moment over the total time spent unemployed. To monetize that sum, we would multiply it by a distress-to-dollars exchange rate. The result: A money amount that roughly matches the plaintiff's unemployment distress cost. This formulation faces two main obstacles. First, we currently cannot directly observe any particular individual's true level
of unemployment distress at different points in time. Second, there is no explicit and agreed upon distress-to-dollars exchange rate. To overcome these obstacles, we can estimate the average unit cost of unemployment distress based on all past awards for unemployment distress in which the jury (or, in a bench trial, the judge) specifically identified unemployment distress as a separate item of damages.

To do this, we take prior awards for unemployment distress received by everyone in the population of prevailing plaintiffs and assume that each such award is the product of (1) a plaintiff-specific unit cost of unemployment distress and (2) the total number of eligible periods of time the plaintiff was unemployed. Since we do know the eligible period of unemployment for each past award, we can calculate the unit cost for each award and then the average unit cost for unemployment distress for those awards. Finally, we set the presumed amount for any particular plaintiff as the product of the average unit cost and the amount of eligible time that this plaintiff spent unemployed.

To illustrate, Table 1 reports a hypothetical set of past inflation-adjusted awards for unemployment distress and, for each award, the number of days unemployed that were eligible for compensation.

Table 1: Hypothetical Past Awards for Unemployment Distress

<table>
<thead>
<tr>
<th>Award No.</th>
<th>Award Amount</th>
<th>Time Unemployed (days)</th>
<th>Unit Cost (= award amount / time)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$15,000</td>
<td>150</td>
<td>$100.00</td>
</tr>
<tr>
<td>2</td>
<td>$25,000</td>
<td>60</td>
<td>$416.67</td>
</tr>
<tr>
<td>3</td>
<td>$10,000</td>
<td>200</td>
<td>$50.00</td>
</tr>
<tr>
<td>4</td>
<td>$6,500</td>
<td>14</td>
<td>$464.29</td>
</tr>
<tr>
<td>5</td>
<td>$1,500</td>
<td>20</td>
<td>$75.00</td>
</tr>
</tbody>
</table>

For these awards, the average unit cost of unemployment distress is $221.19 (= (100 + 416.67 + 50 + 464.29 + 75) / 5).

Now, suppose a particular case in which a plaintiff suffered thirty days of unemployment because of the defendant-employer's illegal firing, and that all those days are eligible for compensation. If so, under the unemployment distress presumption, the presumed damages in that case are $221.19 \times 30 = $6,635.70. If the number of eligible days of unemployment is disputed, the judge would instruct
the jury on the presumed amount as a “per diem” calculation ($221.19 per day unemployed).

This approach also applies to damages for future unemployment distress, that is, the estimated time after final judgment that the plaintiff will be unemployed. For example, if the plaintiff receives front pay for a two-week period, and the average unit cost for unemployment distress is $221.19/day, then the plaintiff is presumed to suffer $3,096.66 ($221.19 \times 14) worth of unemployment distress for those two weeks.

Unlike time periods for calculating lost wages (before or after final judgment), the unemployment distress time period includes all the periods of time that the plaintiff is unemployed. That includes time periods for which the plaintiff would not have worked even if the illegal firing had not occurred, because unemployment distress does not temporarily cease on the days the plaintiff would have had off from work. In our example, if the plaintiff would not have worked on weekends, her front pay award would cover ten days (weekdays only), but her future unemployment distress award would cover all fourteen days (weekdays and weekends).

Overall, this approach assumes that for any distribution of past jury awards for unemployment distress, although awards vary by the amount of total unemployment distress suffered, the distress-to-dollars exchange rate is the same for every past award. Put another way, suppose a single jury decided all awards and could directly observe the total unemployment distress suffered by each plaintiff who received an award. Although that jury could use different exchange rates for different plaintiffs, it should not. As between two people who suffer the exact same level of distress, there is no difference between those people that justifies making one person’s distress worth more (in money) than the other. This moral norm, in turn, may rise to the status of constitutional law by operation of the Equal Protection Clause of the U.S. Constitution and its state constitution equivalents. Accordingly, we proceed as if past juries applied the same distress-to-dollars exchange rate to all plaintiffs.

We could relax this assumption by, for example, relying only on the subset of past jury awards that judges approve on appeal. The premise here is that such judicially approved awards are more likely

20. Typically, where reinstatement is an impractical remedy, prevailing plaintiffs may instead receive an award for future lost wages (sometimes called “front pay”), that is, wage losses caused by the defendant’s wrongful conduct, but which are expected to occur only after final judgment.
to resemble what our hypothetical juries would award after applying a uniform distress-to-dollars exchange rate. There is no way to test this premise. After all, it is equally plausible that judges – fearing, say, jury prejudice against defendants – would tend to disapprove or reduce what our hypothetical juries would award. Moreover, since there are fewer judicially approved past jury awards, we have fewer awards from which to calculate average unit cost. The resulting estimate of average unit cost will be more sensitive to (judicially approved) outliers than an average unit cost based on all past awards, whether or not judicially approved. Finally, if parties tend to seek appellate review of larger jury awards than smaller ones, then the average judicially approved award may be higher than the average of all such awards. It is unclear, however, whether these consequences of relying on judicially approved awards leads to more bias overall, because we cannot directly observe the true distress level suffered by the plaintiffs who received those awards.

Once we calculate the presumed amount, the burden of production shifts to the parties. Now, both plaintiff and defendant can seek to rebut that presumed amount by offering competing damage estimates, based on evidence of how much the plaintiff's actual unit cost of unemployment distress departs from the average unit cost of distress.

To do this, a defendant could argue that the plaintiff's distress while unemployed was not unemployment distress in particular, because something else (other than being unemployed at that time) caused that distress. Suppose that during the period of unemployment, the plaintiff's close friend or relative died in a car accident, and the plaintiff suffered emotional distress after that event occurred. If that event occurred independently of the defendant's illegal act (e.g., the illegal firing) and if the plaintiff would have felt no less distress had he been employed during that time, then proof of that distress is not proof of unemployment distress.

Alternatively, either party could offer evidence that unemployment distress does indeed systematically vary by some characteristic, such as the plaintiff's age or sex, and therefore the plaintiff should be awarded more (or less) than the presumed amount because he shares (or lacks) that salient characteristic.

Furthermore, the defendant can invoke the avoidable consequences rule. That rule, as applied to awards of lost wages, usually demands that, after becoming unemployed, the plaintiff exercise reasonable diligence to obtain comparable employment in
the local area, and reduces the total award by the amount of wages that, with such reasonable diligence, would not have been lost. In so doing, this rule reduces the eligible time periods for calculating lost wages. The rule already applies to lost wages awards for, among other claims, breach-of-employment-contract claims, as well as claims under various employment law statutes.

As applied here, to rebut the presumed amount, the defendant must show that the time the plaintiff spent unemployed that is eligible for compensation under the avoidable consequences rule is less than the time the plaintiff actually spent unemployed. For example, if the plaintiff had unreasonably stopped searching for a comparable job half way through the unemployment period, she cannot receive damages for unemployment distress for the second half of her period of unemployment, if had the plaintiff done otherwise, she would have been employed—and therefore would not have suffered unemployment distress—during that second half.

Finally, to implement the approach here, two initial conditions must hold. First, there must be an initial period of time (a “burn-in” period”) during which the unemployment distress presumption would not be in effect. During this burn-in period, a jury, if asked to award damages for unemployment distress, would complete a special verdict form. That form would ask them to separately find both the total time unemployed under the avoidable consequences rule as well as the total of unemployment distress as distinct from other types of emotional distress suffered. During this period, to avoid any distortion, the jury will not be told that its unemployment distress award will provide data for calculating the presumed amount in later cases in which the unemployment distress presumption does apply.

Second, both data points for each such award must be collected and stored in a public database of jury verdicts that lawyers can easily access. To be sure, the judicial system must bear the cost of

---


building and maintaining this database, but that cost also exists for the many different prior proposals for guiding or constraining jury discretion that rely on inferences from past jury awards.\(^24\) Given the special verdict form and the database, for time periods after the burn-in period, anyone can easily calculate the average unit cost of unemployment distress. The database can be updated either continuously or at intervals (say, every five years) to reflect the most recent distribution of past awards for unemployment distress.

### B. Advantages

This section identifies the advantages of the unemployment distress presumption. First, it is relatively easy for judges and juries to understand and apply. Second, its likely anchoring effect on juries will tend to make unemployment distress awards more predictable. Third, the unemployment distress presumption better fits federal and state constitutional law as compared to other laws that constrain jury discretion to award damages.

#### 1. Simplicity

The unemployment distress presumption is simple, but that simplicity comes at a price. It is simple as compared to other proposals to guide or constrain juries based on past jury awards. At worst, juries must multiply the (pre-provided) average unit distress cost by the number of compensable time periods the plaintiff spent unemployed under the avoidable consequences rule. The cognitive burden is low. There is no need to index past unemployment distress awards by age and physical injury severity, because bodily injury rarely occurs in illegal firing cases and because there is little research to date to suggest that unit distress level for unemployment distress systematically varies with the plaintiff’s age. Thus, there is no need to present juries with complex matrices or award ranges keyed to hypothetical injury vignettes. And unlike other proposals, juries would not be instructed about the shape or other characteristics of the distribution of past awards for unemployment distress, such as its mean, median, upper, and lower bounds. This is a feature. Jurors may not fully understand what a median is or how it differs from the mean of the distribution of past awards. Indeed, some studies find that even

\(^{24}\) E.g., Bovbjerg et al., supra note 16, at 960-61.
prospective math teachers have an incomplete conceptual grasp of mean and median as different measures of central tendency.\footnote{25}

The price for this simplicity is a narrow scope. The presumption applies only to unemployment distress damages, that is, for distress suffered for a time because the plaintiff was unemployed during that time. Indeed, the presumed amount is simple to calculate precisely because it is a function of a quantity that is relatively easy to determine – the amount of time the plaintiff spent unemployed. As a result, the presumed amount cannot well account for items of distress that are not functions of the time spent unemployed. Thus, the presumed amount does not account for the distress of how the defendant illegally fired the plaintiff. And it does not account for the distress of being unemployed that persists after the period of unemployment ends and the plaintiff finds a new job.\footnote{26} In principle, these items of emotional distress were also caused by the defendant's illegal conduct, and therefore they also should be compensable. The unemployment distress presumption does not preclude separate damage awards for these items of distress. Rather, for simplicity's sake, the presumption just does not account for them at all.

2. Anchoring

Even if rebutted, the unemployment distress presumption may favorably function as a nonstrategic anchor for damage awards for unemployment distress. Civil jury research suggests that when lawyers suggest damage amounts to juries as a lump sum (ad damnum)\footnote{27} or a constant dollar amount per unit of time (per diem),\footnote{28} juries tend to adjust how much they award in terms of how close it is to the suggested award.\footnote{29} Indeed, some studies find that damages

---


\footnote{26} Such post-unemployment suffering often occurs, as indicated by the net loss in subjective well-being of an unemployed person even after she finds a new job. See Young, *supra* note 1, at 624.


\footnote{28} McAuliff & Bornstein, *supra* note 27.

\footnote{29} For discussion, see EDIE GREENE & BRIAN H. BORNSTEIN, *Determining Damages: The Psychology of Jury Awards* 150-56 (2003). On the anchoring effect generally, see
caps, when mock jurors are made aware of them, exert an anchoring effect as well.\(^\text{30}\) This research suggests that, even if rebutted, the unemployment distress presumption’s presumed amount, expressed as either a per-diem or a lump sum, may have an anchoring effect on the final award for unemployment distress.

In other contexts, an anchoring effect is a disadvantage, a bias to be reduced, or for plaintiffs’ lawyers, a strategy in closing arguments to get higher awards. Here, however, any biasing caused by the anchoring effect cannot be directly verified, since we cannot directly observe the plaintiff’s true distress level. Still, the presumption’s estimate of average unit cost is likely to function as a nonstrategic anchor that reduces, if not bias, then the variance of these awards overall. Once the presumption goes into effect in a jurisdiction, different juries in that jurisdiction will be presented with the same estimate of average-unit-distress-cost, and that estimate will update only to account for recent jury awards for unemployment distress. If judges indeed worry that a change in law will increase legal uncertainty because emotional distress jury awards tend to exhibit high variance, then the presumption, by reducing that variance, thereby reduces such legal uncertainty about unemployment distress damages.

3. Constitutionality

This section discusses how the unemployment distress presumption fits with federal and state constitutional law as compared to other legal rules that constrain jury discretion to award damages. Like damages caps, damage schedules, and other measures that constrain jury discretion to award damages, the presumption, if unrebutted, requires judges and juries to accept a determinate amount – here, the average unit cost of distress multiplied by the time spent unemployed – as the true cost of the plaintiff’s unemployment distress. In another respect, however, constitutional law tends to treat rebuttable presumptions differently, on the premise that even when they operate, the parties still may present evidence to rebut the fact to be presumed. In this respect, some courts emphasize that legislatures have the general authority over evidentiary rules, of which rebuttable

Adrian Furnham & Hua Chu Boo, A Literature Review of the Anchoring Effect, 40 J. SOCIO-ECON. 35 (2011).

presumptions are a kind. Accordingly, the courts have long declared constitutional law that only requires, for rebuttable presumptions, that there is a "rational" or "reasonable" connection between the proven fact that triggers the presumption and the fact to be presumed as true.\textsuperscript{31}

As a result, the unemployment distress presumption, because it is rebuttable, can largely sidestep the main grounds that courts have accepted for finding that a statutory noneconomic damages cap violates constitutional law.\textsuperscript{32} First, the cap may violate a state constitution's equal protection guarantee, because no government interest suffices to justify treating plaintiffs who suffer harm so severe as to exceed the cap differently than the plaintiffs who suffer noneconomic harm that falls below the cap.\textsuperscript{33} Second, the cap may violate the state constitution's guarantee of a right of access to courts for redress of a particular injury.\textsuperscript{34} Third, by requiring a court to reduce a jury's noneconomic damages award, the cap may violate the state constitution's provision for a right to a jury trial in civil cases by supplanting the jury's own findings regarding damages, thereby burdening or impairing the jury's fact-finding function.\textsuperscript{35} Fourth, by enacting the cap, the legislature may violate the separation of powers required by the state constitution, because the cap in effect usurps the distinctively judicial power of remittitur, that is, the power to reduce a jury's damage award for being excessive as a matter of law.\textsuperscript{36} Fifth, some state constitutions expressly prohibit statutory limitation on damages for injury to any person.\textsuperscript{37}

\begin{thebibliography}{9}
\bibitem{31} K.A. Drechsler, Constitutionality of Statutes or Ordinances Making One Fact Presumptive or Prima Facie Evidence of Another, 162 A.L.R. 495 (1946 & Supp. 2014) (collecting cases).
\bibitem{32} J. Chase Bryan et al., Are Non-Economic Caps Constitutional?, 80 DEF. COUNS. J. 154 (2013).
\bibitem{34} Smith v. Dep't of Ins., 507 So.2d 1080, 1087-90 (Fla. 1987) (FLA. CONST. art. I, § 21).
\bibitem{37} ARIZ. CONST. art. II, § 31; ARK. CONST. art. V, § 32; KY. CONST. § 54; PENN. CONST. art. III § 18; WY. CONST. art. 10, § 4(a).
\end{thebibliography}
The unemployment distress presumption does, however, face different constitutional law challenges. The Due Process Clauses of the U.S. Constitution demand, for any legal presumption, "some rational connection between the fact proved and the ultimate fact presumed," such that inferring one from the other is not a "purely arbitrary mandate." In *Leary v. United States* (1969), the U.S. Supreme Court read this doctrine to demand "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Similarly, both before and after the U.S. Supreme Court declared its "rational connection" test, some state supreme courts declared that a rebuttable legal presumption would violate their respective state constitutions if the proven fact had an arbitrary relationship to, or had no tendency to prove, the presumed fact.

The "rational connection" test usually assumes two discrete outcomes: Given the proven fact, the presumed fact is either true or not true. In contrast, unit distress level is a continuous variable, and therefore can take on an infinite number of values. Accordingly, suppose the doctrine requires the party challenging the unemployment distress presumption to show that it is "more likely than not" that the average unit cost of distress equals the true cost of the plaintiff's unemployment distress. Given an invariant distress-to-dollars exchange rate, this reduces to the requirement that it be likely that the average unit level of distress equals the true level of the plaintiff's unemployment distress.

The problem: There is a zero probability that the average unit distress level implied by the presumed amount will exactly equal any one of those infinitely possible values for the true unit distress level. To illustrate, suppose Plaintiff A is presumed to have suffered $200 worth of distress, or 100 units of distress, given a $2 distress-to-dollars exchange rate. What is the probability that Plaintiff A actually


40. R.E.H., *Constitutionality of Statutes or Ordinances Making One Fact Presumptive or Prima Facie Evidence of Another*, 51 A.L.R. 1139 § II(a) (1927) (collecting cases). For post-*Turnipseed* cases, see, for example, Griggs v. State, 73 So.2d 382, 386 (Ala. App. 1954); Hamilton v. State, 329 So.2d 283 (Fla. 1976).
suffered exactly 100 units of distress, as opposed to, say, 100.1 or 100.01, or 100.001, and so on? Since the unit distress level can take on an infinite number of values that do not exactly equal 100, that probability is zero. As a result, the unemployment distress presumption cannot meet the “rational connection” test in its original form.

In theory, we can modify the “rational connection” test in cases like these to require that it be more likely than not that the proven fact (here, the average unit cost of distress) is close enough to the presumed fact (here, plaintiff’s true unit cost of distress). If the constitutional doctrine governing presumptions is best justified as advancing adjudicative accuracy, then we can decide whether the presumed amount is “accurate enough” by setting some interval that contains that presumed amount, and then estimating the probability that the true value (here, the plaintiff’s true unit cost of distress) falls within that same interval. For example, if the average unit cost of distress is $100 and the interval is [$90, $110], then that average unit cost is “accurate enough” if there is a greater than fifty percent probability that the plaintiff’s true unit cost of distress is between $90 and $100.

There is, however, no a priori way to set the accuracy interval without making at least some assumptions about the shape of the distribution of the true unit cost of unemployment distress among the set of prevailing plaintiffs. To illustrate, suppose we set the interval by the number of standard deviations from the average unit cost of unemployment distress. If unit distress cost follows a normal (Gaussian) distribution and we set the accuracy interval as one standard deviation from the mean, then we can conclude that the presumed unit cost is “close enough” to the true unit cost, because any particular unit cost (selected at random) is about 68 percent likely to be within one standard deviation from the average unit cost. On the other hand, if unit distress cost follows a multimodal or asymmetric distribution, it is less clear that any particular unit cost is more likely than not to be one standard deviation away from the average.

IV. Conclusion

This paper proposed a rebuttable presumption for deciding unemployment distress damages. When a plaintiff suffers unemployment distress because of the defendant’s illegal conduct,
judges and juries would have to presume an amount of unemployment distress specified by (1) the average unit cost for unemployment distress, as estimated based on past awards for unemployment distress and (2) the amount of time the plaintiff spent unemployed. Once this presumption triggers, the burden of production would shift to the parties to produce enough evidence that the plaintiff suffered (or should be deemed to have suffered) less or more than the presumed amount. If no party can rebut the presumption, then the judge must award the presumed damages amount for the plaintiff's unemployment distress.

The paper then identified relative advantages of this presumption. First, since it covers only unemployment distress, it is simple to apply. Second, its likely anchoring effect on juries will reduce the variance of jury awards for unemployment distress, thereby increasing their predictability. Third, it can avoid the constitutional obstacles that face damages caps and other laws that constrain jury discretion. To be sure, constitutional law does require a presumption to have a "rational" connection between the proven fact and the presumed fact. Here, the unemployment distress presumption may satisfy a modified doctrine that requires that it be likely that the average unit cost of distress (the proven fact) be close enough to the plaintiff's true unit cost of distress (the presumed fact). This depends, however, on the assumed shape of the distribution of the unit cost of unemployment distress among prevailing plaintiffs.