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Fact of Possible Future Inflation Will Not Be Included in the Calculation of Future Damages.

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DAMAGES—Future Inflation—Fact of Possible Future Inflation Will Not Be Included in the Calculation of Future Damages

Johnson v. Penrod Drilling Co.,
510 F.2d 234 (5th Cir. 1975).

Penrod Drilling Co. was found liable under the Jones Act for personal injuries sustained by employees Johnson and Starnes. The plaintiffs were awarded damages which were partially based on inflationary trends in determining future wage increases. Penrod appealed. Held—*Reversed and remanded.*[1] The fact of possible future inflation is to be withheld from the jury's consideration in calculating future damages.[2]

The primary theory behind the law of damages is compensation, for the law seeks to place the injured party in the position he would have held had the injury not occurred.[3] Determining just compensation for injuries actually incurred poses no particular problems, but when courts and juries attempt to assess compensation for injuries continuing into the future, the problem of speculation arises.[4] Changes in the economy might produce an increase or decrease in the value of the dollar or the costs of services, and the triers of fact can only guess at the amount of money needed to adequately compensate the plaintiff.[5] It is at this point that inflation becomes a possible factor in the jury's calculations.

Although past and present damages for lost wages and expenses are generally assessed by using the value of money at the time of injury or death[6] and compensation for pain and suffering is estimated by current value at the time of trial,[7] prior changes in the costs of living and the present purchasing power of the dollar may be considered by a jury.[8] This is true even if

1. Although reversed and remanded on other grounds, the Fifth Circuit Court of Appeals expressly disapproved the trial court's consideration of inflationary trends in the United States' economy. Johnson v. Penrod Drilling Co., 510 F.2d 234, 241 (5th Cir. 1975).
2. *Id.* at 241.
3. C. McCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 137, at 560 (1935).
4. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.11, at 1325 (1956).
5. *Id.* § 25.11, at 1323.
6. *See* Maxwell v. Wanik, 287 N.W. 396, 397 (Mich. 1939); Newmann v. Metropolitan Tobacco Co., 189 N.Y.S.2d 600, 605-606 (Sup. Ct. 1959); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.11, at 1323 (1956).
7. *See* Birmingham Elec. Co. v. Howard, 34 So. 2d 830, 832 (Ala. 1948); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.11, at 1323 (1956).
8. New Amsterdam Cas. Co. v. Soileau, 167 F.2d 767, 771 (5th Cir.), *cert. denied*, 335 U.S. 822 (1948); Kroeger v. Safranek, 87 N.W.2d 221, 226 (Nebr. 1957); Gauthier v. Bergeron, 218 A.2d 433, 435 (N.H. 1966); Oklahoma Ry. v. Wilson, 227 P.2d 392, 394-95 (Okla. 1951). *See generally* Annot., 12 A.L.R.2d 611 (1950).

evidence of inflation is not expressly introduced.[9] Thus, attempts to label present verdicts excessive in comparison with older ones have often failed because of judicial recognition of the fluctuating purchasing power of money.[10] Allowance for future inflation, however, still remains unsettled. While some courts will not consider this issue because it is too speculative,[11] others have refused consideration on the basis of current governmental efforts to curb inflation[12] or the prejudicial nature of economic testimony not dependent on current values.[13] On the other hand, those courts which have allowed juries to include an inflationary surcharge in their calculations have said such an allowance is necessary in order that plaintiffs' awards remain adequate during spiraling costs of living.[14]

When awarding future damages for impairment of earning capacity in cases of permanent injuries, courts and juries must consider those earnings likely to be lost in the future,[15] taking into account the plaintiff's work-life

9. Missouri Pac. R.R. v. Elvins, 4 S.W.2d 528, 533 (Ark. 1928); Normand v. Thomas Theatre Corp., 84 N.W.2d 451, 457 (Mich. 1957); Halloran v. New England Tel. & Tel. Co., 115 A. 143, 144 (Vt. 1921). Judges and juries are entitled to consider such economic developments because they are a matter of common knowledge. Missouri Pac. R.R. v. Elvins, 4 S.W.2d 528, 533 (Ark. 1928).

10. Spangler v. Helm's N.Y.-Pitts. Motor Express, 153 A.2d 490, 494 (Pa. 1959); Melanson v. Turner, 436 S.W.2d 197, 200 (Tex. Civ. App.—Fort Worth 1968, no writ).

11. *See* Williams v. United States, 435 F.2d 804, 807 (1st Cir. 1970); Sleeman v. Chesapeake & O. Ry., 414 F.2d 305, 308 (6th Cir. 1969) (predictions of an accumulated estate); United States v. Furumizo, 381 F.2d 965, 971 (9th Cir. 1967); Armentrout v. Virginian Ry., 72 F. Supp. 997, 1001 (S.D.W. Va. 1947), *rev'd on other grounds*, 166 F.2d 400 (4th Cir. 1948); Zaninovich v. American Airlines, Inc., 271 N.Y.S.2d 866, 872 (Supp. Ct. 1966). Where purchasing power of money was considered in two earlier cases, awards resulted in inaccurate damage estimates since courts incorrectly evaluated future economic conditions. In Calihan v. Yellow Cab Co., 13 P.2d 931, 932 (Cal. Dist. Ct. App. 1932) the court declined to find that an award of $6,400 for head and back injuries was excessive, stating that the country was gradually emerging from the depression and would soon be back to normal. In Spell v. United States, 72 F. Supp. 731, 733 (S.D. Fla. 1947) damages for loss of future earnings were not based on a calculation of wages at the time of plaintiff's husband's death because the court felt the wages for unskilled labor at the time of death were at an all-time high.

12. Frankel v. United States, 321 F. Supp. 1331, 1346 (E.D. Pa. 1970), *aff'd sub nom.* Frankel v. Heym, 466 F.2d 1226 (3d Cir. 1972).

13. Raines v. New York Cent. R.R., 263 N.E.2d 895, 899-900 (Ill. App. 1970), *rev'd on other grounds*, 283 N.E.2d 230 (Ill.), *cert. denied*, 409 U.S. 983 (1972).

14. *See* Blackburn v. Aetna Freight Lines, Inc., 250 F. Supp. 289, 291 (W.D. Pa.), *aff'd*, 368 F.2d 345 (3d Cir. 1966); Stringfellow v. Rambo, 170 So. 2d 494, 496 (Ala. 1965); Resner v. Northern Pac. Ry., 505 P.2d 86, 91 (Mont. 1973) (future wage increases); Scofield v. J.W. Jones Constr. Co., 328 P.2d 389, 394 (N.M. 1958).

15. J. STEIN, DAMAGES AND RECOVERY: PERSONAL INJURY AND DEATH ACTIONS § 58, at 95 (1972). The yardstick for measuring loss of future wages is the plaintiff's gross rather than net earnings. Blue v. Western Ry. of Ala., 469 F.2d 487, 496 (5th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973); McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 38-39 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); Brooks v. United States, 273 F. Supp. 619, 633 (D.S.C. 1967). This rule holds true even though compensatory damages in personal injury cases are tax exempt. INT. REV. CODE OF 1954, § 104(a)(2).

expectancy based on his age, health, and occupation.[16] Then, the probable future earnings must be reduced to their present worth[17] so that the plaintiff will not be overcompensated by a utilization of the earning power of that award.[18] This rule, which was set out by the United States Supreme Court in 1916 as the proper measure of future damages in Federal Employer Liability Act (F.E.L.A.) suits,[19] has continued to guide subsequent determinations of damages in American courts.[20] Although it does not specifically prohibit the consideration of future inflation,[21] it has been criticized because it reflects the current view of the second half of the nineteenth century, when the nation's price index fell consistently.[22] The Supreme Court has declined to review subsequent circuit court decisions on the matter of future damages,[23] and only by way of dictum has approved the admission of expert testimony on the matter of future wage increases.[24]

16. C. McCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 86, at 299 (1935).

17. Future earnings are reduced by adding together the sum of the expected earnings with the interest on that same sum between trial and normal due date, then dividing that total into the original sum. C. McCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 86, at 304 n.24 (1935). The legal rate of interest is the figure sometimes used. Louisville & N. Ry. v. Morris, 60 So. 933, 937 (Ala. 1912); Florida Cent. & P. Ry. v. Burney, 26 S.E. 730, 732 (Ga. 1895); Brodie v. Philadelphia Transp. Co., 203 A.2d 657, 659 (Pa. 1964). Some courts, however, have suggested that a better figure would be that rate at which a financially unskilled plaintiff could safely invest his award. Chesapeake & O. Ry. v. Kelly, 241 U.S. 485, 489 (1916); Meier v. Bray, 475 P.2d 587, 590 (Ore. 1970); Chicago & N.W. Ry. v. Ott, 237 P. 238, 244 (Wyo. 1925). As a practical matter, many courts admit standard annuity tables for this calculation. *See* Pennsylvania R.R. v. McKinley, 288 F.2d 262, 265 (6th Cir. 1961); Turrietta v. Wyche, 212 P.2d 1041, 1048 (N.M. 1949); Missouri-K.-T. R.R. v. Miller, 486 P.2d 630, 637 (Okla. 1971); Annot., 50 A.L.R.2d 419 (1956).

18. Chesapeake & O. Ry. v. Kelly, 241 U.S. 489 (1916). The United States Supreme Court acknowledged that a lump sum awarded today would be worth more than the same sum payable in the future because of the earning power of that money. *Id.* at 489. *Contra,* Chicago & N.W. Ry. v. Candler, 283 F. 881, 885 (8th Cir. 1922). English and Canadian courts generally reject this reduction. H. OLECK, DAMAGES TO PERSONS AND PROPERTY § 95, at 99 (Rev. ed. 1961).

19. Chesapeake & O. Ry. v. Kelly, 241 U.S. 485, 491 (1916).

20. *See* Louisville & Nash. R.R. v. Holloway, 246 U.S. 525, 528 (1918); Wolfe v. Mendel, 84 N.W. 2d 109, 115-16 (Nebr. 1957); Brodie v. Philadelphia Transp. Co., 203 A.2d 657, 659 (Pa. 1964); Annot., 154 A.L.R. 796 (1945); Annot., 77 A.L.R. 1439 (1932).

21. *See* Comment, *Damages for Loss of Future Income: Accounting for Inflation,* 6 U. OF SAN FRAN. L. REV. 311, 319 (1972).

22. *See* Henderson, *Some Recent Decisions on Damages; With Special Reference to Questions of Inflation and Income Taxes,* 40 INS. COUNSEL J. 423, 431 (1973). "What the new economics has done, however, is to destroy the myth of the 'earning power of money.' Given rising prices and incomes the purchasing power of money is *reduced* over time." *Id.* at 431.

23. Blue v. Western Ry. of Ala., 469 F.2d 487 (5th Cir. 1972), *cert. denied,* 410 U.S. 956 (1973); Yodice v. Koninkilijke Nederlandsche Stoom. Maat., 443 F.2d 76 (2d Cir. 1971), *cert. denied,* 411 U.S. 933 (1973); Petition of United States Steel Corp., 436 F.2d 1256 (6th Cir. 1970), *cert. denied,* 402 U.S. 987 (1971); McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir.), *cert. denied,* 364 U.S. 870 (1960).

24. Grunenthal v. Long Island R.R. 393 U.S. 156, 160 (1968).

There is little direct authority at the circuit level for a consideration of future inflation. Those courts have rarely been confronted solely with that issue, which is usually discussed in conjunction with other economic factors such as income taxes[25] on wage rate increases,[26] yet they have generally disapproved an allowance of an inflationary surcharge.[27] Representative of the opinion at this level are the holdings of the Sixth Circuit Court of Appeals. That court in 1969 discouraged the trial courts in its circuit from considering future inflation or deflation in federal causes of actions.[28] The court feared that any such consideration would open the door to other speculative factors.[29] The same circuit has held that it is error to refuse to include a reduction of future damages to present value on the theory that such a reduction would be cancelled out by the effects of inflation.[30]

State courts and federal district courts whose decisions have not been appealed have generally approved an allowance for future inflation.[31] The rationale in these jurisdictions is that inflation is an appropriate offset to the

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25. *See* Turcotte v. Ford Motor Co., 494 F.2d 173, 185-86 (1st Cir. 1974); McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 37-38 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960).

26. *See* Magill v. Westinghouse Elec. Corp., 464 F.2d 294, 299-300 (3d Cir. 1972); Petition of United States Steel Corp., 436 F.2d 1256, 1275 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971).

27. Magill v. Westinghouse Elec. Corp., 464 F.2d 294, 301 (3d Cir. 1972); Petition of United States Steel Corp., 436 F.2d 1256, 1280 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971); Williams v. United States, 435 F.2d 804, 807 (1st Cir. 1970); Sleeman v. Chesapeake & O. Ry., 414 F.2d 305, 307 (6th Cir. 1969); United States v. Furumizo, 381 F.2d 965, 970-71 (9th Cir. 1967); McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 38 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960).

28. Sleeman v. Chesapeake & O. Ry., 414 F.2d 305, 307-308 (6th Cir. 1969). Although it acknowledged that recent inflationary trends make verdicts based on present wages somewhat unfair to the plaintiff, the court noted that "the inflation versus deflation debate rages inconclusively . . . [and] seems unlikely to be resolved satisfactorily in one personal injury trial." *Id.* at 308.

29. *Id.* at 308.

30. Petition of United States Steel Corp., 436 F.2d 1256, 1280 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971). *But see* Pierce v. New York Cent. R.R., 304 F. Supp. 44, 46 (W.D. Mich. 1969), *supplemental opinion to* 409 F.2d 1392 (6th Cir. 1969). Similar rulings to those of the Sixth Circuit have been made in the First, Second, Third and Ninth Circuits, where inflationary considerations are generally viewed as being too speculative or as unsupportive of a factor for wage increases. Magill v. Westinghouse Elec. Corp., 464 F.2d 294, 301 (3d Cir. 1972); Williams v. United States, 435 F.2d 804, 807 (1st Cir. 1970); United States v. Furumizo, 381 F.2d 965, 970-71 (9th Cir. 1967) (noting a recent period of deflation); McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 38-39 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960).

31. *E.g., 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 Constr. Co., 302 F. Supp. 630, 643 (E.D. Ark. 1969); Brooks v. United States, 273 F. Supp. 619, 629, 634 (D.S.C. 1967); Calihan v. Yellow Cab Co., 13 P.2d 931, 932 (Cal. Dist. Ct. App. 1932); State v. Daley, 287 N.E.2d 552, 556 (Ind. 1972); Lucivero v. Long Island R.R., 200 N.Y.S.2d 728, 730 (Sup. Ct. 1960); Martin v. Southern Ry., 463 S.W.2d 690, 692 (Tenn. 1971). *Contra*, Frankel v. United States, 321 F. Supp. 1331, 1346 (E.D. Pa. 1970), *aff'd sub nom.* Frankel v. Heym, 466 F.2d 1226

reduction to present value.[32] The concern at the state and federal district court level is to adequately compensate the plaintiff, particularly in regard to future expenses for medical care.[33] The speculative nature of the calculations has been dismissed as no more uncertain than the consideration of compensation for pain and suffering[34] or a reliance upon mortality tables in determining life-expectancy.[35]

The Fifth Circuit's decision in *Johnson v. Penrod Drilling Co.*[36] established that the fact of possible future inflation may not be considered when computing future loss of earnings.[37] Although judicially noting the deteriorating condition of the nation's economy and its likely continuance, the court, nevertheless, denied an allowance for future inflation because of its speculative nature, stating that inflation might lead to a recession rather than continued inflation and that governmental counter-measures have been proposed.[38] The court added that the higher interest rates on investments which accompany inflation would mitigate an exclusion of inflationary surcharge in wage rate calculations.[39] The court, thus, overruled two earlier Fifth Circuit decisions allowing a consideration of future increases in the costs of living.[40]

(3d Cir. 1972); Armentrout v. Virginian Ry., 72 F. Supp. 997, 1001 (S.D.W. Va. 1947), *rev'd on other grounds*, 166 F.2d 400 (4th Cir. 1948); Edwards v. Southern Ry., 184 S.E. 370, 374 (Ga. Ct. App. 1936). In Zaninovich v. American Airlines, Inc., 271 N.Y.S.2d 866, 872 (Sup. Ct. 1966), the court questioned Lucivero v. Long Island R.R., 200 N.Y.S.2d 728 (Sup. Ct. 1960).

32. *See* Pierce v. New York Cent. R.R., 304 F. Supp. 44, 46 (W.D. Mich. 1969); Gowdy v. United States, 271 F. Supp. 733, 752 (W.D. Mich. 1967), *rev'd on other grounds*, 412 F.2d 525 (6th Cir.), *cert. denied*, 396 U.S. 960 (1969); Resner v. Northern Pac. Ry., 505 P.2d 86, 90 (Mont. 1973). The Supreme Court of Alaska has advocated *not* reducing the award to present worth so that the palintiff might better utilize his award if inflation continues, noting that the failure to compensate for future wage increases is a factor which offsets the possibility that the plaintiff may be overcompensated when the award for impairment of earning capacity is not reduced to present worth. Beaulieu v. Elliott, 434 P.2d 665, 672 (Alaska 1967); *see* S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 8.9, at 515-16 (1966); J. STEIN, DAMAGES AND RECOVERY; PERSONAL INJURY AND DEATH ACTIONS § 170.5, at 34 (Supp. 1974).

33. *See* Martin v. Southern Ry., 463 S.W.2d 690, 692 (Tenn. 1971).

34. *See* Scruggs v. Chesapeake & O. Ry., 320 F. Supp. 1248, 1251 (W.D. Va. 1970).

35. Turrietta v. Wyche, 212 P.2d 1041, 1047-48 (N.M. 1949).

36. 510 F.2d 234 (5th Cir. 1975).

37. *Id.* at 241. Neither inflationary trends, nor their descriptions in the forms of the purchasing power of the dollar or the consumer price index, may be considered in computing future loss of earnings.

38. *Id.* at 241. Additionally, the court disallowed as too speculative the consideration of income taxes, taxability of attorney's fees, and taxability of future earnings, and also required a reduction to present worth by taking the calculated gross future earnings of the plaintiffs and using the interest rate prevailing at the time and place of trial. *Id.* at 237.

39. *Id.* at 236.

40. Petition of M/V Elaine Jones, 480 F.2d 11, 28 (5th Cir. 1973); Cunningham v. Bay Drilling Co., 421 F.2d 1398, 1399 (5th Cir. 1970). These decisions had apparently rejected any distinction between an instruction or an allowance for present inflation and

As authority for its decision, the court noted similar holdings in five other circuits.[41] A review of these cases and of subsequent decisions in their respective circuits reveals that the authority is questionable. For example, in spite of the Sixth Circuit's holding in 1969 that awards for future damages are to be reduced to their present value, and its discouragement of the admission in the trial courts of testimony regarding inflationary trends,[42] that court held in 1971 that the rule regarding reduction to present value was not applicable to state causes of action in the Sixth Circuit, at least not in Michigan, and that inflation could properly be considered.[43] The court explained that its earlier comments on inflation and future damages were only dicta.[44] In *Bach v. Penn Central Transportation Co.*,[45] a 1974 F.E.L.A. wrongful death action, the Sixth Circuit indicated that there should not be a blanket denial of inflationary considerations in all cases, as long as the economic projection is reasonable and conforms to the evidence.[46] Although it upheld a refusal by the trial court to admit expert testimony on inflation and future wage increases,[47] the court nonetheless held that it was error to charge the jury that they might not consider future increases or decreases in the purchasing power of money.[48]

The court in *Penrod* relied on a Second Circuit case which actually concerned the exclusion of evidence of income taxes, and inflation was only mentioned as a probable offset for a resulting windfall to the plaintiff.[49] In

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one for future inflation. Petition of M/V Elaine Jones, 480 F.2d 11, 28 n.11 (5th Cir. 1973).

41. Williams v. United States, 435 F.2d 804, 807 (1st Cir. 1970); Sleeman v. Chesapeake & O. Ry., 414 F.2d 305, 308 (6th Cir. 1969); United States v. Furumizo, 381 F.2d 965, 970-71 (9th Cir. 1967); McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 38 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); Frankel v. United States, 321 F. Supp. 1331, 1346 (E.D. Pa. 1970), *aff'd sub nom.* Frankel v. Heym, 466 F.2d 1226 (3d Cir. 1972).

42. Sleeman v. Chesapeake & O. Ry., 414 F.2d 305, 307-308 (6th Cir. 1969).

43. Willmore v. Hertz Corp., 437 F.2d 357, 360 (6th Cir. 1971). The court upheld a lower court instruction on future inflation which allowed broad discretion on the part of the jury. *Id.* at 359-60.

44. *Id.* at 360.

45. 502 F.2d 1117 (6th Cir. 1974).

46. *Id.* at 1122.

47. The court noted that "the predictive abilities of economists have not advanced so far that they can forecast with any certainty the existence and rate of inflation for the next thirty years." *Id.* at 1122.

48. *Id.* at 1122. The court stated:

> Admittedly, if the jury considers this issue without expert testimony, their calculations will be even more imprecise. There is always a chance that the verdict may be too generous. But if jurors should be prohibited from applying their common knowledge of inflation in reaching a verdict, the party entitled to recovery could be grievously undercompensated. The court can always rectify an exorbitant verdict through its power of remittitur.

Id. at 1122.

49. McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 38 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960). The court noted:

> Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in

a later decision that court indicated that it might consider future inflation, if the evidence were submitted by a qualified expert.[50] The rule regarding reduction of an award to present worth was again applied in 1971 and the court noted that "if inflation should continue at its present pace, courts may have to reconsider the propriety of the long recognized charge with respect to discount (of the award) . . . ."[51]

Although the Fifth Circuit in *Penrod* follows the decisions of other circuit courts that deny consideration of future inflation because of its speculative nature, there seems to be a growing trend at the state court level towards such an allowance.[52] There has been a recognition that the use of expert testimony would reduce the speculative nature of the evidence,[53] and the admissibility of such economic evidence has been increasingly accepted.[54] Although some commentators fear that the admission of economic testimony pertaining to future damages would overburden and confuse the jury with

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favor of charging the jury to take future inflation into account . . . . Yet there are few who do not regard some degree of continuing infllation as here to stay and would be willing to translate their own earning power into a fixed annuity . . . .
Id. at 38.

50. *See* Cunningham v. Rederiet Vindeggen A/S, 333 F.2d 308, 312-13 (2d Cir. 1964). The court noted that in this case there was only one expert witness, whose "equivocal" testimony did not convince the jury. *Id.* at 313.

51. Yodice v. Koninkilijke Nederlandsche Stoom. Maat., 443 F.2d 76, 79 (2d Cir. 1917), *cert denied*, 411 U.S. 933 (1973). Penrod also cites as authority Williams v. United States, 435 F.2d 804, 807 (1st Cir. 1970), a Federal Torts Claim Act suit decided under Rhode Island law, in which inflation was ruled too speculative to be considered. However, that state by statute now permits consideration of possible future inflation. R.I. GEN. LAWS ch. 7, § 10-7-1.1 (Supp. 1974). A willingness to consider inflation, at least at the trial level, was recently shown in Mills v. Tucker, 499 F.2d 866 (9th Cir. 1974). In affirming a lower court award which included future damages, the court noted that although the trial judge probably did not fully take into account inflation and job promotions, the circuit court would look only to the total award under Hawaii statute. *Id.* at 868.

52. *E.g.*, Alabam Freight Lines v. Thevenot, 204 P.2d 1050, 1052 (Ariz. 1949); Stenzel v. Bach, 203 N.W.2d 819, 822 (Minn. 1973); Bell Aerospace Corp. v. Anderson, 478 S.W.2d 191, 200 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.).

53. *See* Henderson, *Some Recent Decisions on Damages; With Special Reference to Questions of Inflation and Income Taxes*, 40 INS. COUNSEL J. 423, 436 (1973); Leonard, *Future Economic Value in Wrongful Death Litigation*, 30 OHIO ST. L.J. 502, 503, 507 (1969); O'Connor & Miller, *The Economist-Statistician: A Source of Expert Guidance in Determining Damages*, 48 NOTRE DAME LAW. 354, 355-56 (1972). For a comprehensive consideration of economic variables to be taken into consideration in determining future damages see Brooks v. United States, 273 F. Supp. 619 (D.S.C. 1967).

54. *See In re* Sincere Navigation Corp., 329 F. Supp. 652, 658 (E.D. La. 1971); Pierce v. New York Cent. R.R. 304 F. Supp. 44, 45-46 (W.D. Mich. 1969); Gowdy v. United States, 271 F. Supp. 733, 752-53 (W.D. Mich. 1967), *rev'd on other grounds*, 412 F.2d 525 (6th Cir.), *cert. denied*, 396 U.S. 960 (1969); Annot., 79 A.L.R. 2d 259 (1961) (testimony of actuaries in determining present worth in wrongful death suits). Two recent federal diversity cases arising under the substantive law of New Jersey and Pennsylvania have *required* the guidance of an actuary so that a jury may have evidence from which it may calculate the present worth of future damages: Haddigan v. Harkins, 441 F.2d 844, 853 (3d Cir. 1970); Russell v. Wildwood, 428 F.2d 1176, 1183 (3d Cir. 1970).

complicated details,[55] others believe that jurors are not expected to understand all the intricacies of the economics involved; but, since they are familiar with the concept, they should be given guidance as to what wages and prices are expected to be in the future.[56] Besides admitting the testimony of economists, statisticians, estate planners, and life insurance specialists to aid the jury, courts might also rely on such economic documents as the Department of Labor's Consumer Price Index, labor statistics, congressional committee reports, and the predictions of the Federal Reserve Board.[57]

As an alternative to the introduction of expert evidence for the jury, it has been suggested that the use of special verdicts, leaving mathematical computations to the judge, would alleviate the problem of overly-confused jurors.[58] Another alternative might be the abandonment of the single lump sum recovery in cases of long-term future damages in favor of periodic payments adjusted to the purchasing power of money in the future,[59] but this solution might create an administrative problem for the courts in view of the time and manpower needed to perform such periodic calculations and to enforce the payments.[60]

Inflation, like other economic variables, cannot infallibly be predicted. It is, however, an ever-present consideration which will probably be in the minds of most jurors when they are determining the amount of damages due an injured party. Although the admission of testimony regarding economic trends would lengthen and complicate the trial, the jury's natural tendency to allow for the spiraling costs of living is likely to be inaccurate without expert guidance. If the courts must continue to discount an award to offset a plaintiff's use of its earning power, then equitably the courts should allow an inflationary surcharge to offset its declining value. An exclusion of all consideration of future inflation, as now required in the Fifth Circuit, will unwisely result in inadequate compensation if the nation's recent inflationary trend continues.

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55. *See* Note, *Fluctuating Dollars and Tort Damage Verdicts*, 48 COLUM. L. REV. 264, 271 (1948).

56. S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 8.11, at 527 (1966). *See also* Comment, *A Misuse of Statistics and Future Damages*, 51 NEBR. L. REV. 663, 674 (1972).

57. S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 8.11, at 527 (1966).

58. *See* Comment, *Damages for Loss of Future Income: Accounting for Inflation*, 6 U. OF SAN FRAN. L. REV. 311, 321-22 (1972).

59. *See* Comment, *A Misuse of Statistics and Future Damages*, 51 NEBR. L. REV. 663, 673-74 (1972); Note, *Damages: Effect of Cost of Living Index on Measure of Compensatory Damages for Permanent Injuries*, 2 OKLA. L. REV. 224, 226 (1949).

60. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.11, at 1326 (1956); Comment, *A Misuse of Statistics and Future Damages*, 51 NEBR. L. REV. 663, 674 (1972).