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Tort Damages: The Adjustment of Awards for Lost Future Earning Capacity to Compensate for Inflation and Increased Productivity

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TORT DAMAGES: THE ADJUSTMENT OF AWARDS FOR LOST FUTURE EARNING CAPACITY TO COMPENSATE FOR INFLATION AND INCREASED PRODUCTIVITY: *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (1980).

INTRODUCTION

In 1916 the United States Supreme Court mandated that awards for future damages be discounted to their present worth in order to avoid overcompensation of an injured plaintiff.¹ The rationale for discounting was that “a given sum of money in hand is worth more than the like sum of money payable in the future.”² Due to increasing realization of the economic effects of inflation³, however, many courts

1. *Chesapeake and Ohio Ry. v. Kelley*, 241 U.S. 485 (1916). *But see* *Norfolk and Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980) when the Court, in *dicta*, stated: Admittedly there are many variables that may affect the amount of a wage earner's future income tax liability. . . . But future employment itself, future health, future personal expenditures, future interest rates and future inflation are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. We therefore reject the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury [footnote omitted].

Id. at 494. *See also* *Byrd v. Reederei* 638 F.2d 1300, 1308 (5th Cir. 1981) (Supporting the view that the *Norfolk* decision favored consideration of inflation).

2. 241 U.S. at 489. The rationale behind reduction of a damage award to present value is that the recipient of the award will invest the lump sum and receive interest; therefore the lump sum award should be that amount which, when invested at a given rate, will generate an interest which when added to the original award will fully compensate the injured plaintiff. Because “safe” investments are available to everyone in the form of savings banks, annuities, and bonds, it is considered to be no burden on the plaintiff to have the award reduced. J. STEIN, *DAMAGES AND RECOVERY: PERSONAL INJURY AND DEATH ACTIONS* 328 (1972) [hereinafter cited as *Stein*]; *See also* R. POSNER, *ECONOMIC ANALYSIS OF LAW* 79 (1973). The justification for reduction to present value is rooted in the principle that the plaintiff should not be overcompensated. 241 U.S. at 490. *See* C. MCCORMICK, *LAW OF DAMAGES* 306 (1935). For an excellent discussion of the intricacies of calculating present value, *See* Comment, *Future Inflation As A Factor in the Determination of Damage Awards*, 12 U. TOL. L. REV. 369, 396 (1981) (Symposium Issue) [hereinafter cited as *Future Inflation as a Factor*]. *See generally* S. SPEISER, *RECOVERY FOR WRONGFUL DEATH: ECONOMIC HANDBOOK* (2d ed. 1979).

3. Inflation is defined as “the increase in the volume of money and credit relative to available goods resulting in a substantial and continuing rise in the general price level.” Webster's Third International Dictionary (1965), *quoted in* *Kaczkowski v. Bolubasz*, 491 Pa. 561, 565, 421 A.2d 1027, 1029 (1980).

are reconsidering "the fairness of basing awards for future damages upon the present purchasing power of the dollar."⁴ In its attempt to reconcile the principle of full compensation with the economic effects of inflation, the Supreme Court of Pennsylvania, in *Kaczkowski v. Bolubasz*,⁵ took judicial notice to the current economic situation. Thus, it allowed presentation of evidence relating to inflation and increased productivity.

BACKGROUND

In order to constructively assess the validity of the *Kaczkowski* decision, it is necessary to consider it in light of both public policy and the general approaches taken by other courts in dealing with inflation and increased productivity. In considering inflation when calculating lost future earnings, courts are concerned with three policies: accuracy, efficiency and predictability.⁶ This note will demonstrate the relationship of these policies to damage awards in the context of the approaches courts have taken when considering inflation. Courts considering inflation and increased productivity, and their effect on damage awards for lost future earnings have taken three approaches. Those have been labeled (1) the traditional approach,⁷ (2) the middle ground approach,⁸ and (3) the evidentiary approach.⁹

A. The Traditional Approach

Under the traditional approach, courts completely ignore the effects of increased productivity and inflation because they consider these factors too speculative.¹⁰ This achieves the policy goal of predict-

4. Note, *Future Inflation, Prospective Damages and the Circuit Courts*, 63 U.VA.L.REV. 105 (1977) [hereinafter cited as *Future Inflation*].

5. 491 Pa. 561, 421 A.2d 1027 (1980).

6. *Id.* at 571, 421 A.2d at 1032 (citing *Freeport Sulphur Co. v. S.S. Hermosa*, 526 F.2d 300, 308-312 (5th Cir. 1976) (Wisdom, J. concurring)); See also Note, *Future Inflation*, *supra* note 4, at 108; Note, *Considering Inflation in Calculating Lost Future Earnings*, 18 WASH. L. J. 499, 500 (1979) [hereinafter cited as *Considering Inflation*].

7. 491 Pa. at 575, 421 A.2d at 1034; Comment, *Future Inflation as a Factor*, *supra* note 2, at 370; Note, *Future Inflation*, *supra* note 4, at 108; Note, *Considering Inflation*, *supra* note 6, at 502 (referring to the traditional approach as the "customary approach"). See e.g., *Sleeman v. Chesapeake and Ohio Ry. Co.*, 414 F.2d 305 (6th Cir. 1969).

8. 491 Pa. at 575, 421 A.2d at 1034; Note, *Future Inflation* *supra* note 4, at 109, Note, *Considering Inflation*, *supra* note 6, at 503.

9. 491 Pa. at 576, 421 A.2d at 1035; Note, *Future Inflation* *supra* note 4, at 109; Note, *Considering Inflation*, *supra* note 6, at 505.

10. 491 Pa. at 575, 421 A.2d at 1034; *Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 236 (5th Cir. 1975) (the influence on future damages of possible inflation is too speculative a matter for judicial determination); See e.g. *Williams v. United States*, 435

ability by eliminating speculative variables from the damage award calculation.¹¹ It achieves the goal of efficiency by reducing the relevant inquiry of the trier of fact to exclude those variables.¹²

B. *The Middle Ground Approach*

Courts following the middle ground approach permit the factfinder to consider the effects of inflation and increased productivity on lost future earnings but forbid expert testimony on either subject.¹³ The middle ground approach achieves the policy goal of efficiency by conserving judicial resources through the elimination of burdensome economic testimony.¹⁴ Additionally, accuracy is sought by drawing upon the jury's common experience with inflation.¹⁵

C. *The Evidentiary Approach*

The evidentiary approach, in its several variations,¹⁶ presents the factfinder with expert economic testimony in the interest of achieving

F.2d 804 (1st Cir. 1970); *Frankel v. Heym*, 321 F.Supp 1331 (E.D. Pa. 1970); See generally 2 HARPER & JAMES, LAW ON TORTS 1323 (4th Ed. 1974).

11. Note, *Future Inflation*, *supra* note 4, at 108.

12. *Id.*

13. 491 Pa. at 575, 421 A.2d at 1034; See *Bach v. Penn Central Transportation Co.*, 502 F.2d 1117, 1122 (6th Cir. 1974). *Bach* was subsequently overruled, however, by *Morvant v. Construction Aggregates Co.*, 570 F.2d 626, 632 (6th Cir. 1978), *cert. denied*, 439 U.S. 801 (1979). *Morvant* held that *Bach* had misconstrued *Petition of United States Steel*, 436 F.2d 1256 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971), to forbid expert testimony on inflation. *Morvant* thus allows such testimony, *but see* *Johnson v. Serra*, 521 F.2d 1289 (8th Cir. 1975) (applying Minnesota law to adopt the *Bach* approach); *Riba v. Jasper Blackburn Corp.*, 516 F.2d 840 (8th Cir. 1975) (applying Nebraska law to forbid expert testimony on inflation but allowing juries to consider inflation as a general factor); See generally, Comment, *Future Inflation as a Factor*, *supra* note 2, at 384.

14. Note, *Future Inflation*, *supra* note 4, at 108.

15. 491 Pa. at 575, 421 A.2d at 1034; Note, *Future Inflation*, *supra* note 4, at 108. This approach has been criticized, however, for allowing the factfinder to do what experts in the field cannot. *Id.* at 122. "Speculation by the factfinder, of course, is no more accurate than speculation by the experts. This speculation, moreover, removes the predictability of the traditional approach." *Id.*

16. The evidentiary approach has been applied to allow expert testimony on inflation and increased productivity. One variation, labeled the "total offset" approach, was developed in *Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967), See notes 73-76 and the accompanying text *infra*. Another variation, labeled the "offset present value" method, 491 Pa. at 577, 421 A.2d at 1035, was adopted in *Feldman v. Allegheny Airlines Inc.*, 382 F.Supp 1271 (D. Conn. 1974), *aff'd*, 524 F.2d 384 (1st Cir. 1979), see notes 55-72 and the accompanying text *infra*. A third method, labeled the "independent incorporation" method, Note, *Future Inflation*, *supra* note 4, at 111, was adopted in *District of Columbia v. Barriteau*, 399 A.2d 563 (D.C. 1979), see note 71 and the accompanying text *infra*.

accuracy.¹⁷ By allowing the introduction of economic testimony to the factfinder, this method places less emphasis on efficiency.¹⁸

FACTS OF THE CASE

Kaczkowski v. Bolubasz arose from an accident in which twenty year old Eric Kaczkowski was killed while riding in a vehicle owned by appellee John J. Bolubasz.¹⁹ At trial the jury established liability on the part of defendant Bolubasz.²⁰ The trial court granted plaintiff's motion for a new trial on the issue of damages alone.²¹ At the retrial, the jury was instructed to:

Consider the decedent's personal characteristics to: calculate the potential gross earnings for the decedent for the period of decedent's work life expectancy; to determine the maintenance cost of the decedent for the period of decedent's work life expectancy; to deduct the personal maintenance costs from the gross earnings to produce net earnings; and to discount the net earnings to present value by six percent (6%) simple interest.²²

Based upon these instructions, the jury returned a verdict of \$30,000 on behalf of the estate of Eric Kaczkowski.²³

During the retrial appellant presented the jury with various facts concerning the decedent and his future productivity.²⁴ In an in-

17. Note, *Considering Inflation*, *supra* note 6, at 505; Note, *Future Inflation*, *supra* note 4, at 108.

18. See Note, *Future Inflation*, *supra* note 4, at 127.

19. 491 Pa. at 563, 421 A.2d at 1028.

20. *Id.*

21. *Id.* The procedural history of the case was as follows: Theodore Kaczkowski, the decedent's father, instituted a complaint in trespass against John J. Bolubasz. *Kaczkowski v. Bolubasz*, No. 1246 April Term 1978, Court of Common Pleas of Allegheny County (Feb. 22, 1978). At the original trial the jury established liability on the part of Bolubasz. 491 Pa. at 563, 421 A.2d at 1028. Appellant Kaczkowski's motion for a new trial on the issue of damages alone was then granted. *Id.* On retrial, the jury returned an award of \$30,000 after reduction to present value using a 6% discount rate per the judge's instructions, see note 22 and the accompanying text *infra*. This award was affirmed *per curiam* by the Superior Court which based its decision upon *Havens v. Toner*, 268 Pa. Super Ct. 589, 413 A.2d 1112 (1979). Upon appellant's Petition for Allowance of Appeal, the Supreme Court granted allocatur. 491 Pa. at 565, 421 A.2d at 1029.

22. *Id.* at 564, 421 A.2d at 1028-1029.

23. *Id.*

24. The jury was told the decedent was twenty years old at the time of his death. At that time he was attending the Institute of Computer Management. His close friends and relatives testified he was in good health and was interested in his studies. The Director of Placement at the Institute testified he was familiar with the decedent who evidenced motivation and a willingness to learn. He further testified as to the range of salaries for which decedent would have been qualified. 491 Pa. at 563, 421 A.2d at 1028.

chambers discussion, appellant's counsel further offered to call an expert witness to prove a projection of the potential earning capacity of the decedent.²⁵ The court agreed to allow the testimony of the expert,²⁶ but prohibited him from applying a four percent (4%) annual increment to the victim's base salary.²⁷ This increment represented the combined impact of inflation and productivity gains on future increases in the victim's earnings.²⁸ The court based its refusal on *Havens v. Towner*,²⁹ in which the Pennsylvania Superior Court had forbidden an annual incremental increase based on inflation and future productivity.³⁰ Due to the court's ruling, plaintiff declined to present the expert's testimony, relying instead on the trial court's charge of "impairment of future earning power"³¹ to guide the jury.³²

DECISION OF THE COURT

The issue raised by appellant Kaczowski before the Pennsylvania Supreme Court was "whether the trial court erred in excluding reliable economic testimony showing the impact of inflation and increased productivity on decedent's future earning power."³³ The Supreme Court overturned the Superior Court's ruling that evidence of inflation and increased productivity were forbidden.³⁴ It held that the courts of Pennsylvania should, upon proper foundation, consider the victim's lost future productivity when making damage awards.³⁵ Therefore, the court allowed an incremental increase in estimated earnings based on inflation and future productivity.³⁶ Additionally, because of convinc-

25. *Id.* at 563, 421 A.2d at 1028.

26. The expert witness was Dr. Reuben E. Slesinger, a professor of Economics at the University of Pittsburgh.

27. 491 Pa. at 564, 421 A.2d at 1028.

28. *Id.*

29. 243 Pa. Super. Ct. 371, 365 A.2d 1271 (1976).

30. The trial court interpreted *Havens* to mandate "an annual increment percentage whether called a productivity factor or an inflation factor is not permitted to be used by a witness projecting future loss of earnings reduced to present worth." 491 Pa. at 564, 421 A.2d at 1028. The trial court did not, however, prohibit the expert from testifying as to his projection of lost future earnings reduced to present value. *Id.*

31. *Id.*

32. See note 22 and the accompanying text *supra*.

33. 491 Pa. at 565, 421 A.2d at 1029 (footnotes omitted).

34. *Kaczowski v. Bolubasz*, 268 Pa. Super. Ct. 589, 413 A.2d 1112 (1979) (memorandum opinion), *rev'd* 491 Pa. 561, 583, 421 A.2d 1027, 1039 (1980).

35. 441 Pa. at 583, 421 A.2d at 1038.

36. The allowed incremental increase included both an allowance for inflation as well as for "merit based increases" based upon a victim's "skill, experience and value to his employer." 491 Pa. at 580, 421 A.2d at 1037; see also Stopford, *Kaczowski v. Bolubasz: A Remarkably Important and Innovative Decision*, 4 PA. L. J. REP. 10 (March 23, 1981).

ing economic evidence of inflation, the court abandoned the practice of discounting awards to present value.³⁷

ANALYSIS

One commentator has suggested, "when considering inflation, the court confronts two questions. The first is whether inflation should be a factor. If so, the court must decide how this factor should be applied."³⁸

A. *The Court's Decision to Recognize Inflation and Increased Productivity as Factors in Damage Awards*

When considering the decision of the *Kaczkowski* court to judicially recognize the effects of inflation it should be noted that inflation plays two parts in the calculation of damage awards. The first lies in "determining the impact of inflation on the future earnings of the victim. The second role in which inflation plays a part is in determining the appropriate interest rate to discount the future award to its present value."³⁹ This dual effect of inflation can be seen in the evidence considered by the *Kaczkowski* court in analyzing both inflation and increased productivity.⁴⁰

Before considering any economic evidence, the court grounded its recognition of the effects of inflation upon general principles of tort law compensation. It recognized damages are to be compensatory to the full extent of the injury sustained.⁴¹ It also recognized "loss of future earnings is a distinct item of damages which, if properly proven,

37. 391 Pa. at 580, 421 A.2d at 1037.

38. Note, *Considering Inflation*, *supra* note 6, at 108.

39. 491 Pa. at 565 n.4, 421 A.2d at 1029 n.4. Thus, inflation is only one component of increased future productivity:

Economists recognize that there are at least four major elements which influence the rate of increase of an employee's income. These factors are: (1) the educational attainment of the participant prior to his entry into the labor market; (2) the influence of age upon the earnings of participants over their life cycles; (3) the significance of productivity and growth; and (4) the impact of inflation.

Henderson, *The Consideration of Increased Productivity and Discounting of Future Earnings to Present Value*, 20 S.D.L. REV. 307 (1976) [hereinafter cited as Henderson], *quoted in* 491 Pa. at 565 n.5, 421 A.2d at 1029 n.5. For an example of the influence of age upon earnings, see Bassett, *Economic Testimony in Personal Injury Actions*, 5 Economic Expert in Litigation 9 (1977) (published by the Defense Research Institute).

40. 491 Pa. at 579, 421 A.2d at 1036. To support its conclusion that inflation affects future earnings, the court stated, "we accept the fact that inflation plays an integral part in effectuating increases in an employee's salary. . . ." *Id.* This conclusion was reached after consideration of outside evidence showing such an effect. *Id.* at 573, 421 A.2d at 1033. The court also analyzed the relationship of inflation to the discount rate. *Id.* at 581, 421 A.2d at 1037.

41. *Id.* at 566, 421 A.2d at 1029.

may result in recovery for the plaintiff.”⁴² The court then approached the consideration of inflation, saying the “law does not require that proof in support of claims for damages or in support of compensation must conform to the standard of mathematical exactness.”⁴³ Thus the *Kaczowski* court used well-settled precedent to provide the initial basis for a decision to allow consideration of inflation and increased productivity.

After establishing this foundation, the court specifically addressed the issue of inflation and increased productivity by criticizing an earlier Pennsylvania case which followed the traditional view concerning inflation and increased productivity.⁴⁴ In *Havens v. Tonner*⁴⁵ the plaintiff attempted to introduce by expert testimony a 3½% productivity factor in the calculation of the decedent’s future earnings.⁴⁶ The *Havens* court held, “We view the productivity factor as simply a substitute for inflation and equally speculative and inadmissible in a calculation of future earnings.”⁴⁷

42. *Id.* (citing McCormick, LAW OF DAMAGES 299 (20th Reprint 1975)): “when an injury is a permanent one, one which will cause a loss or lessening of future earning power, a recovery may be had for the probable loss of future earnings.” 491 Pa. at 566 n.7, 421 A.2d at 1030 n.7.

43. *Id.* at 566, 421 A.2d at 1030 (quoting *Lach v. Fleth*, 361 Pa. 340, 352, 64 A.2d 821, 827 (1949)).

44. *Havens v. Tonner*, 243 Pa. Super. Ct. 371, 365 A.2d 1271 (1976).

45. *Id.*

46. The expert economist in *Havens* explained calculation of the productivity factor as follows:

What I have taken into account here is the fact of productivity increases in the future, to try and allow for future increases in wages which would come about due to the fact that the economy over a long period of time has had a tendency to exhibit an increase in the propensity to produce goods and services at a faster, more efficient rate. Namely due to better technology. This, over the longrun [sic] is the principal cause or the principal reason why a person’s wages rise; if he can produce twice as much in an hour after learning to do his job better, his employer can afford to pay him more because the employer has more goods that this individual produced that he can offer for sale and, in fact, in the longrun [sic] in the American economy, productivity has increased or the ability of the American workers to produce more goods and services in an hour somewhere around 3½ percent, therefore, I have allowed the wage increases here approximately of about three and one-half percent per annum for the remaining period of his work-life expectancy.

243 Pa. Super. Ct. at ___, 365 A.2d at 1277, *quoted in*, 491 Pa. at 565, 421 A.2d at 1031; *but see* Friedman, *Reflections on the Inflation Complex*, 26 N.Y.L.S. Rev. 263 (1981), in which it is stated: “Since the early part of the 1970s productivity-growth has slowed to about one-half its former rate; and it is axiomatic that without increasing productivity, rising real income is impossible.” *Id.*

47. 243 Pa. Super. Ct. at ___, 365 A.2d at 1274. The *Havens* court rationalized its holding, saying:

Steadily rising wage rates over the next twenty years, whatever the cause, are simply one face of the coin of inflation. It may be that inflation will become so much an established pattern of our economy that it should be recognized in estimating loss

The *Kaczkowski* court criticized the *Havens* decision on several grounds. First, it found that "the *Havens* court misunderstood that inflation and productivity were separate and distinct phenomena and the court failed to distinguish between the two in its blanket rejection of the productivity factor that was offered in evidence."⁴⁸ Therefore, the *Havens* court made no allowance for consideration of either factor in the calculation of lost future earnings.⁴⁹

The *Kaczkowski* court further analyzed the *Havens* decision in relation to the "tripartite goals of accuracy, efficiency and predictability."⁵⁰ Although the *Havens* court achieved the policy goals of efficiency and predictability by eliminating the cumbersome inflation and productivity variables,⁵¹ the *Kaczkowski* court found the resulting sacrifice in accuracy was untenable.⁵²

of future earnings. Certainly the erratic behavior of economy over the past half dozen years, plagued by war and other unusual circumstances, is not a sufficient demonstration that inflation at any predictable rate will continue for another twenty years. Furthermore, even if inflation is part of the pattern of the future, one certain consequence is that the interest rates on money will reflect that fact. Consequently, a sum representing the present worth of future earnings will earn more dollars in an inflationary period than would otherwise be the case. This may not wholly compensate for inflation but it is a closer and more certain approximation than any assumption of a certain rate of interest over the next twenty years.

Id.

The *Havens* court based its refusal to consider inflation and increased productivity on three cases: *Hoffman v. Sterling Drug*, 485 F.2d 132 (3d Cir. 1973) (applying Pennsylvania law); *Magill v. Westinghouse Elec. Corp.*, 464 F.2d 294 (3d Cir. 1970), *aff'g*, 321 F. Supp 1331 (D.C.E.D. Pa. 1970). In particular, the *Havens* court quoted *Frankel v. Heym*, 321 F.Supp 1331 (E.D. Pa. 1970):

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 projection of over fifty years. It is common knowledge that our Government is and has been attempting to control inflation, even to the point of considering wage and price controls. 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.

243 Pa. Super. Ct. at ____, 365 A.2d at 1275 (quoting 321 F. Supp at 1346).

48. 491 Pa. at 570, 421 A.2d at 1032.

49. *Id.*

50. *Id.* at 571, 421 A.2d at 1032.

51. Since the inflation and productivity variables are removed from consideration in calculating the damage award, the award is more predictable and the possibility of settlement out of court is enhanced. However, even assuming the premise that simplification is synonymous with efficiency and predictability, the Pennsylvania method sacrifices accuracy to the prejudice of the victim by failing to compensate the victim to the full amount of the injury sustained. By an obstinate refusal to give any recognition to inflation and productivity we ignore our responsibility to attempt to "graduate the amount of the damage award exactly to the extent of the loss."

491 Pa. at 571, 421 A.2d at 1032 (citation omitted).

52. 491 Pa. at 571, 421 A.2d at 1032.

Having dispensed with *Havens*, the court further supported its decision to break new judicial ground by quoting Justice Cardozo, who stated “[w]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.”⁵³

Stating its awareness that “[t]he orderly development of the law must be responsive to new conditions and to the persuasion of superior reasoning,”⁵⁴ the court embarked on an analysis of statistical and economic evidence to factually substantiate its acceptance of inflation and increased productivity. The court stated:

Despite the uninformed belief of the *Havens* court, inflation and productivity are not speculative and are capable of definition and prediction by economic experts. For decades, economists have been refining tools to forecast economic growth and have used these tools with proven accuracy [D]espite small tolerances of error these projections have been accurate in the past Thus, there exists a reasonable basis in fact for this court to consider the impact of inflation and productivity on lost future earnings.⁵⁵

The court factually substantiated its consideration of inflation by citing various statistical evidence concerning the presence of the rate of inflation.⁵⁶ This convinced the court that “while the rate of inflation

53. B. Cardozo, *The Nature of the Judicial Process* 150-151 (1921), *quoted in* 491 Pa. at 571, 421 A.2d at 1032.

54. *Griffith v. United Airlines*, 416 Pa. 1, 203 A.2d 796 (1964), *quoted in*, 491 Pa. at 571, 421 A.2d at 1032.

55. *Id.* at 572, 421 A.2d at 1032.

56. *Id.* at 572 n.11, 421 A.2d at 1033 n.11:

From 1940 to 1972 the consumer price index, the government's measure of inflation, rose 185 percent. In terms of purchasing power it took almost \$3.00 in 1972 to purchase what \$1.00 would have purchased in 1940. The compound rate of advances over this period is approximately 3.5% annually. Purchasing Power of Dollar 1940-1978, U.S. Bureau of the Census, Statistical Abstract of the United States: 1978 (99th ed.) Washington, D.C.

See also 491 Pa. at 573 n.12, 421 A.2d 1033 n.12:

Since 1972, the Consumer Price Index (CPI) has not declined in any month. From 1967 through 1978 the CPI has risen 102%:

1972	-	3.4%	1976	-	4.8%
1973	-	8.8%	1977	-	6.8%
1974	-	12.2%	1978	-	9.0%
1975	-	7.0%	1979	-	13.3%

Bureau of Labor Statistics, U.S. Department of Labor, CPI Detailed Report 1 (Dec. 1972-1979). From June 1979 through June 1980 the CPI had increased 14.3%.

may vary during any given period its long term presence as a fact of our economic picture is certain."⁵⁷

To substantiate the view that future productivity is capable of estimation, the court reasoned that the estimate of future earning capacity was no more speculative than "most other estimates made by the trier of fact."⁵⁸ The court held, therefore, "[i]n view of our acceptance of the reliability of the science of economics, the victim's lost future earnings should be treated like any other question of fact and should be submitted to the trier of fact after a proper foundation and expert testimony."⁵⁹

B. The Kaczkowski Approach to Inflation and Increased Productivity

Having accepted inflation and increased productivity as proper subjects of judicial recognition, the court considered the approaches of other jurisdictions.⁶⁰ This was done in an effort to decide how to apply inflation and increased productivity to the estimation of lost future earnings.⁶¹ After considering the general approaches taken by other courts, the *Kaczkowski* court concluded the evidentiary approach was the most valid method to compute lost future earnings.⁶² The court settled on the evidentiary approach because "it has been consistently demonstrated that expert evidence is essential to accurate economic forecasting. Since it is apparent that the middle-ground approach contributes little to the accuracy or predictability of lost future earnings . . . we decline to accept it."⁶³

The court then considered two variants⁶⁴ of the evidentiary approach developed in *Feldman v. Allegheny Airlines, Inc.*⁶⁵ and *Beaulieu v. Elliott*.⁶⁶ In *Feldman*, the court allowed extensive testimony detailing

57. 491 Pa. at 573, 421 A.2d at 1033.

58. 491 Pa. at 574, 421 A.2d at 1034 (citing *Hamil v. Bashline*, 481 Pa. 256, 392 A.2d 1280 (1978)) (ct. allowed consideration of what might have happened had the decedent received proper medical care); *Wallace v. Pennsylvania R.R.*, 222 Pa. 556, 561, 71 A.2d 1086 (1909) (future pain and suffering is recoverable if it is likely or probable to ensue); *Yost v. West Penn Ry. Co.*, 336 Pa. 407, 410, 9 A.2d 368 (1939) (future medical expenses can be recovered if they can be estimated).

59. 491 Pa. at 574, 421 A.2d at 1034 (footnote omitted).

60. See notes 7-14 and the accompanying text *supra*.

61. See note 31 *supra*.

62. See note 9 *supra*.

63. 491 Pa. at 576, 421 A.2d at 1035.

64. See note 16 *supra*.

65. 382 F. Supp 1271 (D. Conn. 1974), *rev'd on other grounds*, 524 F.2d 384 (2d Cir. 1975) (the court of appeals affirmed the district court's holding but remanded to the trial judge for a recalculation of decedent's living expenses). See Note, 62 CORNELL L. REV. 803 (1977); Note, 37 OHIO ST. L.J. 138 (1976).

66. 434 P.2d 665 (Alaska 1967).

the decedent's "college grades, her employment history, the opinion of the deceased held by her fellow workers, the expressed employment goals of the deceased and the potential jobs for which the deceased was qualified."⁶⁷ Based on these and other factors,⁶⁸ the court predicted the productivity increase of the decedent over her work-life expectancy to be 2.87% yearly.⁶⁹ It subtracted this figure from 4.14%,⁷⁰ representing a prudent non-sophisticated investment, to arrive at an annual inflation adjusted discount rate of 1.5%.⁷¹ Then, each year's earnings were discounted to present value using the 1.5% increment as a "real discount rate."⁷² Thus the *Feldman* court allowed for both inflation and increased productivity in a single calculation.⁷³

The Alaska Supreme Court, in *Beaulieu v. Elliott*,⁷⁴ adopted a

67. 491 Pa. at 577, 421 A.2d at 1035.

68. *Feldman v. Allegheny Airlines Inc.*, 382 F. Supp. 1271, 1278 (D. Conn. 1974), *rev'd on other grounds*, 524 F.2d 384, 384 (2d Cir. 1975). One of the other factors was an examination of another individual with remarkably similar credentials.

69. The figure 2.87% represents the average yearly rate of inflation revealed in the Department of Labor's Consumer Price Index over an 18 year period. *Feldman v. Allegheny Airlines Inc.*, 382 F. Supp. 1271, 1293 (D. Conn. 1974), *rev'd on other grounds*, 524 F.2d 384, 387 (2d Cir. 1975).

70. The figure 4.14% represented average earnings from mutual savings bank investments, constituting a prudent non-sophisticated investment. *Id.*

71. The actual figure arrived at, 1.27%, was rounded to 1.5% which was, in turn, corroborated by the trial judge who calculated the real yields of investments from 1940 in Federal Government Securities (with inflation factored out) from the 1974 Economic Report of the President. *Id.*

72. [O]n the basis of the evidence adduced at trial, the evidence judicially noted and collated at the Appendix, and judicial notice of the continuing erratically inflationary behavior of the American economy, that 1.5 per cent per year is an appropriate figure by which to discount an award of damage based on the destruction of future earning capacity when that award has itself been computed without consideration of inflation affecting that amount subsequent to the date of the injury upon which the award is premised.

Feldman v. Allegheny Airlines Inc., 382 F. Supp. 1271, 1294 (D. Conn. 1974), *rev'd on other grounds*, 524 F.2d 384 (2d Cir. 1975). For another view of the evidentiary approach, see *District of Columbia v. Barriteau*, 399 A.2d 563 (App. D.C. 1979) in which an escalation factor, encompassing inflation and productivity, was applied to the injured plaintiff's salary to arrive at a gross figure of \$331,384 for the remainder of plaintiff's work life. The figure \$331,384 was then reduced to present value using a 5.25 discount factor based on government and corporate bond averages, to arrive at a figure of approximately \$194,717. (This figure was not stated by the *Barriteau* court, but was calculated by the author using the *Barriteau* method). Then the expert then applied the same process to the \$4,000 which plaintiff was capable of earning subsequent to the accident. The difference between the two present value figures was \$103,399, representing the amount of loss sustained. *Id.* at 566. The court in *Barriteau* stated that the trend among a number of courts was to allow the trier of fact to consider inflation. *Id.* at 567. *Accord*, *U.S. v. English*, 521 F.2d 63, 75 (9th Cir. 1975).

73. *Id.*

74. 434 P.2d 665 (Alaska 1967). The *Beaulieu* suit arose from an accident in which plaintiff, James Elliott, suffered a fracture dislocation of his right ankle. Liabil-

much simpler approach to the problem. Unlike the court in *Feldman*, the *Beaulieu* court did not allow an increase in the plaintiff's wages based on productivity. "This factor is generally not taken into account when loss of future wages is determined, because there is no definite way of determining at the time of trial what wage increases the plaintiff may expect to receive in the years to come."⁷⁵ The *Beaulieu* court held, however, that the award of future earnings need not be reduced to present value.⁷⁶ This, the court held, would compensate the injured plaintiff for any loss of potential productivity increases.⁷⁷ Thus the court adopted the "total offset" method of determining damages.⁷⁸ Under this method the court "does not discount the award to its present value but assumes that the effect of the future inflation rate will completely offset the interest rate, thereby eliminating any need to discount the award to present value."⁷⁹

Rather than wholly adopt either the *Feldman* or *Beaulieu* approach, the *Kaczkowski* court merged the two to form a hybrid approach to the problem. It chose to use the *Feldman* method of calculating productivity increases, but the *Beaulieu* approach to discounting and determination of present value.⁸⁰ The *Kaczkowski* court followed the *Feldman* approach to increased productivity because it allowed the factfinder to make an informed estimation of the victim's lost future earning capacity after being presented with all relevant evidence.⁸¹ The court found that the *Beaulieu* approach to increased productivity discriminated against persons whose salaries depend on merit-based increases.⁸² Fur-

ity was conceded by *Beaulieu*, and the issue of damages was tried by the court without a jury. *Id.* at 667.

75. *Id.* at 672. The court excluded as speculative evidence "non-scheduled salary increases and bonuses that are granted as one progresses in his chosen occupation in terms of skill, experience and value to the employer." *Id.*, quoted in *Kaczkowski*, 491 Pa. at 579, 421 A.2d at 1036. This view, however, was refined in *State v. Guinn*, 555 P.2d 530 (Alaska 1976), which allowed automatic step increases keyed to the length of service because they are "certain and predictable at time of trial." *Id.* at 546.

76. 434 P.2d at 672.

77. *Id.* The *Beaulieu* court applied a somewhat circular logic in defending the decision to refuse productivity increases as well as refusing to discount the award to present value. It held that failure to discount an award would offset any loss of potential wage increases the plaintiff might have accrued. The court then stated, however: "Thus if there is any fear that failure to reduce the award will give the plaintiff more than he is entitled to . . . such fear is obviated by the fact that the award may well be deficient in that it does not take into account probable wage increases." *Id.*

78. 491 Pa. at 580, 421 A.2d at 1037.

79. *Id.* at 579, 421 A.2d at 1036.

80. *Id.*

81. *Id.* at 579, 421 A.2d at 1037.

82. *Id.* at 580, 421 A.2d at 1037. The court found that *Beaulieu's* refusal to consider such increases discriminated against the employee whose salary depended upon his skill, experience, and value to his employer. *Id.*

thermore, the court found "the Alaska court's conception that merit-based increases are speculative is a throwback to the previously rejected traditional approach."⁸³ Therefore, the court rejected the *Beaulieu* approach toward calculating increased productivity. It found the *Feldman* method achieved the goals of accuracy by presenting expert testimony to the trier of fact;⁸⁴ and of predictability because it is less speculative to assume that increased productivity will occur than to assume stagnation.⁸⁵ The court concluded that although the *Feldman* approach was time consuming, and therefore somewhat inefficient, the resulting accuracy was worth the price.⁸⁶

The court, in choosing the *Beaulieu* "total offset" approach to discounting, stated:

In support of our adoption of the "total offset method" in allowing for the inflationary factor, we note that it is no longer legitimate to assume the availability of future interest rates by discounting to present value without also assuming the necessary concomitant of future inflation. We recognize that inflation has been and probably always will be an inherent part of our economy. Although the specific rate of inflation during any given period may vary, we accept the fact that inflation plays an integral part in effectuating increases in an employee's salary, and we choose to adopt a damage formula which will allow for that factor without actually requiring the factfinder to consider it as an independent element of the award.⁸⁷

The court defended the accuracy of the *Beaulieu* approach, citing a number of economic authorities. "Since over the long run interest rates, and, therefore, the discount rates, will rise and fall with inflation, we shall exploit this natural adjustment by offsetting the two factors in computing lost future earning capacity."⁸⁸ The court found

83. *Id.*

84. 491 Pa. at 579, 421 A.2d at 1037.

85. *Id.* at 580, 421 A.2d at 1037.

86. *Id.*

87. *Id.*

88. *Id.* at 581, 421 A.2d at 1038. To support this statement, the court cited various economic authorities to demonstrate the relationship between interest rates and future inflation:

When inflation becomes expected, lenders expect the real value of their principal and interest payments to be depreciated and borrowers expect to be able to repay loans with money for which less real value must be sacrificed than before expectations changed. Thus at any level of market interest rates, the quantity of loans supplied decreases while the quantity demanded increases. Both forces increase nominal interest rates.

Gibson, *Interest Rates and Inflationary Expectations: New Evidence*, 62 AM. ECON. REV. 854, 855 (1972). The court concluded, therefore, "It can be stated with assurance that present interest rates depend at least in part upon expectations of future

that the accuracy of the total offset method was commended by modern interest theory:

"[W]hen prices are rising, the rate of interest tends to be high but not so high as it should be to compensate for the rise; and when prices are falling, the rate of interest tends to be low, but not so low as it should be to compensate for the fall."⁸⁹

The *Kaczkowski* court found the *Feldman* approach inferior to the "total offset" method because it attempted to predict prospective interest rates. "[I]t appears that predicting prospective interest rates is as difficult as forecasting future inflation."⁹⁰

The *Kaczkowski* court further found the total offset method contributed to judicial efficiency:

Litigators are freed from introducing and verifying complex economic data. Judge and juries are not burdened with complicated, time consuming economic testimony. Finally, by eliminating the variables of inflation and future interest rates from the damage calculation, the ultimate award is more predictable.⁹¹

Therefore, the court held:

Upon proper foundation, the court shall consider the victim's lost future productivity. Moreover, we find as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting. Thus, the Courts of this Commonwealth are instructed to abandon the practice of discounting lost future earnings. By this method, we are able to reflect the impact of inflation in these cases without specifically submitting this question to the jury.⁹²

Thus the *Kaczkowski* court adopted its own hybrid approach to inflation and increased productivity with an obvious concern for the policy goals of accuracy, efficiency, and predictability. The approach therefore must be evaluated in light of those policy concerns.

inflation." 491 Pa. at 581, 421 A.2d at 1037. "Critics of the total offset method fail to realize that future inflation rates do not exist in a vacuum but co-vary significantly." *Id.* (citing *Inflation: A Survey*, 85 ECON J. 741, 788 (1975)).

89. 491 Pa. at 581, 421 A.2d at 1037 (quoting I. Fisher, *The Theory of Interest* 43 (1930)). See also Carlson, *Economic Analysis v. Courtroom Controversy: The Present Value of Future Earnings*, 62 A.B.A.J. 628 (1976).

90. 491 Pa. at 582, 421 A.2d at 1038 (citing *Freeport Sulphur v. S.S. Hermosa*, 526 F.2d 300, 310 (5th Cir. 1976) (concurring opinion)). The *Kaczkowski* court also pointed out the "merit of discounting to present value upon an inflation adjusted interest rate was questioned by the very court which originally proposed it." *Id.* See *Feldman*, 382 F.Supp. at 1293 n.30.

91. 491 Pa. at 583, 421 A.2d at 1038.

92. *Id.* See note 21 *supra*.

1. *The Productivity Factor*

The *Kaczkowski* court selected the *Feldman* approach to increased productivity because it allows presentation of expert testimony to the trier of fact, thus permitting the best estimate of lost future earnings.⁹³ The goal of accuracy is achieved by allowing the factfinder to make an "informed estimation of the victim's lost earning capacity."⁹⁴

One commentator, however, has estimated that the *Feldman* approach overcompensated the injured plaintiff by a substantial amount.⁹⁵ This commentator introduced the Standard Valuation Procedure and calculated future lost earnings using the facts of *Feldman*.⁹⁶ Although the approach appears to improve the accuracy of the award, it does so through a complex set of mathematical calculations.⁹⁷

The *Feldman* approach to increased productivity arrives at a reasonable compromise between the *Beaulieu* approach and the Standard Valuation Procedure. It increases accuracy by allowing expert testimony, but does not go so far as to confuse the jury with exceedingly complex calculations.⁹⁸ Although the use of expert testimony lessens the efficiency of the method,⁹⁹ it is consistent with the idea of full compensation for the injured plaintiff because it allows the trier of fact to make an informed estimate of future productivity in light of relevant evidence.¹⁰⁰

The *Feldman* approach also eliminates some degree of speculation by providing the trier of fact with expert testimony and relevant evidence.¹⁰¹ The *Kaczkowski* court noted, "[a]lthough this approach may be time consuming, and like all estimations of future events may be subject to a degree of speculation, it is exceedingly more accurate to assume that the future will not remain stagnant with the past."¹⁰²

2. *The Total Offset Method*

Two policy concerns dominated the *Kaczkowski* court's adoption of the *Beaulieu* total offset approach. Because the approach eliminates

93. 491 Pa. at 579, 421 A.2d at 1036.

94. *Id.* at 580, 421 A.2d at 1037.

95. Fitzpatrick, *The Personal Economic Loss Occasioned by the Death of Nancy Hollander Feldman: An Introduction to the Standard Valuation Procedure*, 5 *Economic Expert in Litigation* 25 (1977) (published by the Defense Research Institute).

96. *Id.* at 26.

97. *Id.* at 27. The Standard Valuation Procedure goes so far as to include an incremental reduction to reflect the possibility that the decedent, had he not died when he did, would have died before retirement anyway. *Id.* at 54.

98. Note, *Considering Inflation*, *supra* note 6, at 500.

99. 491 Pa. at 580, 421 A.2d at 1036.

100. *Id.* at 582, 421 A.2d at 1038.

101. 491 Pa. at 579, 421 A.2d at 1027.

102. *Id.*

the need for discounting to present value, calculations by the trier of fact are unnecessary.¹⁰³ Therefore, trials become more efficient because those calculations are eliminated from the relevant inquiry of the trier of fact.¹⁰⁴ The *Kaczkowski* court also claimed to have achieved accuracy due to the natural tendency of the rate of interest and inflation to offset each other.¹⁰⁵

The "total offset" approach has, however, been rejected by some courts for its inaccuracy. In *Lumber Terminals, Inc. v. Nowakowski*,¹⁰⁶ the Court of Special Appeals of Maryland agreed that damages for future earnings do not have to be reduced to present value. Although the court agreed with *Beaulieu* on this matter, it refused to adopt the concept that inflation and interest rates offset each other as a matter of law.¹⁰⁷ Instead the court allowed expert testimony to prove such an offset.¹⁰⁸ The method was also rejected in *District of Columbia v. Bar-riteau*¹⁰⁹ which chose instead to allow expert testimony on the subject.¹¹⁰ A further criticism of *Beaulieu*'s inaccuracy is that it overcompensates the injured plaintiff.¹¹¹ "A better argument against balancing future earning power of money against future inflation is not that either is too speculative, . . . but that this balancing treats significant factors of the damage award too curdely and imprecisely."¹¹²

Although the total offset method has been criticized for inaccuracy, several aspects of the *Kaczkowski* court's reasoning tend to refute the detractors of the approach. First, the court analyzed various statistics and authorities which supported the theoretical correctness of the method.¹¹³ Second, by eliminating the need for expert economic testimony, trials become more streamlined and therefore more

103. *Id.* at 580, 421 A.2d at 1027.

104. *Id.* at 583, 421 A.2d at 1027.

105. Note, *Future Inflation*, *supra* note 7, at 108.

106. 36 Md. App. 82, 373 A.2d 282 (1977).

107. *Id.* at ___, 373 A.2d at 290.

108. *Id.*

109. 399 A.2d 563 (App. D.C. 1979).

110. *Id.* at 568. Although the court did not specify a particular method of allowing for inflation, it allowed evidence supporting the independent incorporation method. *Id.* at 565; see Note, *Future Inflation*, *supra* note 4, at 111. Under this method, each year's gross earnings are increased by an inflationary factor. Then each year's earnings are discounted to present value, and the yearly totals are then added up to form the damage award. *Id.*

111. Note, *Considering Inflation*, *supra* note 6, at 509 (citing, Comment, *Future Inflation and the Undercompensated Plaintiff*, 4 LOY. CHI. L.J. 359 (1973)).

112. Comment, *Future Inflation and the Undercompensated Plaintiff*, 4 LOY. CHI. L.J. at 367 (1973).

113. See notes 86-88 and the accompanying text *supra*.

efficient.¹¹⁴ Finally, the court supported its choice by noting that any inaccuracy in the amount of the damage award would be in favor of the injured plaintiff and not the tortfeasor.¹¹⁵ Although the *Kaczkowski* court did not substantiate this position, two justifications can be advanced. One justification is that because of attorney's fees, the plaintiff's award is often reduced to an amount less than the assumed loss.¹¹⁶ Another justification is that a court may always reduce an overly excessive award through its power of remittitur.¹¹⁷ For these reasons some overcompensation of the plaintiff is not unreasonable.

Although the *Beaulieu* approach sacrifices some degree of accuracy in calculation it must be recognized that no method assures total accuracy.¹¹⁸ Therefore, in light of the achievement of efficiency and predictability, the *Kaczkowski* court's choice of the *Beaulieu* approach appears justified.

CONCLUSION

When viewed as a whole, it appears that the *Kaczkowski* court has formulated a hybrid approach that attempts to strike a balance between accuracy, efficiency, and predictability. Although the approach might be open to criticism on technical economic grounds it appears to be a judicially practical approach to a complex problem.

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114. See note 90 and the accompanying text *supra*.

115. 491 Pa. at 582, 421 A.2d at 1038.

116. *Stein*, *supra* note 2, at 328 n.3.

117. See *Bach v. Penn Cent. Transp. Co.*, 502 F.2d 1117, 1122 (6th Cir. 1974).

118. 491 Pa. at 582, 421 A.2d at 1038.

