

Torts—Damages for Wrongful Death—Rate of Inflation is a Limiting Factor in Discounting Future Damages to Present Worth. *Seaboard Coast Line Railroad v. Garrison*, 336 So. 2d 423 (Fla. Dist. Ct. App. 1976).

Elijah Hagan was killed on August 30, 1974, in a railroad crossing accident involving Hagan's automobile and a Seaboard Coast Line Railroad train. Hagan was 46 years old at the date of his death and was survived by his five-year-old son Timothy Bankston. Hagan's son and estate brought suit for his wrongful death. At trial, plaintiffs were permitted to introduce expert testimony that inflation would continue at a minimum annual rate of 5% for the next thirteen years.¹ Plaintiffs recovered judgment against the defendant railroad, and the railroad appealed, contesting the measure of damages used by the trial court.² The Florida district court of appeal affirmed the judgment of the trial court and held that expert testimony on future changes in the purchasing power of the dollar was a proper method of assuring fair compensation to the plaintiff for future losses caused by defendant's negligence.³

In *Seaboard Coast Line Railroad v. Garrison*,⁴ the appellate court was faced with only one issue, a novel one to Florida law. The court had to decide whether expert testimony concerning future inflationary trends was admissible as a basis for determining the estimated value of loss of future support for a decedent's survivor.⁵ In reaching its decision, the court acknowledged that several jurisdictions have held expert testimony on future rates of inflation to be too speculative to be considered.⁶ However, the court concluded that when estimates of future changes in the purchasing power of money were based on sound economic evidence that could be postu-

1. *Seaboard Coast Line R.R. v. Garrison*, 336 So. 2d 423, 424 (Fla. Dist. Ct. App. 1976). Plaintiff's expert witness, a professor of economics at the University of Tampa, based this theory on the premise that had Hagan lived, the amount of his money available for support and so used would have kept pace with inflation. *Id.* The Florida district court of appeal denied certification for appeal to the Florida Supreme Court. *Seaboard Coast Line R.R. v. Garrison*, 336 So. 2d 423 (Fla. Dist. Ct. App. 1976), *cert. denied*, No. 75-1672 (Fla. Dist. Ct. App. 2d Dist. Sept. 10, 1976) (order denying certification for appeal).

2. *Seaboard Coast Line R.R. v. Garrison*, 336 So. 2d 423, 424 (Fla. Dist. Ct. App. 1976).

3. *Id.* at 425.

4. *Id.* at 423.

5. *Id.* at 424.

6. *Id.* at 424 n.2, *citing, inter alia*, *Williams v. United States*, 435 F.2d 804 (1st Cir. 1970) (applying Rhode Island law); *Henderson v. S.C. Loveland Co.*, 396 F. Supp. 658 (N.D. Fla. 1975).

lated with some degree of reliability,⁷ to ignore such trends would be to ignore economic reality.⁸

The court reached this conclusion for three reasons. First, the court thought it likely that juries would consider the impact of inflation even in the absence of any evidence or instruction on the issue.⁹ The court reasoned that inflation had become such a fact of life that its effects were within the common knowledge of each juror. Thus, if the jury would attempt to compensate the plaintiff for future effects of inflation in the absence of any evidence on the subject, it would be proper to aid this jural determination with competent, expert testimony.¹⁰ Second, the uncertain rate of future inflation was held to be an insufficient ground to prohibit the jury from considering expert testimony on inflationary trends.¹¹ The court stated that juries often successfully evaluate the effects of future or hypothetical events.¹² Third, the court noted that the percentage discount rate to be applied to discount the jury's award to present worth was also a matter for determination by the jury.¹³ Because expert testimony was commonly received to aid the jury in this determination, it followed that a fair result could only be reached by permitting expert testimony on both the discount rate to be used in computing present worth and the rate of future inflation.¹⁴ Thus, the court concluded that with expert testimony on both the discount rate and future inflation available, the jury could better fulfill its function of awarding a sum which, when invested, would fairly compensate the plaintiff for future losses caused by defendant's negligence.¹⁵

7. *Seaboard Coast Line R.R. v. Garrison*, 336 So. 2d 423, 426 (Fla. Dist. Ct. App. 1976).

8. *Id.* at 424.

9. *Id.*

10. *Id.* at 424-25. "Quite likely [the jury] will be prone to consider [inflation] in their attempts to fully compensate a plaintiff." *Id.* at 424.

11. *Id.* at 425.

12. *Id.* To bolster this conclusion, the court quoted the following passage from *United States v. English*, 521 F.2d 63, 75 (9th Cir. 1975) (construing California law): "While predicting future inflationary trends, or extrapolating from present ones, may be speculative, so are most predictions courts make about future incomes, expenses . . ." *Seaboard Coast Line R.R. v. Garrison*, 336 So. 2d at 425.

13. This is true at least in Florida. *Renvart Lumber Yards, Inc. v. Levine*, 49 So. 2d 97 (Fla. 1950). Some states name a certain percentage to be used as the discount rate, e.g. the present worth rule in Michigan prescribes a mandatory 5% discount rate, see, e.g., *Pierce v. New York Cent. R.R.*, 304 F. Supp. 44 (W.D. Mich. 1969); and some states require the discount rate to be the legal interest rate. The approach in Texas is similar to the "safe investment" test used in the federal courts. *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 490-91 (1916).

14. *Seaboard Coast Line R.R. v. Garrison*, 336 So. 2d 423, 424 (Fla. Dist. Ct. App. 1976).

15. *Id.* The court cautioned that the evidence upon which the trier of fact was to base

The theory behind compensating an injured plaintiff for these future losses is that the plaintiff should be awarded a sum of money which will approximately compensate him for all damages proximately resulting from the tortfeasor's wrongful conduct.¹⁶ This one-time monetary award necessarily must include damages for such future expenses and injuries that the plaintiff will suffer after the conclusion of the trial.¹⁷ And because this single payment, if invested, has the power to earn money,¹⁸ the United States Supreme Court in *Chesapeake & Ohio Railway v. Kelly*¹⁹ formulated the rule that the jury must be instructed to award the plaintiff only the present worth of the total loss.²⁰ In computing the present worth of the loss, most courts have long permitted testimony on the discount rate to be applied,²¹ but only recently has there been substantial consideration of the effect of inflation on this discount rate.²² There are two views on the inflation issue. Those courts that disallow any consideration of inflation generally do so on the basis that evidence of the rate of future inflation is too speculative.²³ On the other hand,

its future rate of inflation must be competent, sound, and substantial economic evidence. *Id.* at 426.

16. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.7 (1973).

17. Not all awards for future damages are lump-sum awards, e.g. the periodic payments of Workmen's Compensation. For a discussion of a feasible trust fund proposal for payment of future damages as opposed to the current lump-sum award, see the district court decision in *Frankel v. United States*, 321 F. Supp. 1331, 1336 (E.D. Pa. 1970), *aff'd sub nom. Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972). See also Brin, *Economic Projections in Determination of Damages: Inflation and Income Taxes*, 24 FED'N INS. COUNSEL Q. Summer 1974, at 17; Stevenson, *An Alternative to Lump-Sum Damages: The "Exactly Adequate" Award*, 24 DEF. L.J. 455 (1975); 2 OKLA. L. REV. 224, 226 (1949). But see Pierson, *The True Adequate Award*, 3 DEF. L.J. 353, 366 (1958).

18. The aim is to award a sum of money which can, as capital, produce the total value of damages awarded by using both the interest it draws and the capital. 3 L. FRUMER, R. BENOIT & M. FRIEDMAN, PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 3.04[8] [a] (1965).

19. 241 U.S. 485, 491 (1916). For an exhaustive list of other federal and state court decisions requiring reduction to present worth, see 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH 2D § 8:1, at 700-02 nn.1 & 2 (1975). But see *Beaulieu v. Elliott*, 434 P.2d 665 (Alas. 1967) (holding reduction to present worth no longer required because of rampant rate of inflation).

20. *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 491 (1916).

21. See note 13 *supra*; 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH 2D § 8:4 (1975).

22. See Henderson, *The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value*, 20 S.D.L. REV. 307, 320, 320-27 (1975).

23. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 239 (5th Cir. 1975); *In re United States Steel Corp.*, 436 F.2d 1256, 1280 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1970) (Jones Act jurisdiction); *Williams v. United States*, 435 F.2d 804, 807 (1st Cir. 1970) (applying Rhode Island law); *Raines v. New York Cent. R.R.*, 129 Ill. App. 294, 304, 263 N.E.2d 895, 899-900 (1970), *rev'd on other grounds*, 51 Ill. 2d 428, 283 N.E.2d 230 (1972), *cert. denied*, 409 U.S. 983 (1972); *Murphy v. Eaton, Yale & Towne, Inc.*, 444 F.2d 317, 328 (6th Cir. 1971) (Michigan

those courts that allow testimony on future inflationary trends reason that inflation has become such a fact of life that it can be safely predicted. Further, because inflation is a fact of life, to ignore the effects of future inflation would be to under-compensate the plaintiff.²⁴

Consider first those jurisdictions that disallow evidence of inflationary trends. The general rule in the federal courts²⁵ is that expert testimony on the rate of inflation for purposes of computing future damages is not permissible.²⁶ For example, in *Sleeman v. Chesapeake & Ohio Railway*,²⁷ a Federal Employers' Liability Act (F.E.L.A.) case, the district judge did not reduce the damages awarded to present value because he had been convinced that inflationary trends would offset any present worth reduction. On appeal, the sixth circuit reversed, holding that the United States Supreme Court decision in *Chesapeake & Ohio Railway v. Kelly*,²⁸ also an F.E.L.A. action, required a reduction to present worth regardless of other economic factors. The circuit court stated that there was no evidentiary basis for the district court's decision, and decided that inflation was such a speculative influence on future damages that

law) (held jury instruction to consider the effects of inflation was error); *Atwood v. Lever*, 274 So.2d 146, 149 (Miss. 1973); *Zaninovich v. American Airlines, Inc.*, 26 App. Div. 2d 155, —, 271 N.Y.S.2d 866, 872 (1966).

24. The approach in Texas seems to be a recognition that juries can and do consider the effects of inflation, but there is no case ruling on the propriety of an instruction to consider the issue or on the admissibility of testimonial evidence. This could be because the issue has not been raised in Texas courts other than as a justification for ruling an award not to be excessive. *Weakley v. Fischbach & Moore, Inc.*, 515 F.2d 1260, 1266-67 (5th Cir. 1975); *Halliburton Co. v. Olivas*, 517 S.W.2d 349, 354 (Tex. Civ. App.—El Paso 1974, no writ) (includes a reference to today's "double-digit" inflation). See also *Willmore v. Hertz Corp.*, 437 F.2d 357, 360 (6th Cir. 1971) (Michigan law); *Feldman v. Allegheny Airlines, Inc.*, 382 F. Supp. 1271, 1294-95 (D. Conn. 1974), *aff'd in relevant part*, 524 F.2d 384 (2d Cir. 1975); *Pierce v. New York Cent. R.R.*, 304 F. Supp. 44, 46 (W.D. Mich. 1969) (allowed expert testimony to reduce Michigan's required 5% discount rate by the rate of inflation); *Furumizo v. United States*, 245 F. Supp. 981, 1017 (D. Hawaii 1965), *aff'd*, 381 F.2d 965 (9th Cir. 1967) (applying the law of Hawaii); *Sanders v. H&S Motor Freight, Inc.*, 526 S.W.2d 332, 338 (Mo. Ct. App. 1975). For cases that hold consideration of inflation by the jury to be proper, see generally *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744, 787 (Ind. Ct. App. 1976); *Edwards v. Sims*, 294 So.2d 611, 616 (La. Ct. of App. 1974); *Hammond v. Stricklen*, 498 S.W.2d 356, 361 (Tex. Civ. App. — Tyler 1973, writ rep'd n.r.e.). Cf. *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300, 308-13 (5th Cir. 1976) (rehearing granted) (admiralty suit) (concurring opinion); *Beanland v. Chicago, R.I. & Pac. R.R.*, 480 F.2d 109, 116-17 (8th Cir. 1973) (Bright, J., concurring) (concurring opinion).

25. Excluding those cases where federal jurisdiction is based on diversity.

26. See note 23 *supra*.

27. 414 F.2d 305 (6th Cir. 1969).

28. 241 U.S. 485 (1916).

it should not be considered.²⁹

The speculative nature of continuing inflation also was controlling to the fifth circuit in *Johnson v. Penrod Drilling Co.*,³⁰ a recent *en banc* pronouncement "expressly disapprov[ing] the district court's attempt to take into account, in computing the plaintiff's future lost earnings, inflationary trends in this nation's economy for the next several decades."³¹ *Penrod* involved two separate actions for personal injuries brought under the Jones Act,³² in which plaintiffs were injured in accidents aboard defendant's amphibious drilling rig barges.³³ Although the court judicially noticed that inflation could become a predictable condition for the future, it nevertheless decided that the "shadow of inflation" as a coming event was not so clearly discernable that its inclusion in a present rule for calculating future damages was required or even warranted.³⁴ Furthermore, the fifth circuit reasoned that future inflation was not a proper subject for judicial inquiry in light of its debatable nature among authorities and the control over economic conditions exercised by the executive branch of the federal government.³⁵

The debatable nature of inflation and its uncertainty in future

29. *Sleeman v. Chesapeake & Ohio Ry.*, 414 F.2d 305, 308 (6th Cir. 1969).

[T]he inflation versus deflation debate rages inconclusively at the highest policy levels of our government, in national electoral campaigns, in learned economic journals and is exemplified in the daily gyrations of the stock markets. The debate seems unlikely to be resolved satisfactorily in one personal injury trial. And if testimonial resolution of this factor is attempted, the door is opened to similar speculative and debatable offsets tending in other directions.

Id. See also 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 25.11 (1956); *In re United States Steel Corp.*, 436 F.2d 1256, 1280 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1970).

30. 510 F.2d 234 (5th Cir. 1975) (*en banc*). *Accord*, *Standefor v. United States*, 511 F.2d 101 (5th Cir. 1975); *Robertson v. Douglas Steamship Co.*, 510 F.2d 829 (5th Cir. 1975).

31. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 241 (5th Cir. 1975) (*en banc*).

32. 46 U.S.C. § 688 (1975) (authorizes federal jurisdiction for seamen in cases of personal injury or wrongful death).

33. *Johnson v. Penrod Drilling Co.*, 469 F.2d 897, 899 (5th Cir. 1973), *rehearing granted* 478 F.2d 1208, *aff'd*, 510 F.2d 234 (5th Cir. 1975) (*en banc*).

34. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 236 (5th Cir. 1975) (*en banc*). The court noted a mitigating effect that inflation would probably produce higher interest rates on investments, offsetting the failure to include an inflationary surcharge in wage rate calculations. *Id.* Judicial notice of the shrinking value of the dollar was also taken by the Ninth Circuit in *Furumizo v. United States*, 245 F. Supp. 981, 1017 (D. Hawaii 1965), *aff'd*, 381 F.2d 965 (9th Cir. 1967).

35. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 241 (5th Cir. 1975) (*en banc*). "We take judicial notice of the prophetic quality of the Sixth Circuit's disapproval of judicial inquiries into projected inflationary trends in our economy by noting the President's issuance of Executive Order No. 11615, August 17, 1971, 36 F.R. 15727 . . . to impose controls over prices, rents, wages and salaries." *Id.*

years led to the third circuit's affirmation of the district court decision in *Frankel v. United States*,³⁶ a suit under the Federal Tort Claims Act for personal injuries. In ruling evidence of future inflationary trends inadmissible, the court stressed both that the period in which the trial occurred was an unusually inflationary time and that the possibility of continuing inflation was pure speculation. The court noted, however, that even if inflation were to continue, it still need not be considered in awarding future damages. The court reasoned that the return on the invested monetary award would be greater because a period of inflation would also inflate interest rates, thus having at least a partially offsetting effect.³⁷

This partially offsetting effect is not sufficient to counteract the effects of inflation, according to the jurisdictions that allow evidence of future inflationary trends. Because inflation has increasingly become an economic fact of life that most people are aware of and plan for, these courts hold at least that inflation is a proper consideration for the jury.³⁸ Many also hold that expert testimony on the subject is admissible as a guide for the jury's deliberation.³⁹ For example, in *United States v. English*,⁴⁰ a wrongful death action under the Federal Tort Claims Act, the ninth circuit recognized the imprecision inherent in any estimate about the future, but held that, under California law, the trier of fact could take into account future estimates of inflation in arriving at a damage award. In reaching this decision, the court reasoned that to ignore inflation was both grossly

36. 321 F. Supp. 1331 (E.D. Pa. 1970), *aff'd*, 466 F.2d 1226 (3d Cir. 1972).

37. *Frankel v. United States*, 321 F. Supp. 1331, 1346 (E.D. Pa. 1970), *aff'd* 466 F.2d 1226 (3d Cir. 1972). *See also* *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), in which the court stated:

It may be argued that ordinary fluctuations in the purchasing power of money may not properly be considered by a jury in awarding damages. Perhaps not, as to the future; but the jury have the right, and it is their duty, to be realistic. They need not close their eyes to the economic facts of life.

Id. The court went on to point out that it would be mere speculation to adopt the probability of inflation as the foundation of an estimate of future earnings because the possibility that the value of the dollar would rise was viewed as at least as probable as the possibility that it would fall. *Id.* Note that the period in which *Armentrout* was decided, post World War II, was a period of rampant inflation. S. SPEISER, *RECOVERY FOR WRONGFUL DEATH ECONOMIC HANDBOOK* § 6:3, Table 28 (1970).

38. *See, e.g., In re M/V Elaine Jones*, 480 F.2d 11 (5th Cir. 1973); *Feldman v. Allegheny Airlines, Inc.*, 382 F. Supp. 1271 (D. Conn. 1974); *State v. Daley*, 287 N.E.2d 552 (Ind. 1972); *Furumizo v. United States*, 245 F. Supp. 981, 1017 (D. Hawaii 1965), *aff'd*, 381 F.2d 965 (9th Cir. 1967). *See also* note 24 *supra*; 48 COLUM. L. REV. 264, 265 (1948).

39. *See, e.g., Schnebly v. Baker*, 217 N.W.2d 708 (Iowa 1974).

40. 521 F.2d 63 (9th Cir. 1975).

unfair to the plaintiff and inconsistent with economic reality.⁴¹ The court advanced two reasons for this conclusion. Although predicting future inflationary trends may be speculative, the court reasoned that most predictions courts make about the future, including estimates of future incomes and expenses, were equally uncertain, and an attempt to predict a future rate of inflation was superior to ignoring it altogether.⁴² In addition, the court stated that ignoring the effects of inflation was tantamount to predicting either that it would not occur in the future or that its effects would be *de minimus*.⁴³ Under this view, however, the court is still constrained by *Chesapeake & Ohio Railway v. Kelly*⁴⁴ to discount an award to its net present worth. This requires an estimate of future income and expenses, taking into account estimated changes in the purchasing power of the dollar, and then discounting this net income to its present worth.⁴⁵

In calculating these estimated changes in the purchasing power of the dollar, courts generally take two approaches. Some will allow the jury to consider the possibility of future inflation, either through giving an instruction to that effect⁴⁶ or by silently expecting the jury to consider its own knowledge of the subject.⁴⁷ However, the view taken by an increasing number of courts is that competent evidence must be introduced for the jury to consider the effects of inflation

41. *United States v. English*, 521 F.2d 63, 74 (9th Cir. 1975).

42. *Id.* at 75.

43. *United States v. English*, 521 F.2d 63, 74 (9th Cir. 1975). The court held that recognizing economic reality was preferable to the minimum of administrative convenience that ignoring inflation would provide. *Id.*

44. 241 U.S. 485, 489 (1916).

45. *United States v. English*, 521 F.2d 63, 75 (9th Cir. 1975). See alternative methods of including an adjustment for inflation in discounting a future damages award to present worth in *Schnebly v. Baker*, 217 N.W.2d 708 (Iowa 1974). *Contra*, *Beaulieu v. Elliott*, 434 P.2d 665 (Alas. 1967), holding no award for future damages need be reduced to present worth because the effect of future inflation was deemed to cancel out the amount by which by which the award would be discounted.

46. *E.g.*, *Halloran v. New England Tel. & Tel. Co.*, 95 Vt. 273, 115 A. 143 (1921); *Dabareiner v. Weisflog*, 253 Wis. 23, 33 N.W.2d 220 (1948). *Contra*, *Raines v. New York Cent. R.R.*, 263 N.E.2d 895, 899-900 (1970), *rev'd on other grounds*, 283 N.E.2d 230, *cert. denied*, 409 U.S. 983 (1972); *Murphy v. Yale, Eaton & Towne, Inc.*, 444 F.2d 317 (6th Cir. 1971) (applying Michigan law); *Willmore v. Hertz Corp.*, 437 F.2d 357, 360 (6th Cir. 1971) (applying Michigan law); *Normand v. Thomas Theatre Corp.*, 349 Mich. 50, 84 N.W.2d 451 (1957); *Atwood v. Lever*, 274 So.2d 146 (Miss. 1973).

47. *McWeeney v. New York, N.H. & H. R.R.*, 282 F.2d 34, 38 (2d Cir. 1960) (*dicta*); *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744, 787 (Ind. Ct. App. 1976).

in arriving at an award for future loss.⁴⁸ In *Bach v. Penn Central Transport Co.*,⁴⁹ an F.E.L.A. wrongful death action, the court recognized that if the jury were allowed to consider the effects of future inflation without benefit of expert testimony, their calculations would be imprecise, possibly leading to overly generous verdicts.⁵⁰ Thus, it was stated that the court's role was to keep the forecasts of inflation within reasonable bounds and to insure that they conform to the evidence.⁵¹ The Iowa Supreme Court in *Schnebly v. Baker*⁵² also advocated the use of expert testimony to keep the jury's consideration of inflation within reasonable bounds. *Schnebly* was a medical malpractice suit. Plaintiff was allowed to introduce expert testimony that the rate of inflation would equal the investment return on the verdict, with the result that the injured child was given the full award with no discount to present worth.

It thus appears that the principal difference between those courts which allow evidence or consideration of the effects of inflation and those which do not turns upon their view of the reliability of economic trends and forecasts as accurate predictions of future monetary conditions. The major argument in favor of such evidence is that an upward price movement is probable and that valuing future damages in terms of present prices does not fully compensate the injured plaintiff. The major opposing argument is that future inflation is speculative, and that the injured plaintiff can in any event invest his award, with the higher interest rates partially offsetting the lower purchasing power of the dollar.

In *Seaboard Coast Line Railroad v. Garrison*,⁵³ the Florida district court of appeal apparently determined that the "speculative" nature of future inflation, the major argument of those courts which prohibit evidence of inflation, was not so serious as to preclude admission of evidence of its effects on a future damage award.⁵⁴ The court deemed a jury capable of understanding expert testimony on

48. See note 39 *supra* and accompanying text.

49. 502 F.2d 1117 (6th Cir. 1974).

50. *Id.* at 1122. But the court could always rectify an exorbitant verdict through its power of remittitur.

51. *Bach v. Penn Cent. Transp. Co.*, 502 F.2d 1117, 1122 (6th Cir. 1974). Decedent's economic expert offered to show decedent's projected income in the year 2002, with adjustments for wage increases and inflation.

52. 217 N.W.2d 708 (Iowa 1974).

53. 336 So.2d 423 (Fla. Dist. Ct. App. 1976).

54. *Id.* at 425.

the effects of future inflation⁵⁵ and in the final analysis, held consideration of inflation by the jury to be the only way to accurately approximate the plaintiff's loss.⁵⁶

Economists have also stated that an accurate damage verdict must be measured in terms of the limited future purchasing power of the dollar. This inflationary trend is viewed as a probability, not a mere speculative possibility,⁵⁷ leading to the conclusion that if an award for future damages must be discounted to present worth to avoid over-compensating the plaintiff,⁵⁸ then the applicable discount rate should be reduced by the rate of inflation to avoid under-compensating the plaintiff.⁵⁹ This conclusion logically is reached even if future inflation is assumed to be speculative, because the rate of future inflation is at least as certain as the future interest earnings rate applied to discount the award.⁶⁰

But it is argued by some courts that the rate of inflation need not be considered because the discount rate, a projection of future interest rates, includes compensation for expected future inflation.⁶¹ However, this discount rate is itself speculative because there is no "safe"⁶² investment paying at that rate of interest guaranteed to the

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

56. *Seaboard Coast Line R.R. v. Garrison*, 336 So.2d 423, 425 (Fla. Dist. Ct. App. 1976); 1 S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* 2d § 8:11 (1975).

57. Henderson, *The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value*, 20 S.D.L. REV. 307, 311 (1975); Leonard, *Future Economic Value in Wrongful Death Litigation*, 1969 INS. L.J. 597, 601, reprinted from 30 OHIO ST. L.J. 502, 507 (1969).

58. *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 489 (1916).

59. See note 24 *supra*. It is suggested that in determining this rate of inflation by which to reduce the discount rate, expert testimony is the best guideline for both the court and the jury. For consideration of the desirability and preparation of expert witnesses, see generally Brin, *Economic Projections in Determination of Damages: Inflation and Income Taxes*, 24 FED'N INS. COUNSEL Q. Summer 1974, at 14; Dick, *The Economist's Role in the Trial of a Personal Injury Case*, 18 PRAC. LAW. May 1972, at 57; O'Connor & Miller, *The Economist-Statistician: A Source of Expert Guidance in Determining Damages*, 48 NOTRE DAME LAW. 354 (1972); Peck & Hopkins, *Economics and Impaired Earning Capacity in Personal Injury Cases*, 44 WASH. L. REV. 351 (1969). See also note 74 *infra* and accompanying text.

60. See *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300, 311 (5th Cir. 1976) (Wisdom, J., concurring) (concurring opinion), (rehearing granted), 1 S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* 2d § 8:9 (1975); 4 LOY. CHI. L.J. 359, 361 (1973).

61. *Frankel v. United States*, 321 F. Supp. 1331 (E.D. Pa. 1970), *aff'd sub nom.* *Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972); R. POSNER, *ECONOMIC ANALYSIS OF LAW* 81-82 (1972); I. FISHER, *THE THEORY OF INTEREST* 41-44 (1930). See the discussion of the effect of this principle on damages calculations in *Feldman v. Allegheny Airlines, Inc.*, 382 F. Supp. 1271, 1288-93 (D. Conn. 1974), *aff'd in relevant part* 524 F.2d 384 (2d Cir. 1975).

62. See generally *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 491 (1916).

plaintiff.⁶³ So the injured party ends up losing on two grounds: first, the plaintiff has suffered by the negligence of the tortfeasor, and second, he must bear the risk and burden that his fixed income from the verdict will not keep pace with changing economic conditions.⁶⁴

The federal courts are cited as clinging to the "outmoded"⁶⁵ view that these changing economic conditions need not be reflected in an adjustment of the discount rate, whereas many state courts have caught up with current economic patterns.⁶⁶ These federal courts generally rely upon *Chesapeake & Ohio Railway v. Kelly*⁶⁷ to hold that discounting to present worth is required in any event, but the problem with this rationale lies with the frame of reference for the *Kelly* holding, a 1916 decision.⁶⁸ Because money is an asset

63. For graphic illustrations of this point, see Kalven, *The Jury, The Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958); S. SPEISER, RECOVERY FOR WRONGFUL DEATH ECONOMIC HANDBOOK § 6:3 (1970). As to the speculative nature of inflation, see generally NACCA SEMINAR, 6TH CIRCUIT, WRONGFUL DEATH AND SURVIVORSHIP 139 (1958); Comment, *Wrongful Death Limitations—R.I.P.*, 17 DE PAUL L. REV. 385 (1968). But see Pierson, *The True Adequate Award*, 3 DEF. L.J. 353 (1958).

64. Henderson, *The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value*, 20 S.D.L. REV. 306, 308-10 (1975); Henderson, *Some Recent Decisions on Damages: With Special Reference to Questions of Inflation and Income Taxes*, 40 INS. COUNSEL J. 423, 428-32 (1973); Comment, *Future Inflation as an Element of Damages in Alabama*, 5 CUM.-SAM. L. REV. 72, 74 (1974); Comment, *Damages for Loss of Future Income; Accounting for Inflation*, 6 U.S.F.L. REV. 311, 314-21 (1972). See also J. STEIN, PERSONAL INJURY AND DEATH ACTIONS 331 (1972), in which the author has criticized the majority rule of refusing to allow evidence of inflation for future damages purposes. Cf. Comment, *Inflation and Future Loss of Earnings*, 27 BAYLOR L. REV. 281 (1975) (commenting on inflation as a factor in increasing future damages for loss of future earnings); Note, *Loss of Future Earnings: Present Worth Versus Wage Growth*, 35 MONT. L. REV. 354 (1974).

65. Henderson, *The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value*, 20 S.D.L. REV. 307 (1975).

66. Henderson, *Some Recent Decisions on Damages: With Special Reference to Questions on Inflation and Income Taxes*, 40 INS. COUNSEL J. 423, 432 (1973).

67. 241 U.S. 485 (1916).

68. See note 64 *supra* and accompanying text. *Kelly* reflects the experience of the last half of the nineteenth century, when the prevailing view was that the earning power of money gave an advantage to a person receiving immediate payment. Professor Henderson believes that, given the rising prices of today and rising incomes, the earning power of money is little more than a myth and that the purchasing power of money actually decreases over time. He concludes that *Kelly* should not be narrowly read both to require reduction to present value and to prohibit the consideration of inflation. Henderson, *The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value*, 20 S.D.L. REV. 307, 308-10 (1975); Henderson, *Some Recent Decisions on Damages: With Special Reference to Questions of Inflation and Income Taxes*, 40 INS. COUNSEL J. 423, 431 (1973). See also Comment, *Future Inflation and the Undercompensated Plaintiff*, 4 LOY. CHI. L.J. 359, 367 (1973). In comparing the purchasing power of the consumer dollar, using 1957-59 dollars as the basis of comparison, the dollar in 1916 was worth \$2.633; in 1967 it was worth \$0.860. S. SPEISER, RECOVERY FOR WRONGFUL DEATH ECONOMIC HANDBOOK § 6:3, Table 26 (1970). The annual rate of change in the purchasing power of the dollar since 1914 has been 2.3%. *Id.* at 88.

which has the ability to earn money, recognition of the concept of discounting to present worth certainly would be a prerequisite to awarding an injured plaintiff only that to which he is entitled. But the goal of full compensation is shattered when the plaintiff is left to run the risk that future inflation will not occur, especially in light of the universal acceptance of inflation as a fact of life.⁶⁹ Increasing control by the government in the economic area should hasten the courts' recognition of this reality rather than serve as a demand for the courts to ignore the issue.⁷⁰ When a court denies any responsibility for considering inflation as an element of the future damages award, the court is abandoning its duty to assure full compensation for the injured party.⁷¹ When this full compensation can only be supplied by a monetary award, a court should be required to make a reasonably accurate appraisal of future economic conditions and their effect on this award, including evidence of inflation.

And, as the court concluded in *Seaboard Coast Line Railroad v. Garrison*,⁷² evidence of inflation is best presented by liberal use of expert economic testimony.⁷³ When one considers the many factors upon which a decision by the expert witness is based,⁷⁴ it becomes obvious that expert guidance is necessary to aid the jury's application of this criterion to the damage verdict.⁷⁵ Because the measure of justice in a wrongful death suit to a large extent is future damages, a monetary phenomenon, the court in *Seaboard Coast*

69. See, e.g., L. MINGER & L. ZARROWITZ, *ECONOMIC FORECASTS AND EXPECTATIONS* (Nat'l Bur. Econ. Research 1969); 5 CUM.-SAM L. REV. 72 (1974); Comment, *Future Inflation and the Undercompensated Plaintiff*, 4 LOY. CHI. L.J. 359, 361 (1973). The federal government's index of inflation is the Gross National Product Implicit Price Deflator, published quarterly by the U.S. Department of Commerce.

70. Leonard, *Future Economic Value in Wrongful Death Litigation*, 30 OHIO ST. L.J. 502, 508-13 (1969). To a great extent, governmental efforts in the economic area have been aimed not at eliminating inflation altogether, but at reducing it to a manageable two or three per cent level. It may well be said that some rate of inflation is the cost of an industrialized nation. See S. SPEISER, *RECOVERY FOR WRONGFUL DEATH ECONOMIC HANDBOOK* § 6:6 (1970). But see *Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 241 (5th Cir. 1975).

71. Leonard, *Future Economic Value in Wrongful Death Litigation*, 30 OHIO ST. L.J. 502, 514 (1969).

72. 336 So. 2d 423 (Fla. Dist. Ct. App. 1976).

73. See note 59 *supra*. It could be argued that allowing expert testimony in this instance would involve the parties in a costly battle between differing expert witnesses. The answer to this argument, at least as far as the federal courts are concerned, is FED. R. EVID. 706, recognizing the court's power to appoint its own expert witnesses.

74. O'Connor & Miller, *The Economist-Statistician: A Source of Expert Guidance in Determining Damages*, 48 NOTRE DAME LAW. 354, 368 (1972).

75. *Id.* at 359.

Line Railroad v. Garrison effectively recognized the changing role of money in the economy and the upward trend of prices. The issue of the adequacy of future damages cannot be resolved by an insistence upon speculation in one direction—discounting to present worth—while denying the probability of future decreases in the purchasing power of the dollar in the other.⁷⁶ The Florida district court of appeal in *Seaboard Coast Line Railroad v. Garrison*⁷⁷ thus reached the correct conclusion when it held that the rate of inflation is a limiting factor in discounting future damages to present worth.

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76. Henderson, *The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value*, 20 S.D.L. REV. 307, 310 (1975).

77. 336 So. 2d 423 (Fla. Dist. Ct. App. 1976).