

**TORTS—DAMAGES—ADJUSTING FUTURE EARNINGS FOR INFLATION—***Feldman v. Allegheny Airlines, Inc.*, 382 F. Supp. 1271 (D. Conn. 1974), *aff'd in part, rev'd in part and remanded*, 524 F.2d 384 (2d Cir. 1975).

## I. INTRODUCTION

The high rate of inflation experienced in recent years has resulted in numerous attempts by plaintiff's counsel to have the effect of future inflation on earnings taken into account in determining damages in personal injury and wrongful death cases.<sup>1</sup> *Feldman v. Allegheny Airlines, Inc.*,<sup>2</sup> a wrongful death case decided by the federal district court in Connecticut and reviewed by the Second Circuit, illustrates many of the issues that courts must face when the inflation issue is raised. The case is particularly important for two reasons. First, the district court used a sophisticated method for making the inflation adjustment. Second, since the case was heard without a jury, we have a detailed analysis of the court's decision rather than an unexplained general verdict. Therefore, the case provides a helpful model for both counsel and other courts.<sup>3</sup>

When the issue of allowances for future inflation is raised, courts must consider two basic problems. One is the choice of method for calculating the adjustment. The second is determining the kind and amount of evidence on future inflation that will be required. Some courts have found one or both of these problems to be insurmountable and have denied any adjustment for inflation. Other courts have adopted a wide range of solutions to both problems. After considering the background of the *Feldman* case, this note will examine the solutions to these two basic problems and related issues raised in *Feldman* and other cases.<sup>4</sup>

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<sup>1</sup> Recent literature on the subject includes Henderson, *Some Recent Decisions on Damages: With Special Reference to Questions of Inflation and Income Taxes*, 40 INSURANCE COUNSEL J. 423 (1973); Note, *Future Inflation and the Undercompensated Plaintiff*, 4 LOYOLA U. CHICAGO L.J. 359 (1973); and Comment, *Damages for Loss of Future Income: Accounting for Inflation*, 6 UNIV. SAN FRAN. L. REV. 311 (1972).

<sup>2</sup> 382 F. Supp. 1271 (D. Conn. 1974), *aff'd in part, rev'd in part and remanded*, 524 F.2d 384 (2d Cir. 1975).

<sup>3</sup> 382 F. Supp. at 1288-1312. While a similar approach was used by the court in *In re Sincere Navigation Corp.*, 329 F. Supp. 652, 660 (E.D. La. 1971), the opinion sheds little light on the basis for the decision.

<sup>4</sup> This note is based primarily on recent federal court decisions, including both federal law and diversity cases. For state court decisions, see Annot., 12 A.L.R.2d 611 (1950) and sources cited in note 1, *supra*.

## II. THE BACKGROUND OF THE *Feldman* CASE

Nancy Feldman, wife of the plaintiff, was killed in the crash of one of the defendant's airplanes in Connecticut in 1971. A diversity action was brought under the Connecticut wrongful death statute. The defendant stipulated its liability and the trial was only on the issue of damages.<sup>5</sup> The case was tried without a jury by Judge Blumenfeld, who awarded a judgment of \$444,056.<sup>6</sup> The Second Circuit, in an opinion by District Judge Lasker,<sup>7</sup> affirmed most of Judge Blumenfeld's decision, but reversed and remanded the case on two relatively minor points which will be discussed below. Judge Friendly entered an opinion "concurring *dubitante*."<sup>8</sup> Some of his doubts will also be discussed below. The court of appeals, in affirming the district court decision, made clear that the case should not be considered a precedent for cases arising under federal law.<sup>9</sup>

Under the Connecticut statute, the recovery was based on the value of the decedent's earning capacity (after taxes) plus the value of her capacity to enjoy life's nonremunerative activities minus a deduction for personal living expenses. Earning capacity and personal expenses were reduced to present value.<sup>10</sup> Thus the court had to determine the amounts for the above three elements and a discount rate.

In deciding whether to adjust for inflation and how to do so, the court had a free hand since neither Connecticut decisions barring such an adjustment nor decisions making one existed.<sup>11</sup> However, as will be seen later, the willingness of the court to make the adjustment is attributable in part to a feature of the Connecticut law on damages for wrongful death. In addition, the form of the adjustment was determined in part by the type of evidence that was available to and presented by the plaintiff.

## III. EARNING CAPACITY, TAXES AND PERSONAL EXPENSES

While proof of earning capacity is often difficult in the case of a young decedent and is often based on general statistics (such as average earnings for all college graduates<sup>12</sup>) the plaintiff in the

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<sup>5</sup> 382 F. Supp. at 1275.

<sup>6</sup> *Id.* at 1306.

<sup>7</sup> 524 F.2d 384.

<sup>8</sup> *Id.* at 390.

<sup>9</sup> *Id.* at 387, 393.

<sup>10</sup> *Id.* at 386; 382 F. Supp. at 1287-88.

<sup>11</sup> 382 F.Supp. at 1291; 524 F.2d at 387, 390.

<sup>12</sup> *See, e.g.,* Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974); S. SPEISER,

*Feldman* case had considerable evidence specifically applicable to the decedent.<sup>13</sup> From that evidence the court concluded that the decedent would have obtained a job in Washington, D.C. similar to one she previously held in Connecticut while her husband was in law school, that the salaries paid for the type of work the decedent would have obtained closely followed federal government pay scales, and that she would have started at the GS-12 salary level in 1971 and thereafter received raises equal to the increments in the government service.<sup>14</sup> Evidence was also presented that enabled the court to conclude that the decedent would have left work for eight years in order to raise a family and would then have returned to work until retirement at age sixty-five.<sup>15</sup> The court then used the 1971 federal pay scales and calculated total earnings of \$883,426.<sup>16</sup> This amount did not reflect inflation and was not yet reduced to present value.

Under Connecticut law, the court had to deduct personal living expenses in calculating the judgment. The figures used by the district court were based on the decedent's expenses prior to her death, with adjustments to reflect the higher cost of living in Washington, the higher income the decedent would have received and the resultant increase in her standard of living, and an expected reduction in expenses upon retirement.<sup>17</sup> The court of appeals reversed the district

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RECOVERY FOR WRONGFUL DEATH 2d §§ 3.17, 3.19 (1975).

<sup>13</sup> The decedent was twenty-five at her death. 382 F. Supp. at 1286 n.24.

<sup>14</sup> 382 F. Supp. at 1283-87.

<sup>15</sup> *Id.*

<sup>16</sup> 382 F. Supp. at 1298.

For each of the eight years that the court found the decedent would have been out of work, the court included in her earning capacity the salary she would have earned in her last year of work on the ground that the activities for that period of her life would have been at least as valuable to her as the salary she would have foregone. This is consistent with the idea of opportunity costs. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 79-80 (1972). See also, Kirby, *The Housewife and the Economist*, 11 TRIAL, No. 5, at 63 (1975); Komesar, *Toward A General Theory of Personal Injury Loss*, 3 J. LEGAL STUDIES 457 (1974). The court did not include the salary increases that would have been foregone during the eight years and the difference between the decedent's salary for all of the years thereafter that resulted from not receiving any increases for eight years. These substantial amounts should have been included as they would have been part of the opportunity cost.

The court of appeals reversed part of Judge Blumenfeld's decision on the ground that under Connecticut law compensation for the period that the decedent would have been unemployed while raising a family must be in the category of "loss of enjoyment of life's activities" rather than "loss of future earnings" and must be valued independently. 524 F.2d at 389. The district court awarded a lump sum of \$100,000 for the "loss of enjoyment" category. If on remand, the court were to simply transfer the amounts of salary foregone by the decedent to the "loss of enjoyment" category, the defendant would be worse off because the "loss of enjoyment" award is not reduced to present value.

<sup>17</sup> 382 F. Supp. at 1302-04.

court's findings on this point and, taking judicial notice of the cost of living for persons in the Feldman's position, suggested that the district court use a higher figure.<sup>18</sup> In doing so, the court of appeals may have overlooked one point. The earnings figures were based on 1971 salary rates and did not reflect inflation up to the time of trial, during which time federal salaries had risen 16.33%.<sup>19</sup> Therefore, the figures for expenses should also have been based on 1971 figures, while the court of appeals may have taken notice of current figures.<sup>20</sup>

The court was also required to deduct income taxes from the decedent's gross earning capacity.<sup>21</sup> From the defendant's calculation of a 16.7% rate and the plaintiff's calculation of a rate ranging from 23.4 to 30%, the court decided to apply a flat rate of 25% for each year.<sup>22</sup> While this flat rate may be reasonable based on the nominal salary figures the court used at this point, as Judge Friendly pointed out, the later adjustment for inflation assumes that salaries will be increasing, pushing the decedent into higher tax brackets.<sup>23</sup> The defendant did not raise the issue, and the district court did not account for this effect.

The deduction of income taxes was important in this case because it eliminated an argument for refusing an adjustment for future inflation.<sup>24</sup> While courts have most often denied inflation adjustments on the grounds of lack of a practical method and lack of evidence, they have also frequently mentioned tort damage rules that exclude consideration of certain other factors that then offset each other and thus produce an overall fair result. One such rule bars deduction of income taxes that would have been paid by the decedent on his income.<sup>25</sup> A leading case, *McWeeney v. New York, N.H. & H. R.R. Co.*,<sup>26</sup> held that no jury instruction should be given on income taxes

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<sup>18</sup> 524 F.2d at 390.

<sup>19</sup> 382 F. Supp. at 1296 n.34.

<sup>20</sup> The issue of too low an estimate of the decedent's living expenses was not raised in the defendant's briefs on appeal and may have been chosen by the court of appeals as a convenient means to reduce the verdict without disputing Judge Blumenfeld's decision on a matter of Connecticut law on which there was no precedent. 524 F.2d at 393.

<sup>21</sup> 382 F. Supp. at 1287, citing *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 671, 136 A.2d 918, 925 (1957).

<sup>22</sup> 382 F. Supp. at 1287-88. One writer has suggested that tax withholding rates be used to calculate an appropriate deduction for income taxes. Henderson, *supra* note 1, at 446.

<sup>23</sup> 524 F.2d at 392. See Comment, *Inflation and the Federal Income Tax*, 82 YALE L.J. 716, 728-35 (1973).

<sup>24</sup> 382 F. Supp. at 1291.

<sup>25</sup> Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L.J. 212 (1958).

<sup>26</sup> 282 F.2d 34 (2d Cir.) (en banc), cert. denied, 364 U.S. 870 (1960) (F.E.L.A. case).

and based its decision in part on the ground that any windfall to the plaintiff would be offset by the lack of adjustment for inflation and provision for attorney's fees.<sup>27</sup> This argument has been turned around and used to justify the refusal to consider inflation on the ground that any undercompensation from the refusal to consider inflation would be offset by the lack of a deduction of income taxes.<sup>28</sup> Such an argument was unavailable in *Feldman*.

Two other offsetting factors relating to interest rates are often mentioned by courts denying an inflation adjustment. The first is the claim that the plaintiff will be able to keep pace with inflation since interest rates on investments will increase.<sup>29</sup> Statistics cited by the court in *Feldman* suggest that this proposition is doubtful, since even recent, unusually high interest rates have not kept up with inflation.<sup>30</sup> A second offsetting factor is the practice of some courts of using a discount rate that is not based on current high interest rates attributable to inflation, but on the interest rates likely to be received over the plaintiff's life.<sup>31</sup> While this practice may be used in a case where the court has purportedly not made an adjustment for inflation,<sup>32</sup> it is actually a crude adjustment of the interest rate, which was used in a more sophisticated fashion in *Feldman* and other cases. The Fifth Circuit apparently realized this and, in its recent decision barring any adjustments for future inflation, that court overruled an earlier opinion permitting this practice.<sup>33</sup>

#### IV. INFLATION ADJUSTMENTS: METHODS

At this point the court had determined the earning capacity to

<sup>27</sup> 282 F.2d at 38.

<sup>28</sup> *Buchalski v. Universal Marine Corp.*, 393 F. Supp. 246, 252 (W.D. Wash. 1975). It has also been held that where consideration of inflation is required by statute, income taxes should also be considered. *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974)(Rhode Island law).

<sup>29</sup> *Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 236 (5th Cir.)(rehearing en banc), cert. denied, 96 S.Ct. 69 (1975)(Jones Act case); *Stanley v. United States*, 347 F. Supp. 1088, 1097-98(D. Me. 1972)(F.T.C.A.-Maine law); *Frankel v. United States*, 321 F. Supp. 1331, 1346 (E.D. Pa. 1970), aff'd, 466 F.2d 1226 (3d Cir. 1972)(Pennsylvania law); but see *Beaulieu v. Elliott*, 434 P.2d 665, 671 (Alas. 1967).

<sup>30</sup> 382 F. Supp. at 1294 n.31.

<sup>31</sup> *Blue v. Western Ry. of Ala.*, 469 F.2d 487 (5th Cir. 1972)(F.E.L.A. case); *Williams v. United States*, 435 F.2d 804 (1st Cir. 1970)(F.T.C.A. case-Rhode Island law); *In re Farrell Lines, Inc.*, 378 F. Supp. 1354 (S.D. Ga. 1974).

<sup>32</sup> *Williams v. United States*, 435 F.2d 804 (1st Cir. 1970).

<sup>33</sup> *Johnson v. Penrod Drilling Co.*, 510 F.2d at 237, overruling *Blue v. Western Ry. of Ala.*, 469 F.2d 487 (5th Cir. 1972).

be \$883,426 (\$662,571 after taxes<sup>34</sup>) and personal expenses to be \$225,364.<sup>35</sup> These sums were calculated without any consideration of the effect of inflation and had not yet been reduced to present value as required.<sup>36</sup> The court chose to combine the adjustment for inflation with the discounting process.

The *Feldman* court had a choice as to the method of making the adjustment, since prior decisions of other courts had used two different methods and there was no governing Connecticut or Second Circuit decision. The first method, used by two circuits in cases governed by state law, permits earnings and expenses to be adjusted for future inflation prior to discounting to present value. Under Rhode Island law, where evidence on inflation is made admissible for determining damages by statute,<sup>37</sup> the First Circuit permitted a 2½% increase in income for inflation and a 3% increase for productivity annually.<sup>38</sup> In a Federal Tort Claims Act case governed by California law,<sup>39</sup> the Ninth Circuit reversed a lower court which had adjusted for inflation by not discounting the award to present value,<sup>40</sup> but held that estimates of future inflation "supported by competent evidence" could be used in estimating future income and expenses.<sup>41</sup> Other courts have chosen to adjust for inflation through the discount rate. In *Beaulieu v. Elliott*,<sup>42</sup> the Supreme Court of Alaska approved a lower court's refusal to discount the award to present value in order to offset future inflation and potential salary increases that had not been accounted for in the estimate of future income. It does not appear that there was evidence that suggested to the court that the inflation rate was equal to the discount rate. Rather, the court was satisfied with a rough

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<sup>34</sup> 382 F. Supp. at 1298, Table I. Slight inaccuracy is due to the rounding of each year's figure to the nearest dollar by the court.

<sup>35</sup> 382 F. Supp. at 1305, Table II.

<sup>36</sup> 382 F. Supp. at 1288 n.25. The award for loss of enjoyment of life's activities is not discounted. *Id.* at 1299.

<sup>37</sup> R.I. GEN. LAWS ANN. § 10-7-1.1(3) (Supp. 1975) provides (in part) that "[i]n determining said award, evidence shall be admissible concerning economic trends, including but not limited to projected purchasing power of money, inflation and projected increase or decrease in the costs of living."

<sup>38</sup> *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974).

<sup>39</sup> 28 U.S.C. §§ 1346(b), 2674 (1970).

<sup>40</sup> *United States v. English*, 521 F.2d 63, 72 (9th Cir. 1975)(F.T.C.A.-California law).

<sup>41</sup> 521 F.2d at 75-76. This type of adjustment is illustrated in *Henderson*, *supra* note 1, at 437-41.

A formula for combining the expected productivity increases, inflation, and the discount rate consistent with the salary adjustment method is provided in S. SPEISER, *RECOVERY FOR WRONGFUL DEATH-ECONOMIC HANDBOOK* § 3.4, at 35-37 (1970).

<sup>42</sup> 434 P.2d 665, 670-72 (Alas. 1967).

balancing of the two factors. In other cases, courts have permitted no reduction to present value where it was shown that the expected inflation rate and the discount rates were equal.<sup>43</sup> Where the inflation rate was not equal to the discount rate, at least one court prior to *Feldman* took the differences as the net discount rate.<sup>44</sup> The court must, of course, make a choice between the two methods, since use of both would overcompensate the plaintiff.<sup>45</sup>

In *Feldman*, the court chose to use the discount rate adjustment in accounting for inflation. Its decision was based on the existence of reliable evidence as to the decedent's future earnings, including productivity increases and promotions but excluding inflation. This yielded a high estimate for future earnings. Adding a prediction for future inflation onto those estimates would have produced what would appear to be an extremely high recovery. As Judge Friendly noted, under one set of assumptions consistent with the district court's calculations, Mrs. Feldman would have been earning \$122,823 in the year 2011.<sup>46</sup> It is likely that even with a full explanation of the basis for such a large estimate, comparison with past experience with salaries and inflation, and an understanding of the effect of compounding a 4.5% inflation rate for forty years, judges and juries would be reluctant to award the full amount.<sup>47</sup> In such a case, a judge or jury would most likely respond by making only a partial inflation adjustment to achieve an overall reasonable figure in the perspective of current dollars. While the use of the discount rate adjustment may result in an understatement of the deduction for income taxes,<sup>48</sup> it

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<sup>43</sup> *Pierce v. New York Cent. R.R. Co.*, 304 F. Supp. 44 (W.D. Mich. 1969)(Michigan law); *Schnebly v. Baker*, 217 N.W.2d 708, 728 (Iowa 1974); *Hampton v. State Highway Comm.*, 209 Kan. 565, 498 P.2d 236 (1972).

<sup>44</sup> *In re Sincere Navigation Corp.*, 329 F. Supp. 652, 660 (E.D. La. 1971)(5% discount rate minus 3% inflation rate equals 2% net discount rate). In *Herman v. Hess Oil Virgin Islands Corp.*, 379 F. Supp. 1268 (D. St.Croix 1974), the court admitted testimony on a discount rate excluding inflation but the basis and amount of the rate are not specified in the opinion.

<sup>45</sup> *Wilkinson v. Yamashita-Shinnihon Kisen, K.K.*, 366 F. Supp. 110 (D. Md. 1973).

<sup>46</sup> 524 F.2d at 392.

<sup>47</sup> In *Bach v. Penn Central Transp. Co.*, 502 F.2d 1117 (6th Cir. 1974)(F.E.L.A. case), testimony by the plaintiff's expert that the plaintiff's earnings of \$13,496 as a railroad employee would have reached \$49,413 in the year 2002 was held to be inadmissible as too speculative.

<sup>48</sup> See text at note 23, *supra*. At a minimum, it puts the burden on the defendant to point out the full implications of what the plaintiff proposes.

One approach for the defendant is to show what the plaintiffs could earn annually if they invest the amount of the proposed judgment at current interest rates. *Johnson v. Serra*, 521 F.2d 1289, 1294 n.8 (8th Cir. 1975)(Minnesota law); *Zaninovich v. American Airlines, Inc.*, 2 App. Div. 2d 155, 160, 271 N.Y.S.2d 866 (1966). Such an argument was tried in *Feldman*. Brief for Defendant-Appellant, at 18-19.

does help to assure that the plaintiff is fully compensated by avoiding the presentation of shockingly large income estimates to the judge or jury.

Posner, in his *Economic Analysis of Law*,<sup>49</sup> points out a difference in the results reached by the two methods of adjustment discussed above. Assume that the decedent would have earned \$1,000 in the month one year from now, and also assume a market interest rate of seven percent and a three percent expected rate of inflation for the year. How much should the plaintiff receive today? If one uses the method of the *Feldman* court, a net discount rate of four percent is applied to the \$1,000. The plaintiff receives \$962 ( $1000 \div 1.04$ ), which if invested at seven percent for a year yields \$1,029 ( $962 \times 1.07$ ). However, if the plaintiff's salary had been adjusted for the inflation, he would have received \$1,031.<sup>50</sup> Using the other method, the salary would first be adjusted for inflation (to \$1,031) and then discounted. The plaintiff would receive \$964 ( $1031 \div 1.07$ ), which would yield \$1,031 ( $964 \times 1.07$ ) after one year. The difference between the two methods is small in this example and was small in the *Feldman* case.<sup>51</sup> It would become more significant in a case where larger earnings were adjusted over a longer period.<sup>52</sup> However, since *Feldman* involved a forty year period and above average salary levels, such a case would be rare.

## V. INFLATION ADJUSTMENTS: EVIDENCE

Many of the decisions on the inflation issue have dealt with the problem of evidence, although in several different contexts. The basic problem for the attorney is to determine what type of evidence will be admitted and what types will be sufficient.

The rejection by some courts of proposed adjustments for inflation has been based, at least in part, on the lack of evidence. Instructions to juries regarding inflation have been rejected as encouraging

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<sup>49</sup> R. POSNER, *ECONOMIC ANALYSIS OF LAW*, 80-82 (1972).

<sup>50</sup> *Id.* at 82 n.4. Posner's calculation is based on the assumption that the current dollar will be worth 97 cents at the end of the year of 3% inflation. If instead, one assumes that after 3% inflation what once cost one dollar will now cost \$1.03, then the plaintiff's salary should be \$1030, and he would still be shortchanged under the type of calculation made in *Feldman*.

<sup>51</sup> The difference between the two calculations in *Feldman* was \$2,000, assuming a 4 ½% inflation rate and 6% interest rate. 524 F.2d at 391.

<sup>52</sup> If the reason for the difference between the use of the net discount rate and the salary adjustment is not clear, consider the fate of the employee whose \$100 per week salary was cut by fifty percent when business was bad and then received a fifty percent raise when business returned to normal. D. HUFF, *HOW TO LIE WITH STATISTICS* (1954).



the jury to increase an award based on matters outside the record,<sup>53</sup> and as inappropriate when there was no evidence on future fluctuations of the dollar.<sup>54</sup> Failure to reduce an award to present value has resulted in a reversal where there was no evidence of inflation.<sup>55</sup> An attempt to use past salary increases which were due in part to inflation to project future earnings was rejected where there was no evidence that indicated that such salary and economic trends would continue at the same pace.<sup>56</sup>

However, other courts have permitted some consideration of the inflation issue without any requirement of evidence or even under a ban on such evidence. Following a Nebraska supreme court decision allowing a jury to consider inflation as a factor but barring an instruction on the subject,<sup>57</sup> the Eighth Circuit held that testimony by an economics professor on the effect of inflation on future earnings was inadmissible.<sup>58</sup> Thus, under Nebraska law, consideration of inflation will occur only if the issue is raised by the jurors during their deliberations. The Sixth Circuit went a step further by permitting an instruction to the jury about inflation in a case where there was no evidence on the record.<sup>59</sup> The court did so in the belief that inflation was a matter of common knowledge. A court may also take inflation into consideration by judicial notice without evidence from the parties.<sup>60</sup>

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<sup>53</sup> *Atwood v. Lever*, 274 So. 2d 146 (Miss. 1973).

<sup>54</sup> *Murphy v. Eaton, Yale & Towne, Inc.*, 444 F.2d 317 (6th Cir. 1971)(Michigan law).

<sup>55</sup> *Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij*, 443 F.2d 76 (2d Cir. 1971); *In re United States Steel*, 436 F.2d 1256 (6th Cir. 1970)(Jones Act case); *Sleeman v. Chesapeake & Ohio Ry. Co.*, 414 F.2d 305 (6th Cir. 1969)(F.E.L.A. case).

<sup>56</sup> *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3rd Cir. 1973), *on remand* 374 F. Supp. 850 (M.D. Pa. 1974)(Pennsylvania law).

An adjustment for inflation was denied in *Raines v. New York Cent. R.R.*, 29 Ill. App. 2d 294, 263 N.E.2d 895 (1970), *rev'd on other grounds*, 51 Ill. 2d 428, 283 N.E.2d 230 (1972) although the plaintiff presented a substantial amount of evidence. However, in general, there are fewer rejections when there is a strong presentation of evidence to support the request for an inflation adjustment.

<sup>57</sup> *McClennen v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559 (1973).

<sup>58</sup> *Riha v. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975)(Nebraska law).

<sup>59</sup> *Willmore v. Hertz Corp.*, 437 F.2d 357 (6th Cir. 1971)(Michigan law).

In this case, as in *Feldman*, there was no state law on the issue of future inflation. In approving an instruction to the jury on future inflation, the court relied on a comment in a Michigan case which held that past inflation should be considered when comparing the size of a current judgment with past judgments in similar cases. *Normand v. Thomas Theater*, 349 Mich. 50, 84 N.W.2d 451, 456-57 (1951). For a similar Ohio case on this latter point, see *Richlin v. Godding Amusement Co.*, 113 Ohio App. 99, 170 N.E.2d 505 (1960), *appeal dismissed*, 172 Ohio St. 342, 175 N.E.2d 516 (1961).

<sup>60</sup> *Furumizo v. United States*, 245 F. Supp. 981 (D. Hawaii 1965), *aff'd*, 381 F.2d 965 (9th Cir. 1967)(court took notice of inflation in comparing judgment with earlier judgment, not in accounting for inflation). See S. SPEISER, *supra* note 12, § 8:11, at 742 n.98.

Despite this consideration of inflation adjustment, it is doubtful whether the plaintiff will be fully compensated.

Generally, when inflation is considered without evidence, the jury is free to choose both the method and extent of the adjustment. An exception to this is *Beaulieu v. Elliott*,<sup>61</sup> which requires no evidence but adopts a specific method for making the adjustment and gives no discretion to the jury. Courts that use one of the methods of adjustment discussed above have permitted various types of testimony, but have recently been limiting certain types of testimony and setting standards for evidence of future inflation. In one typical case, the court admitted the testimony of an economist who estimated future wage increases at five percent, based on two percent inflation and three percent productivity increases, and calculated total wages of the decedent based on those estimates.<sup>62</sup> Another court, in a pretrial decision, agreed to allow an economist to testify on the relationship he observed between increases in the Consumer Price Index and both wages and investment yields.<sup>63</sup> In cases like *Feldman* in which the discount rate is adjusted, the testimony is slightly different. While in both types of cases an economist might present testimony on increases due to productivity,<sup>64</sup> the main issues in the latter type of case are the discount rate and the estimated future inflation rate used to calculate the net discount rate.<sup>65</sup>

*Feldman* provides the most detailed description of the evidence used to determine the net discount rate.<sup>66</sup> The plaintiff's expert presented evidence showing the rate of inflation (based on the Consumer Price Index) and yields on several types of investments over the past eighteen years and found the discount rate excluding inflation (the real rate of return) to be about 1.5%.<sup>67</sup> To corroborate the plaintiff's figures, the court made similar calculations but used a longer period of time and investments in four categories of United States government obligations. The court found that a person investing in Treasury bills from 1940 to 1973 would have received a real rate of return of 0.5%. A person investing in Treasury bills from 1952 to 1967 would have earned 1.9%. A person investing in ten to fifteen year Federal

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<sup>61</sup> 434 P.2d 665 (Alas. 1967).

<sup>62</sup> *Scruggs v. Chesapeake & Ohio Ry. Co.*, 320 F. Supp. 1248 (W.D.Va. 1970)(F.E.L.A. case).

<sup>63</sup> *Plant v. Simmons Co.*, 321 F. Supp. 735 (D. Md. 1970).

<sup>64</sup> See *Herman v. Hess Oil Virgin Islands Corp.*, 379 F. Supp. 1268 (D. St. Croix 1974).

<sup>65</sup> *Id.*; *Feldman v. Allegheny Airlines, Inc.*, 382 F. Supp. at 1293-94.

<sup>66</sup> 382 F. Supp. at 1293-95, 1306-12.

<sup>67</sup> *Id.* at 1293.

bonds from 1942 to 1964 would have earned 0.7% and a person investing in three to five year Federal notes from 1940 to 1971 would have lost 0.5%.<sup>68</sup> From these figures the court concluded that the plaintiff's figure of 1.5% was reasonable for use for a forty year period and applied it to the earnings and expenses it had determined.<sup>69</sup>

Two circuit courts have placed limits on the type of testimony on the effects of inflation that an economist can present. In *Bach v. Penn Central Transp. Co.*,<sup>70</sup> the Sixth Circuit upheld the district court's refusal to admit testimony of an economist to the effect that inflation would have increased the decedent's salary of \$13,496 in the year before his death to \$49,413 in the year 2002, on the grounds that such testimony was only speculative.<sup>71</sup> At the same time, however, the court held that the district court had erred in instructing the jury that it could not consider the effect of inflation based on the jurors' knowledge of it.<sup>72</sup> The Eighth Circuit followed *Bach* in *Johnson v. Serra*,<sup>73</sup> holding that testimony by an economist as to future inflation over a twenty-eight year period was too speculative and had led to an excessive verdict by the jury. The court did not bar "expert opinion evidence 'to show that raises in income or promotions would most probably occur,'"<sup>74</sup> But it did prohibit economists, who it observed have "fared only slightly better than fortune tellers and soothsayers in foretelling the future," from translating estimates of future inflation into a "specific dollar figure supposedly equatable with the decedent's income adjusted for possible future inflation through the year 2002."<sup>75</sup> These decisions may encourage plaintiffs to use the discount rate adjustment, which does not require the calculations that the *Johnson* court disliked. However, it would seriously disadvantage the defendant if a judge permitted a plaintiff to present evidence on inflation and discount rates to obtain the net discount rate adjustment as in *Feldman*, but then did not permit the defendant to show the salary amounts that are implicit in the plaintiff's calculations. These

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<sup>68</sup> *Id.* at 1306-12. The court's source of data was the 1974 *Economic Report of the President*.

<sup>69</sup> *Id.* at 1293.

<sup>70</sup> 502 F.2d 1117 (6th Cir. 1974).

<sup>71</sup> *Id.* at 1122. On the other hand, the Sixth Circuit recently permitted an economist to make calculations before the jury from estimates of life expectancy and probable future earnings (without consideration of inflation). *Amerco Marketing Co. of Memphis v. Myers*, 494 F.2d 904 (6th Cir. 1974).

<sup>72</sup> 502 F.2d at 1122.

<sup>73</sup> 521 F.2d 1289 (8th Cir. 1975).

<sup>74</sup> 521 F.2d at 1296, quoting *Bach*, 502 F.2d at 1122.

<sup>75</sup> 521 F.2d at 1294, 1296.

cases also raise the question of whether the types of evidence that these courts kept from juries should be permitted before a judge in a nonjury trial.<sup>76</sup>

A recent Ninth Circuit case indicates concern with the same problem of evidence confronted by the courts in *Bach* and *Johnson*. In *United States v. English*,<sup>77</sup> the court reversed the decision of the district court to account for inflation by not discounting the award to present value.<sup>78</sup> The court did indicate that the district court could adjust for inflation through the estimate for future income and expenses.<sup>79</sup> But it indicated that such estimates must be supported by "competent evidence" and that "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" can be used.<sup>80</sup> It is not clear whether the court would exclude any testimony beyond *Bach* and *Johnson* under this broad standard.<sup>81</sup>

Another case dealing with the problem of evidence involved a district court's interpretation and application of previous decisions of the Third Circuit. In *Huddell v. Levin*,<sup>82</sup> the district court stated that the Third Circuit rule<sup>83</sup> is that "there must be competent evidence of 'probable future salary or economic trends'; evidence that growth has occurred in the past is not alone sufficient for this purpose."<sup>84</sup> This appears to be an extremely strict standard. By contrast, the *Feldman* court quoted Judge Friendly's statement from *McWeeney* that "there are few who do not regard some degree of continuing inflation as here to stay."<sup>85</sup> The *Feldman* court then proceeded to analyze past real rates of return as its sole guide to future rates of return. The evidence accepted in *Huddell* indicates that little more than evidence of past growth is required. In *Huddell*, the economist's predictions were based on an econometric model, which was based in part on past trends and was tested by comparing its simulated

<sup>76</sup> See Section VI *infra*.

<sup>77</sup> 521 F.2d 63 (9th Cir. 1975).

<sup>78</sup> This was the approach accepted in *Beaulieu v. Elliott*, 434 P.2d 665 (Alas. 1967).

<sup>79</sup> 521 F.2d at 75.

<sup>80</sup> *Id.* at 75-76.

<sup>81</sup> The court cites *Bach*, 502 F.2d 1117, but does not directly adopt its holding limiting certain expert testimony.

<sup>82</sup> 395 F. Supp. 64 (D. N.J. 1975)(New Jersey law).

<sup>83</sup> The district court cites *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3rd Cir. 1973) and *Magill v. Westinghouse Elec. Corp.*, 464 F.2d 294 (3d Cir. 1972).

<sup>84</sup> 395 F. Supp. at 84 (citation omitted).

<sup>85</sup> 382 F. Supp. at 1291, citing 282 F.2d at 38.

predictions of the past with what had really happened.<sup>86</sup> The court described the testimony as based on "past trends" and "generally accepted economic theory."<sup>87</sup> The court also noted that the estimated growth rate provided by the economist, combining productivity increases and inflation, was equal to the average growth rate for the past 125 years.<sup>88</sup>

Just as sophisticated forecasting schemes rely heavily on the past, current indicators of future inflations, such as the interest rates on bonds,<sup>89</sup> must be analyzed with reference to the past. The assertions of economists about the likelihood of continued inflation, like that of Judge Friendly, are based largely on the past.<sup>90</sup> Thus while the *Huddell* court might have found that the evidence in the *Feldman* case did not meet its test quoted above, the evidence used in the *Huddell* case also relies heavily on past growth.

## VI. INFLATION ADJUSTMENTS AND JURIES

A final question raised by *Feldman* is whether the problem of adjusting for inflation should be solved differently in jury and non-jury cases. While it is often argued that a jury may be led astray if allowed to consider inflation<sup>91</sup> or to hear certain testimony,<sup>92</sup> Judge Friendly claimed that in *Feldman* Judge Blumenfeld's award, which exceeded the estimate of the plaintiff's expert, was more than a jury would have given and that the extensive computations indicated the "dangers of a delusive exactness."<sup>93</sup> While this statement may merely reflect a different evaluation of the evidence in the *Feldman* case, there is a basic problem raised by the potential for different treatment of the inflation issue in jury and nonjury cases. The argument that consideration of issues such as inflation and income taxes is too complex for juries is old.<sup>94</sup> There are several counterarguments and safeguards.

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<sup>86</sup> 395 F. Supp. at 83.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Henderschott and Van Horne, *Expected Inflation Implied By Capital Market Rates*, 28 J. FINANCE 301 (1973).

<sup>90</sup> See, e.g., Leonard, *Future Economic Value in Wrongful Death Litigation*, 30 OHIO ST. L.J. 502 (1969).

<sup>91</sup> *Raines v. New York Cent. R.R.*, 29 Ill. App. 2d 294, 263 N.E.2d 895 (1970).

<sup>92</sup> *Johnson v. Serra*, 521 F.2d 1289 (8th Cir. 1975).

<sup>93</sup> 524 F.2d at 392 (citation omitted).

<sup>94</sup> Note, *Fluctuating Dollars and Tort Damage Verdicts*, 48 COLUM. L. REV. 264, 271 (1948). See cases cited in *Brooks v. United States*, 273 F. Supp. 619 (D. S.C. 1967), discussing income taxes.

The calculation of an inflation adjustment and use of the statistics presented by an expert is no more difficult than the use of mortality and annuity statistics and the calculation of present value already performed by juries.<sup>95</sup> Restricting the introduction of evidence while permitting jury consideration of the inflation issue can only result in uninformed speculation, which is more likely to produce error than "informed speculation."<sup>96</sup>

Two mechanisms exist that can be used to correct and prevent errors. First, as *Bach* noted, the trial court may deal with an excessive verdict by ordering a remittitur.<sup>97</sup> Second, the trial court can use a special verdict to permit it and appellate courts to see what a jury has done with each element of the judgment.<sup>98</sup> A further possible step is to have the jury determine the individual elements of the damage award, leaving the final calculations to the court.<sup>99</sup>

## VII. CONCLUSION

The *Feldman* case represents one more step in the development of methods by the courts to adjust damage awards for future inflation.<sup>100</sup> Full development of the law on this issue will probably take many more years.<sup>101</sup> The issue has not been faced in many states, forcing the federal courts, in diversity cases like *Feldman*, to make their own educated guesses as to what the state courts will do. In addition to the wide range of state cases, there are conflicts between the federal circuits as to the federal law and within circuits on the treatment of federal law and diversity cases.<sup>102</sup>

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<sup>95</sup> S. SPEISER, *supra* note 12, § 8:11, at 740-43.

<sup>96</sup> *Id.* at 742.

<sup>97</sup> 502 F.2d at 1122.

<sup>98</sup> A special verdict may create problems on occasion. See *Armentrout v. Virginian Ry.*, 72 F. Supp. 997 (S.D. W.Va. 1947), *rev'd on other grounds*, 166 F.2d 400 (4th Cir. 1948).

<sup>99</sup> Nordstrom, *supra* note 25, at 229; Immel, *Actuarial Tables and Damage Awards*, 19 OHIO ST. L.J. 240, 251 (1958).

Such an arrangement would reduce the jury's ability to adjust damages in accordance with its views on the degree of "guilt" of the defendant. See Kalven, *The Jury, The Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 160-68 (1958).

<sup>100</sup> Legislation, like that in Rhode Island or that proposed by Stuart Speiser, makes evidence on inflation admissible but does not resolve the problems of the admissibility of certain types of testimony or the method of calculation of the inflation adjustment. See note 37 *supra*; S. SPEISER, *supra* note 12, § 15:22, Model statute § 15:8, at 502.

<sup>101</sup> The rate of development is probably positively correlated with the rate of inflation.

<sup>102</sup> Compare *Bach*, 502 F.2d 1117, with *Johnson v. Penrod Drilling*, 510 F.2d 234 (5th Cir.) (rehearing en banc), *cert. denied*, 96 S.Ct. 69 (1975) for the conflict in federal law. A conflict in the cases of the Sixth Circuit is described in *United States v. English*, 521 F.2d at 74 n.14.

On the issue of the method of calculation,<sup>103</sup> the plaintiff should be given a choice in most cases. The mathematical difference between the calculations will usually be minimal. In a case with strong evidence like *Feldman*, the plaintiff should be able to present the issue of increased earning capacity separately from the inflation adjustment. Regardless of the method selected by the plaintiff, the defendant will still be able to attack the plaintiff's case, introduce his own evidence, and reveal the full implications of facts the plaintiff has presented. One exception to a rule giving the plaintiff a free choice of method would require use of an adjustment of earnings when income taxes must be deducted. Such an exception may well develop in those states that deduct taxes in order to facilitate an accurate calculation of that deduction. There may be a growing number of such states since the tax and inflation issues are so often linked, and those states that permit inflation adjustments may also require deduction of taxes.<sup>104</sup>

Either of the two methods of making the inflation adjustment can be used to obtain full compensation for the plaintiff,<sup>105</sup> but in both cases adequate evidence is required. The present discomfort felt by many judges in dealing with this evidence will disappear after cases involving inflation adjustments become more common. Continued litigation of this issue and appellate review should result in more uniformity in the presentation of evidence and in the results. Judges who have pinned the speculation label on evidence of future inflation will eventually find it no more speculative than the evidence used in determining the discount to present value.<sup>106</sup> Finally, standard instructions should be developed that will enable most litigants to forego the time and expense of presenting evidence on inflation. Plaintiffs or defendants with unusual cases or who wish to present new evidence suggesting that the standard instruction was outdated could do so. These standard instructions, combined with more judicial experience, should help to avoid excessive verdicts and other jury errors on this issue.

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<sup>103</sup> See Section IV, *supra*.

<sup>104</sup> See, e.g., *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974).

<sup>105</sup> Other methods would require a substantial departure from traditional tort law in the United States. See *Frankel v. Heym*, 321 F. Supp. 1331 (E.D. Pa. 1970), *aff'd*, 466 F.2d 1226 (3d Cir. 1972). The adaptations to tort law made in several Latin American countries to deal with severe inflation might serve as a model for the United States. See K. KARST & K. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA*, 493-508 (1976).

<sup>106</sup> Note, *Future Inflation and the Uncompensated Plaintiff*, *supra* note 1, at 366-67.