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Recent Decisions:Damages - Measure of Damages - Impairment of Earning Capacity [*Sleeman v. Chesapeake & Ohio Ry.*, 414 F.2d 305 (6th Cir. 1969)]

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state discretion — the case has clearly hobbled state efforts to establish AFDC contribution standards consistent with the state-determined limits of their own monetary resources. Because the court overlooked the distinguishing factors of the *King* decision, the federal standard of need-oriented disbursements was lamentably beclouded, and to the extent that *Solman* saddled old inequities in welfare administration with a new paradox, it may represent a clarion for legislative reform.

CRAY J. COPPINS, JR.

DAMAGES — MEASURE OF DAMAGES — IMPAIRMENT OF EARNING CAPACITY

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

In present-day America, the clogged highways and airways, polluted waters and skies, and heavy reliance on consumer goods have increased the likelihood that the average citizen will someday be seeking a damage award or settlement. Growing congestion in the trial courts, caused largely by the bulk of auto accident disputes, evinces the frequency with which the damage award system is called into play. Therefore, while today's damage award system may be the last concern of the average citizen, tomorrow it may determine the value of his lost eyesight, the amount of income he might have earned in the remaining years of his life, or the dollar value of that life itself. While he might have correctly assumed that the courts would try to fully compensate him for his loss,[1] he will be surprised to learn that the method employed to compute his award of future damages is divorced from the realities which determine his future loss.

[1] The damage award should be "equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted" from the continued worklife of the claimant. Chesapeake & O. Ry. v. Kelly, 241 U.S. 485, 489 (1916). *See also* Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 70-71 (1913). In Gressman v. Morning Journal Ass'n, 197 N.Y. 474, 480, 90 N.E. 1131, 1133 (1910), the court presented the ideal that damages should be "precisely commensurate with the injury." The future damages award should provide the plaintiff with "that sum of money which, if invested in reasonably safe investments, will return the amount of the decrease in plaintiff's earning capacity . . . during the period of his work life . . . ." Lawless, *Computation of Future Damages: A View from the Bench*, 54 GEO. L.J. 1131, 1134 (1966).

In cases where an individual has sustained permanent, debilitating injuries, the most significant component of the damage award is the sum which represents the compensation for his diminished future earning capacity. To the several factors normally considered in determining the appropriate compensation for future earnings loss,[2] the court in *Sleeman v. Chesapeake & Ohio Ry.*[3] was invited to add an allowance for inflation, a factor which would serve, in part, to equate damage awards and actual losses. In *Sleeman*, the district court, sitting without a jury, held that the injuries suffered by the plaintiff, who had been struck by a privately owned vehicle while crossing the defendant's parking lot, were partially attributable to the railroad's failure to properly illuminate and mark the lot for pedestrian traffic.[4] In computing the appropriate sum to compensate the plaintiff for his total disability, the trial court reasoned that the declining value of the dollar should cancel the customary discount to present worth.[5] The Court of Appeals for the Sixth Circuit reversed the lower court's assessment of damages, remanding for a recomputation of the award with the required discount, but without the offsetting adjustment for inflation. The court held that the future impact of current inflation was too speculative to be considered in the computation of future pecuniary loss.

In evaluating the reasoning set forth by the court of appeals, it is helpful to look at the eclectic historical development of the contemporary formula for determining future damage awards. The earliest Anglo-Saxon damage awards made no allowance for the suffering and loss actually incurred by an individual plaintiff. Rather, as judicial redress emerged in place of "vengeance of the blood" feuds, the state established a system of money compensation, with a schedule of fixed values for particular injuries. For example,

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[2] Among the factors currently considered by most federal courts in computing future wage loss damages are wages *at the accident date*, worklife expectancy, the value of money in hand (discounted to present worth), the impact of federal income tax on the lost wages, the portion of the earned wages which would have been allotted to expenses of the decedent (in wrongful death damages), and, in some instances, compensation from collateral sources. *See* Commissioners' Awards and Opinions, at 21-22, Petition of United States Steel Corp., Civil No. A-65-6 (N.D. Ohio May 7), *appeal docketed*, Civil No. 19835-39 (6th Cir. Sept. 8, 1969).

[3] 414 F.2d 305 (6th Cir. 1969).

[4] 290 F. Supp. 817 (W.D. Mich. 1968).

[5] The district judge relied on the testimony of Professor Henderson of Michigan State University, an expert witness in Gowdy v. United States, 271 F. Supp. 733 (W.D. Mich. 1967), *rev'd on other grounds*, 412 F.2d 525 (6th Cir. 1969). Professor Henderson had asserted that the declining value of the dollar would offset the discount to present worth in an award for future pecuniary damages. *Gowdy* was subsequently reversed on a conflict of laws issue, with no review of the damage award.

the loss of an ear was worth 12 shillings and an exposed bone brought 3 shillings.[6] This publication of fixed damage values by the state served to delay the emergence of a flexible process of award determination.[7] Amid the simple society which existed following the Norman Conquest, the need for a flexible evaluation of damages was recognized. It is believed that the actual assessment of damages was introduced in England at about the same time that trial by jury emerged — perhaps A.D. 1200.[8] In the first damage awards given in King's Court, the jury was given complete discretion to assess damages based on its view of the loss in each case. Rules of law governing the assessment of damages emerged, however, as courts sought to exert widening control over the jurors' judgment.[9] Justified by the belief that a jury composed of laymen could not realistically consider the many variables which affect a plaintiff's loss,[10] this judicial tendency to delimit the role of the jury in assessing damages has continued down to the present.

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[6] C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 22 (1935).

[7] *Id.* at 23.

[8] *Id.* at 23-24.

[9] The earliest juries consisted of yeomen from the locality where the wrongful act occurred, individuals with a personal knowledge of the particular loss or injury. The trial judge, usually sent out from London and unfamiliar with the particular case, would seldom correct or overturn the findings of these neighbors. With such discretion in the jury's hands, there was little need for a law of damages. However, even in these earliest trials of the 13th and 14th centuries, the judge would make the entire damage determination in cases where judgment was given upon demurrer, confession, or default. By the 1400's the judges also had taken upon themselves the power to increase or decrease the amount of the jury awards when the extent of the injury was within their cognizance. In the 17th century the granting of new trials emerged where the jury had violated one of the few rules of damages or where the court considered the amount awarded unreasonable.

There is also evidence of minimal jury instructions in the earliest trials. In a pattern similar to that of the court's power to set aside or alter a jury award, instructions to the jury evolved from a mere suggestion to a binding charge. By the 19th century, the judge was required to instruct the jury upon the measure of the award, and failure to do so or misdirection were grounds for a new trial. This increased reliance on jury instructions fostered the growth of the rules of damages. *Id.* at 25-28.

[10] The standard of certainty emerged as a fundamental touchstone against which proposed elements of the damage award were tested. The standard required that the amount of plaintiff's loss be established by reference to *factual data.* Although the rule was initially applied only in contract cases, particularly to claims for lost profits, it also came to be relied upon in assessing tort damages. *Id.* at 99. Professor McCormick notes that, to mitigate the standard's harshness, the courts have adopted several modifications, including the following:

(a) If the fact of damage is proved with certainty, the extent or amount may be left to reasonable inference.
(b) Where the defendant's wrong has caused the difficulty of proof of damage, he cannot complain of the resulting uncertainty.
(c) Mere difficulty in ascertaining the amount of damage is not fatal.
(d) Mathematical precision in fixing the exact amount is not required.

By fashioning a formula which enumerated the factors which the jury might consider in arriving at a damage award, the judiciary has sought to provide the plaintiff with a sum equivalent to the stream of payments he would have earned but for his injury. Guided by the concepts of truth and fairness, the courts — and at times the legislatures[11] — have dealt with suggested components of the damage award on an ad hoc basis, purportedly accepting those deemed consonant with reality and rejecting the rest. Paradoxically, this development has created a formula for jury control which ensures that the jury's award will *not* be the equivalent of the plaintiff's expected stream of income. For example, the proposition that a man's wage rate normally increases substantially over his working life would seem realistic given the increasing productivity characteristic of today's economy. In addition to increments reflecting economic growth, most workers can expect higher salaries in future years resulting from personal advancements. While individual courts have made allowances for projected advances in salary grade,[12] the station in life which the claimant might have attained,[13] and wage contracts which became effective after the claimant's accident,[14] most courts have refused to permit the consideration of such relevant factors and have continued to compute future lost earnings solely upon the basis of the wage rate received at the date of injury or death.[15]

The failure of most courts to consider these elements is compounded by their failure to include other important components in the damage formula. Few courts have made any allowance for

(e) If the best evidence of the damage of which the situation admits is furnished, this is sufficient. *Id.* at 101.

It can be seen from the cases reviewed *infra*, and particularly from the analysis of the *Sleeman* decision, that these modifications are not uniformly applied by the courts. Had the *Sleeman* court applied these modifications, it is arguable that it would have made an allowance for inflation.

11 For an example of legislative activity in this area, see *id.* at 235-36.

12 *See* LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir. 1965).

13 *See* Aivaliotis v. S.S. Atlantic Glory, 214 F. Supp. 568 (E.D. Va. 1963).

14 *See* Petition of Petroleum Tankers Corp., 204 F. Supp. 727 (S.D.N.Y. 1960).

15 For example, in McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 35 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960), the court held that in cases of total disability or death, the three elements for computing lost earning capacity are future normal earning power, worklife expectancy, and the discount to present worth. (In cases of *partial* disability, the claimant's post-accident earning power is a fourth factor.) Yet, the court proceeded to use the claimant's wages *at the accident date* as his *future* normal earning power in the above formula. Similarly, in O'Connor v. United States, 269 F.2d 578, 582 (2d Cir. 1959), the court stated that earnings at the accident date are but one of several factors used in computing future lost wages; yet, the final award for future lost earnings was based solely upon the decedent's take-home pay at the date of the accident.

fringe benefits such as pension funds, stock option plans, hospitalization, and medical benefits.[16] Yet, it is no secret that such forms of employment compensation are becoming an increasingly important part of an employee's work agreement.[17] Similarly, in computing damages the courts have declined to consider the claimant's attorney's fees, which currently absorb 25 to 50 percent of the award.[18] With the emergence of the contingent fee concept, it is likely that no factor has had as great an effect upon the damage award as the payment of attorney's fees.

Perhaps the least realistic element in most damage award computations is the collateral source rule.[19] The rule is based upon the punitive proposition that payment of the plaintiff's expenses by a disinterested third party (*e.g.*, under insurance contracts, wage continuation plans, pension benefits, etc.) ought to benefit the plaintiff and not the wrongdoer.[20] Accordingly, the courts have held that a defendant remains liable for losses which the plaintiff would have incurred but for his sources of collateral compensation. The result has been to visit a windfall upon those plaintiffs fortunate

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[16] One of the first federal cases to include these factors in the damage award formula was Petition of United States Steel Corp., Civil No. A-65-6 (N.D. Ohio May 7), *appeal docketed*, Civil No. 19835-39 (6th Cir. Sept. 8, 1969).

[17] Expert testimony indicates that the fringe benefits currently received by an average maritime worker equal about 27 percent of his basic wage. *Id.* Commissioners' Reports and Opinions at 24. In *United States Steel*, the Commissioners included in the future damage award an adjusted 20 percent factor as compensation for lost fringe benefits.

[18] In New York, the court-prescribed maximum scales of contingent fees provide either a sliding scale from 25 to 50 percent or a flat amount of 33 1/3 percent. *See* N.Y. APP. DIV. 1ST. DEPT., SPECIAL RULES REGULATING THE CONDUCT OF ATTORNEYS AND COUNSELLORS AT LAW, R. 4. Long before the American Revolution, the rule became established in England that the party who won a lawsuit could recover from his adversary the costs of litigation, which included both court costs and attorney fees. This indemnification of litigation expenses prevails in England today, but now lies within the discretion of the court. It appears that the English system of costs was adopted in this country before the Revolution, with each state subsequently prescribing by statute the amount recoverable for attorney's fees. Although these amounts may have been adequate at the time, none of the statutes have been revised to provide for devaluation of the dollar. In federal courts the $20 docket fee is awarded to the prevailing party for his attorney's fee, in Pennsylvania $3, in New Hampshire $1. Most statutes enacted more recently make no provision for attorney's fees, further establishing the tradition that such costs are not recoverable in this country. C. MCCORMICK, *supra* note 6, at 234-36.

[19] *See* Peckinpaugh, *An Analysis of the Collateral Source Rule*, 1966 INS. L.J. 545, 547.

[20] *See* Clark v. Berry Seed Co., 225 Iowa 262, 271, 280 N.W. 505, 510 (1938) (medical expenses to be paid by the plaintiff's employer were included in the damage award); Clough v. Schwartz, 94 N.H. 138, 141, 48 A.2d 921, 923 (1946) (plaintiff's medical bills paid by a firemen's relief association were not discounted from the award). *See also* Sainsbury v. Pennsylvania Greyhound Lines, Inc., 183 F.2d 548 (4th Cir. 1930); Gillis v. Farmers Union Oil Co., 186 F. Supp. 331 (N.D. Ohio 1960).

enough to have procured appropriate insurance, employment benefits, or access to certain gratuities.[21]

The foregoing review illustrates the inroads which the judiciary has made into the jury's originally unlimited power to assess damages. It also demonstrates that for the most part, the courts have not accorded a position of primacy to the *reality* of the disabled plaintiff's loss. Further, they have justified their rulings on the several factors offered as formula components with conclusory language which does not disclose a pattern of logical consistency.[22] What is worse, there has been no uniform application of the "principles" enunciated by the courts. A prime example of the latter is the inconsistent treatment accorded the amount of a claimant's future

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[21] The rule has been applied even where a defendant employer paid a portion of the plaintiff's insurance premium. For example, in Petition of United States Steel Corp., Civil No. A-65-6 (N.D. Ohio May 7), *appeal docketed*, Civil No. 19835-39 (6th Cir. Sept. 8, 1969), no downward adjustments were made for social security benefits or life insurance payments received by the decedents' families, the commissioners noting that although the defendant employer paid one-half of the social security tax, such payment was actually made in lieu of higher wages which the employee might otherwise have received directly. *Id.* Commissioners' Awards and Opinions at 9. This treatment is consistent with the holding in New York, N.H. & H.R.R. v. Leary, 204 F.2d 461, 468 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953), that the Railroad Retirement Act serves as social security for common carrier employees, the benefits of which are not directly attributable to the negligent employer and, therefore, not deductible from the employee's damage award. The doctrine has been relaxed only in cases where the defendant bore the *entire* cost of a benefit received by the plaintiff. *See, e.g.*, Moore-McCormick Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir. 1961), *cert. denied*, 368 U.S. 989 (1962), which deducted the proceeds of a liability insurance policy, premiums for which were paid solely by the defendant-employer; O'Connor v. United States, 269 F.2d 578, 585 (2d Cir. 1959), where the court held that under the Federal Tort Claims Act the trial court was to ascertain whether the defendant had borne the cost of flight risk insurance — if it had, the proceeds of the insurance might be deducted from the award; Lawson v. United States, 192 F.2d 479 (2d Cir. 1951), where the discounted proceeds of War Risk Insurance, the cost of which was paid by the defendant, were deducted from the damages awarded to the deserted wife of a deceased seaman. The cure for the inequities caused by the rule may lie outside the courts. With increasing frequency, insurance policies provide for subrogation of the insured's interest, thereby eliminating double recoveries. Currently auto insurance companies are attempting to eliminate double recovery of medical expenses arising from accidents. Newer policies provide that the company will have subrogated rights against the negligent driver to recover payments it has made for the victim's medical expenses. This is patterned after the subrogation of property damage rights, which has for some time been standard in auto insurance policies. Peckinpaugh, *supra* note 19, at 546-47.

[22] The court in McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 38 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960), was bound by "[w]hatever the reasons of history or policy for the American practice of generally not awarding attorneys' fees to the successful party" might happen to be. In defending the collateral source rule, American courts abandon the rule of certainty and exact compensation in favor of the view that the wrongdoer should not benefit from the victim's collateral assistance. *See* cases cited note 20 *supra*. The *McWeeney* court's refusal to reverse a deduction of income taxes from the plaintiff's $4,800 yearly salary was justified, in part, by the fact that attorney's fees and inflation were not accounted for in the award and the belief that the jury would be confused by an additional calculation. 282 F.2d at 37-38.

earnings which would have been paid in income taxes.[23] In *McWeeney v. New York, N.H. & H.R.R.*,[24] the Court of Appeals for the Second Circuit held that it was not reversible error for the trial court to fail to discount an amount for taxes from the claimant's $4,800 salary. The court based its decision on the lack of a predictable future tax rate for the 39-year-old bachelor plaintiff, and on the *confusion* which this additional computation would bring to the formula. Noting that its refusal to deduct taxes would partially compensate for the fact that no allowance was made for either contingent fees or the effects of inflation, the court conceded that the failure to deduct an amount for taxes might lead to excessive awards, but reasoned that such cases would arise only where higher salaries were involved (*e.g.*, $100,000, where the tax rate would be over 50 percent).[25] Five years later, in *LeRoy v. Sabena Belgian World Airlines*,[26] the same court held that a district court had properly exercised its discretion in *deducting* a 15 percent tax factor from a wrongful death award, where the decedent's average future annual earnings were $16,000 (with 38 years of future loss of earnings totalling nearly $600,000). In *LeRoy*, the court viewed the tax element as "one of the *smaller* uncertainties involved in the computations."[27] It has been argued that the uncertainty of future taxes, which *McWeeney* relied on, is eliminated in wrongful death actions, such as *LeRoy*;[28] however, the fact that the claimant is dead does not appear to augment the trial court's ability to predict the decedent's potential tax liabilities. Thus, as *McWeeney* and *LeRoy* illustrate, even where the courts have sought to apply reasoned principles in considering elements of the damage award formula,

[23] Because damage are excluded from gross income by *Internal Revenue Code of 1954* § 104(a)(2), overcompensation results when the award does not reflect tax liability.

[24] 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960).

[25] *Id.* at 38. A critique of the *McWeeney* decision suggests: "To allow the size of the plaintiff's income to be the controlling factor would discriminate between plaintiffs on a basis having no relation to the amount of damages suffered and would not reduce the conjecturality as to future tax liability." 14 VAND. L. REV. 639, 642 (1961). This description arguably applies to the other components of future damages presently being considered.

[26] 344 F.2d 266 (2d Cir. 1965).

[27] *Id.* at 276 (emphasis added).

[28] *See also* Brooks v. United States, 273 F. Supp. 619, 628-32 (D.S.C. 1967) (taxes should be deducted in a wrongful death action where the decedent's salary is $10,746 at the time of his death). The courts are presently undecided on the question of discounting for taxes, with one case, Furumizo v. United States, 245 F. Supp. 981, 1014 (D. Hawaii 1965), suggesting that such a deduction represents the more modern and reasonable rule. For a list of federal cases supporting or rejecting the deduction for income taxes, see Brooks v. United States, *supra* at 631 n.17.

the standards have proved unreliable and the results have been inconsistent.

A final element of the future loss of wages formula — an element crucial to evaluating the *Sleeman* court's disallowance of an adjustment for inflation — is the requirement of discount to present worth.[29] In a 1916 case, *Chesapeake & Ohio Ry. v. Kelly*,[30] the United States Supreme Court departed from the disjointed application of judicial "principles" discussed above and held that because "it is self-evident that a sum of money in hand is worth more than a like sum payable in the future,"[31] the award must be discounted to present worth. However, the Court prescribed no fixed rule to insure that the award plus interest would evenly match the future loss. Rather, it suggested that the discount factor should reflect the *then current* earning power of money which might change over the years.[32] Consistent with *Kelly's* refusal to prescribe an absolute discount factor, federal courts have adopted no single factor in discounting present worth, relying instead upon juror discretion.[33]

Indeed, the discount principle is "self-evident"; the notion that a stream of payments over time is not *today* "worth" an amount equal to their sum forms the basis for all debt transactions. Because this has been true since the barter system gave way to money economies, it is somewhat startling that until 1916 the principle was not applied to damage awards. Yet perhaps this delay really is not

[29] Another factor which merits passing mention and which is unique to wrongful death actions is that after the inclusion or exclusion of discount for income tax has been determined, the award must be discounted by the amount which would have been spent for living expenses by the decedent. The federal and state courts have adopted no specific guide for this apportionment, allowing as much as 83 1/3 percent of the award to be received by a wife with five minor children, and 50 percent by the wife alone. Petition of Marina Mercante Nicaraguense, S.A., 248 F. Supp. 15, 27 n.31 (S.D.N.Y. 1965), *modified*, 364 F.2d 118 (2d Cir. 1966). *See* Gardner v. National Bulk Carriers, Inc., 333 F.2d 676 (4th Cir. 1964), *aff'g* 221 F. Supp. 243, 246 (D. Va. 1963); O'Connor v. United States, 269 F.2d 578, 583 (2d Cir. 1959); Brooks v. United States, 273 F. Supp. 619, 633 (D.S.C. 1967); Petition of Petroleum Tankers Corp., 204 F. Supp. 727, 734 (S.D.N.Y. 1960).

[30] 241 U.S. 485 (1916).

[31] *Id.* at 489.

[32] *Kelly* suggests only that the discount factor should not be the highest legal interest rate available, thus requiring the plaintiff to exercise investment skills in order to recoup the differential. *Id.* at 490-91.

[33] The Second Circuit has said that the discount factor must be no less than 4 percent, but it established no basis for this requirement. Alexander v. Nash-Kelvinator Corp., 271 F.2d 524, 527 (2d Cir. 1959). The Sixth Circuit, which remanded *Sleeman* to the trial court for reduction of the award to present worth, has said that a jury receiving an instruction to award the "money value which will fully, fairly, and justly compensate the plaintiff for all such loss . . . he has suffered or will suffer" will properly discount to present worth without further guides. Pennsylvania R.R. v. McKinley, 288 F.2d 262, 265 (6th Cir. 1961).

so surprising when one considers that equally "self-evident" concepts — the inclusion of pay raises, fringe benefits, and an allowance for contingent fees — *still* have not been applied to those awards.

It was amidst this atmosphere of judicially constrained juror discretion that the *Sleeman* court was confronted with adjudging the merits of an allowance for inflation. Reasoning that such an allowance was "speculative and debatable" in nature and that it would negate the required discount to present worth, the court held that the allowance should not be considered as a component of the damage award formula. In light of the nation's economic history since the 1930's, the court conceded that the use of present wages as a standard for future earnings loss was somewhat unfair to the plaintiff; however, it feared that an allowance for inflation would open the door to similarly unpredictable upward adjustments.[34]

In view of the fact that the collateral source rule, and the judicial failure to consider real income increments, fringe benefits, and contingent fees have all served to divorce damage awards from actual losses,[35] it is paradoxical that the *Sleeman* court would base its decision upon a standard of certainty for assuring that damage awards approximate actual losses. Yet even if one acknowledges the validity of the court's approach, it is arguable that the increasing rate of inflation, which has been relatively steady over the past 30 years, appears to be more predictable than the income tax discounts allowed by the Court of Appeals for the Second Circuit. Moreover, the court's apparent belief that the inflation allowance would induce trial courts to incorporate into the award the most tangential components of future damages represents, at best, a makeweight argument often used whenever a hasty and conclusory rationale is needed to dismiss an unsettling suggestion.[36] However, even if the merits of this reasoning were conceded, the nature and duration of inflationary trends can be established by expert testi-

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[34] 414 F.2d at 308.

[35] The irony of this result is apparent when one contrasts the scrutiny with which the courts today apply the rules of evidence and procedure, and the laws of liability, with the inevitable divorce of the final award from the actual loss owing to reliance upon unrealistic rules of damages.

[36] *See, e.g.*, Priestly v. Fowler, 150 Eng. Rep. 1030 (Ex. 1837), where, in a case of first impression, Lord Abinger, C.B., without considering the relevance of the cause of action to the then infant industrial age, denied recovery to a servant injured while riding in his master's defective van. Lord Abinger rationalized this result by noting that to allow recovery would open the floodgates to a sea of litigation.

mony and objective presentation of statistical data.[37] When competent testimony can establish that inflation and other factors will operate to create a disparity between plaintiff's actual loss and his damage award, equity would seem to require that they be given due consideration in the damage award formula.[38]

Declining to include the allowance for inflation in the formula, the *Sleeman* court remanded to the trial court for a reduction of the award to its present worth, as required by *Kelly*.[39] However, in its blind adherence to the *Kelly* discount requirement the court offended the spirit of the *Kelly* Court's reasoning. In *Kelly*, the Court reasoned that the reduction to present worth was necessary to make the award plus interest commensurate with the actual loss. This discount factor was to be based on the current earning power of money at the time of each trial, not on an inflexible rule.[40] While the interest available through investment of the award is no less significant today than in 1916, the theory upon which the *Kelly* Court premised its inclusion in the damage formula suggests

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[37] Galbraith suggests that notwithstanding attempts to control rising prices, inflation will persist at a "suppressed" rate because of the wage-price spiral. J. GALBRAITH, A THEORY OF PRICE CONTROL 63-65 (1952). *See* Leonard, *Future Economic Value in Wrongful Death Litigation*, 30 OHIO ST. L.J. 502, 507-08 (1969). Professor Leonard predicts that salaries will continue to rise in the years ahead, reflecting increased productivity and continuing inflation. The reality of inflation has also been judicially acknowledged. In McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 38 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960), Judge Friendly observed that "there are few who do not regard some degree of continuing inflation as here to stay and would be willing to translate their own earning power into a fixed annuity." Harper and James note that Judge Friendly's observations reflect the prevailing mood in the nation today. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.11, Comment at 146 nn.8-9 (Supp. 1968). *See also* Normand v. Thomas Theatre Corp., 349 Mich. 50, 84 N.W.2d 451 (1957), wherein the court took judicial notice of the effects of inflation in comparing the verdict with awards in prior years for similar injuries; Talbert v. Chicago, R.I. & P. Ry., 321 Mo. 1080, 15 S.W.2d 762 (1929), where, in a trial 13 years after the accident, the court noted that $5,000 in 1914 would have been worth more to the estate than was $10,000 in 1927. For a review of the problems which inflation presents in damage awards, see 2 F. HARPER & F. JAMES, *supra* at 1323-26 (1956), and at 145-46 (Supp. 1968).

[38] An additional argument against forcing plaintiffs to bear the cost of such factors is the belief by some that plaintiffs are generally undercompensated. The court in Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958), said: "We think we may judicially note that notwithstanding that the law contemplates full compensation, incidental losses and handicaps are suffered in a great number of personal injury cases which are not, and cannot be, fully compensated." *See* 2 F. HARPER & F. JAMES, *supra* note 37, at 1303-04, reporting a survey which reveals that severely injured railroad workers generally have not received suitable compensation for lost wages. For a further discussion of the inadequacies of the present system, see Kalven, *The Jury, The Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958).

[39] 414 F.2d at 308.

[40] *See* note 32 *supra* & accompanying text.

that the same Court sitting today would also recognize inflation as a separate element of compensation.

The most important aspect of *Sleeman* is not the narrow holding of the case, but rather its exemplification of the bizarre mélange that is the American damage award system. Even if *Sleeman* had approved the inflation allowance, the decision would probably have attracted few followers among the other circuits. The entire system is oriented to the belief that, without close control by the courts, juries are incapable of *accurately* assessing a claimant's loss.[41] The result, however, has been to divorce the computation of damage awards from economic reality. When simple arithmetic indicates that judicial rules do not reflect actual losses, concern for a fair and accurate system of damage award compensation demands a reevaluation.

A more effective approach to damages should begin with a reconsideration of the jury's capacity to assess variables. One commentator, noting that juries are required to deal with uncertainties of liability whenever the versions of the plaintiff and defendant are inconsistent, has made the following observation:

> It is only as to the fixing of damages that the rigorous requirement that the fact of loss must be proved with "certainty" comes to be laid down, though probably the jury is no less competent to make a reasonable guess as to whether a profit would have been made under given circumstances than to guess whether one witness is lying or another.[42]

Jurors are assumed to be capable of grasping complexities outside the area of damages; should they not be even more able to deal with factors as common to their personal experience as wages, consumer prices, fringe benefits, and the like?

With the increased complexity of today's economy has come an increased understanding of the forces at work in the economy. Through the use of expert testimony, this knowledge is readily available to those charged with the task of assessing future damages. Professor Leonard, who has testified in more than 30 such cases, urges that reliance on such expertise is the only way in which the reality of future loss can be equitably ascertained.[43] Moreover, the need for greater flexibility in assessing the real factors of future losses is apparent. Until more discretion is revested in the trier of

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[41] *See* C. MCCORMICK, *supra* note 6, at 24.

[42] *Id.* at 105.

[43] Leonard, *supra* note 37, at 503.