Determining the Effect of Inflation on Lost Future Earnings: What Price Equity?

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NOTE

DETERMINING THE EFFECT OF INFLATION ON LOST FUTURE EARNINGS: WHAT PRICE EQUITY?

One of the most deeply entrenched principles of tort law is that compensatory damages are awarded to make an injured party whole.¹ This rule, however, is far easier to state than to apply. Assuming that adequate compensation can be made, determining the cash value necessary to compensate a person for loss of a limb, or a family for loss of its principal wage earner, can be problematic.² Certain elements of damage, such as accrued medical expenses, can be translated easily into a cash award. Other elements, however, such as future expenses,³ pose numerous valuation problems due to the rule that the plaintiff be awarded lump-sum compensation at the time of judgment for all past, present, and future injuries attributable to the defendant’s tortious act.⁴


³ A plaintiff so severely injured as to be unable to regain employment may face several types of future expenses. For example, the type of injury suffered may require ongoing medical treatment or other types of care. See, e.g., Schnebly v. Baker, 217 N.W.2d 708, 724-25 (Iowa 1974); Cords v. Anderson, 80 Wis. 2d 525, 549 & n.6, 259 N.W.2d 672, 683 & n.6 (1977). For general information on the law pertaining to future medical expenses, see J. Stein, supra note 1, § 95, at 162-57. Additionally, damages for future pain and suffering generally are available to a plaintiff if a reasonable probability of continued pain and suffering can be shown. See generally id. § 15, at 24.

⁴ Restatement (Second) of Torts § 910 (1979). According to the Restatement, “the situation as it appears at the time of trial is determinative” of the amount of damages. Id.
One of the most significant elements in personal injury and wrongful death recoveries is loss of future earning capacity.\textsuperscript{5} A proper award to compensate for lost earning capacity is lost future earnings—the salary the plaintiff would have received had he continued to work until his natural death or retirement.\textsuperscript{6} During a plaintiff's working life, however, several factors may affect the size of his annual salary.\textsuperscript{7} Among these factors is future inflation.\textsuperscript{8}


\textsuperscript{6} J. Stein, supra note 1, § 64, at 103-04. In wrongful death actions, an award of damages is meant to serve one of two functions, depending on the nature of the enabling statute. 1 S. Speiser, supra note 5, § 3:6, at 140 & n.10. Lost future earnings are either construed as representing a loss to the decedent's estate, see, e.g., R.I. Gen. Laws § 10-7-2 (Supp. 1981) (distribution of recovery to be made in accordance with intestacy laws), or as the decedent's potential contributions to his survivors, see, e.g., Ill. Ann. Stat. ch. 70 § 2 (Smith-Hurd Supp. 1982-1983) (pecuniary loss to "surviving spouse and next of kin" recoverable). But see Conn. Gen. Stat. § 52-555 (1981) ("just damages" for injuries of decedent plus reasonable expenses recoverable). See generally 1 S. Speiser, supra note 5, § 3:6, at 140-46. After calculating future earnings, the decedent's estimated personal expenditures must be deducted from the earnings award. E.g., Feldman v. Allegheny Airlines, Inc., 524 F.2d 384, 389 (2d Cir. 1975). For a general discussion of other deductions made from lost future earnings in wrongful death cases, see 1 S. Speiser, supra note 5, § 3:6, at 144-46; J. Stein, supra note 1, § 237, at 495-96.

In wrongful death actions, of course, it is the size of the decedent's earnings that is used to measure the plaintiff's damages. 1 S. Speiser, supra note 5, § 3:5, at 136-38. Since the calculation of lost future earnings poses similar problems with regard to inflation in both personal injury and wrongful death actions, this Note will not discuss death claims separately in text but will refer to the "plaintiff's" earnings throughout.


Formerly, income tax liability that would have been assessed against a plaintiff's earnings had he continued to work was ignored in computing lost future earnings since the award itself is not taxable. See, e.g., Flanigan v. Burlington N., Inc., 632 F.2d 880, 886-87 & n.2 (8th Cir. 1980), cert. denied, 450 U.S. 921 (1981); Johnson v. Fenrod Drilling Co., 510 F.2d 234, 236-37 (5th Cir.), cert. denied, 423 U.S. 839 (1975), overruled on other grounds,
The treatment to be accorded future inflation in calculating

Culver v. Slater Boat Co., 688 F.2d 280 (5th Cir. 1982) (en banc); McWeeney v. New York, N.H. & H. R.R., 282 F.2d 34, 39-40 (2d Cir. 1960); Beaulieu v. Elliott, 434 F.2d 665, 672-73 (Alaska 1970); Lumber Terminals, Inc. v. Nowakowski, 36 Md. App. 82, 96-97, 373 A.2d 282, 291-92 (Ct. Spec. App. 1977); see also I.R.C. § 104(a)(2) (West 1982). The Supreme Court, however, in Norfolk & W. Ry. v. Liepelt, 444 U.S. 490 (1980), recently overturned this rule as a matter of federal law. Id. at 498. In Norfolk, the Court held that future tax liability is relevant to the computation of lost earnings since it is one of the determinants of the amount awarded to the wage earner's dependents. Id. at 493-94. The Court reasoned that since it is relevant to the size of the award, the speculative nature of tax liability should not preclude its consideration. See id. at 494. In demonstrating how to calculate the impact of taxes on the lost earnings award, some commentators suggest that the Norfolk rule could result in higher lump-sum awards for some plaintiffs. See Brady, Brookshire, & Cobb, Calculating the Effects of Income Taxes on Lost Earnings, TRAIL, Sept. 1982, at 65, 68.

See Dennis, Sirmon & Drinkwater, supra note 7, at 182-84. Inflation has been defined "as a general increase in the price level and refers to an average change in all prices." House COMM. ON THE BUDGET, REPORT OF THE TASK FORCE ON INFLATION, H.R. REP. NO. 12, 96th Cong., 1st Sess. 27 (1979) [hereinafter cited as TASK FORCE REPORT]; see also P. SAMUELSON, ECONOMICS 270 (10th ed. 1976) (definitions of inflation and deflation).

A distinction must be made between past and future inflation in regard to lost earnings. See, e.g., Willmore v. Hertz Corp., 437 F.2d 357, 359-60 (6th Cir. 1971). Past inflation refers to inflation occurring before a judgment is entered. See, e.g., Steckler v. United States, 549 F.2d 1372, 1380 (10th Cir. 1977). Thus, it affects only earnings that accrue up until the date of judgment. Awards for this portion of lost earning capacity usually are based upon the plaintiff's actual earnings prior to the accident. See, e.g., In re United Steel Corp., 436 F.2d 1256, 1269-70 (6th Cir. 1970) (dictum criticizing an earlier case permitting lost past earnings to be based on average earnings). In some cases, however, the use of average earnings as the basis for determining lost past earnings has been allowed. See, e.g., Steckler v. United States, 549 F.2d 1372, 1380 (10th Cir. 1977); Imperial Oil, Ltd. v. Drlik, 234 F.2d 4, 11-12 (6th Cir. 1956).

Since the award is based upon a static figure, inflation occurring between the date of the injury and the date of judgment will reduce the plaintiff's effective recovery. See Note, Pre-assessment Inflation as a Factor in Damages, 48 U. CHI. L. REV. 999, 1001-02 (1979). Currently, attempts to compensate for the effects of such past inflation are limited to including it in the final award interest that the award would have earned up to the date of judgment. See Ginsburg v. Insurance Co. of N.Am., 427 F.2d 1318, 1321 (6th Cir. 1970); Note, supra, at 1000. Several commentators have argued that awarding such interest does not completely redress the plaintiff. See Patell, Well & Wolfson, Accumulating Damages in Litigation: The Roles of Uncertainty and Interest Rates, 11 J. LEGAL STUD. 341, 362 (1982); Note, supra, at 1000. Proposed modifications of this method include accounting for inflation occurring between the time of the judgment and the time of injury by multiplying the award by the ratio reflecting the change in the inflation rate. See Note, supra, at 1012-13; cf. Steckler v. United States, 549 F.2d 1372, 1380 (10th Cir. 1977) (proposing to account for past inflation by compounding the award by the inflation rate between the date of the injury and the date of judgment).

It should be noted that it may not be accurate to use the same techniques to compensate for both past and future inflation, since it is conceded generally that future inflation is not likely to increase at the same rate. See, e.g., McWeeney v. New York, N.H. & H. R.R., 282 F.2d 34, 38 (2d Cir. 1960); Henderson, The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value, 20 SAN DIEGO L. REV. 307, 321-22 (1975); see also Coyne, supra note 7, at 25 (assumption of constant future inflation rate
lost future earnings has become a controversial subject. A growing number of courts and commentators agree that the effects of future inflation should be recognized in computing damage awards. There is no agreement, however, as to how future inflation should be incorporated into the structure of existing damage calculations. These issues are interrelated, since the arguments favoring inclusion of inflation necessarily require discussion of the viability, in a courtroom setting, of proposed calculation methods. This Note will analyze these issues in the context of the major policy concerns that they raise, namely, fairness to the plaintiff, certainty of the amount of the award, and courtroom efficiency. The Note then will review the positions taken on these issues by courts and economists, and conclude with a discussion of two proposed solutions that strike reasonable balances among the underlying policy concerns.

**The Traditional Rule for Determining Lost Future Wages**

Before engaging in any meaningful discussion of the policy considerations involved in incorporating inflation into damage calculations, the traditional method for determining lost future earnings must be understood. Under this method, the plaintiff's base annual earnings for the duration of his working life are estimated by adding future wage increases that he is reasonably likely to receive, such as merit raises, to his annual salary as of the date of most serious source of error in computing awards).

* See O'Connor & Miller, supra note 7, at 354; infra notes 51-108 and accompanying text.


12 See, e.g., Note, supra note 10, at 108. A number of courts that have addressed the inflation issue have noted the need to prevent confusion and prejudice in determining awards and the practical necessity of ensuring efficient management of trials. See, e.g., Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 461 (3d Cir.), cert. granted, 103 S. Ct. 50 (1982).

13 See, e.g., Culver v. Slater Boat Co., 688 F.2d 280, 286-87 (6th Cir. 1982) (en banc) (dictum). See generally Crosby, supra note 5, at 543; cf. Peck & Hopkins, supra note 2, at 353 (traditional damage calculation rule fails to account for inflation, productivity increases,
the injury. The probable length of the plaintiff's working life, or his worklife expectancy, is then determined by using actuarial tables. These figures are multiplied to produce an estimate of the plaintiff's gross future earnings, which is then discounted to produce the amount finally awarded.

Discounting is the process by which the present value of a sum to be realized at some definite time in the future is determined. In this process, each year's base salary is multiplied by a discount factor containing the discount rate, which is an interest rate gener-

and fringe benefits). Most courts are willing to admit evidence of future wage increases. See, e.g., O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1197-98 (7th Cir. 1982); United States v. English, 521 F.2d 63, 71 n.5 (9th Cir. 1975); Bach v. Penn Cent. Transp. Co., 502 F.2d 1117, 1122 (6th Cir. 1974); Magill v. Westinghouse Elec. Corp., 464 F.2d 294, 300 (3d Cir. 1972). This acceptability appears to depend upon the degree of certainty that the increase would have been realized. See, e.g., Culver v. Slater Boat Co., 644 F.2d 460, 464 n.7 (5th Cir. 1981) (wage increases granted up to the time of trial are included in calculating the award), rev'd on other grounds, 688 F.2d 280 (5th Cir. 1982) (en banc); State v. Guinn, 555 P.2d 530, 546 (Alaska 1976) (automatic increases based on length of service included in the award).

14 See 1 S. SPEISER, supra note 5, § 3:14, at 169-71; J. STEIN, supra note 1, § 59, at 96-97. The typical measure of base annual earnings is the plaintiff's salary prior to the injury. See, e.g., Maxwell v. Wanik, 290 Mich. 106, 108, 287 N.W. 396, 397 (1939); McIver v. Gloria, 169 S.W.2d 710, 712 (Tex. 1943); J. STEIN, supra note 1, § 64, at 103-04. If, for some reason, the plaintiff's salary at the time of the injury is unrepresentative of his true earning capacity, the use of an average salary figure may be permitted. E.g., Steckler v. United States, 549 F.2d 1372, 1380 (10th Cir. 1977); see supra note 8. In other problem situations, such as those arising from the death or serious injury of a minor, a homemaker, or one who otherwise has no employment record, courts have held that just compensation requires that damages be based on what the plaintiff could have earned in the future. See, e.g., Feldman v. Allegheny Airlines, Inc., 524 F.2d 384, 388 (2d Cir. 1975).

15 Henderson, supra note 8, at 308 n.3. Worklife expectancy is the proper measure of the number of years over which the award will accrue "[b]ecause damages in personal injury and wrongful death actions involve the earning capacity of wage earners . . . ." Id.

16 See 1 S. SPEISER, supra note 5, § 3:27, at 232-38; Peck & Hopkins, supra note 2, at 353.


19 E.g., Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 34 n.4 (2d Cir. 1980), cert. denied, 451 U.S. 971 (1981). The discount factor, \( v \), is expressed by the following equation:

\[
v = \frac{1}{1 + i}
\]

where \( i \) = the discount rate

S. KELLISON, supra note 18, at 8. When the discount factor is multiplied by the requisite future sum, it yields the present value of that sum. Id.
erally equated with the current rate on low-risk investments. The resulting annual figures are then added to produce the total lost earnings award. The concept of present value can best be ex-

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20 E.g., Ward, supra note 7, at 63. The discount rate applicable to a particular type of asset depends upon the rate of return that the holder could receive on the asset. See P. Samuelson, supra note 8, at 615 n.4. Most economists recommend that the current interest rate on low-risk government bonds or similar securities is appropriate for lost future earnings awards, reasoning that a reasonably prudent but financially unsophisticated plaintiff would invest the award in these types of securities. See Carlson, Economic Analysis v. Courtroom Controversy: The Present Value of Future Earnings, 62 A.B.A. J. 628, 629-30 (1976); Sherman, Projection of Economic Loss: Inflation v. Present Value, 14 CREIGHTON L. REV. 723, 726-27 (1981); Ward, supra note 7, at 63. The federal courts generally have sanctioned this approach. See Chesapeake & Ohio Ry. v. Kelly, 241 U.S. 485, 490-91 (1916). Some economists suggest, however, that it is unrealistic to assume that the plaintiff will be knowledgeable enough to seek out low-risk government securities, and that a rate based on the available return on passbook savings accounts should be used. See, e.g., Coyne, supra note 7, at 28. In contrast to the foregoing, some state courts, those of Pennsylvania for example, have adopted a standard discount rate. See, e.g., Windle v. Davis, 275 Pa. 23, 29, 118 A. 503, 505 (1922) (6% rate). The recent adoption of the total offset method of accounting for inflation by the Pennsylvania Supreme Court may not have overturned this rule, since it only requires a presumption that the wage increase rate equals the discount rate. See Kaczkowski v. Bolubasz, 491 Pa. 561, 583, 421 A.2d 1027, 1037-38 (1980). The standard discount rate also has been applied by the courts of Canada and Australia. See Dexter, Murray, & Pollay, Inflation, Interest Rates and Indemnity: The Economic Realities of Compensation Awards, 13 U. BRIT. COLUM. L. REV. 298, 301 (1979) (7% Canadian discount rate); Sher, Damages for Personal Injuries: Current Developments, Future Trends and Suggested Reforms, 55 AUSTL. L.J. 458, 459-60 (1981) (Australia’s highest court appears consistently to apply a 6% discount rate).

21 E.g., Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 34 n.4 (2d Cir. 1980), cert. denied, 451 U.S. 971 (1981). Professor Samuelson gives an excellent explanation of the discounting process:

To arrive at any asset's present discounted value, let each dollar stand on its own feet; evaluate the present worth of each part of the stream of future receipts, giving due allowance for the discounting required by its payment date. Then simply add together all these separate present discounted values. P. Samuelson, supra note 8, at 616 (emphasis in original). This process can be described in equation form as follows:

$$\text{Present Value} = \sum_{t=0}^{x} \frac{N}{(1 + i)^t}$$

where $N = \text{the sum to be discounted over year } t$

$i = \text{the discount rate}$

$t = \text{the number of the year over which } N \text{ is being discounted (i.e., 1 for the first year, 2 for the second year)}$

$x = \text{total number of years over which income must be discounted.}$

Id. at 618. It should be noted that the income for each year must be discounted individually. Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 34 n.4 (2d Cir. 1980), cert. de-
plained by use of an example. Suppose that Y has agreed to accept payment from X of a $10,000 debt 10 years from now. The present value of X's promise to pay is an amount that, combined with the return that can be made on it by prudent investment, will equal $10,000 on the date of payment. Similarly, the present value of lost future earnings is an amount that, if invested prudently, will yield a large enough return so that the full amount of the plaintiff's lost earnings will have been realized by the end of his worklife expectancy.\footnote{See P. Samuelson, supra note 8, at 615; Franz, Simplifying Future Lost Earnings, Trial, Aug. 1977, at 34, 36.}

The impetus for discounting lost future earnings is to avoid giving the plaintiff a windfall,\footnote{See, e.g., Chesapeake & Ohio Ry. v. Kelly, 241 U.S. 485, 489 (1916); O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1199 (7th Cir. 1982); Sleeman v. Chesapeake & Ohio Ry., 414 F.2d 305, 307-08 (6th Cir. 1969); Beaulieu v. Elliott, 434 P.2d 665, 671 (Alaska 1967).} since money received today is invariably worth more than the same dollar amount received in the future.\footnote{E.g., Chesapeake & Ohio Ry. v. Kelly, 241 U.S. 485, 489 (1916). The Kelly Court deemed "self-evident" the idea that present money is worth more than future payment. Id. This is true since money presently held can be invested, whereas a promise of future payment cannot. See P. Samuelson, supra note 8, at 615.} During inflationary periods, however, discounting results in undercompensating the plaintiff.\footnote{See I. Fisher, Appreciation and Interest 75 (1896).} This stems from the nature of interest rates, as explained by economist Irving Fisher almost 100 years ago.\footnote{See, e.g., Carlson, supra note 20, at 630. Professor Fisher expressed his concept of the relationship between interest rates and inflation: The money rate [i.e., the interest rate] and the real rate are normally identical; that is, they will . . . be the same when the purchasing power of the dollar in terms of the cost of living is constant or stable. When the cost of living is not stable, the rate of interest takes the appreciation and depreciation into account to some extent, but only slightly and, in general, indirectly. That is, when prices are rising, the rate of interest tends to be high but not so high as it should be to compensate for the rise; and when prices are falling, the rate of interest tends to be low, but not so low as it should be to compensate for the fall. I. Fisher, The Theory of Interest 43 (1930).} According to Professor Fisher's theory, interest rates have two components: the rate of return that the investor expects to receive on his investment, or the real rate of interest, and a percentage representing the inflation rate that the investor anticipates over the period of the investment.\footnote{See P. Samuelson, supra note 8, at 615; Franz, Simplifying Future Lost Earnings, Trial, Aug. 1977, at 34, 36.} This additional percentage
ideally compensates the investor for the diminution of the principal's purchasing power over the investment period. In the context of lost future earnings, this means that the inflation component of the discount rate only purports to compensate the plaintiff for loss of purchasing power on the original discounted award. Even if the discount rate correctly compensates for inflation's effect on the plaintiff's original award, it cannot account for cost-of-living raises and other inflation-linked wage increases that would have increased his total lifetime earnings had he continued to work. It follows that an award for lost future earnings calculated in the traditional manner will undercompensate the plaintiff unless the inflation rate remains constant throughout the plaintiff's worklife expectancy.

A number of methods are available to a court seeking to eliminate this shortfall. Until recently, however, judicial skepticism concerning the accuracy of economic prediction and the intelligibility of economic evidence to the typical juror militated against inclusion of inflation in calculating lost future wages. While this

28 See, e.g., O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1199 (7th Cir. 1982); Sherman, supra note 20, at 728; Ward, supra note 7, at 63.

29 E.g., Coyne, supra note 7, at 25-26; Fisher & Hartnett, Admissibility of Economic Testimony on Future Inflation, 18 S. Tex. L.J. 59, 66 n.39 (1977); Sherman, supra note 20, at 728-29.

30 See, e.g., O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1199 (7th Cir. 1982). The inflation component of the discount rate cannot compensate for cost-of-living raises the plaintiff otherwise would have received because such raises increase the plaintiff's annual salary—the basis of the original award. See supra notes 27-29 and accompanying text.

31 E.g., Carlson, supra note 20, at 629; Henderson, supra note 8, at 310.


skepticism has diminished in recent years, these underlying concerns still pose obstacles to the adoption of a new damages calculation rule. Since the arguments against including inflation illuminate the interrelationship of these policy concerns, it is appropriate to consider them in some detail.

ARGUMENTS AGAINST INCLUSION OF INFLATION IN LOST FUTURE EARNINGS

The rule against considering inflation in calculating damages originally was justified on the ground that there was no certainty that inflation would continue in the future, and to assume its continuance amounted to speculation. This rationale was reasonable prior to World War II, when price levels in the American economy tended to be stable and deflation was a more common phenomenon than inflation. Postwar economic statistics, however, demonstrate

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44 See, e.g., Docas v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 35 (2d Cir. 1980), cert. denied, 451 U.S. 971 (1981). Recently, federal courts appear to be taking the view that while prediction of future inflation is in some degree speculative, such speculation is more tolerable than ignoring inflation altogether. See, e.g., O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1198-99 (7th Cir. 1982); United States v. English, 521 F.2d 63, 75 (9th Cir. 1975). Several state courts also have taken this view. See, e.g., Seaboard Coast Line R.R. v. Garrison, 336 So. 2d 423, 425 (Fla. Dist. Ct. App. 1976); Cords v. Anderson, 80 Wis. 2d 525, 551-52, 259 N.W.2d 672, 684 (1977).


46 TASK FORCE REPORT, supra note 8, at 24; Henderson, supra note 8, at 309; see P. SAMUELSON, supra note 8, at 270. Ample statistical data support the conclusion that inflation was not an American economic problem before World War II. Before 1913, for example, the average annual change in the American price level was 0.1%. See ECONOMIC REPORT OF THE PRESIDENT, 1981, at 71 (Table 3-2) (1981) [hereinafter cited as ECONOMIC REPORT]. Between 1919 and the start of World War II, the average annual change was 2.5%. Id. From 1946 to 1979, the average annual change was 2.8%. Id. These statistics are based on the Consumer Price Index (CPI), which measures changes in the price level based on monthly
a consistent increase in wages and prices. More difficult to answer is the charge that present economic measurements of the prices of a “fixed marketbasket” of goods. TASK FORCE REPORT, supra note 8, at 27. The CPI is “the most widely recognized measure of inflation in the United States.” Id.

37 E.g., TASK FORCE REPORT, supra note 8, at 24. The natural effect of rising prices is to cause the purchasing power of money to decline. P. SAMUELSON, supra note 8, at 270-72. As shown by the following chart, measurement of the dollar’s purchasing power in terms of its value in 1967 reveals a consistent decline since 1940:

<table>
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<tr>
<th>Year</th>
<th>Producer Prices</th>
<th>Consumer Prices</th>
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<tbody>
<tr>
<td>1940</td>
<td>$2.469</td>
<td>$2.381</td>
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<tr>
<td>1945</td>
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<td>1.855</td>
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<td>1950</td>
<td>1.266</td>
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<td>1955</td>
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<td>1.068</td>
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<td>1967</td>
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<td>1970</td>
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<td>1979</td>
<td>.459</td>
<td>.461</td>
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<tr>
<td>1980</td>
<td>.405</td>
<td>.406</td>
</tr>
<tr>
<td>1981 (to May)</td>
<td>.372</td>
<td>.372</td>
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</tbody>
</table>

STATISTICAL ABSTRACT OF THE UNITED STATES, 1981, No. 765, at 458 (Table) (1981). For a summary of the price history of the United States over the postwar period that combines statistics with explanations of why inflation has become such a persistent problem, see TASK FORCE REPORT, supra note 8, at 24-26.

38 E.g., Kaczkowski v. Bolubasz, 491 Pa. 561, 573, 421 A.2d 1027, 1033 (1980); Malabre, Analysts See Inflation Easing, Then Rising, But Not to Old Peaks, Wall St. J., Mar. 10, 1982, at 1, col. 6. It should not be assumed that the rate of inflation necessarily will increase in the future. See, e.g., ECONOMIC REPORT, supra note 36, at 213. Indeed, some economists have postulated that the rate of increase in inflation may decrease over the course of the 1980’s. See, e.g., id.; Miller, Slowdowns in Economic Activity and the Rate of Inflation, ECON. REV. FED. RES. BANK KAN. CITY, Sept.-Oct. 1981, at 18, 27; cf. Malabre, supra, at 1, col. 6 (inflation expected to continue at lower rates than in recent past, but increase does not necessarily indicate a long-term trend). Economists expressing this opinion, however, also believe that decreases in inflation depend upon the successful implementation of fiscal policy. See, e.g., Impact of Inflation on the Economy: Hearings Before the Task Force on Inflation of the House Comm. on the Budget, 96th Cong., 1st Sess. 249 (1979) (attachment by Prof. Linden); TASK FORCE REPORT, supra note 8, at 30; ECONOMIC REPORT, supra note 36, at 214-15; Miller, supra, at 27. The consensus appears to be that preventing inflation will continue to be a major economic policy concern throughout the 1980’s. See PRESIDENT’S COMMISSION FOR A NATIONAL AGENDA FOR THE EIGHTIES, THE AMERICAN ECONOMY: EMPLOYMENT, PRODUCTIVITY AND INFLATION IN THE EIGHTIES 47-48 (1980).
techniques for predicting future inflation amount to little more than sophisticated speculation. 39 This contention, voiced by several economists, 40 has elicited two types of response. First, it has been noted that other elements of damages whose determination necessarily requires speculation, such as pain and suffering, are routinely calculated. 41 Second, the practical result of refusing to account for inflation has been deemed identical to that of assuming an inflation rate of zero—an assumption that contradicts available economic data. 42 Arguably, such an assumption is even more spec-


40 See, e.g., Carlson, supra note 20, at 628; Formuzis & O’Donnell, Inflation and the Valuation of Future Economic Losses, 38 Mont. L. Rev. 297, 299 (1977). But see Fisher & Hartnett, supra note 29, at 81 (more realistic awards result from the admission of evidence regarding inflationary trends); Ward, supra note 7, at 60 (use of probabilities in inflation rate predictions does not necessarily make those predictions speculative).

41 See C. McCormick, supra note 1, § 88, at 318; J. Stein, supra note 1, § 9, at 15. In addition to pain and suffering, other elements of damages, such as lost future profits, are sanctioned despite speculation as to their determination. See Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556, 564-67 (2d Cir. 1970). Permitting such recovery is justified by an unwillingness to allow tortfeasors to benefit from the uncertainties of estimating a plaintiff’s injury. See J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 567 (1981); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946). This is not to say, however, that there are no guidelines for the jury in determining suitable awards for such damages. The values chosen must have some basis in the evidence presented. See, e.g., 327 U.S. at 264; Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556, 566 (2d Cir. 1970).

42 See Henderson, supra note 8, at 309. The assumption of a zero inflation rate does not necessarily mean that the price level is assumed to be unchanging. Usually, it merely implies the assumption of a constant level of price change over time. See Statistical Abstract of the United States, 1981 § 15, at 457 (1981) (defining CPI as a measure of average change in prices). Available data indicates that while the price level, as measured by the CPI, has risen steadily over time, its growth was more rapid in some years than others. Compare Economic Report, supra note 36, at 294 (showing consistent rise in CPI for the years 1939-1981) with Task Force Report, supra note 8, at 24-26 (discussing irregularities in the size of the increase of the CPI for the years 1940-1979). Because of this history of erratic CPI fluctuations, some economists argue that projection of the current rate of inflation over time still results in undercompensation to the plaintiff. See, e.g., Coyne, supra note 7, at 25-26. This shortcoming, however, is common to all of the proposed methods of compensating for inflation, with the possible exception of periodic payment of judgment plans. See infra note 123. As the Second Circuit has indicated, however, it is natural to base predictions of future conditions on past trends. Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 37 (2d Cir. 1980), cert. denied, 451 U.S. 971 (1981). Consequently, courts do not expect absolute
The mere fact that prediction of future inflation involves some speculation, therefore, does not justify refusal to account for inflation in damage awards.

The strongest arguments against recognizing the impact of inflation on damages are pragmatic, and arise from the peculiar difficulties of trying damages issues before a jury. It is contended, for example, that the admission of economic evidence will confuse a jury or result in unfair verdicts due to passion or prejudice. Such arguments are bolstered by the fact that there is greater room for dispute concerning the validity of an economic hypothesis, as opposed to other scientific theories, because economic hypotheses are not susceptible to empirical verification. Indeed, there is little consensus among economists concerning the proper treatment of inflation in damage calculations.

accuracy in damage awards. E.g., O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1200 (7th Cir. 1982); Doca, 634 F.2d at 38. It is submitted that economists, when making proposals concerning the future inflation problem, should be aware of this pragmatism on the part of judges.

See Coyne, supra note 7, at 29; Formuzis & O'Donnell, supra note 40, at 299.


See, e.g., Huddell v. Levin, 537 F.2d 726, 743 (3d Cir. 1976); Raines v. New York Cent. R.R., 129 Ill. App. 2d 294, 305-06, 283 N.E.2d 895, 900-01 (Ct. App. 1970), rev'd on other grounds, 51 Ill. 2d 428, 263 N.E.2d 230, cert. denied, 409 U.S. 983 (1972). While there is concern over presenting economic evidence to a lay jury, the possibility of uninformed speculation by the jury regarding future inflation has been used as an argument in favor of admitting such evidence. See, e.g., Tenore v. Nu Car Carriers, 67 N.J. 466, 481-84, 341 A.2d 613, 621-23 (1975).

See J. Cramer, Empirical Econometrics 2 (1971). One reason for the problems of verification posed by economic theory is that a significant portion of important economic data is not quantifiable. See id. at 2-3; O. Morgenstern, On the Accuracy of Economic Observations 3-5 (1963). A more basic flaw is that economic models are too general to be tested by experimental means. J. Cramer, supra, at 2. Consequently, econometric studies tend to include specific hypotheses which fit the situation and data around which the study is designed, but which have little connection with the economic theories that they purport to prove. See id.; P. Samuelson, supra note 8, at 10-13.

See, e.g., Carlson, supra note 20, at 628. Most economists who have debated the role of inflation in damage calculations agree that inflation must be taken into account to produce an accurate estimate of lost future earnings. See id. at 629-30; Coyne, supra note 7, at 25-26; Fisher & Hartnett, supra note 29, at 59-60; Formuzis & O'Donnell, supra note 40, at 297-98; Franz, supra note 22, at 36; Henderson, supra note 8, at 310-11; Lebrenz, The Inflationary Impact Upon the Economic Loss From Impaired Earning Capacity, 69 Ill. B.J. 372, 372 (1981); Sherman, supra note 20, at 733; Ward, supra note 7, at 62.
Despite the problems involved in adopting an inflation-compensating rule, a number of courts and economists have concluded that the traditional view of the role of inflation in damage calculations is no longer viable. Departure from this view, however, requires careful evaluation of the relative importance of and concerns for equity, certainty, and efficiency. The specific question raised is whether the objectives of damages law dictate awards that estimate lost future earnings as precisely as possible, or awards that are insulated as completely as possible from confusion and prejudice. Until recently, federal courts adhered to the traditional rule primarily out of a distrust of economic predictions, as a brief review of judicial treatment of the issue demonstrates. Four stages can be discerned in the courts' movement away from the traditional rule: recognition of the impact of inflation upon awards; acceptance of jury consideration of inflation's impact; admission of economic evidence concerning future inflation rates; and evaluation of methods for including inflation in damage calculations.

Judicial Treatment of Inflation in Damage Calculations

Most early cases conceded that inflation existed. For example, awards rendered during a period of high inflation were not considered excessive if they were larger than awards for similar injuries made during less inflationary periods, even if the difference was substantial. The deflation prevalent during the pre-World
War II era affected damage awards, since the increasing purchasing power of money resulted in overcompensating a plaintiff if his award was not discounted to present value. In 1916, the United States Supreme Court recognized this economic reality in Chesapeake & Ohio Railway v. Kelly. In Kelly, the Court reversed a wrongful death award because of the trial judge's refusal to require that the jury discount the decedent's lost future earnings to present value. The Court declared that "as a rule . . . the ascertained future benefits ought to be discounted in the making up of the award." Although Kelly only mandated discounting of awards determined under federal law, the rule subsequently was adopted by state courts.

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53 See Henderson, supra note 8, at 309; supra note 36 and accompanying text.
54 See Henderson, supra note 8, at 309.
56 Id. at 493.
57 Id. at 490. The Kelly Court's discussion of the factors involved in computing lost future earnings raised several issues that have since proven troublesome to the judiciary. For example, the Court suggested that the discount rate reflects rates available on low-risk investments. Id. The highest legal rate of interest need not be used, since that rate may only be obtainable by skilled investors. Id. Additionally, the Court alluded to the difficulties involved in requiring jurors to deal with economic considerations, but refused to rule on whether expert economic witnesses or present value tables should be admitted into evidence. Id. at 491. These matters were left to the "law of the forum." Id. Moreover, there is dictum in Kelly suggesting that the Court might have been willing, had the issue arisen, to require the inclusion of future inflation in damage calculations. Id. Indeed, the Court emphasized that "[i]n computing the damages recoverable for the deprivation of future benefits, the principle of limiting the recovery to compensation requires that adequate allowance be made, according to circumstances, for the earning power of money . . . ." Id. (emphasis added).
58 See id. at 491. The action in Kelly was founded upon the Federal Employers Liability Act. Id. at 486.
After Kelly, courts were disinclined to expand the rules pertaining to the consideration of inflation in calculating damages.\(^6\) This was due, at least in part, to the courts’ belief that the inflation-rate component of the discount rate sufficiently recompensed the plaintiff for the impact of inflation on the award.\(^1\) Juries were permitted to consider inflation, but only based upon their common knowledge.\(^2\) It generally was held that instructing the jury on inflation did not constitute reversible error,\(^3\) but it was also held that refusal to give such instruction was not ground for reversal.\(^4\) Consequently, consideration of inflation was essentially a matter for the jury’s discretion.\(^5\)


See, e.g., J. Stein, supra note 1, § 170, at 330. Courts have been reluctant to formulate a requirement that inflation be considered in determining tort damages. See Lumber Terminals, Inc. v. Nowakowski, 36 Md. App. 82, 94-95, 373 A.2d 282, 289 (Ct. App. 1977); see also Schnebly v. Baker, 217 N.W.2d 708, 727 (fewer courts have addressed the question of future inflation than have dealt with past inflation), rev’d on other grounds, 221 N.W.2d 739 (Iowa 1974).


See Fisher & Hartnett, supra note 29, at 63-64. It appears to have been the state courts’ view that the jury was free to consider or not consider the impact of inflation without evidence. See, e.g., Louisville & N.R. v. Scott’s Adm’r, 188 Ky. 99, 103, 220 S.W. 1066, 1068 (1920); Halloran v. New England Tel. & Tel. Co., 95 Vt. 273, 276, 115 A. 143, 144 (1921). Most federal courts apparently do not allow the jury to consider the impact of inflation unless it has evidence upon which to base its conclusions. See, e.g., Blue v. Western Ry., 469 F.2d 487, 496 (5th Cir. 1972); Magill v. Westinghouse Elec. Corp., 464 F.2d 294, 300 (3d Cir. 1972), cert. denied, 410 U.S. 956 (1973). But see Baker v. Baltimore & Ohio R.R., 502 F.2d 638, 644 (6th Cir. 1974).
Attempts by counsel to compel evaluation of inflation by submitting evidence as to trends of general wage increases originally were rejected, since such evidence was considered too speculative to support a damage award. This rule was relaxed by later decisions admitting evidence showing a trend of wage increases in the plaintiff's occupation. Additionally, evidence showing inflationary trends in the economy at large, or attempting to link increases in national productivity and inflation rates to wages in the plaintiff's occupation were excluded as speculative.

While this position still is maintained by some state courts, recent circuit court decisions suggest that admissibility of evidence of inflationary trends is becoming the majority rule in the federal system.

A number of federal cases have devoted extensive discussion to the question of how inflation should be accounted for in damage calculations. These decisions appear to be laying the groundwork

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Notably, the Federal Rules of Evidence appear to support the admissibility of inflation testimony. Fisher & Hartnett, supra note 29, at 78-79. Inflation testimony usually is given by economists, who are considered experts in a field of "specialized knowledge." See Fed. R. Evid. 702. More importantly, as Professor Rothstein has observed, "the area testified to need not be 'beyond lay comprehension',... but need only be an area where expert help would be of 'assist[ance]'." P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 80 (1973). Arguably, economic prediction of inflation is such an area. See Fisher, Use of an Economist to Prove Future Economic Losses, 18 S. Tex. L.J. 403, 411-13 (1977). Moreover, under the federal rules, opinion testimony is admissible even though based on evidence which is inadmissible in itself. Fed. R. Evid. 703; see P. ROTHSTEIN, supra, at 81-82.

for a new damage calculation rule under federal law. The Ninth Circuit reversed a damage award because, in an attempt to compensate for future inflation, the trial judge had refused to discount the plaintiff's lost future earnings to present value. The court found this method clearly erroneous, but recognized that "to ignore inflation when the rates are high is to ignore economic reality." The court concluded that inflation rate changes that could be postulated with "some reliability" could be taken into account. The court proposed a formula under which gross future earnings are compounded by the estimated future inflation rate, before deducting taxes and decedent's personal expenditures. This figure is then discounted to present value. Following the Ninth Circuit's decision in English, the Second Circuit, in Feldman v. Allegheny Airlines, Inc., upheld a district court's award based upon Connecticut law, insofar as it accounted for inflation by decreasing the discount rate by the estimated rate of future inflation. After reviewing a number of state and federal

73 521 F.2d 63 (9th Cir. 1975).
74 Id. at 71 & n.7. In English, a wrongful death claim was brought under the Federal Tort Claims Act, 28 U.S.C. § 2674 (1976). 521 F.2d at 65. The law to be applied in such an action is "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1976). Since the English plaintiff's injury occurred in California, the Ninth Circuit applied California law in deciding damage issues. 521 F.2d at 65.
75 521 F.2d at 72.
76 Id. at 75; see, e.g., Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 435, 460-61 (3d Cir.), cert. granted, 103 S. Ct. 50 (1982); O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1200 (7th Cir. 1982).
77 521 F.2d at 75-76.
78 Id. at 76.
79 Id. The English method subsequently was adopted by the Tenth Circuit in Steckler v. United States, 549 F.2d 1372, 1378 (10th Cir. 1977). The Steckler court reversed an award because of the trial court's failure to account for inflation in calculating lost future earnings. Id. at 1380. The court briefly summarized the total offset method of Beaulieu v. Elliott, 434 P.2d 665, 671 (Alaska 1967), see infra note 100, and the admission of evidence of inflationary trends in Riha v. Jasper Blackburn Corp., 516 F.2d 840, 845 (8th Cir. 1975), as well as the Feldman and English approaches. 549 F.2d at 1377-78. While the court did not explain its doubts regarding the Beaulieu, Riha, and Feldman approaches, it did state its belief that the English approach was the "best rationale" since it dealt more adequately with "inflation trends." See id.
80 524 F.2d 384 (2d Cir. 1975).
81 Id. at 388. Feldman involved a wrongful death action governed by Connecticut law. Id. at 386. Connecticut law requires that recovery in wrongful death cases be measured in terms of the value to the decedent of the loss of her life. Id. Under this standard of value-
cases dealing with inflation questions, the Feldman court observed
that while estimating inflation requires some recourse to specula-
tion, such estimations have been countenanced by state courts in
the past.82
The most recent circuit court cases to evaluate methods of ac-
counting for inflation have been influenced by the decisions in
Feldman and English, although each has reached a slightly differ-
ent conclusion concerning the wisdom of the English and Feldman
approaches.83 In Doca v. Marina Mercante Nicaraguense, S.A.,84
the Second Circuit upheld the trial court's decision to take inflation
into account.85 The Doca court examined its prior cases, in-
cluding Feldman, in which it had looked favorably upon including
inflation in the determination of lost future earnings.86 Although
refusing to adopt a calculation method by judicial fiat, the court
indicated cautious approval of a method similar to the Feldman
approach.87 In O'Shea v. Riverway Towing Co.,88 the Seventh Cir-
tion, the court found no error in the district judge's attempt to compensate for the effect of
inflation on the award. Id. at 387-88. The amount of the award, however, was held to be
erroneous due to the district judge's underestimation of the decedent's living expenses. Id.
at 389-90.

82 Id. at 387. In his oft-cited concurrence, Judge Friendly observed that the state and
federal decisions on the question of estimating inflation are “in a stage of uncertainty and
flux,” and that in many instances state case law yields no clue as to how the highest state
courts would rule on an inflation question. Id. at 390 & n.1 (Friendly, J., concurring dubit-
tante). While critical of the assumptions accepted by the majority in calculating the award,
Judge Friendly was reluctant to advocate a remand since the parameters of state law were
so uncertain. Id. at 393 (Friendly, J., concurring dubitante).

83 See, e.g., Culver v. Slater Boat Co., 688 F.2d 280, 309-10 (5th Cir. 1982) (en banc);
Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 460-61 (3d Cir.), cert. granted, 103 S.
Ct. 50 (1982); O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1200 (7th Cir. 1982); Doca v.
Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 38-40 (2d Cir. 1980), cert. denied, 451


85 634 F.2d at 40. The Doca court recognized that no evidence had been submitted
justifying the use of the low one percent discount rate adopted by the district court. Id. Of
greater significance was the court's finding that by both removing the inflation-compensat-
ing component from the discount rate and including cost-of-living increases, the district
court had double-counted inflation. Id.

86 Id. at 35. The court observed that “[i]n this Circuit, the issue [of inflation] has been
considered but not resolved.” Id. The court examined cases from other circuits which made
allowance for inflation. Id. at 35-36. Since Doca involved a maritime personal injury claim, it
was decided under federal law. See id. at 32.

87 Id. at 38-40. The Doca court observed that the data gathered in Feldman showed “a
fairly constant relationship between interest and inflation rates,” and that this relationship
might be used to account directly for the effects of inflation. Id. at 37-39. The court also
indicated that, based on the data presented in Feldman, a standard real rate of two percent
could be used in all lost earnings calculations. Id. at 39-40 & n.10.
cuit upheld an award made by a district judge who had considered a significant amount of inflation evidence, including testimony of the plaintiff’s expert economist.\textsuperscript{88} Like the Docu court, the O’Shea panel reviewed a number of different approaches to the problem.\textsuperscript{89} The court examined the methods espoused by English and Feldman,\textsuperscript{90} noting their similarities,\textsuperscript{91} and indicated that both were acceptable.\textsuperscript{92} The O’Shea court declined, however, to mandate the use of a particular method in figuring inflation into damages.\textsuperscript{93}

The most recent opinion examining calculation methods in detail was delivered by the Fifth Circuit in \textit{Culver v. Slater Boat Co.}.\textsuperscript{94} The Culver court abandoned the traditional rule in favor of weighing economic evidence on a case-by-case basis to determine the extent to which inflation should be included in lost future earnings.\textsuperscript{95} After evaluating and rejecting its prior contrary deci-

\textsuperscript{88} 677 F.2d 1194 (7th Cir. 1982). O’Shea involved a personal injury action brought under federal admiralty jurisdiction. \textit{Id.} at 1196.

\textsuperscript{89} \textit{Id.} at 1200-01. The trial judge allowed the plaintiff’s economist to testify as to his methodology and calculations as well as to his earnings estimates. \textit{Id.} at 1196-97. The economist presented a series of earnings estimates ranging from $50,000 to $114,000, depending upon the discount rate selected. \textit{Id.} at 1197. The trial judge awarded $86,033 for lost future earnings without explaining how he arrived at that figure, despite the federal rule requiring a judge trying a case without a jury to give a written explanation for the award that he makes. \textit{Id.} at 1201; see \textit{Fed. R. Civ. P. 52}(a). Since the trial court might have arrived at its award by assuming “reasonable” inflation and discount rates of three percent and two percent respectively, the award was held not to be unreasonably high. \textit{See} 677 F.2d at 1201.

\textsuperscript{90} 677 F.2d at 1199-1200.

\textsuperscript{91} \textit{Id.} The O’Shea court reviewed the Feldman and English approaches without mentioning either case by name. \textit{See id.}

\textsuperscript{92} \textit{Id.} at 1200. The Feldman and English methods produce close, though not identical results. \textit{See} Feldman v. Allegheny Airlines, Inc., 524 F.2d at 391 (Friendly, J., concurring dubitante). Indeed, the Feldman concurrence noted a less than $2,000 differential when both methods are applied to a $250,000 award. \textit{Id.} (Friendly, J., concurring dubitante).

\textsuperscript{93} 677 F.2d at 1200.

\textsuperscript{94} \textit{Id.} The O’Shea court explained that discounting without including future inflation in base earnings undercompensates the plaintiff. \textit{Id.} The court also mentioned some elements of the economist’s method that the defendant could have challenged as erroneous. \textit{Id.} at 1200-01. For example, inflation is not the only factor that causes base earnings to rise, contrary to the economist’s assumption. \textit{Id.} at 1200. Additionally, the court indicated that merit raises have an impact, as do real wages, in other sectors of the economy. \textit{Id.} The economist was overly optimistic, the court believed, in assuming that the plaintiff, a 57-year old woman not in robust health, would continue to work full time until her 70th birthday. \textit{Id.} The court also raised the point that a woman in the plaintiff’s tax bracket would be unlikely to invest in tax-free municipal bonds, as her economist assumed. \textit{Id.} at 1201. Finally, the court questioned the economist’s deduction of all taxes that the plaintiff would have been assessed on the lost earnings; the plaintiff would have to pay taxes only on the interest she would receive on the award. \textit{Id.}

\textsuperscript{95} 688 F.2d 280 (5th Cir. 1982) (en banc).

\textsuperscript{96} \textit{Id.} at 310-11. The Culver decision overruled Johnson v. Penrod Drilling Co., 510 F.2d
sions, the court analyzed available inflation-compensating methods. Like the Second and Seventh Circuits, the Fifth Circuit concluded that inflation evidence should be admissible, but that it would be inappropriate to adopt a particular calculation method as a matter of law.

Unlike its sister circuits, the Third Circuit in *Pfeifer v. Jones & Laughlin Steel Corp.*, adopted a rule to account for the impact of inflation on lost future earnings. In *Pfeifer*, the court up-

234 (5th Cir.) (en banc), *cert. denied*, 423 U.S. 839 (1975), which held that inflation is too speculative to be included in future damage calculations. 688 F.2d at 283; see 510 F.2d at 241. The *Penrod* court took judicial notice of the existence of inflation, but concluded that present inflation did not render future inflation sufficiently certain to justify including it in a damages calculation rule. 510 F.2d at 236. The court justified its holding by stating that inflationary increases could be symptoms of an approaching recession or depression, instead of demonstrating a continuing inflationary trend. *Id.* The court also stated that increases in the discount rate caused by inflation would suffice to mitigate inflation's impact on the plaintiff's award. *Id.*

*See* 688 F.2d at 295-306. The *Culver* court reversed the district court, which had refused to permit the inflation issue to be raised at trial by excluding relevant evidence, jury instructions, and interrogatories. *Id.* at 283.


*See* *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194, 1200 (7th Cir. 1982).

*See* 688 F.2d at 308, 310-11. The court devoted most of its attention to the "total offset" method and the *Feldman* rule. *See id.* at 302. Under the total offset method, the inflation rate is presumed to equal the discount rate, and is removed from the award by eliminating the discounting process. *Id.* at 299 & nn.26-27. The court rejected this approach, however, since it does not take into account the earnings histories of individual plaintiffs and would tend to overcompensate the plaintiff if the rate of wage increase in his industry was less than the CPI. *See id.* at 299, 308.

The *Feldman* rule was criticized on two grounds. *See id.* at 302. First, the court noted that this rule necessarily assumes that the plaintiff's future earnings would have kept pace with inflation, which may not be true. *Id.* Second, the *Feldman* method's accuracy is lessened if future economic conditions differ significantly from the present conditions. *Id.* Despite these problems, the court considered the *Feldman* method acceptable. *Id.* at 302.

A number of the Fifth Circuit judges disagreed with the *Culver* majority. Judge Hill thought that the *Feldman* approach should be adopted for use in future earnings calculations. *Id.* at 312 (Hill, J., concurring). Judge Hill viewed the evidence-weighing approach as granting the jury too much latitude to speculate about the appropriate rate of future inflation without offering sufficient guidance. *Id.* In a dissent, Judge Clark contended that the *Penrod* rule was preferable to one requiring juries to wrestle with conflicting economic evidence. *See id.* at 314 (Clark, J., dissenting). Judge Clark agreed with the majority, however, that it was incorrect to exclude evidence of merit raises and productivity-based increases under the *Penrod* rule. *Id.* (Clark, J., dissenting). Judge Johnson argued vigorously for adoption of the total offset method. *See id.* at 317-24 (Johnson, J., dissenting). Finally, Judge Tjoflat dissented on the ground that the plaintiffs had not preserved the inflation issue for appeal. *Id.* at 315 (Tjoflat, J., dissenting).

*678 F.2d 453* (3d Cir.), *cert. granted*, 103 S. Ct. 50 (1982).

*678 F.2d at 461.*
held the trial judge's attempt to compensate for the effect of inflation by not discounting the award, thus expressly embracing the rule recently adopted by the Pennsylvania Supreme Court.\textsuperscript{103} In its analysis of the propriety of the award, the court chose not to compare this "total offset" approach with other possible methods.\textsuperscript{104} Instead, the \textit{Pfeifer} court focused its analysis upon the ability of a federal court applying federal law to adopt a state standard.\textsuperscript{105} After determining that there was "no jurisprudential impediment" to the adoption of the Pennsylvania rule, the court reviewed Pennsylvania case law on the inflation issue and concluded that "an honest and accurate calculation must consider the stark reality of inflationary conditions."\textsuperscript{106} Finally, the \textit{Pfeifer} court noted with approval that use of the total offset rule avoided speculation as well as "'complicated, time consuming economic testimony,'" and rendered more predictable awards.\textsuperscript{107}

Presently, the federal courts appear to take the position that while inflation should be included in lost future earnings, the suitability of the method employed should be determined on a case-by-case basis.\textsuperscript{108} Given the courts' justifiable concern with balance-

\textsuperscript{103} Id. The method adopted by the Pennsylvania Supreme Court in Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A.2d 1027 (1980), has been referred to as the "total offset" method, see \textit{Pfeifer}, 678 F.2d at 461, or the "Alaska Rule," see \textit{Culver} v. Slater Boat Co., 688 F.2d 280, 299 (6th Cir. 1982) (en banc).

\textsuperscript{104} See 678 F.2d at 457-61.

\textsuperscript{105} See id. at 456.

\textsuperscript{106} Id. at 458-61.

\textsuperscript{107} Id. (quoting Kaczkowski v. Bolubasz, 491 Pa. 561, 583, 421 A.2d 1027, 1038 (1980)).

\textsuperscript{108} E.g., O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1199-1201 (7th Cir. 1982); Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 34-40 (2d Cir. 1980), cert. denied, 451 U.S. 971 (1980); Taenzler v. Burlington N., Inc., 608 F.2d 796, 799-801 (8th Cir. 1979). The only circuit that continues to espouse the traditional rule with respect to inflation is the First Circuit. See Williams v. United States, 435 F.2d 804, 807 (1st Cir. 1970) (applying Rhode Island law). In \textit{Williams}, the First Circuit, interpreting Rhode Island law, held that future inflation could not be included in determining lost future earnings. \textit{Id.} at 807. In a subsequent case, again applying Rhode Island law but which now included an inflation-compensation statute, the First Circuit reached a result different than that rendered in \textit{Williams}. See Turcotte v. Ford Motor Co., 494 F.2d 173, 184-87 (1st Cir. 1974). Thus, it is uncertain whether the First Circuit would apply the principles used in \textit{Williams} to a case decided under federal law.

Although it has yet to rule on the inflation question, the Supreme Court has indicated several times in dicta that it approves of accounting for inflation in calculating future damages. See, e.g., Norfolk & W. Ry. v. Liepelt, 444 U.S. 490, 494 (1980); Grunenthal v. Long Island, R.R., 393 U.S. 156, 160-61 (1968); Chesapeake & Ohio Ry. v. Kelly, 241 U.S. 485, 491 (1916). In \textit{Norfolk}, the Court considered whether future income tax liability on lost future earnings should be taken into account in a wrongful death action brought under the Federal Employers' Liability Act. See \textit{id.} at 490-91. The Court held that the exclusion of evidence
ing considerations of equity, certainty, and efficiency in determining damages, this position appears reasonable. It is favored by several economists who contend that greater fairness to the plaintiff will result if detailed information about wage trends in the plaintiff's specific occupation is used to determine lost future earnings, rather than across-the-board application of a general formula.

Serious questions remain, however, concerning the risk of prejudice posed by economic testimony. One obvious source of prejudice is the public's tendency to distrust the credibility of economic calculations. Furthermore, a jury may be unable to comprehend economic presentations. The evidentiary approach, therefore, may leave the plaintiff no better off than if the traditional rule were still in force. Indeed, the plaintiff may be at a disadvantage if the jury does not fairly evaluate his economic
demonstrating the impact that income taxes would have had on a decedent's lost future earnings was reversible error. Id. at 494. The Court observed:

[T]here are many variables that may affect the amount of a wage earner's future income-tax liability. . . . But future employment itself, future health, future personal expenditures, future interest rates, and future inflation are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life.

Id. at 494.

109 See supra notes 35-47 and accompanying text. The term "efficiency" will be used in this Note as it relates to a number of issues concerning the actual conduct of trials, such as avoidance of wasted time and unwarranted evidence. See, e.g., Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 461 (3d Cir.) (total offset method contributes to "judicial efficiency"), cert. granted, 103 S. Ct. 50 (1982); Riha v. Jasper Blackburn Corp., 516 F.2d 840, 843 n.4 (8th Cir. 1975) (evidence of future inflation and tax considerations "will create unmanageable trials").

110 See supra note 7, at 27-28; Fisher & Hartnett, supra note 29, at 79-80; Lebrenz, supra note 47, at 375; Peck & Hopkins, supra note 2, at 361.


112 See O. Morgenstern, supra note 46, at 9. A problem often mentioned by the courts is that rather than being doubtful, the jury may accept detailed economic calculations with too little skepticism. See Taenzler v. Burlington N., Inc., 608 F.2d 736, 800 (8th Cir. 1979).

113 See, e.g., P. Samuelson, supra note 8, at 8-9; Fisher, supra note 70, at 410.

114 See, e.g., Culver v. Slater Boat Co., 644 F.2d 460, 464 (5th Cir. 1981), rev'd on other grounds en banc, 688 F.2d 280 (1982). In Culver, the trial judge permitted evidence of "provable increases" in the decedent's wages up to the date of trial to be considered by the jury. Id. The jury apparently rejected this evidence, basing the award instead on the decedent's average earnings for the 5-year period preceding his death. Id.
It is suggested that the federal courts should closely scrutinize the various methods proposed by economists with a view toward eventually adopting a uniform inflation calculation rule. Courts seem disposed to adopt the method of accounting for inflation that requires the least recourse to economic evidence while producing reasonably fair and nonspeculative awards. With this in mind, the various proposals espoused by commentators and economists will be examined briefly.

THE ECONOMISTS' PROPOSALS FOR INCLUDING INFLATION IN DAMAGES

Several commentators believe that lump-sum compensation does not adequately compensate a plaintiff in certain cases. As an alternative, they recommend a system of installment payments. The two proposals usually discussed are structured settlements.

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115 See id. at 463. Culver illustrates how a jury's misinterpretation of economic evidence can lead to substantial injustice. See id. In Culver, the plaintiff submitted no evidence as to what would constitute a proper discount rate. Id. at 464. The defendant's expert suggested a rate of 9.125%, the current rate on government bonds. Id. at 463 & n.4. On being instructed to discount the award "by a percentage that you feel represents an appropriate rate of interest at the present time," the jury chose to discount by 25%. Id. at 463 & nn.2-3. The trial judge substituted 9.125% in calculating the award, an act the Fifth Circuit held not to be an abuse of discretion. Id. at 463, 464-65.


INFLATION AND LOST FUTURE EARNINGS

The phrase "structured settlement" is an all-encompassing term used to describe any settlement that includes a periodic payment plan to provide for future expenses of an injured party. Because they generally involve "locked in" periodic payments, structured settlements have been criticized on the ground that they allow defendants to minimize costs while failing to take into account the payments' decreasing purchasing power which results from rising inflation. Since these arrangements are consensual, however, careful planning on the part of counsel for both parties can ensure a settlement that is acceptable and beneficial to all.

A more innovative approach replaces the traditional lump-sum judgment with a periodic payment of judgment plan. Calculating

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119 E.g., Kreindler, Structured 'Lemons', N.Y.L.J., July 20, 1981, at 1, col. 1. Structured settlements typically feature an annuity to compensate for future damages and lump-sum payments for accrued expenses. E.g., Lilly, supra note 117, at 243. Several different annuities can be combined in the same settlement. See Krause, supra note 117, at 1528.

120 E.g., Kreindler, supra note 119, at 2, col. 1. Structured settlements are often cheaper for a defendant-insurance company than a lump-sum award, since it can purchase an annuity for less money than the plaintiff can. Id. at 2, col. 2.

121 Corboy, Structured Injustice: Compulsory Payment of Judgments, 66 A.B.A. J. 1524, 1524 (1980); see, e.g., Krause, supra note 117, at 1532-29; Lilly, supra note 117, at 247; Sedgwick & Judge, supra note 118, at 587. The defendant can arrange a settlement that provides for future increases in payments to compensate for inflation while retaining the advantage of decreased costs. See Kreindler, supra note 119, at 2, col. 1. Opponents of the structured settlement concept nonetheless concede that there are circumstances in which it will be to the plaintiff's advantage to make a structured settlement. See id. The key to arranging a structured settlement that will satisfy both parties lies in making sure that the plaintiff understands the limitations of such a settlement. See, e.g., id. At any rate, lawyers and judges will have to learn to think in terms of structuring awards for the plaintiff's long-range benefits in order to work effectively with structured settlements. Krause, supra note 117, at 1528.

It also has been suggested that increased use of structured settlements will benefit plaintiffs' attorneys directly by giving them the option of asking for payment from the defendant in annuity form, with its concomitant tax advantages. See Lilly, supra note 117, at 246; Sedgwick & Judge, supra note 118, at 588. But see Grossman & Roman, The Model Periodic Payment of Judgments Act: An Economic Analysis, TRIAL, May, 1982, at 62, 65 (use of periodic installment legal fees raises serious legal and ethical questions).

122 See, e.g., MODEL PERIODIC PAYMENT OF JUDGMENTS ACT § 3, 14 U.L.A. 6 (West Supp. 1982) (the Act). Many states have adopted legislation requiring periodic payments in specific actions, such as those brought under workers' compensation or no-fault insurance plans. See Elligett, supra note 118, at 133-34. Approximately one-half of the states have no-fault automobile insurance legislation, which generally calls for some type of periodic payment. Id. at 134. Much of this legislation is patterned on the Uniform Motor Vehicle Accident Reparations Act. Id. at 133-34; see UNIF. MOTOR VEHICLE ACCIDENT REPARATIONS ACT § 27, 14 U.L.A. 102-03 (1980). For examples of periodic payment provisions in state legislation, see Ark. Stat. Ann. § 65-4021 (1980) (monthly payments required); Fla. Stat. Ann. § 627.736(1)(b) (West Supp. 1982) (disability payments must be made "not less than every 2
present value and future inflation is unnecessary under such a plan since the payments can be adjusted as they accrue.123 Because of the difficulties in application that have arisen, such as determining the types of actions in which it should be used,124 there currently is little enthusiasm for expanded application of this approach.125

weeks"; N.Y. INS. LAW § 675(1) (McKinney Supp. 1982-1983) (payment to be made as loss accrues). It has been suggested that such plans should be applied in personal injury and wrongful death cases as well, particularly where large verdicts are probable. See, e.g., Elligett, supra note 118, at 134. A number of states have enacted provisions allowing periodic payments in medical malpractice actions. See, e.g., CAL. CIV. PROC. CODE § 667.7 (West 1980); Fla. STAT. ANN. § 768.31 (West Supp. 1981); Kan. STAT. ANN. § 60-2609 (Supp. 1981).

Periodic payments are advantageous because they eliminate the possibility that the plaintiff will squander a large lump-sum recovery intended to provide him with lifetime income. See, e.g., Elligett, supra note 118, at 131; Henderson, supra note 117, at 302; Sedwick & Judge, supra note 118, at 584. Similarly, since payments can be terminated if the plaintiff fails to live out his predicted lifespan, his heirs will not enjoy a windfall. See, e.g., Elligett, supra note 118, at 140-41. Specific mechanisms proposed for eliminating windfalls by terminating future medical benefits and pain and suffering damages on the plaintiff's death have drawn strong criticism. See, e.g., Corboy, supra note 121, at 1526; Grossman & Roman, supra note 121, at 64.

123 Present value and inflation considerations are not irrelevant under a periodic payment plan if the plan does not build inflation increases into future installments, or allow frequent reevaluation of judgments. The Act, for example, requires future damages to be computed in current dollars. See MODEL PERIODIC PAYMENT OF JUDGMENTS ACT § 5, 14 U.L.A. 9 (West Supp. 1982). Section 7 of the Act provides for adjustments to be made at yearly intervals, beginning 1 year after the judgment is first entered. See id. § 7. Adjustments are made in the following manner: the base earnings figure is discounted three percent annually, then compounded by the current discount rate on 52-week treasury bills. Id. §§ 7(c), 10. It has been argued that this method systematically undercompensates the plaintiff and thus its enactment would be imprudent. See Grossman & Roman, supra note 121, at 63. Tax complications arise as well, since if the award is invested in treasury bills, as the drafters suggest, income from it will be taxable. See Corboy, supra note 121, at 1525. Additionally, this method of compensating for inflation has been found undesirable because it requires continued judicial involvement. See Krause, supra note 117, at 1629.

124 See Elligett, supra note 118, at 133-39. Problems with respect to periodic payment statutes include whether the trial court or the jury should determine the number of years over which payments should be made, see id. at 138, and whether the consent of one or both parties should be required, see MODEL PERIODIC PAYMENT OF JUDGMENTS ACT § 3(a), 14 U.L.A. 6 (West Supp. 1982).

125 See Corboy, supra note 121, at 1526. No state has adopted the Model Periodic Payment of Judgments Act, 14 U.L.A. 2 (West Supp. 1982), and at least one commentator apparently believes that the Act will never be successful. See Corboy, supra note 121, at 1526. Indeed, the designating of the Act a "Model" as opposed to a "Uniform" Act indicates the drafters' realization that it has little chance of enactment in a significant number of jurisdictions. Id.

Some limited periodic payment schemes have been subject to constitutional challenge. See, e.g., American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc, 163 Cal. Rptr. 513 (Ct. App. 1980); Note, RECENT LEGISLATION: THE KANSAS APPROACH TO MEDICAL MALPRACTICE, 16 WASHBURN L.J. 395, 418-19 (1977). In American Bank & Trust, the California Court of Appeals affirmed a lower court's ruling that the California periodic payment
Despite the shortcomings inherent in lump-sum judgments, most economists believe that they would provide adequate compensation if inflation were to be factored into them. Several methods have been proposed to accomplish this purpose. Those most commonly discussed by the commentators, though infrequently adopted by the courts, are based essentially upon the Fisher theory of interest rates. Under these methods, estimation of the real rate of interest alone allows the economist to account for inflation. Since direct economic estimation is required, however, the problems of credibility and clarity associated with the evidentiary approach apply. Additionally, to the extent that the estimated inflation rate contained in the discount rate lags behind actual inflation, these methods automatically underestimate inflation and thus undercompensate the plaintiff.

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1 See, e.g., Carlson, supra note 20, at 631; Coyne, supra note 7, at 31; Formuzis & O'Donnell, supra note 40, at 304-05; Franz, supra note 22, at 37; Peck & Hopkins, supra note 2, at 377.

2 See, e.g., Carlson, supra note 20, at 630-31 (allowing the discount rate to offset increases in wages); Coyne, supra note 7, at 29-31 (compounding and then discounting, deriving all figures from specific information about the plaintiff where practicable); Formuzis & O'Donnell, supra note 40, at 302 (using the relationship between wage increase rates and interest rates to predict the wage increase rate).

3 See supra notes 108-15 and accompanying text.

4 See, e.g., I. Fisher, supra note 27, at 43; Hazlitt, Inflation and Interest Rates, 27 Freeman 213, 216 (1977); McCracken, Interest Rate Forecasting . . . and Other Popular Delusions, 159 Bankers Mag. 71, 74 (1976). Since the Fisher theory implicitly assumes that the real rate of interest remains stable over time, an estimation problem arises if this stability does not in fact occur. The validity of the stable real rate assumption continues to be a source of controversy among economists. Gibson, Interest Rates and Inflationary Expectations: New Evidence, 62 Am. Econ. Rev. 854, 854 (1972). Many economists support the
Two other inflation-compensation suggestions avoid the evidentiary problems inherent in predicting either the real rate or the future inflation rate. The first method, devised by Professors Formuzis and O'Donnell, is based upon the hypothesis that there is a constant relationship between the discount rate and the national rate of wage growth. By applying regression analysis to 3-year moving averages of interest rates and wage-growth rates theory that the real rate fluctuates. See, e.g., Carlson, Short-Term Interest Rates as Predictors of Inflation: A Comment, 67 Am. Econ. Rev. 469, 469 (1977). But see Fama, Interest Rates and Inflation: The Message in the Entrails, 67 Am. Econ. Rev. 487, 496 (1977) (real rate may fluctuate, but its variation reflects changes in the inflation rate); Gibson, supra, at 863 (real rate constant for short-term interest rates). In view of this uncertainty concerning the behavior of the real rate, it would appear less speculative to base predictions concerning wage and price increases on the relationship that these factors bear to the discount rate. See Formuzis & O'Donnell, supra note 40, at 299. The existence of a predictable relationship between wage increase rates and interest rates is uncontroversial. See, e.g., Franz, supra note 22, at 36.

Regression analysis, as the term is used in econometrics, is defined as "a method for predicting the value of a dependent variable from known values of independent variables." C. AMMER & D. AMMER, DICTIONARY OF BUSINESS AND ECONOMICS 358 (1977). For a brief summary of how regression analysis operates, see infra text accompanying notes 134-43.

A moving average is defined as:

[A] series of calculations made by taking the simple average or arithmetic mean, of a consecutive number of items, then discarding the first item and adding the first of the remaining items, and continuing the process, so that the number of items in the series remains constant.

C. AMMER & D. AMMER, supra note 134, at 278; cf. Formuzis & O'Donnell, supra note 40, at 300 n.14 (defining moving average as taken for 1 year only). Moving averages are calculated using successive, equal-sized clusters of observations. The process can best be demonstrated by means of a simple example:

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For a similar illustration, see C. AMMER & D. AMMER, supra note 134, at 278.
using data for a 20-year period, they discovered that the wage increase rate consistently exceeded the rate of discount by 1.4%. Using this result, they devised the following procedure to factor inflation into lost future earnings: the discount rate is increased by 1.4 to produce an estimated rate of wage increase; base annual earnings then are compounded by this estimated rate prior to discounting.

This method presents clear advantages. Not only is it simple to explain and apply, but it also lends itself to the formulation of an inflation-accounting rule which could be incorporated easily into the existing discounting rule accepted by the courts. Furthermore, by eliminating the need for testimony concerning the inflation rate, a possible source of confusion and prejudice is eliminated. According to its formulators, the method’s accuracy was affirmed by a statistical test and its efficiency has been demonstrated in trial courts.

The final method of accounting for inflation’s impact, promul-
gated by Professor Carlson, eschews calculations altogether. Unlike most of his colleagues, Professor Carlson contends that it is possible to compensate a plaintiff adequately for the impact of inflation upon lost future earnings by eliminating the discounting process.\textsuperscript{144} This approach also is simple to explain and apply since it requires presentation of little economic evidence.\textsuperscript{140} Moreover, because it requires that only one assumption be made—that the discount rate equals the wage increase rate—this method involves less speculation than the Formuzis and O'Donnell approach.\textsuperscript{146} In addition, awards based on the Carlson method would be predictable and thus would tend to encourage settlements.\textsuperscript{147} Professor Carlson's

\textsuperscript{144} See Carlson, supra note 20, at 630-31. A small number of economists support Professor Carlson's approach. See Franz, supra note 22, at 37 (Carlson method preferred over the Formuzis/O'Donnell method for courtroom use); Sherman, supra note 20, at 733.

Professor Carlson's assumption that the impact of the wage increase rate and the discount rate cancel out hinges on the nature of the compounding and discounting processes. See, e.g., Carlson, supra note 20, at 629; Franz, supra note 22, at 37. These processes are arithmetical inverses of each other as can easily be demonstrated. Let $X$ equal the amount of base earnings. If $X$ is first compounded by $(1 + i)$, the discounting process produces the following results:

\[
\text{Present value of } X \frac{(1 + i) + X (1 + i)}{1 (1 + i)} = X \frac{(1 + i)}{(1 + i)} = X
\]

See P. SAMUELSON, supra note 8, at 615 n.4; supra note 19.

\textsuperscript{146} See, e.g., Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 461 (3d Cir.), cert. granted, 103 S. Ct. 50 (1982). Professor Carlson applies his offset method to wage gains resulting from productivity increases as well as those due to inflation. Carlson, supra note 20, at 631. His rationale for this appears to be that since current national productivity trends are low and presently show a tendency to decline, it is fair to assume the plaintiff's annual productivity increase to be zero if he is representative of his occupation. \textit{Id.} In such an economic climate, the real rate of return on an investment—the appropriate discount rate for this situation—should behave similarly. \textit{Id.} Offsetting productivity increase rates against the rate of return on investment, therefore, is reasonable. \textit{Id.} Professors Formuzis and O'Donnell suggest that this assumption produces the proper result, but for a different reason. Productivity, they contend, is built into wage growth rates just as the real rate is built into the discount rate. Formuzis & O'Donnell, supra note 40, at 299-300. Inflation is the other component of both rates. \textit{Id.} at 300. Thus, the difference between the rate of wage growth and the rate of interest is a direct reflection of the difference between the rate of increase in productivity and the rate of return on capital. \textit{Id.}

\textsuperscript{147} See, e.g., Kaczkowski v. Bolubasz, 491 Pa. 561, 571, 421 A.2d 1027, 1038 (1980). Predictability of the size of the award is no insignificant benefit when one recalls that the plaintiff has the option of negotiating for a structured settlement if it appears that the court
INFLATION AND LOST FUTURE EARNINGS

method has been disapproved of, however, on the ground that it consistently underestimates the impact of inflation upon the plaintiff's award.\textsuperscript{148} Since there is a stable nonzero differential between wage increases and discount rates,\textsuperscript{149} the Carlson method necessarily undercompensates for inflation to the extent of this difference.\textsuperscript{150} Clearly, a rule that attempts to estimate this difference is fairer than one that ignores it. It is submitted, therefore, that the federal courts should adopt the Formuzis/O'Donnell method as a matter of law. While estimates of the wage increase/discount rate differential vary, these estimates cluster near the 1.4\% figure that Professors Formuzis and O'Donnell discovered.\textsuperscript{151} Thus, the amount of error in the final award would be slight by comparison with the Carlson method, which assumes that no difference exists. Indeed, it is as unreasonable to refuse to estimate this difference as it would be to refuse to account for inflation at all.\textsuperscript{152} Furthermore, this approach retains the simplicity and efficiency advantages of the Carlson method. If adopted with the understanding that future changes in the American economy may require adjustment in the differential used, it would appear that the Formuzis/O'Donnell approach offers a better balance of equity, certainty, and efficiency than any of the other methods proposed.

award might be inadequate. See supra notes 117-21 and accompanying text.

\textsuperscript{148} See, e.g., Steckler v. United States, 549 F.2d 1372, 1377-78 (10th Cir. 1977); United States v. English, 521 F.2d 63, 73-75 (9th Cir. 1975); Coyne, supra note 7, at 31; Formuzis & O'Donnell, supra note 40, at 303-04; Lipnowski, supra note 7, at 331; Maher, Estimating Future Earnings Loss: Misinterpretation and Faulty Logic, TRIAL, Feb., 1979, at 39, 41; Ward, supra note 7, at 63.

\textsuperscript{149} See Formuzis & O'Donnell, supra note 40, at 299; Franz, supra note 22, at 36.

\textsuperscript{150} See Formuzis & O'Donnell, supra note 40, at 302-03. If the wage increase exceeds the discount rate used to calculate the lost earnings by one to two percent, that amount of annual wage increase will not be factored into the award. See id.

\textsuperscript{151} See Franz, supra note 22, at 36. Professor Franz only indicated that the wage increase/discount rate differential was "over 1\%." Id. Professor Coyne found a 1.6\% differential. Coyne, supra note 7, at 26. Neither of these estimates is substantially different from the Formuzis/O'Donnell 1.4\% figure. See Formuzis & O'Donnell, supra note 40, at 302.

\textsuperscript{152} See, e.g., Culver v. Slater Boat Co., 688 F.2d 280, 294-95 (5th Cir. 1982) (en banc); O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1200 (7th Cir. 1982); Doca v. Marina Mercante Nicaragüense, S.A., 634 F.2d 30, 36-37 (2d Cir. 1980), cert. denied, 451 U.S. 971 (1981). Several federal courts have observed that inflation is so much a part of American economic reality that it is unreasonable to refuse to estimate its effect on awards merely because making such an estimate requires speculation. E.g., Doca v. Marina Mercante Nicaragüense, S.A., 634 F.2d 30, 37 (2d Cir. 1980), cert. denied, 451 U.S. 971 (1981). Similarly, choosing a simple but inaccurate estimation method is unreasonable if more accurate and equally simple methods exist. See Coyne, supra note 7, at 25.
CONCLUSION

A number of approaches have been devised to incorporate the impact of inflation into lost future earnings calculations. While all of these proposals provide the plaintiff with fairer compensation than the traditional procedure, courts quite properly have not accepted any method without determining how well it comports with the policy considerations of equity, certainty, and efficiency. Economists, who presumably are best qualified to judge the accuracy of economic prediction methods, have been slow to evaluate the competing proposals. While a number of courts have attempted to perform such an evaluation, they arguably have neither the time nor the expertise for such a task.

Thus far, the federal courts have admitted evidence of inflation rates, but have hesitated to lay down a fixed rule to use in damage calculations. This approach, though fair, is impractical. The method proposed by Professors Formuzis and O'Donnell, how-

1 Articles recently published by economists on the topic of future inflation's impact on damages generally have been aimed at persuading the reader of the practicality and accuracy of the method advocated by the author. See, e.g., Carlson, supra note 20, at 628; Formuzis & O'Donnell, supra note 40, at 305; Sherman, supra note 20, at 723. Those articles that do not take a partisan approach often merely review factors that should be taken into account in damage computations. See, e.g., Henderson, supra note 8, at 308; Peck & Hopkins, supra note 2, at 377. Economists who have chosen to discuss approaches used by their colleagues often do not attempt to be comprehensive. See Coyne, supra note 7, at 27-28; Maher, supra note 148, at 39.

A study comparing the results produced by all of the calculation methods previously discussed would be a valuable contribution to the literature on this topic. One possible approach is that used by Professors Formuzis and O'Donnell in testing their hypothesis. Twenty random "accident" dates were selected between 1955 and 1975. Formuzis & O'Donnell, supra note 40, at 304. It was assumed that each plaintiff was deprived completely of future earning capacity, and that the worklife of each would end in 1975. See id. Using the interest rate available on short-term government securities on the date of the "accident" as the discount rate, "awards" were calculated. Id. The amounts of these "awards" were then compared with actual interest rates and earnings. Id. Such a study, done on a larger number of awards and comparing a number of different methods, would allow for a more reliable evaluation of the fairness of each method.

184 The burdensome caseload with which the American judicial system struggles is undisputed. See, e.g., Meador, The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action, 1981 B.Y.U. L. Rev. 617, 618-20 (federal court statistics); Flango & Blair, Creating an Intermediate Appellate Court: Does It Reduce the Caseload of a State's Highest Court?, 64 Judicature 75, 75 (1980) (statistics concerning state appellate courts). It also should be remembered that judges usually are not economic experts. See Plourd v. Southern Pac. Transp. Co., 266 Or. 666, 513 P.2d 1140, 1145 (1973). Nor can a busy judge be certain that counsel will alleviate his ignorance of this technical field with expert testimony. See Fisher, supra note 70, at 403. One reason for this simply may be uncertainty as to how to use such testimony advantageously. See Ward, supra note 7, at 60.
ever, is simple as well as fair, and avoids the efficiency and cer-
tainty problems posed by other methods. This method, which pro-
vides a reasonable balance of the relevant policy concerns, con-
stitutes the best option available to the courts.

Catherine C. Olanich