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FUTURE INFLATION AND THE UNDERCOMPENSATED PLAINTIFF

The legal and economic principle underlying assessment of damages is that the injured party should, as nearly as possible, be fully compensated for his injury.¹ An assessment of damages for future loss which compensates the plaintiff at a present point in time for losses extending far into the future should reflect reasonably probable future occurrences which would significantly affect the value of the compensation. A damage award which ignores the economic fact that an amount of money given at a present point in time will, through investment, be worth more than the same amount given over future intervals, will be of certain and critical inaccuracy.² The function of fairly compensating victims of serious tortious injuries is too essential to indulge in ignoring so relevant an economic fact as the earning power of money. Of equal significance in approaching an accurate and fair assessment of actual lost value is the economic fact that the purchasing power of money changes dramatically over an extended period of future time.³ As concluded by Stuart Speiser in his treatise on wrongful death, it is a matter of "logic, fairness, and justice" that as the defendant gets the benefit of reduction to present value, the plaintiff should receive consideration for future inflation shrinking the purchasing power of the dollars awarded for future loss.⁴

Compensation for loss of future earnings, without adjustment for future inflation, permanently freezes the lost earnings of the plaintiff at the present cost of living. Yet, the most prevalent position taken by courts today is either to consciously prohibit introduction of economic evidence on this matter, or, unconsciously, to overlook the problem of future loss of dollar value. In recent years, the issue has been raised with increasing frequency, and some courts are now explicitly allowing for the

1. *Bussy v. Donaldson*, 4 U.S. (4 Dall.) 206 (1800).

2. *See Chesapeake and Ohio Ry. v. Kelley*, 241 U.S. 485 (1916).

3. *See Note, Damages for Loss or Future Income: Accounting for Inflation*, 6 U. SAN FRAN. L. REV. 311 (1972); *Fluctuating Dollars and Tort Damage Verdicts*, 48 COLUM. L. REV. 264 (1948).

4. S. SPEISER, *RECOVERY FOR WRONGFUL DEATH*, Sec. 8:9 (1966).

likelihood of continuing increases in the cost of living. This note will look at the economic effect of inflation on compensation for future loss and will explore the different legal approaches taken by the courts. These approaches, showing widely divergent concern for precision, give varying emphasis to the influence of future inflation. The position will be taken that a rational and equitable mechanism for evaluating the exact weight to be given to future inflation is to allow the finder of fact to consider expert economic evidence and determine the exact weight to be given to the inflation factor.

ECONOMIC PERSPECTIVE ON FUTURE INFLATION

The problem of accounting for future changes in the cost of living has a significant effect on whether an injured party is justly compensated. As long as inflation continues, the plaintiff will be undercompensated by a system using a lump-sum award which does not allow for future changes in the cost of living. It does not take galloping inflation of 6% or more a year to drastically shrink the value of the damage award to the injured party. Assuming an annual increase in purchasing power of only 3%, a damage award given to a twenty year old permanently disabled plaintiff will, by his sixty-fifth birthday, will be reduced by 75% in real purchasing power.⁵ A 3% increase in the cost of living per year, for twenty years, would shrink a \$100,000.00 award down to \$54,400.00 in value.⁶ As the plaintiff grows older, the injustice becomes more apparent, and the possibility of economic drain on his family becomes more real.

As indicated by economist George Terborgh, the hardship of inflation is most acute for those unable to earn a livelihood and wholly dependent on a fixed source of income.⁷ This describes the permanently disabled personal injury victim who must live off his damage award. Terborgh reveals that fortunately, complete dependence of the infirm and the aged on fixed income is now rare due to the development of social insurance which is escalated in some manner against inflation.⁸ For instance, federal social security benefits were not traditionally escalated for inflation, but achieved a similar result through periodic adjustment by Congress. However, the 92nd Congress amended the Social Security Act to provide for automatic cost of living increases in benefits, effective January 1, 1973. Periodic payment of damage awards has been suggested

5. P. SAMUELSON, *ECONOMICS* 270 (6th Edition 1964).

6. G. TERBORGH, *ESSAYS ON INFLATION* 89 (1971).

7. *Id.* at 89.

8. *Id.* at 90.

as an analogous adjustment.⁹ This note will assume the continuance of a system of lump-sum damage award, though the prospect of continuing changes in dollar value makes a strong argument for a system of periodic awards.

Those receiving a lump-sum award discounted to present value and unadjusted for future inflation have no opportunity to adjust their award to meet the effect of decreasing dollar value. The only real choice of the plaintiff is to try to hedge against inflation by submitting to the hazardous course of high risk investment, or to suffer a shrinkage in the value of the award to far below the value of the losses it supposedly measures. For those who are totally dependent on their awards, a minimal rate of inflation over their life spans will have a debilitating effect on their ability to survive economically.

Just as compensation which ignores the effect of inflation does substantial injustice to the plaintiff, an award which ignores an extended period of deflation does injustice to the defendant.¹⁰ The apparent economic fact of life, however, as recognized by many courts¹¹ and economists, is that the future will probably bring a continuation of the current, extended period of inflation. A leading case which refuses to allow for future inflation is *Armentrout v. Virginian Ry.*¹² Even here the court indicated that it need not close its eyes to the economic facts of life, but it stated that the possibility of future deflation is at least as great as the possibility of future inflation. An economic overview indicates that it is not highly speculative to assert that future inflation is more probable than future deflation.

Over the last sixty years of recorded economic history the cost of living index has risen, almost without interruption. Using 1967 as the base year (100%), the cost of living index has risen from 29.7% in 1913 to 126.6% in October, 1972.¹³ The significant temporary interruption in this long extended period of inflation occurred during the years of the depression. While it might be overly optimistic to declare that this country will never again experience a significant long-term

9. See Note, 2 OKL. L. REV. 224 (1949).

10. See, e.g., *Calihan v. Yellow Cab Co.*, 125 Cal. App. 649, 13 P.2d 931 (1932) (dictum).

11. See, e.g., *McWeeney v. New York, New Haven, and Hartford R.R.*, 282 F.2d 34 (2d Cir. 1960), cert. denied, 364 U.S. 870 (1960); *Brooks v. U.S.*, 273 F. Supp. 619 (D.S.C. 1967); *Beaulieu v. Elliot*, 434 P.2d 665 (Alaska 1967); *Port Terminal R.R. Ass'n v. Macaluso*, 450 S.W.2d 873 (Tex. Civ. App. 1970); *Henwood v. Moore*, 203 S.W.2d 973 (Tex. Civ. App. 1947).

12. 72 F. Supp. 97 (S.D.W. Va. 1947).

13. U.S. DEPARTMENT OF LABOR, HANDBOOK OF LABOR STATISTICS 1909-1947 (1950) and FEDERAL RESERVE BULLETIN, Dec. 1972 at A68.

period of deflation, the economic indications are that it is reasonable to predict a continuation of inflation for some time. Economists may differ considerably in explaining why inflation is so prevalent a condition. They may differ in predicting the short term extent of inflation, such as the rate at which the consumer price index will rise in the following year. However, a prediction of generally continuing inflation is more descriptive than explanatory in nature, and therefore is not so controversial a position.

Economics Professor G. Dick maintains that it is highly probable that the United States will continue to experience inflation for some time, at a minimal rate of 2% or 3% a year.¹⁴ Economists D. Hamilton and M. Patterson suggest that it is possible to adjust damage awards by using a compound rate of 2% inflation a year, a rate which is in conformity with long periods of American price experience.¹⁵ Accounting and Economics Professor W. Patton, noting that the dollar, by any measure used, has lost more than 60% of its buying power in the last twenty to twenty-five years, intimates that anxiety as to future inflation is fully justified in light of the historical evidence.¹⁶ Lewis Berman, an observer for *Fortune*, has indicated that the resilience of inflation despite all the government's anti-inflation programs has led many economists to believe that systemic changes have occurred which tend to make future inflation inevitable.¹⁷ He notes that the stubbornness of inflation is leading the Council of Economic Advisors to re-examine the problem, and states that the Council may conceivably conclude that "all available prescriptions are either ineffective or worse than the disease—and that the U.S. will simply have to learn to live with inflation."¹⁸

Another indication of the pervasiveness of inflation is its international character. An empirical study of inflation in forty "democratic" nations, from 1955 to 1971, indicates that all of these nations experienced an increase in their general price level (based on United Nations data), and only three of these nations had increase rates of less than 2% yearly.¹⁹ Another empirical survey of inflation in sixteen industrialized nations, including the United States, concludes that it is absolutely clear that no

14. Dick, *Economists Role in the Trial of a Personal Injury Case*, 18 *PAC. LAW* 57, 59 (1972).

15. Hamilton and Patterson, *The Economic Side of Wrongful Death Actions in New Mexico*, 2 *N. MEX. L. REV.* 127, 136 (1972).

16. *Financial Executive, Part II Inflation Measurement, Impact Culprits*, Nov. 1972 at 54.

17. *FORTUNE, Emerging Debate About Inflation*, March 1972 at 50.

18. *Id.* at 153.

19. NATIONAL BUREAU OF ECONOMIC RESEARCH—NEW DIRECTIONS IN ECONOMIC RESEARCH, 51st Annual Report, Sept. 1971 at 73.

democratically elected government is prepared to deflate its nation's economy and risk substantial increases in unemployment.²⁰

Recently, as a rationale supporting a refusal to allow for future inflation, courts have taken notice of the Economic Stabilization Act of 1970 which imposes broad price controls.²¹ Rigid controls have since been relaxed, but the economic failure of these controls to bring an end to inflation should be noted. During the thirteen months of Phases I and II of this policy (August, 1971 to September, 1972) the consumer price index on all items rose 3.2%, on food 4.2%, and on services 3.4%.²²

Unfortunately, the following economic analysis made by Judge Friendly in *McWeeney v. New York, New Haven, & Hartford Railroad* seems to be justified:

Yet there are few who do not regard some degree of continuing inflation as here to stay and would be willing to translate their own earning power into a fixed annuity, and it is scarcely to be expected that the average personal injury plaintiff will have the acumen to find investments that are proof against both inflation and deflation—a task formidable for the most expert investor.²³

An economic perspective on the problem of inflation indicates the prevalence of inflation and its serious effect on the plaintiff when courts do not compensate for it. A person who causes an injury to another should not be allowed to cast any appreciable portion of the loss on the injured party.²⁴ Juries are allowed to act upon probable and inferential proof of damages, for any other rule enables the wrongdoer to profit by his own wrongdoing.²⁵ Courts should therefore make allowance for future inflation, so that the heavy burden of decreasing dollar value does not fall on the injured party.

LEGAL PERSPECTIVE ON FUTURE INFLATION

The complexities involved in recognizing and giving substantive weight to the effect of changing dollar values have caused courts to take a variety of positions on the future inflation question.²⁶ These positions

20. FORTUNE, *Faster Growth Ahead—And Faster Inflation Too*, August 1972 at 146.

21. *Johnson v. Penrod Drilling Co.*, 469 F.2d 897 (5th Cir. 1972).

22. U.S. Department of Labor, Bureau of Labor Statistics, MONTHLY LABOR REVIEW, Dec. 1972 at 32.

23. 282 F.2d 34, 38 (2d Cir. 1960), cert. denied, 364 U.S. 870 (1960).

24. See *Gowdy v. United States*, 271 F. Supp. 733 (W.D. Mich. 1967); *Pierce v. New York Cent. R.R.*, 304 F. Supp. 44 (W.D. Mich. 1969). (Cited in *Pierce* as rationale for allowing consideration of future inflation).

25. *Bigelow v. R.K.O. Radio Pictures*, 327 U.S. 251, 264 (1946).

26. See 12 A.L.R.2d 611. See also *Actuarial Assessment of Damages: The Thalidomide Case*, 35 MOD. L. REV. 140 for discussion of English cases on future inflation.

vary in the degree to which they recognize future inflation, the substantive weight which they accord its effect, and the precision of the mechanism adopted for assessing its effect. The most prevalent posture is that the problem of future inflation is not consciously grappled with.²⁷ This might be a practical and reasonable position when losses are slight or do not extend far into the future. Where future losses are more significant, this position is almost certain to leave the plaintiff seriously undercompensated. Plaintiff's lawyers are increasingly presenting the inflation issue to the courts where significant future personal injury or wrongful death losses are involved, thereby requiring courts to take a position on this issue. When they are forced to take a position, the most prevalent posture has been to deny a direct accounting for the effect of future inflation.

The earliest posture which gave some cognizance to future inflation came about through judicial notice of continuing inflation in reviewing damage awards for excessiveness. Awards were found to be not excessive considering the likelihood that the value of the dollar will continue to decrease.²⁸ This position recognizes that future inflation has an effect and gives it some imprecise weight at the reviewing stage, but fails to provide a meaningful, operational mechanism for the initial assessment of damages. The implication is that the jury guessed at the weight to be given inflation, and that it guessed correctly. The speculativeness of the adjustment for the changing value of the dollar is increased by the off-hand manner of the court in evaluating the problem.

In its behalf, such judicial notice embodies a recognition that damage awards are never likely to be completely accurate in assessing loss. Accordingly, such a position gives an imprecise, but substantive weight to future inflation. Theoretically there is a figure that will compensate each plaintiff for the precise value of his loss, and yet practically that figure is impossible to ascertain. By taking judicial notice the court avoids what might be considered to be the pretense of exactitude. Judicial notice is but one of the ways in which courts have given weight to future inflation, without attempting to precisely calculate its effect.

A common position posits that failing to consider future inflation and

27. See 2 F. HARPER AND F. JAMES, *THE LAW OF TORTS*, 1325, § 25.11 (1956).

28. *Port Terminal Railroad Association v. Macaluso*, 450 S.W.2d 873 (1st Dist. Tex. Civ. App. 1970); *Scofield v. J.W. Jones Constr. Co.*, 64 N.M. 319, 328 P.2d 389 (1959); *Borzea v. Anselmi*, 71 Wyo. 348, 258 P.2d 796 (1952); *Alabam Freight Lines v. Thevenot*, 68 Ariz. 260, 204 P.2d 1050 (1949); *Henwood v. Moore*, 203 S.W.2d 973 (Tex. Civ. App. 1947) (award nonetheless, found to be excessive); *Weadock v. Eagle Indem. Co.*, 15 So. 2d 132 (La. App. 1943). *Contra*, *Hodkinson v. Parker*, 70 S.D. 272, 16 N.W.2d 924 (1944). See H. OLECK, *DAMAGES TO PERSONS AND PROPERTY* § 117 (1957).

plaintiffs' lawyer's fees is roughly balanced by not accounting for income taxes on plaintiff's lost earning power.²⁹ The implication is that since these factors roughly balance out, it is simpler not to give any of the factors specific affirmative weight. The imprecision of this rule leads one to question whether its basic balancing formula is arithmetically correct in the weight it assigns to each factor. Judge Friendly, the author of this method of accounting for future inflation, has suggested that if inflation should continue at its present pace, courts may have to reconsider the propriety of this balancing formula.³⁰

Other courts have given greater substantive weight to future inflation by taking a posture somewhat closer to attempting precise calculation of the effect of inflation. These courts refuse to discount the award for future earnings as a balance "equal" to disregarding future inflation. The rationale for this position is explained by the Supreme Court of Alaska in *Beaulieu v. Elliot*:

Annual inflation at a varying rate is and has been with us for many years. . . . This rate of depreciation offsets the interest that could be earned on government bonds and many other "safe" investments. As a result the plaintiff, who through no fault of his own is given his future earnings reduced to present value must, . . . invest his money, in enterprises, other than those which are considered "safe". . . . Since the plaintiff, through the defendant's fault and not his own, has been placed in the position of having no assurance that his award of future earnings, reduced to present value, can be utilized so that he will ultimately realize his full earnings, we believe that justice will best be served by permitting the trier of fact to compute loss of future earnings without reductions to present value.³¹

There is an appealing logic to this crude balancing of reduction to present value versus adjustment for future inflation. The damage award might be viewed as the product of two conceptual equations. The first equation consists of all the additive factors of loss measured in current dollars. The second equation is the mathematical transformation of the dollar loss of the first equation into the real value loss. The discount to present value, accounting for the earning power of money, is that part of the real value loss equation which attempts to measure dollars presently given against the future earning value of the dollars. An adjustment for

29. *McWeeney v. New York, New Haven and Hartford R.R.*, 282 F.2d 34 (2d Cir.), cert. denied, 364 U.S. 870 (1960).

30. *Yodice v. Koninklijke Nederlansche Stoomboot Maatschappij*, 443 F.2d 76 (2d Cir. 1971).

31. 434 P.2d 665, 671 (Alas. 1967). Accord, *Pierce v. N.Y. Cent. R.R.*, 304 F. Supp. 44 (W.D. Mich. 1969); *Gowdy v. United States*, 271 F. Supp. 733 (W.D. Mich. 1967). *Contra*, *Meir v. Bray*, 256 Ore. 613, 475 P.2d 587 (1970).

future inflation, accounting for the change in purchasing power of the dollar, is a component of the real value loss equation which attempts to measure dollars presently given against the future purchasing value of the dollars. These two future influences on dollar value are logical counterparts.

The lump-sum damage award for loss of future earnings is comparable to a hypothetical long term labor wage contract where all salaries are paid on the first day of the contract. Management would think it unfair if the earning power of wages over the length of the contract was not accounted for in the wage level negotiated. Labor would think it unfair if the diminishing purchasing power of their wages over the length of the contract was not accounted for in the wage level negotiated. Compensation to the permanently disabled for loss of future earnings, without adjustment for inflation, permanently freezes plaintiff's earnings at the present cost of living.

Those courts which have expressly repudiated balancing of these two factors of future economic value³² have expressed concern that prediction of future inflation is too speculative to be given weight.³³ In *Sleeman v. Chesapeake O.R.R.*,³⁴ a case frequently cited by courts refusing to adjust for inflation, the court recognized that the nation's economic history since the 1930's would appear to make the lack of adjustment for inflation somewhat unfair to the plaintiff, but nonetheless, felt that the inflation versus deflation debate is still continuing inconclusively. The *Sleeman* court further indicated that adjustment for future inflation would leave the door open to similar "speculative and debatable offsets tending in other [unnamed] directions."³⁵

By way of contrast, discounting to present value is an economic and mathematical refinement more fictional and speculative than an allowance for future inflation.³⁶ In discounting an award by future interest rates, speculative assumptions are made as to how plaintiff will invest his award, and then additional assumptions are made as to hypothetical investment choices of the plaintiff. Speculation about plaintiff's investment use of his award will most likely be incorrect because individuals under infinitely varying future circumstances will use their money differ-

32. *Johnson v. Penrod Drilling Co.*, 469 F.2d 897 (5th Cir. 1972); *U.S. Steel Corp. v. Lamp*, 436 F.2d 1256 (6th Cir. 1970), *cert. denied*, 402 U.S. 987, *reh. denied*, 403 U.S. 924, *reh. denied*, 403 U.S. 940 (1971); *Frankel v. U.S.*, 321 F. Supp. 1331 (E.D. Pa. 1970); *Sleeman v. Chesapeake and O. R.R.*, 414 F.2d 305 (6th Cir. 1969).

33. *Cf. Zaninovitch v. American Airlines, Inc.*, 26 App. Div. 2d 153, 271 N.Y.S.2d 866 (1966); *Armentrout v. Virginian Ry. Co.*, 72 F. Supp. 997 (S.D. W. Va. 1947).

34. 414 F.2d 305 (6th Cir. 1969).

35. *Id.* at 308.

36. S. SPEISER, *RECOVERY FOR WRONGFUL DEATH*, § 8:9 (1966).

ently. This being the case, the prediction as to the investment potential of the damage award will be both fictional and incorrect. Allowing for future inflation is dependent only on an expert economic assessment of the future value of money. It is a logical certainty that the changing value of money will have a direct, non-fictional effect on the value of the award to the plaintiff.

Sleeman also indicates that future inflation should not be balanced against discount to present value because of the precedent of *Chesapeake and Ohio Railway v. Kelley*.³⁷ In *Kelley*, an F.E.L.A. case, the Supreme Court recognized the earning power of money and ruled that awards should be discounted to adjust for this factor. This decision was based on the necessity of adjusting present lump-sum awards for future earnings, and stands more generally for the principle that accurate and fair compensation requires consideration of future influences on the real value of the dollar award. The *Kelley* discount to present value rule should not be followed inflexibly to include discount for future earnings but to preclude consideration of the effect of future inflation on the damage award.

A better argument against balancing future earning power of money against future inflation is not that either is too speculative, or that such a position offends Supreme Court precedent, but that this balancing treats significant factors of the damage award too crudely and imprecisely. The ultimate accuracy and fairness of a damage award will depend upon the extent to which the finder of fact is permitted to evaluate all relevant factors which have a significant effect on the assessment of plaintiff's losses. Admittedly, complete accuracy cannot be achieved, but an attempt at complete accuracy will produce a greater likelihood of fair and accurate awards. The commuter facing a somewhat inaccurate train schedule, will still more likely catch his train by using the schedule than by ignoring it. Some courts have allowed the finder of fact to consider inflationary trends as evidence, and to evaluate the precise weight to be given to future inflation.

In *Scruggs v. Chesapeake and Ohio Railway Company*³⁸ the court held that it is proper to allow an economics professor to testify on future trends in the purchasing power of money. The court stated that such testimony would not make the conclusions of the jury less correct, and could make the conclusions more correct. Inflation is cited in *Scruggs* as a topic of almost universal discussion, which would probably not

37. 241 U.S. 485 (1916).

38. 320 F. Supp. 1248 (W.D. Va. 1970).

escape the attention of the jury even in the absence of testimony about it. The *Scruggs* court indicated that consideration of inflation is no less speculative than assessment of damages for pain and suffering.

In *Nollenberger v. United Airlines*³⁹ the court submitted a special interrogatory to the jury on what annual rate of inflation, if any, should be allowed. In *Curry v. United States*⁴⁰ the trier of fact was permitted to take into account a future inflationary rate assessed at 3% to 4% a year. In the case of *In re Sincere Navigation Corporation*⁴¹ it was held that the trier of fact may take into account the possible erosion of any sum paid as a result of future inflation, and the reviewing court assumed a finding of 3% inflation a year, presumably based on the testimony of an expert witness.

These cases illustrate a greater willingness by some courts to independently evaluate the economic reality of the increasing cost of living, and to assess its effect on the damage award as precisely as possible. A rational mechanism for evaluating inflation is allowing the testimony of expert economic witnesses.⁴² Two state courts have recently reviewed cases where economists have testified as to future inflation, and have arrived at equally equivocal decisions. In *Raines v. New York Central Railroad Company*⁴³ the Illinois Supreme Court held that the alleged error in introducing economic evidence of inflationary trends will not be reviewed when the other evidence is sufficient to support the award. In overruling an Illinois Appellate Court,⁴⁴ *Raines* gave some encouragement to those introducing economic witnesses, without finally deciding the question. In *Hampton v. State Highway Commission*⁴⁵ the court upheld an award where an economist had testified as to the effect of future inflation, without specifically approving adjustments for future inflation (see concurring opinions).

Some recent cases have specifically denied allowance of any kind for future inflation.⁴⁶ A commentary frequently cited by those courts denying any consideration for future inflation or refusing to allow expert

39. 216 F. Supp. 734 (S.D. Cal. 1963).

40. 338 F. Supp. 1219 (N.D. Cal. 1971).

41. 329 F. Supp. 652 (E.D. La. 1971).

42. See generally C. Pyun, *The Role of Economists' Testimony In Perspective: An Economist's View*, 39 INSURANCE COUNSEL J. 361 (1972); J. Maher, *Economist as Witness*, CASE AND COM., Vol. 77, Mar.-Apr. 1972, at 16; G. Meisel, *Economist Testimony*, 20 DEFENSE L.J. 115 (1971).

43. 51 Ill. 2d 428, 283 N.E.2d 230, cert. denied, 409 U.S. 983 (1972). *Accord*, Meador v. City of Salem, 51 Ill. 2d 572, 284 N.E.2d 266 (1972).

44. *Raines v. New York Central R.R.*, 129 Ill. App. 2d 294, 263 N.E.2d 895 (1970). See 60 ILL. B.J. 518 (1972).

45. 209 Kan. 565, 498 P.2d 236 (1972).

46. *Frankel v. Heym*, 466 F.2d 1226 (3rd Cir. 1972); *Williams v. United States*, 435 F.2d 804 (1st Cir. 1970). See also *Magill v. Westinghouse Electric Corp.*, 464 F.2d 294 (3rd Cir. 1972).

testimony is from Harper and James, *The Law of Torts*.⁴⁷ Writing in 1956 Harper and James state,

Future trends in the value of money are necessarily unknown and so always render such damages speculative in a way we cannot escape. . . . When courts have consciously grappled with the problem they have either found all prophecy too speculative, and so, perforce have taken the equally speculative course of betting on a continuance of the status quo; or they have made intuitive and not always very wise judgments that present conditions represent a departure from some imaginary norm to which they think we shall rapidly return. 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.⁴⁸

The law of damage compensation offers ample precedent for use of economic projections which are somewhat speculative in nature. In *Turrieta v. Wyche*⁴⁹ the court stated that testimony as to prospective future earnings over the life of a permanently disabled victim is speculative at best, but admissible as the best obtainable evidence. As the *Turrieta* court points out, it is entirely problematical whether the plaintiff will continue to live, continue in good health, continue to show the same ability and desire for work, as well as that the wage scale will not be materially affected by depressions, strikes, inflation or war. In *Kromer v. Dahl*⁵⁰ the court allowed the testimony of an economist to estimate future earnings of a freshman in college in a wrongful death case. The economist's testimony was accepted as the best evidence on the subject.

Norman Leonard, President of the American Society of Econometric Appraisers has asserted that knowledge from economics has now established that the size of wrongful death damages should reflect future earning trends because such economics knowledge is no longer based on speculation and conjecture.⁵¹ If one considers the estimates which must be made to arrive at a prediction of the precise lifetime earnings of an adolescent, a prediction of general direction and rate of future price movement does not, by comparison, seem unacceptably speculative. For example, Illinois Pattern Jury Instruction 31.01.04 allows the jury to consider such potentially uncertain elements as the health, occupation, habits of industry, sobriety and thrift, and reasonable future earnings of the deceased in determining wrongful death loss of support. There is arguably no greater speculation involved in evaluating these elements

47. 2 F. HARPER AND F. JAMES, *THE LAW OF TORTS*, § 25.11, at 1323 (1956).

48. *Id.* at 1325-26.

49. 54 N.M. 5, 212 P.2d 1041, 1047 (1949).

50. 145 Mont. 491, 402 P.2d 979 (1965).

51. Leonard, *Future Economic Value in Wrongful Death Litigation*, 30 OHIO ST. L.J. 502, 507 (1969).

than there is in a jury evaluating an economist's expert testimony as to future money value.

Some fear that the use of expert economic testimony as to the precise effect of future inflation will overburden the jury. Juries, however, have proven equal to the task of using statistics, and mortality and annuity tables in determining loss of prospective earnings.⁵² When measuring damages caused, the most accurate possible approximation of loss should be sought. Juries understand the general concept of inflation and will be able to reasonably evaluate the probative value of economic evidence presented to them.⁵³

CONCLUSIONS

Trial courts consciously grappling with the effect of declining dollar value may take one of at least three possible positions. The first position would be to instruct the jury that the damage award should not reflect the changing value of money, thereby preventing the jury in a very significant way from approaching an accurate assessment of damages. The second treatment would be to recognize generally the importance of the changing value of money, but to draw back from providing a thoughtful mechanism for rationally approaching the actual effect of this element. The court could take judicial notice of continuing inflation, or provide imprecise balancing formulae to account for inflation.

The final treatment for assessing inflation would be to submit the question to the test of our adversary system of justice. Rather than ignoring the critical effect of inflation, or recognizing inflation but not providing a rational means of determining its exact effect, courts should recognize the problem and take in all expert and relevant testimony that they consider to have probative value. There are three major checks on any abuse of this opportunity to empirically improve the damage assessments of the jury. The first check is the inquisitive behavior of the opposing attorney, who will point out any fallacies in expert testimony by cross-examination and counter-expert witnesses. The second check is the judge who will insist that the economist's testimony be carefully controlled in the same manner as other expert witnesses. The final check is the jury, which will be in a much better position to rationally and openly assess the evidence, for whatever value it may have. The fumbling, speculative deliberations will become less speculative and more accurate when the inflation issue is directly and openly confronted.

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52. See S. SPEISER, RECOVERY FOR WRONGFUL DEATH, § 8:11 (1966).

53. *Id.*