Future Inflation: A New Element of Damages in Wisconsin

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FUTURE INFLATION:
A NEW ELEMENT OF DAMAGES IN WISCONSIN

"The rule of damages must give true expression to the realities of life." — Benjamin N. Cardozo.

Inflation is an economic reality which has consistently plagued the economy since the mid-1950's. Although there have been some infrequent declines in consumer prices in the last four decades, there has not been a major decline since the Great Depression. In the past thirty years inflation has been perhaps the single most persistent problem facing the federal government. Each new presidential administration has unsuccessfully attempted to combat spiraling prices. Furthermore, inflation is not likely to subside in the near future.

Despite impressive evidence of both past and continuing inflation, courts have only recently begun to consider inflation as a proper element in computing future damages. However, lump sum awards of future damages based on loss of earning capacity and future medical expenses have created a compelling need to consider inflation. Our legal system strives to compensate a plaintiff for future losses by awarding a fixed sum of money now. This common law principle of single recovery has few exceptions. Although the possibility of replacing lump sum recoveries with a system of periodic payments has been suggested, most such proposals have been rejected because of their expensive and burdensome ramifications. Consequently,

the lump sum payment will undoubtedly remain the basis of the damage award system, and along with it, the need for judicial consideration of inflation.

A court’s initial determination of whether inflation ought to be an element in computing future damages involves three fundamental policy concerns: (1) achieving just and accurate compensation, (2) preventing speculative awards and (3) attaining simplified and efficient trial procedures. Determining the admissibility of inflation necessarily involves trade-offs between these policy concerns since no solution successfully satisfies all three criteria. As a result, courts have arrived at differing solutions to the problems of inflation and future damages.

These solutions can be broadly categorized into three different approaches. Under the traditional approach, inflation is not to be considered as an element of future damages and evidence of rising prices is not admissible in court. Other courts have adopted the so-called “middle-ground approach” which allows the jury to consider inflation, but with little or no expert testimony on the subject. Another solution is simply to admit any evidence of inflation. This third view, known as the “economic evidence approach,” seems to be representative of the current legal trend.

A simple example shows the effects of using an inflation factor in calculating damages. Assuming that a decedent’s future work-life expectancy was twenty years and that his estimated annual salary was $20,000, the lump sum award for future work loss before consideration of inflation, or the time used. See Annuities to Settle Cases, 42 Ins. Counsel J. 367 (1975); T. Evans, Structured Settlements — A Useful Tool in Catastrophic Injury Cases, 33 Mo. B.J. 419 (1977). The N.C.C.U.S.L. is drafting a Uniform Periodic Payments Act which, as presently proposed, is intended “to eliminate opinion evidence or predictions as to economic fluctuations.” National Conference of Commissioners on Uniform State Laws, Uniform Periodic Payments Act 6 (January 13, 1978) (Special Committee Meeting Draft).

8. See text accompanying notes 90-101 infra.
9. See text accompanying notes 102-105 infra.
10. See text accompanying notes 106-112 infra.
11. For the purposes of illustration, drastic simplifications will be made. For example, the awards in this hypothetical will not be reduced to account for personal consumption and expenditures. This example only purports to show the effect that inflation has on a damage award.
value of money, would be $400,000. If a court failed to consider possible increases in earnings due to a worker's increased productivity or inflation, a court might reduce the estimated earnings per year by a discount rate to determine the present value of the award. Use of a six percent discount factor would yield a lump sum award of approximately $229,397. However, a court could allow for inflation by increasing each year's earnings by a projected rate of inflation such as four percent. These inflation-adjusted earnings could then be reduced to present value by use of the six percent discount rate. Under this method the lump sum award would be $329,470. Thus, allowing for inflation in this instance, the award for future loss of earnings is increased by more than $100,000.

Hypothetical Future Damage Computations

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<th>discounted inflated earnings</th>
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12. See column (2) of chart in text accompanying note 16 infra.
13. See column (3) of chart in text accompanying note 16 infra. The six percent discount factor is a figure assumed by the author for the purposes of illustration.
14. See column (4) of chart in text accompanying note 16 infra. The four percent inflation rate is a figure assumed by the author for the purposes of illustration.
15. See column (5) of chart in text accompanying note 16 infra.
16. All calculations are rounded approximations.
A different method of allowing for inflation of the damage calculation has been followed by several courts. Under this approach, a real discount rate is determined by subtracting the estimated inflation rate from the discount rate. Using the figures given above for these rates, the real discount rate would be six percent minus four percent, or two percent. Applying this factor to the estimated earnings of the decedent, the future loss value is $327,029, or approximately $2,500 less than that determined under the more commonly used approach. Use of this minority approach has been criticized by some writers.

I. Damage Awards in Wisconsin

Damages are defined as the compensation awarded to an injured party by the law. In Wisconsin, tort damages are based on the theory of compensation. These "compensatory damages are given to make whole the damage or injury suffered by the injured party." Although damages are not allowed when based only on speculation and conjecture, "plaintiffs are not required to ascertain their damages with mathematical precision, but rather the trier of fact must set damages at a reasonable amount." Evidence offered by the plaintiff need only reasonably support the various components of the award. "There is no requirement that . . . each item of damages awarded must bear the same mathematical ratio to the evidence."

These fundamental principles must be considered in any discussion of the rules relating to the admissibility of expert testimony on the inflation issue and the propriety of even including inflation as an element of future damages. Expert testimony is generally admissible on any issue which requires special knowledge, skill or experience in areas which are not within the realm of the ordinary experience of mankind. Such testi-

18. See column (6) of chart in text accompanying note 16 supra.
19. See Posner, supra note 6, at 83 n.4.
20. J. Ghiardi, Personal Injury Damages in Wisconsin § 1.01 (1964) [hereinafter cited as Ghiardi].
22. Dickson v. Pritchard, 111 Wis. 310, 312, 87 N.W. 292, 293 (1901).
25. In re Bowler Trust, 56 Wis. 2d 171, 184, 201 N.W.2d 573, 579 (1972); Pollock v. Pollock, 273 Wis. 233, 246, 77 N.W.2d 485, 492 (1956); Wis. Stat. § 907.02 (1975).
mony is not proper if the trier of fact is able and competent to draw its own conclusions. Although inflation is a fact of life which is within the ordinary experience of all jurors, the probability of its future existence and its effect upon the adequacy of damages are not. The resolution of these issues requires mastery of a complex set of variables. Expert testimony offered to assist the jury in making the appropriate mathematical calculations would be a material aid in "the jury's search for truth."

In Wisconsin experts may give opinions based on undisputed facts or facts within their first-hand knowledge. Additionally, expert witnesses may state opinions based on assumed facts. Thus, it appears that expert testimony on future inflation and its effects on the adequacy of future damage awards is admissible under Wisconsin law. Such opinions are based, in large part, on past inflationary trends, which are undisputed or at least within an expert's personal knowledge. However, an equally valid argument might be made that opinions of the future based on past economic history would be too speculative due to the unpredictability of economic conditions.

The Wisconsin Supreme Court has certainly not been blind to past inflation. The court has consistently recognized its relevance to damage awards in other contexts. The "past inflation" issue has arisen, for example, in cases where the defendant appealed claiming that the damage award was excessive in comparison to prior awards in earlier suits involving similar circumstances. In these cases the Wisconsin court has adopted the majority view, recognizing that because of intervening inflation such past awards do not provide a relevant basis for comparison. The Wisconsin court has also taken past

31. See United States v. English, 521 F.2d 63, 72-73 (9th Cir. 1975), and cases cited therein.
32. See Crye v. Mueller, 7 Wis. 2d 182, 190-91, 96 N.W.2d 520, 525 (1959). Cf. Rebholz v. Wettengel, 211 Wis. 285, 291-92, 248 N.W. 109, 111 (1933). Rebholz is interesting in that it was decided in 1933. Therefore, the subject was deflation rather
inflation into account in situations where the trial court had allowed the jury to consider only the economic conditions existing at the time of the verdict. In *Dabareiner v. Weisflog* the court approved a jury instruction that: “In determining money value of damages, you are entitled to consider the present depleted value of a dollar and its lessened purchasing power.” This willingness of the Wisconsin court to consider past inflation, however, does not necessarily require speculation or expert testimony. Past changes in the price level are matters of common knowledge and are matters of public record.

The Wisconsin court has allowed future economic considerations to enter into the damage calculation by permitting the use of discount factors to reduce awards to present value. The use of a discount factor evidences a recognition of the fact that a present lump sum award for an amount to be paid in the future overcompensates a plaintiff in one sense because it implicitly includes interest on the award from the date of payment until the time in the future when the loss is realized. In 1916, the United States Supreme Court recognized that a “sum of money in hand is worth more than the like sum . . . payable in the future,” and held that a lump sum award of future damages must be discounted to its present value. Similarly, early decisions of the Wisconsin Supreme Court held that a lump sum award must be reduced to its present value.

At the present time, if counsel makes a timely request, the jury will be instructed to reduce an award of future damages to present value. The proper discount rate to be applied is a

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34. 253 Wis. 23, 29, 33 N.W.2d 220, 223 (1948).

35. See text accompanying notes 123-125 infra.

36. Posner, supra note 6, at 79.


39. Failure to so instruct is not prejudicial error unless the instruction has been requested. *Bourassa v. Gateway Erectors, Inc.*, 54 Wis. 2d 176, 186, 194 N.W.2d 602, 607 (1972); *Walker v. Baker*, 13 Wis. 2d 637, 650, 109 N.W.2d 499, 506 (1961).

40. Wis. J.I. — Civil No. 1796:
question of fact to be determined by the jury. In *Miller v. Tainter*, the Wisconsin court held that the trial court's failure to properly instruct the jury on the choice of a discount rate constituted prejudicial error. The court also suggested that expert testimony on the subject might be appropriate.

The selection of a proper discount rate necessarily involves a great deal of speculation. However, the Wisconsin Supreme Court has not overlooked this fact. In *McCrosen v. Nekoosa Edwards Paper Co.*, it was noted that:

This court has recognized this problem [speculation] inherent in determining the present value of future losses and has weighed the inability of a court or anyone else to predict the future with certainty against the considered policy conclusion that the ends of justice will be furthered by recognizing the probabilities in respect to the computation of future damages.

By allowing this degree of speculation and the use of expert testimony in the area of discounting awards, the Wisconsin court has apparently elevated the policy of just compensation well above considerations of award accuracy and trial efficiency.

In *McCrosen*, the court considered the type of evidence required of an expert to establish underlying assumptions which serve as the basis for the expert's economic predictions. In an offer of proof made at trial, the plaintiff's attorney asked an actuarial expert what the plaintiff's loss of future earnings would be assuming a five percent discount rate and a four percent wage increase every six months. A similar hypothetical

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In determining the amount of any award to be made, you are instructed that a sum allowed at this time to compensate for a loss or an expense which will be incurred in the future must be reduced by you to its present value.

By "present value" is meant such sum which if invested at this time at the current rate of interest, will produce in principal and interest the amount necessary to fairly and reasonably compensate the injured party for such loss or expense, if any, as you find he will sustain at a particular time or times in the future.

41. 252 Wis. 266, 31 N.W.2d 531 (1948).
42. Id. at 268-69, 31 N.W.2d at 533.
44. 59 Wis. 2d 245, 261-62, 208 N.W.2d 148, 157-58 (1973); see also Reinke v. Woltjen, 32 Wis. 2d 653, 660, 146 N.W.2d 493, 497 (1966).
question was asked assuming the same discount rate and no future wage increases. Although the witness answered both questions, the trial court refused to permit the jury to hear the expert's answers.\(^{45}\)

On appeal, the defendant argued that the trial court was correct because the hypothetical questions were based on assumptions not clearly established by the evidence. The supreme court rejected this argument:

[Contrary to the defendant's assertion on this appeal, it is not objectionable that the evidence supporting assumptions on which a hypothetical question is based is in dispute. Having established in the evidence some basis for the assumptions, they may be utilized in formulating a hypothetical question to an expert. Whether the jury believes the underlying assumptions is within its fact-finding functions...]

\(^{46}\)The assumptions upon which the hypothetical questions were based were in evidence, and the defendant on this appeal does not argue that they are incorrect.\(^{46}\)

Granting that the expert's testimony was speculative, the supreme court noted that the defendant's appeal probed "the basic problem implicit in any attempt to predict the future with certainty."\(^{47}\) The court pointed out that:

Wisconsin cases have recognized that, in order to show the impairment of future earning capacity, a plaintiff must be permitted to introduce evidence that is more speculative and uncertain than would be acceptable for proof of historical facts. . . . [T]he court recognizes that certainty is an unattainable standard to predict future losses and that, to do justice, calculations based on facts at hand and upon reasonable probabilities satisfy the rule.\(^{48}\)

The McCrossen court also discussed the admissibility of the evidence concerning future wage increases. Although many things are responsible for wage increases, inflation is certainly one of the principal factors. The expert in McCrossen was asked to assume an eight percent annual increase in wages. The supreme court noted that considerable past experience supports the assumption that wages will increase in the future.

\(^{45}\) 59 Wis. 2d at 260, 208 N.W.2d at 157.
\(^{46}\)  Id. at 260-61, 208 N.W.2d at 157.
\(^{47}\)  Id. at 261, 208 N.W.2d at 157.
\(^{48}\)  Id. at 262-63, 208 N.W.2d at 158.
Still, it found that the factor itself was "based but tenuously on past experience," and held that the trial court's refusal to admit the answer to the hypothetical question into evidence was not an abuse of discretion.\textsuperscript{49} However, the court then opened the door for admission of such evidence in future trials: "On the other hand, given the evidentiary foundation of an uninterrupted series of wage increases and the recent economic history of the industry, we would not upset the trial judge's exercise of discretion were he to have permitted the question and its answer."\textsuperscript{50} Thus, the court indicated that evidence of future inflation is admissible so long as the calculations were based on facts at hand and reasonable probabilities.

II. \textit{Cords v. Anderson}

On November 14, 1977, the Wisconsin Supreme Court carried the \textit{McCrossen} rationale one step further when it held that the failure to include future inflation in the damage computation was reversible error in the case of \textit{Cords v. Anderson}.\textsuperscript{51} Jane Cords was a member of a group that had spent a day picnicking and hiking in Parfey's Glen, a state owned recreational area.\textsuperscript{52} After consuming her evening meal, Norina Boyle, another member of the group, set out for an evening stroll along a nearby trail. As darkness set in, Boyle accidentally strayed from the narrow pathway and tumbled into a deep ravine. Jane Cords and Sue Henry, another member of their party, attempted to rescue Boyle, but soon found themselves beside her in the gorge sixty feet below.\textsuperscript{53} Cords was seriously and permanently injured as a result of her fall.\textsuperscript{54}

The three injured women brought suit against Floyd Anderson, the manager of the recreational area. In a trial to the court,\textsuperscript{49} Id. at 264, 208 N.W.2d at 159.
\textsuperscript{50} Id.
\textsuperscript{51} 80 Wis. 2d 525, 259 N.W.2d 672 (1977). Although the decision has a considerable impact on the rescue doctrine and on the liability of public officials for damages resulting from negligent performance of ministerial duties, discussion of the case will deal strictly with the issue of inflation and future damages.
\textsuperscript{52} Id. at 531, 259 N.W.2d at 675.
\textsuperscript{53} Id. at 535, 259 N.W.2d at 677.
\textsuperscript{54} A physical education major, Ms. Cords, as a result of the fall, fractured her wrist, suffered two ruptured lungs and injured her spinal cord which resulted in permanent paraplegia. Confined to a wheelchair for life, she later contracted phlebitis in her left leg, a permanent condition of uncontrolled muscle cramps, loss of control over her bowel and bladder and a susceptibility to bladder and skin problems. \textit{Id.} at 553, 259 N.W.2d at 685.
Jane Cords was found forty percent negligent in attempting the descent\(^5\) and was awarded $208,921.06 in damages.\(^6\) Included in this award was $45,284.00 for future medical expenses reduced to present value.\(^7\) According to the plaintiff's economic expert, this figure represented her medical expenses, but only if medical costs remained constant indefinitely into the future.\(^8\) However, the parties had stipulated that medical costs had risen an average of five percent per year during the seven years preceding the trial.\(^9\) The plaintiff's expert determined that if that five percent rate of medical cost inflation continued into the future, the present value of Jane Cords' medical expenses would be $104,988.\(^1\) The trial court refused to consider the stipulated evidence concerning the effect of inflation on medical costs because of the "state of speculation of our economy" and did not make any allowance for rising medical costs.\(^2\)

The supreme court, in a four-to-three decision, reversed the lower court's evidentiary ruling.\(^3\) Holding that the trial court's refusal to take inflation into account was an abuse of discretion, the court remanded the case to the trial court to "consider inflation as it seems reasonably probable in reaching a reasonable damage figure."\(^4\)

The Cords decision leaves several important questions unanswered. First, the court gave little guidance as to the type of evidence which should be presented in cases involving future inflation and future damages. Although the trial court was directed to consider inflation, the court stated that it was "not . . . limited to mathematically applying a five percent annual inflation rate indefinitely into the future to determine future

\(^{55}\) Id. at 561, 259 N.W.2d at 689 (dissenting opinion).
\(^{56}\) Id. at 537, 259 N.W.2d at 678.
\(^{57}\) Id. at 549 n.6, 259 N.W.2d at 683. The trial court found $2,917.77 as the amount in medical and related expenses which were incurred by Jane Cords to the date of the findings. Compensation for her injuries was found to be $300,000. The third figure representing Jane Cords' damages was the $45,284.00 for future medical expenses (sixty percent of the sum of these figures would represent the judgment, $208,921.06).
\(^{58}\) Id. at 549, 259 N.W.2d at 683.
\(^{59}\) Id. at 551, 259 N.W.2d at 684. The evidence was based on the medical care component of the Consumer Price Index which had risen 37.7% from 1967 through 1973. Id. at 530, 259 N.W.2d at 674.
\(^{60}\) Id. at 549-50, 259 N.W.2d at 683.
\(^{61}\) Id. at 552, 259 N.W.2d at 684.
\(^{62}\) Justice Connor T. Hansen wrote a strong dissent in which Justices Hanley and Robert W. Hansen joined. The majority opinion was written by Justice Day.
\(^{63}\) Id. at 552, 259 N.W.2d at 684.
One might infer that the court approved the testimony of the plaintiff's economist, which was based on changes in the medical care component of the Consumer Price Index over a seven year span preceding the trial. It is more likely, however, that the court simply did not find it necessary to consider the type of evidence relevant to the inflation issue because the nature of the evidence was not in issue: only its admissibility was disputed. The court did note, however, that such awards are "to some degree speculative" and that "the plaintiffs are not required to ascertain their damages with mathematical precision."

Some courts have dealt directly with the question of what types of evidence are admissible on the issue of inflation in future damages. Several courts have given their approval to statistics based on figures drawn from the Consumer Price Index, such as those presented at the Cords trial. Other courts, however, have found that evidence of price rises over a short and highly inflationary period are insufficient for projecting inflation over a relatively long period of time.

A second question left unanswered by the Cords decision is whether inflation should be considered by the trier of fact in determining future damages other than medical expenses. The court's holding could be narrowly interpreted to apply only to calculations of future medical expenses, but such a reading seems inappropriate. While there have been some cases involv-

64. Id.
65. See United States v. English, 521 F.2d 63, 75-76 (9th Cir. 1975), where the Ninth Circuit after allowing the trier of fact to consider inflation, cautiously warned that any such estimates must be "based on sound and substantial economic evidence, and as can be postulated with some reliability." See also Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 481-84, 341 A.2d 613, 621-23 (1975), where the New Jersey Supreme Court discussed the impropriety of evidence in the form of tables purporting to show plaintiff's aggregate damages.
66. 80 Wis. 2d at 551, 259 N.W.2d at 684.
68. See, e.g., Steckler v. United States, 549 F.2d 1372, 1378 (10th Cir. 1977); Hunt v. State, 252 N.W.2d 715 (Iowa 1977).
70. In Cords the court declared, "However, inflation may be taken into account by the fact finder as a separate factor to arrive at an amount that will fairly compensate the victim for required future medical expenses." 80 Wis. 2d at 551-52, 259 N.W.2d at 684 (emphasis added).
ing future medical expenses,\textsuperscript{71} the majority of the cases which have considered the inflated future damages question have involved compensation for diminished earning capacity.\textsuperscript{72} The Wisconsin court in \textit{Cords} recognized that the policy of awarding adequate compensation required that evidence of inflationary trends be admitted on the medical expense question, even though it was "to some degree speculative."\textsuperscript{73} The same rationale should apply to all questions of future economic damage.

The dissent raised what was perhaps the most perplexing question left open by the \textit{Cords} decision. The dissenting justices noted that, although other jurisdictions allow the trier of fact to assume that inflation will persist, they were aware of no decision requiring such an assumption.\textsuperscript{74} Generally the future inflation issue arises when a trial court rules on the admissibility of expert testimony and evidence concerning future inflation. In \textit{Cords}, however, the trial court admitted such testimony, but refused to make an allowance for inflation because it concluded that it was too speculative. The supreme court remanded the case, advising the lower court that it "should consider inflation. Was the trial court required to recalculate the future damage award to allow for future inflation or was it merely to reconsider the award in light of the supreme court's remand?\textsuperscript{75}

\textit{United States v. English}\textsuperscript{76} is perhaps the case most often cited for the proposition that the trier of fact may consider

\begin{itemize}
\item \textsuperscript{73} 80 Wis. 2d at 551, 259 N.W.2d at 684. \textit{See also Ghiardi, supra note 20, at § 1.01.}
\item \textsuperscript{74} 80 Wis. 2d at 564, 259 N.W.2d at 690.
\item \textsuperscript{75} The recent case digest of the \textit{Wisconsin Bar Bulletin} interprets the holding in perhaps the most reasonable way: "Adopting the recent trend to allow, but not require the fact finder to consider inflation when awarding future damages, the court finds abuse of discretion and, hence, directs on remand consideration should be given to the inflation factor, as it seems reasonably probable in reaching a reasonable damage figure." \textit{WISBAR supreme court digest}, Wis. B. BULL., Dec. 1977, at 25, 28-29.
\item \textsuperscript{76} 521 F.2d 63 (9th Cir. 1975).
\end{itemize}
future inflation in awarding future damages. In that case, the Ninth Circuit held, much like the Cords court, that the trier of fact "may" take inflation into account in fixing damages.\textsuperscript{77} The Tenth Circuit adopted the English rationale in Steckler v. United States.\textsuperscript{78} As in Cords, the trial court in Steckler allowed an expert to testify on the effect of inflation on plaintiff's damages, but rejected the contention that the award should be increased to allow for the anticipated inflation.\textsuperscript{79} The court of appeals remanded, directing that "[o]n remand the court should then determine from the evidence a reasonable annual percentage figure for the purpose of accounting for probable wage inflation."\textsuperscript{80} Despite the concern of the Cords dissent, Steckler is at least one opinion that seems to hold that failure to actually allow for inflation in computing future damages is reversible error. Clearly, there should be no question that expert testimony is admissible on the issue of future inflation in Wisconsin. However, still to be authoritatively determined is the question of whether the trier of fact, when supplied with the economic evidence, is bound to use it in determining damages. Arguably, the Cords decision provides an affirmative answer.

III. FUTURE INFLATION IN OTHER JURISDICTIONS

The nation's highest court has not definitively decided the question of whether inflation should be an element of future damages. In fact, the Court has denied certiorari in several cases which involved the issue in some respect.\textsuperscript{81} The Supreme Court has, however, adopted a general policy of allowing a limited degree of speculation and conjecture in the factual determination of damages:

\textsuperscript{77} Id. at 74.
\textsuperscript{78} 549 F.2d 1372, 1378 (10th Cir. 1977).
\textsuperscript{79} Id. at 1376.
\textsuperscript{80} Id. at 1378.
It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.

In a 1968 decision, *Grunenthal v. Long Island Railroad*, the Court, in dicta, appeared to suggest that future wage increases should be considered in computing future damages. The case could be interpreted to stand for the proposition that expert testimony is admissible on the issue of future wage increases as well as inflation and productivity or merit increases. In *Grunenthal*, the Court upheld the trial court's award of $150,000 in a federal employer's liability action. The trial judge noted that the award was supported by convincing testimony concerning recent and steady wage increases. However, wage increases may be due to either inflation or an increase in productivity, and the reported decision does not indicate which of these two causes was used as a basis for prediction. Furthermore, if the Court wished to recognize inflation as an acceptable element of future damages, it probably would have specifically expressed such a viewpoint.

Perhaps the only decision in which the Supreme Court dealt directly with the issue of how changes in the economy should affect future damage awards is a 1916 decision, *Chesapeake & Ohio Railway v. Kelly*. The *Kelly* Court recognized the time value of money and required that lump sum awards for future damages be reduced to present value. In 1969 the Sixth Circuit Court of Appeals decided that the *Kelly* decision required reduction of future damages to present value and that it would be error to fail to do so on the grounds that inflationary trends

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83. 393 U.S. 156 (1968).
84. Id. at 160.
86. Id. at 491.
offset the need for such a reduction. Such inflexible reliance on the 1916 *Kelly* decision has been criticized. On the other hand, some commentators question the practice of using inflation figures as an offset to regular discounting in light of the explicit mandate of *Kelly*. Hopefully, the disagreements and confusion among courts and commentators will cause the Court to re-evaluate *Kelly* and possibly add an element of uniformity to damage awards in the United States.

The most recent case advancing the traditional view that inflation should not be considered in awarding future damages is *Johnson v. Penrod Drilling Co.* In *Johnson*, a personal injury action brought under the Jones Act, the Fifth Circuit took judicial notice of the nation’s inflationary economy and the likelihood that inflation will continue in the future. Still, the court refused to allow for future inflation because of its speculative nature. Despite the fact that the Fifth Circuit has reaffirmed the *Johnson* holding in subsequent decisions applying federal law, most states within that circuit allow future inflation as an element of damages.

Two other circuits have followed the traditional approach while applying state substantive law. Unable to find any Rhode Island precedent on the issue of inflation, the First Circuit, in *Williams v. United States*, held that evidence of future inflation is too speculative to be admissible. However, after *Williams*, Rhode Island amended its wrongful death statute to permit evidence of future inflationary trends. Bound by state

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89. See Comment, Inflation and Future Loss of Earnings, 27 Baylor L. Rev. 281, 285 n.24 (1975); Prospective Damages, supra note 72, at 112.
90. 510 F.2d 234 (5th Cir. 1975). See also 7 St. Mary’s L.J. 432 (1975).
91. 510 F.2d at 236.
92. See Davis v. Hill Eng’r Inc., 549 F.2d 314, 332 (5th Cir. 1977); Higginbotham v. Mobil Oil Corp., 545 F.2d 422, 434-35 (5th Cir. 1977). But see Weakley v. Fischbach & Moore, Inc., 515 F.2d 1260, 1266-67 (5th Cir. 1975); Bryan v. John Bean Div. of FMC Corp., 566 F.2d 541, 555 (5th Cir. 1978) (both cases applying Texas law in approving of consideration of future inflation).
94. 435 F.2d 804 (1st Cir. 1970).
95. Id. at 807.
law, the First Circuit has since applied the amended statute to allow inflation evidence in a trial.\footnote{97}

The Third Circuit has addressed the issue on three occasions.\footnote{98} Although all three cases involved Pennsylvania substantive law, the decisions were made without reference to any state decisional law on the issue. The cases appear to support the traditional view because evidence of future inflation was held inadmissible. However, language in each case indicates that the court might have held differently if the inflation had a sufficient foundation.

The holdings in \textit{Magill v. Westinghouse Electric Corp.}\footnote{99} and in \textit{Hoffman v. Sterling Drug, Inc.}\footnote{100} were based on the fact that there was no evidence offered at either trial concerning economic trends. The \textit{Hoffman} court considered a future earnings award based on an estimated annual six percent wage increase to be speculative because there was no evidence introduced to support such a projection. The court noted that "Hoffman's counsel [had] isolated a five-year period in the late 1960's, one of the more inflationary periods in our history, and used it as the basis for a projection of over 26 years without introducing any evidence to support such a projection."\footnote{101} Thus, although the Third Circuit appears to follow the traditional view, it seems likely that it would allow such future inflation evidence if offered with a substantial factual basis.

Some courts have wavered from the traditional view and have adopted a "middle-ground approach," best represented by the Sixth Circuit’s decision in \textit{Bach v. Penn Central Transportation Co.}\footnote{102} The \textit{Bach} precedent has also been followed in the Eighth Circuit.\footnote{103} In \textit{Bach}, an economist was prepared to testify that, based on his estimate of future inflation, the decedent, who was earning $13,496 per year at the time of his death,

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\begin{itemize}
\item \footnotemark[97] See Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974).
\item \footnotemark[99] 464 F.2d 294 (3d Cir. 1972).
\item \footnotemark[100] 485 F.2d 132 (3d Cir. 1972).
\item \footnotemark[101] Id. at 144.
\item \footnotemark[102] 502 F.2d 1117 (6th Cir. 1974).
\end{itemize}
would have an annual income of $49,413 by his retirement in the year 2002, approximately thirty years after his death. The trial court had refused to allow the expert’s testimony. On appeal, the court acknowledged the inability of economists to forecast inflation with certainty and held that such testimony was speculative and inadmissible. However, the court further stated that:

Even though no expert testimony on inflation and future increases was admitted, it was still error for the district court to charge the jury that it should not consider future increases or decreases in the purchasing power of money . . . . Inflation is a fact of life within the common experience of all jurors. Admittedly, if the jury considers this issue without expert testimony, their calculations will be even more imprecise. There is always a chance that the verdict may be too generous. But if jurors should be prohibited from applying their common knowledge of inflation in reaching a verdict, the party entitled to recovery could be grievously undercompensated.

Thus, under the middle-ground approach economic testimony regarding future inflation is inadmissible, but the jury may, given proper instructions, consider the effects of inflation in awarding future damages.

Finally, several courts have adopted the “economic evidence approach” and have allowed expert economic evidence and considerations of future inflation in computing future damages. Although some earlier Second Circuit decisions seem to follow the traditional view, two recent cases in that circuit have allowed extensive expert economic testimony on inflation. Although bound by Connecticut law in Perry v. Allegheny Airlines, Inc., the court did not appear to base its decision on state precedent when it affirmed the lower court’s decision to admit expert economic testimony.

104. 502 F.2d at 1122.
105. Id. (citations omitted).
107. See Feldman v. Allegheny Airlines, Inc., 524 F.2d 384 (2d Cir. 1975); Perry v. Allegheny Airlines, Inc., 489 F.2d 1349 (2d Cir. 1974). It should be noted that both the majority and concurring opinions in Feldman were careful to point out that they were not creating a federal rule. 524 F.2d at 387, 393.
108. 489 F.2d 1349 (2d Cir. 1974).
109. Id. at 1353.
The Ninth Circuit enthusiastically adopted the "economic evidence approach" in United States v. English and Burlington Northern, Inc. v. Boxberger. After stating compelling policy reasons in favor of awarding an accurate amount, the English court emphasized the need for such expert testimony:

Nor do we intend to have our holding of today read as authorizing the court to arbitrarily draw an estimate of inflation out of thin air. As with any other element of damages, we must require the estimate of future inflation to be supported by competent evidence . . . . By our holding we allow the trier of fact in awarding damages to take into account only such estimates of future changes in the purchasing power of money as are based on sound and substantial economic evidence, and as can be postulated with some reliability.

IV. POLICY CONSIDERATIONS

The ideal damage award should accurately compensate the plaintiff without undue reliance on speculative, confusing or inaccurate expert testimony. Such testimony can often be expensive and time consuming. Of course, an award, which is to justly compensate an injured party, must necessarily consider the impact of future inflation. However, no perfect method has yet been devised by the courts to give proper consideration to the effect of future economic changes. Courts must arrive at a solution to the problem by balancing the relevant policy considerations.

If expert economic testimony is admitted and the trier of fact is allowed to consider the effect of inflation, the policy of just compensation is furthered, but it is done at the expense of two other policies. This approach does not prevent speculation in the damage calculation and may serve to further complicate trial procedures. One trial judge who refused to consider inflation of institutional care expenses offered this pertinent analysis:

The projected inflationary trend is speculation. Plaintiff has used the decade of the 1960's, one of the more inflationary times in the history of our country, as the basis for a projec-

110. 521 F.2d 63 (9th Cir. 1975). The Tenth Circuit adopted the English approach in Steckler v. United States, 549 F.2d 1372 (10th Cir. 1977).
111. 529 F.2d 284 (9th Cir. 1975).
112. 521 F.2d at 75-76.
tion of over fifty years. It is common knowledge that our Government is and has been attempting to control inflation...

Economists differ on their predictions. Moreover, plaintiff will have money that can be invested and if inflation continues, the return on the money will be greater, and this would have an offsetting effect.\textsuperscript{113}

The speculation problem is aggravated by the fact that each expert's choice of data can have a significant effect on the projection. For example, in the last five years the average annual rise of the consumer price index was 6.9%. However, the same statistic for the years of 1948 to 1977 is 3.2%.\textsuperscript{114} Thus, use of data drawn from highly inflationary periods to project future economic trends may produce a distorted prediction. Although such projections have been rejected by many courts, this was the method used in the Cords trial.\textsuperscript{115}

The "plethora of uncertainties"\textsuperscript{116} involved with the use of economic projections often leads to erroneous assumptions and unrealistic results. In DeWeese\textit{ v. United States}\textsuperscript{117} the trial judge noted that, "Illustrative of the heights to which experts can rise when turned loose with a pencil, a calculator, and a set of financial tables are the figures this 'econometrist' came up with under Projection 'B' using the 8% inflation rate."\textsuperscript{118} The econometrist's prediction was based on an assumed inflation rate at eight percent and a discount rate of four percent. Additionally, the expert guessed that the deceased commuter copilot would have been hired by a commercial airline after five years. Although the copilot was earning $7,680 per year at the time of his death, the econometrist projected that he would have been making $310,485 annually by the time he reached sixty years of age. The lost earnings were estimated to be in excess of 3.7 million dollars. The court noted that, had a more realistic six percent discount rate been assumed, the annual tax free income would have been $72,360.78.\textsuperscript{119} Stating that the


\textsuperscript{115} See note 69 and accompanying text \textit{supra}.

\textsuperscript{116} Feldman\textit{ v. Allegheny Airlines, Inc.}, 524 F.2d 384, 392 (2d Cir. 1975) (Friendly, J., concurring).

\textsuperscript{117} 419 F. Supp. 170 (D. Colo. 1976).

\textsuperscript{118} \textit{Id. at 176}.

\textsuperscript{119} \textit{Id}.
economist's predictions were "totally unconvincing" and "nothing but crystal ball gazing," the court held that such testimony was inadmissible because "such flights of fancy by an 'econometrist' were of no aid to a court." Naturally, projections which include figures which are completely out of line with past earnings of a deceased are not likely to impress a court. Such evidence might only mislead the trier of fact and frustrate the goal of just and accurate compensation if not rationally based and carefully screened.

The failure of economists to agree on an appropriate projection is a further basis for argument against the admission of such evidence. Expert estimates of future inflation rates have ranged from two to nine percent in recent litigation. Estimates of the discount rate, which are also based on expert testimony, have varied significantly in recent cases. However, the choice of a discount rate is somewhat limited in Wisconsin by the civil jury instructions which suggest the use of the "current rate of interest." Although the use of the current interest rate can be justified economically, it still does not determine exactly which rate should be used. However, it is a guideline and it does provide a check against an expert who might project an inaccurate or unrealistic discount rate. A similar jury instruction guiding the jury in its choice of an inflation rate could also be adopted. Such an instruction could advise the jury of the importance of choosing an appropriate past

120. Id. at 172.
121. Id. at 177.
period on which to base the projected inflation rate and inform the jury of the information which may be used in making this determination. The jury should also be instructed that it is not bound by the expert's testimony.\textsuperscript{126} Such complex instructions might add to the confusion of jurors, but they might also help alleviate the confusion often created by complex and academic expert testimony.

There are several other problems which arise when inflation is made an element of future damage awards. It is possible that some elements of future damages may not increase at the same rate as the overall economy.\textsuperscript{127} Furthermore, to accurately account for the true effect of future inflation requires that a number of complex variables, such as progressive income taxes\textsuperscript{128} and the effect of inflation on interest rates,\textsuperscript{129} must be considered.

A number of arguments have been offered against the use of the "middle-ground" and "traditional" approaches. The "middle-ground approach" is supported by only one relevant policy consideration. Allowing consideration of inflation without any evidence on the issue authorizes "the court to arbitrarily draw an estimate of inflation out of thin air."\textsuperscript{130} Use of this approach involves a danger of inequity and inconsistency since different juries will invariably choose different rates of inflation. Thus, although this approach will produce a less complicated trial than the "economic evidence approach," the results will be more speculative and less accurate.

The problem with the traditional approach is that it will almost always undercompensate the plaintiff. The traditional approach ignores inflation, which will most likely be a part of

\textsuperscript{126} See Perry v. Allegheny Airlines, Inc., 489 F.2d 1349, 1353 (2d Cir. 1974) (where such an instruction was used).

\textsuperscript{127} See Feldman v. Allegheny Airlines, Inc., 524 F.2d 384, 392 (2d Cir. 1975) (Friendly, J., concurring). The dissenting justices in Cords noted the possibility of a national health insurance program. 80 Wis. 2d at 564, 259 N.W.2d at 690.


\textsuperscript{130} United States v. English, 521 F.2d 63, 75 (9th Cir. 1975).
the economy for a considerable time in the future. To fail to account for such an obvious element of damages is to be blind to reality. The emphasis should be placed on properly controlling the hazards involved with the use of the inflation element in order to achieve truly fair results.

V. THE ALASKAN APPROACH

In Beaulieu v. Elliot,131 the Alaska Supreme Court adopted an intriguing approach which eliminates many of the problems encountered when future inflation is made an element of damages, but also creates several new problems. By refusing to discount future damages in recognition of the offsetting effect of inflation, the Alaskan approach instantly achieves two policy considerations. It diminishes the chances of undercompensating the plaintiff while totally eliminating the complex, and often confusing, testimony of economic experts.

This approach has been rejected in several jurisdictions132 and has been criticized by several commentators.133 Some of the courts have rejected the approach because of the Supreme Court's mandate that awards of future damages be discounted134 or because of conflicting state statutes and precedent.135

However, the approach has been supported by some economists,136 courts137 and commentators.138 Notwithstanding this support, the Alaskan system seems crudely imprecise and indeed is contrary to both Supreme Court and state precedent concerning discounting. Because most realistic estimates of inflation are lower than supportable levels of interest rates, the

132. See, e.g., Davis v. Hill Eng'r, Inc., 549 F.2d 314, 331-32 (5th Cir. 1977); United States v. English, 521 F.2d 63, 75 (9th Cir. 1975); Turcotte v. Ford Motor Co., 494 F.2d 173, 186-87 (1st Cir. 1974).
138. E.g., Prospective Damages, supra note 72, at 125-30. This comment provides an excellent and extensive analysis of Beaulieu.
Alaskan approach may consistently overcompensate plaintiffs in our present economy. To greatly simplify an accepted theory of economics, the market rate of interest is based primarily on two elements: the true or real rate of interest and the rate of inflation. To equate the market rate of interest with the rate of inflation, as the Alaskan approach suggests, is to ignore the real interest rate which has been estimated to be between three and four percent. Therefore, any "rate of inflation applied to future income must also be an element in the rate of discount." Thus, besides crudely and imprecisely equating two independent economic factors, the system could consistently overcompensate plaintiffs.

VI. CONCLUSION

The Cords decision set down a new rule of damages in Wisconsin. Just compensation requires the admission of economic evidence of future inflation and that it be considered in awarding future damages. The policy considerations for such an allowance were best expressed by the English court:

(1) While predicting future inflationary trends, or extrapolating from present ones, may be speculative, so are most predictions courts make about future incomes, expenses . . . . Since it is still more probable that there will in the future be changes in the purchasing power of the dollar, it is better to try as best we can to predict them rather than to ignore them altogether. (2) Even in the short time since the cases against considering inflation in making damage awards have been decided, inflation has become a considerably more important factor in our economic lives . . . . While the administrative convenience of ignoring inflation has some appeal when inflation rates are low, to ignore inflation when rates are high is to ignore economic reality.

What then are the alternatives and how will such a system be effectively checked?

The Alaskan approach should not be adopted by the Wis-

139. Posner, supra note 6, at 81.
141. Id.
142. Note that in the simplified example offered in the text accompanying notes 11 through 18, supra, offsetting both elements would yield a $400,000 damage award while considering both would yield a significantly smaller sum of $329,470.
143. United States v. English, 521 F.2d 63, 75 (9th Cir. 1975).
consin court. Although such a system does lead to very predictable awards and more efficient trials, its techniques are imprecise and tend to overcompensate.

The checks will necessarily have to come from both the bench and the defense bar. An alert and informed bench can and certainly will play a significant role in preventing windfall awards since "[t]he courts' role is to keep such extrapolations within reasonable bounds and insure that they conform to the evidence." The capability to use the power of remittitur, which gives an overcompensated plaintiff the option of a new trial on damages or a reduced award, should be utilized when necessary at the trial level. At both the trial and appellate levels, careful analysis should be made of the size of the award in relation to the adequacy of the evidence offered. Thus, it is imperative that judges insist that an economic expert's testimony is controlled, reasonable and not speculative or incredible.

The second check on abuses which may excessively inflate future damage awards should come from the defense counsel who, through effective cross-examination (and possibly through the defendant's own economic expert), must point out any fallacies in the testimony of plaintiff's expert. An informed attorney can certainly aid the trier of fact in its appraisal of evidence which is open to a variety of interpretations.

In the final analysis, the ultimate check will necessarily come from the jury itself. Effective use of jury instructions by the court and of cross-examination and argument by defense counsel will aid the jury in its appraisal of the effects of inflation on future damages. Although the use of future inflation as an element of future damages will undoubtedly further burden the jury in its deliberations, a general understanding of inflation hopefully will allow the jury to reasonably and rationally evaluate the value of evidence of future inflation and the effect it should have on the damage award.

W. Ted Tornehl

146. See Johnson v. Serra, 521 F.2d 1289 (8th Cir. 1975).