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## Damages: Expert Testimony and Future Inflation

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# COMMENTS

## DAMAGES: EXPERT TESTIMONY AND FUTURE INFLATION

### I. INTRODUCTION

The question of the measure of compensatory damages in personal injury and wrongful death actions is of paramount concern to both aggrieved parties and defendants. In the determination of total compensation for the plaintiff, one frequently occurring issue—future damages—involves complex economic theory and statistical projections in the computation of such items of prospective loss as future earnings. At this point in the trial it is crucial that expert testimony be admitted so that jurors can fathom the technical complexities of these future financial determinations.<sup>1</sup>

Inflation has become an accepted ingredient of our contemporary society.<sup>2</sup> Whether or not a jury should be allowed to consider testimony by expert economists on possible future rates of inflation, however, has become a source of controversy in both state and federal courts. The goal of this comment is to survey the current state of the law on the issue of inflation in personal injury and wrongful death actions, with particular emphasis on the current controversy over the admissibility of testimony concerning future inflationary trends in assessing damages for future earnings. Since jurors drawn

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1. The court in *Plourd v. Southern Pac. Trans. Co.*, 266 Ore. 666, 513 P.2d 1140 (1973) summed up the necessity for experts in this area:

Nevertheless, it is our experience that the computation of the present value of future wage losses or impairment of earning capacity is not a simple problem, but involves the application of mathematical principles beyond the understanding of most lay jurors and that attorneys and judges themselves sometimes have difficulty in making or understanding such computations, much less explaining them in such a way as to be understood by most lay jurors.

*Id.* at 676, 513 P.2d at 1145. See also *Scruggs v. Chesapeake & Ohio Ry. Co.*, 320 F. Supp. 1248 (W.D.Va. 1970); *Sandow v. Weyerhaeuser Co.*, 252 Ore. 377, 449 P.2d 426 (1969); *Ritter v. Beals*, 225 Ore. 504, 358 P.2d 1080 (1961). The use of experts is employed in this area primarily to rid the trial of an appearance of "conjecture":

It appears to us that in this particular case the element of conjecture is reduced significantly by the admission of expert testimony as to the possible future earnings of the decedent. It also appears that this expert testimony is not only the best evidence, but the only evidence available in this case to prove future earnings.

*Krohmer v. Dahl*, 145 Mont. 491, 402 P.2d 979 (1965). For more discussion on the use of expert testimony to dispel the problem of speculation see generally Leonard, *Future Economic Value in Wrongful Death Litigation*, 30 OHIO ST. L.J. 502 (1969); O'Connor & Miller, *The Economist — Statistician: A Source of Expert Guidance in Determining Damages*, 48 NOTRE DAME LAW. 354 (1972).

2. See S. SPEISER, *RECOVERY FOR WRONGFUL DEATH ECONOMIC HANDBOOK*, § 6:3, at 87 (1970) (note particularly its world-wide ramifications at p. 94 in Table 29 which illustrates the depreciation of the value of money in 44 countries since 1951).

from an inflation-ridden society are aware of the impact of future inflation, should the courts recognize it as relevant, and thus admit testimony as to its future effects?

## II. DETERMINING A JUST COMPENSATORY AWARD

In personal injury and wrongful death actions the jury must weigh several basic economic factors in order to determine an adequate and just damage award. These factors normally include: 1) the life and work-life expectancies of the plaintiff (decedent); 2) a determination of his earnings at the time of the accident (death); 3) a determination of the rate at which his earning capacity would be expected to increase in the future; 4) the impact of future income taxes on his earning capacity (depending on the jurisdiction and cause of action, this may not be a factor); and 5) a reduction to present value of the part of the judgment consisting of the period from the date of trial to the end of his work-life expectancy. In wrongful death actions, the jury must also consider that portion of the future earning capacity that would have been consumed by the plaintiff, and the length of time any dependents would have been expected to share in that earning capacity.<sup>3</sup>

To illustrate the process of determining an award for future earnings, consider the following example of a wrongful death action. John Jones, who was earning \$20,000 a year as a construction foreman, died on January 1, 1977, at the age of fifty. The decedent's widow brought an action under the state's wrongful death statute against the railroad whose employee caused the death in a crossing accident. The first facts established at trial for purposes of determining future damages must be the decedent's life and work-life expectancies. Normally, an expert witness such as an actuary or physician testifies by referring to standard mortality tables. The life expectancy established by the table is not necessarily conclusive, but will be considered along with other factors which might affect his life span, such as his age, health, habits, and occupation.<sup>4</sup> For this example consider the life expectancy of Mr. Jones to have been 70 years and his work-life sixty-five years; thus, a median work-life expectancy of fifteen years is admitted into evidence.

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3. See discussion in text pp. 263-64 *infra*.

4. *Holliday v. Pacific-Atlantic S.S. Co.*, 117 F. Supp. 729 (D. Del. 1953), *aff'd*, 212 F.2d 206 (3d Cir. 1954) (persons in hazardous occupations do not always have identical expectancies to those not so employed); *Townsend v. Briggs*, 99 Cal. 481, 34 P. 116 (1893) (error to disallow evidence of plaintiff's habits as to sobriety); *Borz v. Omaha Maternity & Gen. Hosp. Ass'n*, 96 Neb. 648, 148 N.W. 575 (1914) (probative value of tables may be destroyed by evidence of ill health, disease, or hazardous employment).

Secondly, evidence of his present salary of \$20,000 is admitted, as well as the value of any fringe benefits that might have been accumulated at the time of death. This figure is then multiplied by his work life expectancy of fifteen years. Thus, his total future earnings are \$300,000. This sum, however, must be reduced to its "present value" or "present worth" by the jury. The theory behind the present value rule is that a lump sum of money given to the plaintiff today will produce a greater amount in the future than that for which he is entitled to be compensated, because of the capacity for investment and accumulation of interest.<sup>5</sup> This reduction to present value is computed by a process of "discounting:" reducing the award by the reasonable rate of return which could be expected to accrue during the compensation period. The present value of the award plus the projected amount to be earned by interest is the sum envisioned by the jury as necessary to make the plaintiff "whole."<sup>6</sup>

There is no reduction to present value of the loss to the widow for the period from the date of death to the date of trial because the theory of discounting assumes that the plaintiff would have had the use of the money, which, of course, she does not during this time span. In a personal injury case, most jurisdictions also reduce that portion of the award allocable to medical, nursing, and other similar expenses.<sup>7</sup> On the other hand, any portion of the final award in a personal injury action that has been assessed for future pain and suffering has been held not to be subject to discounting to present value.<sup>8</sup>

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5. See *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916). *Noble v. Tweedy*, 90 Cal. App. 2d 738, 203 P.2d 778 (1949); *Borzea v. Anselmi*, 71 Wyo. 348, 258 P.2d 796 (1952).

6. An example of a sample jury instruction for the determination of present value can be found in S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 8:5, at 719-20 (2d ed. 1975).

7. *McCrank v. Great Northern Ry. Co.*, 260 Minn. 329, 109 N.W.2d 582 (1961); *Mintz v. Atlantic Coast Line R.R. Co.*, 233 N.C. 607, 65 S.E. 2d 120(1951); *Kramer v. Henely*, 227 Iowa 504, 288 N.W. 610 (1939).

8. See *Texas & Pacific Ry. Co. v. Buckles*, 232 F.2d 257 (5th Cir. 1957); *Trexler v. Tug Raven*, 290 F. Supp. 429 (E.D. Va. 1968), *rev'd on other grounds*, 419 F.2d 536 (4th Cir. 1969), *cert. denied*, 398 U.S. 938 (1970); *Braddock v. Seaboard Air Line R.R. Co.*, 80 So. 2d 662 (Fla. 1955); *Chancey v. Shirah*, 96 Ga. App. 91, 99 S.E. 2d 365 (1957); J. STEIN, *DAMAGES AND RECOVERY: PERSONAL INJURY AND DEATH ACTIONS* § 29 at 44-45 (1972). *Ahlstrom v. Minneapolis, S.P. & S.S.M.R.R. Co.*, 244 Minn. 1, 68 N.W.2d 873 (1955) sums up why the reduction is not attempted in this area as it is with future earning capacity:

An award for pain, suffering, and disability on a per diem basis ignores the subjective basis of such damages. Unlike loss of earnings or the cost of a medical attendant, pain, suffering, and disability recoveries cannot be reduced to mathematical formulae, and on this theory they have been exempted from deductions for present worth. Each day of suffering is a part of a whole and will vary and decrease as time goes on. To permit a per diem evaluation of pain, suffering, and disability would plunge the already subjective determination into absurdity by demanding accurate mathematical compu-

Since the jury will most likely be required to reduce to present value at least the future earnings figure, the determination of the appropriate interest rate to be employed is very often hotly contested during the trial, due to its ultimate effect on the compensation of the plaintiff and corresponding liability of the defendant:

The interest rate employed is of great practical significance, because the higher the rate used in discounting, the lower will be the present sum or total necessary to produce the future contributions or accumulations. In such case the beneficiaries or the estate will get a smaller recovery, which favors the defense. By the same token, if a lower interest rate (or discount) is applied, the award will be higher, favoring the beneficiaries or the estate.<sup>9</sup>

Once determined, the appropriate discount rate, plus the work-life expectancy figure are used in connection with special mathematical tables in order to determine the reduction to present value.<sup>10</sup> Assume that in the case of Mr. Jones, use of his fifteen year work-life expectancy and a five percent discount rate yields the number 11.0 on the present value tables. The jury then simply multiplies 11.0 by the annual salary of \$20,000 and arrives at the present value of the lost earnings, or \$220,000. A two year allotment to compensate for the span from the date of death to the trial, \$40,000, is added without a reduction; thus, the actual damage award is \$260,000. Finally, depending upon the jurisdiction or possible cause of action, a deduction might be required for future income taxes the decedent would have had to pay.<sup>11</sup> Also, since this is a wrongful death action, there would most likely be a reduction for that which the deceased would have spent on himself.

The question whether an allowance for the variable of future inflation should be included in the six to eight economic variables considered by the jury and established during trial has been a prob-

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tation of the present worth of an amount reached by guesswork.

*Id.* at 4, 68 N.W.2d at 891.

9. S. SPEISER, *supra* note 5, § 8:4, at 712-13.

10. For examples of these "Mathematical Tables for Reduction to Present Value" and their complexity, see S. SPEISER, *supra* note 5, § 8:4, at 713-18. For a discussion of the intricacies inherent in these tables, see 3 PERSONAL INJURY ACTIONS AND DEFENSES AND DAMAGES § 3.04(d) at 211-12 n.4 (M. Bender pub. 1965).

11. In the recent decision, *Felder v. United States*, 543 F.2d 657, 665 (9th Cir. 1976) the Court held that both federal and state income taxes must be deducted in computing a wrongful death award under the Federal Tort Claims Act for survivors of decedents whose annual income at the time of death was at least \$30,000. To allow the plaintiffs to recover without the deductions would be the equivalent of "punitive" damages specifically prohibited by the Act: "To award the full incomes to the survivors without deducting these taxes would be to award them monetary compensation that they could not logically or reasonably have expected to receive had decedent lived." *Id.* at 2203.

lem for courts in injury and death action. Since inflation affects the "value" of the dollars used to compensate the plaintiff for all his damages, it would seem to be an important factor in arriving at a final figure.<sup>12</sup> And, because the means used to compensate the survivors or injured plaintiff is dollars, juries should be concerned not only with the face value of the damage award, but also with its "extrinsic" value, that which it can purchase, in order to adequately compensate.<sup>13</sup> As with the establishment at trial of an appropriate future interest rate, the admissibility of a future inflationary rate also has a tremendous impact on both the total compensation for the plaintiff for his lost earnings and the overall liability of the defendant. Attorneys from both sides thus seek out experts who will predict rates favorable to their corresponding goal of increased compensation or decreased liability:

Even with no prospect of advancement he [the deceased] could expect periodic raises because of economy-wide increases in labor productivity and because of general inflation. How rapid will the increases be? The answer, in brief, is that no one knows. Here is a ready bone of contention in the courtroom. Other things being equal, the more rapidly wages are projected to rise in the future, the bigger will be the estimate of the plaintiff's future earnings. The plaintiff would like an expert who can make a case for the rampaging inflation in the future, and the defendant would like an expert who will argue that future inflation is likely to become at worst moderate. Both will probably be wrong, but both certainly cannot be right. The force of one's rhetoric in the courtroom may sway opinion, but it will not change an unknown future.<sup>14</sup>

To illustrate the magnitude of the impact, and why defense attorneys are opposed to such testimony, consider the case of Mr. Jones. If the court permitted a jury to review testimony that the

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12. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1159 (1971) defines "inflation" as: "an increase in the volume of money and credit relative to available goods resulting in a substantial and continuing rise in the general price level - contrasted with deflation."

13. See Note, *Fluctuating Dollars and Tort Damage Verdicts*, 48 COLUM. L. REV. 264 (1948):

At the outset, it is essential to distinguish between the intrinsic and extrinsic value of money. Although the intrinsic value is set by Congress in terms of gold content, there is no legislation which purports to regulate the extrinsic value at which money shall circulate, that is, its value in relation to commodities.

*Id.* at 265.

14. Carlson, *Economic Analysis v. Courtroom Controversy: The Present Value of Future Earnings*, 62 ABA. L.J. 628, 629 (1976). Dr. Carlson, an economist, feels that the controversy between attorneys over what should be the "present value" of future earnings can be resolved. He concludes that the discount rate which is used to determine the "present value" of future gross earnings should be equal to, and thus offset, "projected economy-wide wage increases."

future rate of inflation was five percent, that would offset the five percent discount rate—leaving the widow with \$340,000 instead of the reduced amount of \$260,000.

### III. ADMISSIBLE PREDICTION OR UNBRIDLED SPECULATION?

Despite the fact that recent decisions have labeled the use of expert testimony on future *rates* of inflation as a “novel” question, for many years it has been held that courts may take into account future *prospects* of inflation or deflation in fixing damages for personal injuries.<sup>15</sup> Consideration of an “increased cost of living” and the “impaired purchasing power of the dollar” have been scrutinized when the adequacy or inadequacy of a jury award has been challenged.<sup>16</sup> Inflation was a topic of concern for both judges and juries in personal injury cases long before the current debate over the admission of expert testimony to forecast future inflationary trends:

The court may also take account of future prospects of inflation or deflation, in fixing personal injury damages. The basis of this rule is that compensation means compensation in money, and the value of money lies not in its intrinsic worth but in what it will buy.

It has been held proper for lawyers to argue to a jury that a change in the purchasing power of money or a recent change in economics, generally, should be considered in arriving at an award. . . . Further, this change in the value of money is so much a matter of common knowledge, that judicial notice of the change may be taken by the court in a personal injury action, although evidence of the change has not been introduced.<sup>17</sup>

The increased recognition of the need for analysis of future, as well as present inflationary trends—which traditionally have been considered—has continued to grow over the last five years. From this legal controversy there has evolved a particular set of arguments on behalf of admitting an expert’s data on that subject.<sup>18</sup>

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15. *Calihan v. Yellow Cab Co.*, 125 Cal. App. 649, 13 P.2d 931 (1932); *Richey v. Service Ry. Cleaners*, 28 So. 2d 284 (La. App. 1946); *Henwood v. Moore*, 203 S.W. 2d 973 (Tex. Civ. App. 1947). The court in *Weadock v. Eagle Indemnity Co.*, 15 So. 2d 132 (La. App. 1943) 34 years ago acknowledged the need for a consideration of future inflation: “[t]he decreased purchasing power of the American dollar, with little or no prospect for any change, except probably further decrease, for many years, is a pertinent factor to be taken into consideration in determining the award.” *Id.* at 146.

16. See 3 PERSONAL INJURY ACTIONS, *supra* note 7, § 3.04(9), at 217-19; 22 AM. JUR. 2d DAMAGES § 365 (1965).

17. 22 AM. JUR. 2d DAMAGES § 87 (1965) (footnotes omitted). See also 25A C.J.S. DAMAGES § 197 (1966).

18. *United States v. English*, 521 F.2d 63 (9th Cir. 1975); *Seaboard Coast Line R.R. Co. v. Garrison*, 336 So. 2d 423 (Fla. 1976); *Schnebly v. Baker*, 217 N.W.2d 708 (Iowa 1974);

Some courts have adopted a "middle" ground between permitting such expert testimony and disregarding future inflation altogether, by allowing juries to consider inflation "generally" but not expert evidence forecasting a specific rate of inflation in the future.<sup>19</sup>

The principal cases supporting admissibility of expert testimony on inflation in computing future damages use several grounds to support that theory. One approach argues that inflation is a fact of life and something which all citizens can both relate to and must account for in their own financial affairs.<sup>20</sup> Therefore, jurors drawn from this same segment of society are personally aware of the effects of inflation, for it cannot easily be ignored. Since inflation is such a universal concern, the jury will probably take it into consideration even without an economist's projections. Some courts have allowed the jury to consider inflationary additions to the final figure of damages in order to permit the injured individual or decedent's survivor to keep up with an increasing cost of living.<sup>21</sup> To take the opposite position would require a court to "take the position of an ostrich with his head in the sand. Economic reality requires us to consider not only what the plaintiff is to receive in theory, but in fact."<sup>22</sup>

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Loetzerich v. Texas Pac.-Missouri Pac. Terminal R.R., 325 So. 2d 626 (La. App. 1976); Resner v. N. Pac. Ry., 161 Mont. 177, 505 P.2d 86 (1973); Plourd v. Southern Pac. Transp. Co., 266 Ore. 666, 513 P.2d 1140 (1973). Huddell v. Levin, 537 F.2d 726 (3rd Cir. 1976) adequately clarified this viewpoint:

In holding that expert economic testimony is admissible in actions for wrongful death on the issue of the effect of inflation on the survivor's future pecuniary loss, we are aware that not all courts share this view. In our judgment, however, it is simply unrealistic to ignore the problem of inflation in this context. Given the enormity of the potential impact of rising costs over a long period of time, we conclude that evidence of informed estimates of future inflationary trends will result in damage awards that are fair and just.

*Id.* at 743.

19. See Johnson v. Serra, 521 F.2d 1289 (8th Cir. 1975); Riha v. Jasper Blackburn Corp., 516 F.2d 840 (8th Cir. 1975); Bach v. Penn Central Transp. Co., 502 F.2d 1117, (6th Cir. 1974); Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 474, 483, 341 A.2d 613, 617, 622 (1975). In *Bach*, 502 F.2d at 1122 and *Riha*, 516 F.2d at 843-45, the courts allowed an instruction permitting the jury to consider the element of inflation though not permitting actual economist's testimony.

20. Seaboard Coast Line R. R. Co. v. Garrison, 336 So. 2d 423, 424 (Fla. 1976).

21. Stringfellow v. Rambo, 277 Ala. 349, 351, 170 So. 2d 494, 496 (1965); Resner v. N. Pac. Ry., 161 Mont. 177, 180, 505 P.2d 86, 91 (1973); Scofield v. J.W. Jones Construction Co., 64 N.M. 319, 325, 328 P.2d 389, 394 (1958).

22. Resner v. N. Pac. Ry., 161 Mont. 177, 186, 505 P.2d 86, 91 (1973). Other cases approving an allowance for inflation include *In re Sincere Navigation Corp.*, 329 F. Supp. 652, 660 (E.D. La. 1971); Scruggs v. Chesapeake & O. Ry., 320 F. Supp. 1248, 1251 (W.D. Va. 1970); Brinegar v. San Ore Construction Co., 302 F. Supp. 630, 643 (E.D. Ark. 1969); Brooks v. United States, 273 F. Supp. 619, 629, 634 (D.S.C. 1967); State v. Daley, 287 N.E.2d 552, 556 (Ind. 1972); Lucivero v. Long Island R.R., 22 Misc. 2d 674, 677, 200 N.Y.S.2d 728, 730 (Sup. Ct. 1960); Martin v. Southern Ry. Co., 225 Tenn. 77, 80, 463 S.W.2d 690, 692 (1971).



Consistent with this notion of recognizing "economic reality" is the argument that to disregard inflation is to assume the decedent or injured party would have worked at the same wage forever or "as if he had contracted to work his remaining work-life expectancy at the same salary he was earning on his date of death without any pay raises contemplated."<sup>23</sup> Under this theory, it is relevant to have an economist testify as to future wage increases based on a combination of inflation and increased productivity. One commentator<sup>24</sup> analyzing the fiction of the fixed wage has arrived at a similar conclusion:

More importantly, the plaintiff's position must be considered. To base a future-compensating award on present wage levels relegates beneficiaries to fixed income status. If inflation occurs, as is reasonable to assume, plaintiff will not have been compensated for the loss, since decedent would not have worked at fixed wages throughout his work-life.<sup>25</sup>

The Alaska Supreme Court in *Beaulieu v. Elliott*,<sup>26</sup> a personal injury action, also examined the subject of future wage increases and inflation. Recognizing that annual inflation at a varying rate has been and will continue to exist, the court held it a proper subject for judicial scrutiny. Specifically, the *Beaulieu* court held that the loss of future earnings should not be discounted to "present value" because "inflation . . . offsets the interest that could be earned on . . . 'safe' investments."<sup>27</sup> This line of reasoning is in direct conflict with the reasoning in *Johnson v. Penrod Drilling Co.*<sup>28</sup> where the court held that inflationary surcharges need not be added to the final computation of damages because that factor would be taken

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23. Demos, *Measure of Damages — Wrongful Death*, 60 ILL. BAR J. 518, 521 (1972).

24. Dennis, Sirmon, Drinkwater, *Wrongful Death Damages—Fair Compensation for Future Pecuniary Loss Requires Consideration of Economic Trends and Income Tax Consequences*, 47 MISS. L.J. 173 (1976). For some enlightening appendices showing human life value calculations with earnings adjustments for inflation, see 204-09.

25. *Id.* at 183.

26. 434 P.2d 665 (Ala. 1967).

27. *Id.* at 671. As well as using the interest rate on "safe" investments to discount an award, the "legal" rate of interest has also been adopted by courts in the past. See *Jones v. Friesel*, 207 F. Supp. 925 (W.D. Pa. 1962); *Florida Cent. & Pac. R. Co. v. Burney*, 98 Ga. 1, 26 S.E. 730 (1895). See also Annot., 105 A.L.R. 234 (1936) for a general discussion of the determination of discount rates.

28. 510 F.2d 234 (5th Cir. 1975). The court held: "[I]f future inflation does cause higher wages, experience predictably demonstrates that higher rates on investments which have always accompanied inflation will also occur and this factor will mitigate the failure to include an inflationary surcharge in wage rate calculations." *Id.* at 236. It has also been mentioned that inflation will be taken into account because the plaintiff can invest his award in "equities such as land and thus have the benefit of both inflation and income." *Schnebley v. Baker*, 217 N.W.2d 708, 727 (Iowa 1974).

into consideration by these same "safe" investment rates discussed in *Beaulieu*. The *Johnson* court held that the interest rates on these investments (plaintiff's damage award) will increase in proportion to the inflationary rate so that discounting is proper. The question then arises, however, whether or not the plaintiff would be adequately compensated if these interest rates did not in fact keep up with a spiraling inflationary rate. The jury should be allowed to take that possible imbalance into consideration.

Besides these arguments for admissibility, it has also been held that because a future rate of inflation is "uncertain" or cannot be determined with exactitude is an insufficient reason for totally disregarding its existence: "Juries are constantly called upon to evaluate the effect of future or hypothetical events."<sup>29</sup> The fact that the court is dealing with "hypotheticals" or "educated guesses" when projecting inflation is not a function unknown in the courtroom:

While there is no certainty to the future, this is an inadequate ground for the exclusion of an educated guess. Mortality tables obviously do not purport to state exactly when a particular individual will die, but they do provide a reasonable estimate, fair to plaintiff and defendant, while reducing the jury's scope of conjecture. Similar logic should be applied to the issue of consideration of future economic trends.<sup>30</sup>

The Ninth Circuit Court of Appeals in *United States v. English*,<sup>31</sup> an action for personal injuries under the Federal Tort Claims Act, agreed with the proposition that "reasonable predictions" are not so foreign to the legal arena. Most predictions are uncertain to an extent, but that alone is a poor excuse not to strive to ascertain them:

While predicting future inflationary trends, or extrapolating from present ones, may be speculative, so are most predictions courts make about future incomes, expenses (as, for example, in the case of the wrongful death of an infant). Since it is still more probable that there will in the future be changes in the purchasing power of the dollar, it is better to try as best we can to predict them rather than to ignore them altogether.<sup>32</sup>

Proponents of the admissibility of expert testimony on future

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29. *Seaboard Coast Line R.R. Co. v. Garrison*, 336 So. 2d 423, 425 (Fla. 1976).

30. 47 Miss. L.J., *supra* note 23 at 182 n.49.

31. *United States v. English*, 521 F.2d 63 (9th cir. 1975).

32. *Id.* at 75. For added authority that the decreasing power of the dollar has been held to be a proper factor for consideration in calculating an award for future loss of wages see, *Goutierrez v. Travelers Insurance Co.*, 107 So. 2d 847 (La. App. 1959); *Edwards v. Simms*, 294 So. 2d 611 (La. App. 1974).

inflation urge that a consideration of probabilities is essential in a determination of a "just" award. They concede, however, that certain precautions must still be adopted to insure that the evidence presented to the jury is nevertheless "competent."<sup>33</sup> To satisfy the requirement of "competency" the judge should limit the jury's inquiry to those estimates of future changes in the purchasing power of money which can be "based on sound and substantial economic evidence, and . . . can be postulated with some reliability."<sup>34</sup>

Thus, the advocates of expert testimony on future inflation stress 1) economic reality, 2) the underlying concept of all compensatory damages—making the plaintiff "whole," 3) the fictional nature of the fixed future wage, and 4) that statistical predictions by economists in this area are as "reliable" as forecasting life expectancy and future interest rates. Yet at the same time they realize the need for guidelines to establish a foundation for the evidence that is to be admitted.

Those opposed to admitting expert testimony on future inflation basically argue that reduction to "present value" is still the best rule to be followed; and that any testimony as to future rates of inflation which might affect that reduction is mere conjecture and too speculative.<sup>35</sup> Although the issue has come up in different contexts in the federal courts, many have disallowed inflationary additions to future earnings.<sup>36</sup> For example, in *Johnson v. Penrod Drilling Co.*, the Fifth Circuit held not only that the influence of possible inflation on future lost earnings is too speculative a matter for judicial determination, but also that a jury should be instructed not to consider other signposts of inflation such as the purchasing power of the dollar or the consumer price index.<sup>37</sup>

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33. The dangers inherent in making predictions about the future of economic conditions have been recognized along with their advantages. See *Bach v. Penn. Central Transp. Co.*, 502 F.2d 1117, 1122 (6th Cir. 1974).

34. *United States v. English*, 521 F.2d 63, 76 (9th Cir. 1975). *Huddell v. Levin*, 537 F.2d 726 (3rd Cir. 1976) also indicated: "The plaintiff, however, bears the burden of proof and it is the responsibility of the plaintiff to provide for the jury some evidentiary and logical basis for calculating or, at least rationally estimating a compensatory award." *Id.* at 743-44.

35. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975); *Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972); *Murphy v. Eaton, Yale & Towne, Inc.*, 444 F.2d 317 (6th Cir. 1971); *Henderson v. S.C. Loveland Co., Inc.*, 396 F. Supp. 658 (N.D. Fla. 1975); *Raines v. New York Central R.R. Co.*, 129 Ill. App.2d 294, 263 N.E.2d 895 (1970), *rev'd on other grounds*, 51 Ill. 2d 428, 283 N.E.2d 230 (1972), *cert. denied*, 409 U.S. 983 (1972).

36. *Magill v. Westinghouse Electric Corp.*, 464 F.2d 294, 301 (3rd Cir. 1972); *Petition of United States Steel Corp.*, 436 F.2d 1256, 1280 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971); *United States v. Furumizo*, 381 F.2d 965, 970-71 (9th Cir. 1967).

37. The reasoning used in *Penrod* by the Fifth Circuit that inflation is too "speculative" to be considered in the computation of lost future earnings has been extended to the area of

Similarly, in *Williams v. United States*<sup>38</sup> the First Circuit held that in fixing damages for wrongful death anticipated future earnings should not be increased in an attempt to account for possible future inflation. And, the Sixth Circuit held that a lower court erroneously awarded damages without reducing them to present worth on the basis that inflationary trends would offset any present worth reduction.<sup>39</sup> *Sleeman v. Chesapeake & Ohio R. Ry.*<sup>40</sup> epitomizes the position that "unbridled speculation" on future rates of inflation leads nowhere and merely establishes precedent that may allow "speculation" to become admissible in *other* areas as well:

Of course, the nation's economic history since the 1930's would appear to make the use of present wages as the standard for loss of future earnings somewhat unfair to plaintiffs. But as to the future, the inflation versus deflation debate rages inconclusively at the highest policy levels of our government, in national electoral campaigns, in learned economic journals and is exemplified by the daily gyrations of the stock markets. The debate seems unlikely to be resolved satisfactorily in one personal injury trial. And if testimonial resolution of this factor bearing on the future is attempted, the door is open to similarly speculative and debatable offsets tending in other directions.<sup>41</sup>

One of the primary authorities cited in the opinions holding such testimony inadmissible is F. Harper and F. James, *Law of Torts*.<sup>42</sup> In that volume, the authors discussed the speculation inherent in future damages and concluded that the only logical position is to retain the basic rule of reducing awards to their present value:

Future trends in the value of money are necessarily unknown and so always render such damages speculative in a way we cannot escape. . . . It is not at all clear that courts would be willing to hear experts on the matter, or that they would get much real help if they did. For the most part the problem which is inevitably present in

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property damages. See *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300, 308 (5th Cir. 1976). The Fifth Circuit in *Matter of S/S Helena*, 529 F.2d 744, 753 (5th Cir. 1976) also remanded a district court decision where the judges had not followed the dictates of *Penrod* and had offset the discounting to present value by considering the effects of inflation in determining several wives' damages for loss of support.

38. 435 F.2d 804 (1st Cir. 1970).

39. *Sleeman v. Chesapeake and Ohio Ry. Co.*, 414 F.2d 305 (6th Cir. 1969).

40. *Id.* at 307.

41. *Id.* at 308. This argument of not wanting to open the door to testimony on other "hypothetical matters" in the courtroom seems to be one of the most valid for this side of the controversy. See also *McWeeney v. New York, N.H. & H. R.R. Co.*, 282 F.2d 34 (2d Cir. 1960), *cert. denied*, 364 U.S. 870 (1960).

42. 2 F. HARPER & F. JAMES, *LAW OF TORTS* § 25.11 (1956).

every case of future loss is not analyzed and the present value of money is assumed to be the proper basis.<sup>43</sup>

Despite authority such as Harper and James and recent court decisions which hold the nature of such expert testimony to be "too speculative," there has been growing criticism of this position not only in other courts but in scholarly journals as well.<sup>44</sup>

It should also be noted, as was stated earlier,<sup>45</sup> that the concept of inflation in these actions may be considered at different levels. Recent decisions on the "inadmissibility" of expert evidence on *future* inflation have been made in the context of cases focused primarily on predicting future wage increases, and thus do not address the issue of whether the jury may consider *present* inflationary economic trends when arriving at a verdict, or whether an appeals court can note the decreased purchasing power of the dollar when reviewing a lower court's decision. The reasoning behind using evidence or taking judicial notice of inflation in the latter two situations, however, should also be applied by analogy to its consideration in future wage projections.

It would seem from the plethora of literature and court decisions in this area that a trend is discernible in the direction of the acceptance of the admissibility of expert economic testimony on the subject of future inflation in personal injury and wrongful death actions. This viewpoint appears to be not only the most rational position, but by far the most equitable. It is most consistent with the underlying theory of compensatory damages: to strive to make the plaintiff "whole" by giving him the value of what he would have received in the future had it not been for the negligence of the defendant.

It has long been established that a jury can consider "economic conditions" and the "present purchasing power of money" in com-

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43. *Id.* at 1325-26. Henderson, in 40 INS. COUNSEL J., *infra* note 44, at 430, indicates that the 1968 supplement to this prestigious authority has changed the weight of this statement by accepting the "fact" of inflation.

44. Henderson, *The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value*, 20 S.D. L. REV. 307, 308-10 (1975); Henderson, *Some Recent Decisions on Damages; with Special Reference to Questions of Inflation and Income Taxes*, 40 INS. COUNSEL J. 423, 428-32 (1973); Comment, *Future Inflation as an Element of Damages in Alabama*, 5 CUMB.-SAM. L. REV. 72-74 (1974); Note, *Future Inflation and the Undercompensated Plaintiff*, 4 LOYOLA U. CHICAGO L.J. 359 (1973); Comment, *Damages for Loss of Future Income: Accounting for Inflation*, 6 SAN. FRAN. L. REV. 311 (1972); Note, *Damages Adjusting Future Earnings for Inflation*, 37 OHIO ST. L.J. 138, 152 (1976); Note, *Damages—Future Inflation—Fact of Possible Future Inflation will not be Included in the Calculation of Future Damages*, 7 ST. MARY'S L.J. 432, 439 (1975); Comment, "Inflation and Future Loss of Earnings", 27 BAYLOR L. REV. 281, 291 (1975).

45. See generally cases cited notes 16 and 17 *supra*.

ing to a final figure. Because inflation, both present and future, seems to be an essential ingredient of the former and a synonym for the latter, inflation is indeed relevant in accomplishing full compensation for the plaintiff. A reviewing court can consider current economic trends in determining whether a jury verdict is excessive; it seems no less germane to consider future economic trends when a verdict is similarly scrutinized. Thus, "future" inflation is no less relevant than its present rate, which juries and judges sitting as triers of fact are already allowed to consider: "We must remember that the problem for the jury is death cases, is the *future*—future earnings, and concomitant contributions or accumulations. The past is only one guide to the future, and it is not conclusive by any means."<sup>46</sup>

Is the "speculation" or "unreliability" inherent in future interest rates, projection and allowance for future income tax rates, and predictions of life and work-life expectancy, different from a labor economist's statistical predictions as to future rates of inflation? The basic concern in damage actions is to compensate; in order to actually accomplish that result, the *real* value of the dollars awarded not only now but in the future, that is, present *and* future "purchasing power" of that money must be of the utmost concern for the trier of fact. In order to fill its normal function of compensation, the jury must be given all the relevant information which may affect its final assessment. Although the present value of a damage award coincides with its *real* value at the time it is awarded, juries should not be allowed to ignore the fact that inflation gradually diminishes the purchasing power of those dollars. The result is an eventual inequity between the amount awarded and the intended value of that judgment. The basic concern for the courts would seem to be not whether there will be inflation or deflation in the future, but the most accurate projection of the reality of future inflation.

Since it appears in the interests of justice to consider predictions of future rates of inflation, courts need to be given guidance in formulating more consistent standards to judge the competency of admissible expert testimony. The jury should not be left to speculate on its own as to the future. Experts should present evidence subject to effective cross-examination.<sup>47</sup> Hopefully state and federal

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46. S. SPEISER, *supra* note 6, § 8:10, at 740.

47. S. SPEISER, *supra* note 2, § 13:2, at 208 feels that in selecting an economist to testify on the subject of appraising earnings there are seven essential qualifications that must be met:

1. Field of formal study: economic theory, labor economics, mathematics, statistics.

case law will develop various tests for evaluating the experts' competency, and the statistical bases for their projections will become more uniform. Also, state legislatures may follow the steps of Rhode Island, which has settled the issue of admissibility by passing a statute specifically declaring the admissibility of expert projections on the issue of inflation.<sup>48</sup>

## V. CONCLUSION

Inflation has been and most likely will continue to be a problem with which all of us will have to deal in planning our financial futures. It is virtually an established facet of our contemporary society and a variable with which the injured party or decedent would have had to wrestle had he continued working. Thus it would seem to be a factor that must be taken into account when the court comes to a conclusion concerning the future damages these individuals or their survivors should receive, particularly in the area of future earnings. If it is not taken into the jury room, as a court has so perceptively noted,<sup>49</sup> our judicial system will be ignoring a blatant and ever-increasing economic reality—transforming itself into the proverbial "ostrich with its head in the sand."<sup>50</sup>

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2. Experience: university or college teaching at a tenured academic rank with demonstrated capacity for research and experience in appraisal work, including testimony at trial.

3. Degree: doctorate in economics.

4. Publication in the field of economics in recognized leading scholarly journals.

5. Related employment: government service or consulting work, with government and industry.

6. Membership: American Economic Association.

7. Computer familiarity: knowledge of computers and of computer programming.

48. R.I. GEN. LAWS ANN. § 10-7-1.1.3 (Bobbs-Merrill Supp. 1976) in relation to wrongful death actions provides:

Reduce the remainder thus ascertained to its present value as of the date of the award. In determining said award, evidence shall be admissible concerning economic trends, including but not limited to projected purchasing power of money, inflation and projected increase or decrease in the costs of living.

49. *Resner v. Northern Pac. Ry.*, 161 Mont. 177, 505 P.2d 86 (1973).

50. *Id.* at 186, 505 P.2d at 91.