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Computation of Future Damages: A View from the Bench

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COMPUTATION OF FUTURE DAMAGES: A VIEW FROM THE BENCH

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Recognizing that speculation inheres in lump-sum verdicts for future losses, Justice Lawless explores some practical computation problems which magnify this speculation. The author examines the plight of a jury which must decide upon a discount factor, reduce a lump-sum award to its present worth, and perhaps wrestle with a taxation adjustment. Concluding that this practice results in unrealistic burdens on juries and injustice to litigants, Justice Lawless recommends that if we are to continue the lump-sum method, some of the guesswork should be obviated by special findings which leave mathematical calculations on jury-found facts with the judge.

INTRODUCTION

At the turn of the century the United States Supreme Court held that a common-law action could not be maintained in a court of the United States against a Mexican railroad, incorporated in Colorado, for the wrongful death in Mexico of an American switchman.[1] Mr. Justice Holmes, writing for the majority, said that the American court should refuse to administer a Mexican statutory rule of damages which provided compensation in the form of scheduled, periodic payments instead of the lump-sum award traditional to American jury verdicts.[2]

While the case is of primary interest for students of conflict of laws, it neatly contrasts two wholly different remedies in computing damages for future loss: the Mexican periodic payment based on what *does* happen in the future, and the American lump-sum payment based on what *may* happen in the future. The Supreme Court opined that justice to the defendant would not permit the substitution of a lump sum provided under Texas law for the periodic payments which the Mexican statute required. As Holmes put it: "[T]o reduce a liability conditioned as this was to a lump sum would be to *leave the whole matter to a mere guess.*"[3] Yet, is it not true that every lump-sum

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1 Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904).

2 *Id.* at 128 (dictum).

3 *Id.* at 128. (Emphasis added.)

verdict is in a sense predicated upon a chain of guesses or, more accurately, educated estimates? Future loss to a plaintiff cannot be computed with precision when the elements of loss are variable and unknown. Plaintiff may or may not require future surgery, he may or may not require future nursing care, his future earnings may or may not decrease, and finally, plaintiff may live to his expectancy, exceed it, or never realize it. Each element of future damage is necessarily based upon the jury's prediction as to what will occur in the future.

It is interesting that more than fifty years have passed since Holmes' observation, and no perceptible chorus for reform has been heard to urge greater precision in computing awards of damage for future expense and future loss.

Since the cardinal principle of damages in Anglo-American law is that of compensation for injury caused plaintiff by defendant's breach of duty, it is regrettable that the common-law system and most state statutes are so tightly wedded to a lump-sum judgment in the typical negligence case. While the single recovery rule may be practical in terms of efficient court disposition, it leaves much to be desired in terms of basic justice. This is true because, first, the average jury is confronted with prophecy and, second, the successful litigant may improvidently dispose of the lump sum intended to substitute for future earnings.[4] It is as Professors Harper and James suggest "both capricious and inflexible."[5]

The obvious alternative to lump-sum recovery is an award of periodic payments such as are made under workmen's compensation laws,[6] but over fifty years' experience in the administration of such laws in New York has not shown this alternative to be simple or self-operating. Indeed, it "has proved to be infinitely more elaborate, extensive, and controversial than had been imagined."[7]

Given the continued presence of the lump-sum award, there should be methods to increase the precision of its operation. Today trial courts extend themselves to hear every relevant item of proof so that they may judiciously resolve questions of liability on an empirical and

[4] A study by the United States Railroad Retirement Board for the years 1938-1940 concluded that the disposition of lump-sum settlements does not assure a stable substitute for wage loss. 2 HARPER & JAMES, TORTS § 25.2, at 1303-04 (1956).

[5] *Id.* at 1304.

[6] See, *e.g.*, N.Y. WORKMEN'S COMP. LAW § 203.

[7] Gelhorn & Lauer, *Administration of the New York Workmen's Compensation Law*, 37 N.Y.U.L. REV. 564, 600 (1962).

dispassionate basis. But at the very climax of trial, when it comes to computing future loss, a somewhat cavalier attitude takes hold. The typical charge to the jury considering an award for future damages urges the jury to make an award for the diminution of plaintiff's earning capacity on the basis of (1) his earnings prior to injury, (2) the condition of his health, his prospect for advancement, and the probabilities, before his injury, of future earnings, and (3) his life expectancy. The trial judge, in his charge, will often exhort the jurors to contrast the state of the plaintiff's future life after the accident with what it would have been if there had been no accident—surely a task calling for divine insight. Ordinarily, this instruction will follow an explanation of complicated principles of negligence, whether ordinary, statutory, contributory, active or passive, and perhaps even an explanation of the *ad hoc* employee rule and reference to statutes and commissioners' regulations. After these basic points are covered, the jury is then instructed to assess damages which will fairly and justly compensate the plaintiff, to consider and compute future loss, to decide upon a discount factor which will reduce it to present value, and to reduce the award to present value. In some jurisdictions the court may add adjustments for inflation and taxation.

It is the purpose of this article to examine some of the practical problems presented in computing future damages under present law and to suggest some available judicial techniques for improving the approach to assessing future damages.

COMPUTATION PROBLEMS

PRESENT WORTH

In the typical negligence case where plaintiff is compensated in a lump sum for loss of future earnings and for expenses to be incurred in the future, he is awarded a sum of money now for income which he would, without an accident, have received at various future dates. However, where the jury awards a sum of money equal to the total decrease in plaintiff's earning capacity without reducing it to present worth, it ignores the fact that money in hand has earning power. In a majority of jurisdictions, therefore, the jury must be instructed to compute the total loss due to injury and then to reduce the total to reflect the present value of the award.[8]

[8] See Annot., 154 A.L.R. 796 (1945); Annot., 105 A.L.R. 234 (1936); Annot., 77 A.L.R. 1439 (1932). Cases decided under the Federal Employers' Liability Act must be deter-

The present value rule is based upon the rationale that the plaintiff is entitled only to a sum of money which will over his lifetime compensate him for his decreased future earnings and expenses. The courts in some jurisdictions consider a present award based on loss-per-year times work expectancy a form of overcompensation. It has been said that the verdict should take into account the value of both the principal in hand and interest to be earned thereon as compensation for the decreased earning capacity of the plaintiff.[9] The goal of the personal injury award is to give the plaintiff that sum of money which, if invested in reasonably safe investments, will return the amount of the decrease in plaintiff's earning capacity during the period of his injury where a temporary disability is involved, or during the period of his work life where a total disability occurs.[10]

Explaining "present value" to the jury imports further complication. The trial court cannot be expected to provide the jury with a law school education within the ordinary limits of its charge and then make mathematicians of them when it comes to reducing the full verdict to present worth. Still, when such a charge is given, several items must

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mined in accord with principles of law announced by the United States Supreme Court. In Chesapeake & O. Ry. v. Kelly, 241 U.S. 485 (1916), the Court held it error not to instruct on present value. *Id.* at 491. This federal rule has been followed in FELA and other cases in at least twenty-three states and the District of Columbia. *E.g.*, Globe Furniture Co. v. Gately, 51 App. D.C. 367, 279 Fed. 1005 (1922); Wong Kit v. Crescent Creamery Co., 87 Cal. App. 563, 262 Pac. 481 (Dist. Ct. App. 1927); Western Atl. R.R. v. Bennet, 47 Ga. App. 629, 171 S.E. 187 (1933); Hart v. Hinkley, 215 Iowa 915, 247 N.W. 258 (1933). A federal court of appeals held it was prejudicial error under New Jersey law to refuse to charge present value on request. Trent v. Atlantic City Elec. Co., 334 F.2d 847, 867-68 (3d Cir. 1964).

No New York case has been discovered which holds that in a negligence action the jury *must* be instructed to reduce to present value the damages awarded for loss of future earnings or for future expenses. However, a present value instruction was not disapproved in an FELA case tried in that state. McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960). In addition, the earning power of money has been considered in New York in determining excessiveness of a verdict, one element of which was loss of earnings. Greck v. New York Cent. R.R., 21 App. Div. 2d 776, 250 N.Y.S.2d 992 (1964); Campbell v. North Am. Brewing Co., 22 App. Div. 414, 47 N.Y.S. 992 (1897); Wolfe v. General Mills, Inc., 35 Misc. 2d 996 (Sup. Ct. 1962). Finally, the New York Court of Appeals has held that the damages of a discharged employee for contract breach are measured by the present worth of the obligation to pay wages at a future time. Hollwedel v. Duffy-Mott Co., 263 N.Y. 95, 188 N.E. 266 (1933).

[9] Stewart v. Atlantic Gulf & Pac. Co., 9 F. Supp. 344, 347 (S.D. Fla. 1934).

[10] 22 AM. JUR. 2d *Damages* § 96 (1965).

be considered in presenting this rule to the jury: (1) the period of time for which compensation may be given, (2) the use of mortality or life expectancy tables, (3) the measure of decreased earning capacity, (4) the use of actuarial tables or the testimony of an actuary, and (5) the selection of an interest rate.

In one case, a New Hampshire trial court instructed the jury as follows:

> In estimating the probable expectancy of life of the child . . . you are to take into consideration his age, health, physical condition and appearance of health of his parents. Of course, in determining what compensation should be given for the above factors, you should award only the *present worth* of any elements of damage.[11]

The appellate court was of the opinion that this instruction did not sufficiently explain the words "present worth" and wrote:

> It is not to be assumed that average jurors have mathematical knowledge sufficient for an understanding of the words, or enough skill to calculate present worth. They are entitled to know that present worth of damages to be suffered in the future is such sum of money in hand as with a proper rate of interest compounded will yield the sum to be obtained at the conclusion of the period in contemplation. The rate of interest taken may be the average current rate according to standard investment practices.[12]

In that case a new trial was awarded in order that the jury be given such instructions as would fully explain to them the functions they were to perform.

It should be emphasized that the error of omission of the present value charge does not always warrant reversal. In *Gleason v. Lowe*,[13] the trial judge failed to limit the future damages to present worth. The error was recognized upon a motion for a new trial, and on appeal, the court held: "Such an error is reflected in the amount of the verdict only, and, if we can cure the error without injury, we will do so. . . . Whether the error calls for reversal or mere remittitur is a question dependent for answer upon . . . the demands of justice in a particular case."[14] However, there are numerous cases, particularly in actions brought under the Federal Employers' Liability Act, where it has been held reversible error not to charge present worth.[15]

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[11] Humphreys v. Ash, 90 N.H. 223, 230, 6 A.2d 436, 440 (1939). (Emphasis added.)
[12] *Id.* at 230, 6 A.2d at 441.
[13] 232 Mich. 300, 205 N.W. 199 (1925).
[14] *Id.* at 306, 205 N.W. at 201.
[15] Annot., 77 A.L.R. 1439 (1932).

A common ground for refusing relief on appeal from a verdict rendered in the absence of a present value charge is the failure of counsel for the defendant to request such an instruction. As a practical matter, defense counsel are unlikely in a close liability case to offer the foundation proof upon which a present value instruction should be based. To do so is to suggest to the jury that the defendant believes there may be liability. Moreover, numerous members of the trial bar believe that such a charge is confusing to the jury and that on balance, omission of instruction on present value is substantially offset by omission to charge concerning the effects of inflation. In fact, request is not frequently made in New York for a present value instruction, and most trial judges believe that none should be given unless requested and unless the necessary underlying proof with respect to interest rates and discount factor is in evidence. Without such proof there is no basis for the charge, for "it is not to be assumed that the average jurors have mathematical knowledge sufficient . . . to calculate present worth."[16]

RATE OF DISCOUNT

In states where the jury is instructed to adjust for present value, the rate of discount varies. In the leading case of *Chesapeake & O. Ry. v. Kelly*,[17] it was held that the trial court should have instructed the jury that damages for the deprivation of future benefits were to be based on the present cash value of such benefits. The Supreme Court said:

> We do not mean to say that the discount should be at what is commonly called the "legal rate" of interest; that is, the rate limited by law, beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities, at least without the exercise of financial experience and skill in the administration of the fund; and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, for where this is necessarily employed the interest return is in part earned by the investor rather than by the investment. This, however, is a matter that ordinarily may be adjusted by scaling the rate of interest to be adopted in computing the present value of the future benefits . . . .[18]

The Court recognized that as a rule the best and safest investments, and those which require the least care, yield only a moderate return.[19]

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[16] Humphreys v. Ash, 90 N.H. 223, 230, 6 A.2d 436, 441 (1939).

[17] 241 U.S. 485 (1916).

[18] *Id.* at 490-91.

[19] *Ibid.*

In *Gulf, Colo. & S.F. Ry. v. Moser*,[20] where the trial court instructed the jury to award the present value of the loss without stating any rule for its ascertainment, it was held error. Yet in a later case, a vague instruction that the loss of future benefits should be reduced to its present cash value "upon a rate of interest which you fix as reasonable, just, and right under all the circumstances,"[21] was approved.[22] An instruction that the jury should arrive at present worth by discounting it at a reasonable discount, "such sum as you are to consider reasonably safe in arriving at the earning power of money," was held not to be reversible error.[23] It has also been held that no fixed rate is required but that "the jury should determine from the evidence what interest could be fairly expected from safe investments which a person of ordinary prudence, but without particular financial experience or skill, could make in that locality."[24]

With the possible exception of persons advanced in age and those whose worklife expectancy is short, there would normally be fluctuations in future earnings. It does not appear to be sufficient, therefore, simply to give a jury a compound discount table, for such a table is predicated on a constant annual sum. In theory, the proper method is to determine for each year the amount that would have been earned and the applicable interest rate, discount the earnings for a year based on the number of years in the future that it would have been payable, and then total the discounted sums for all of the years that it is found that the loss will continue.[25] Yet, this procedure was criticized in New York as being "impossibly difficult":[26]

> Though [the jury] . . . must make due allowance for the difference between the value of future payments, they cannot be required to make apportionment of uncertain deductions against each payment or to apply with exactitude tables of . . . discount to uncertain sums. All that can be required of them is to pass upon the evidence and to make reasonable allowance for each factor entering into the determination of the entire damage.[27]

[20] 275 U.S. 133 (1927).

[21] Western & Atl. R.R. v. Hughes, 37 Ga. App. 771, 773, 142 S.E. 185, 188 (1928).

[22] Western & Atl. R.R. v. Hughes, 278 U.S. 496 (1929).

[23] Birmingham Belt R.R. v. Hendrix, 215 Ala. 285, 288, 110 So. 312, 314 (1926), *cert. denied*, 273 U.S. 758 (1927).

[24] Southern Pac. Co. v. Klinge, 65 F.2d 85, 87 (10th Cir.), *cert. denied*, 290 U.S. 657 (1933).

[25] Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir. 1961), *cert. denied*, 368 U.S. 989 and 370 U.S. 937 (1962).

[26] Hollwedel v. Duffy-Mott Co., 263 N.Y. 95, 188 N.E. 266 (1933).

[27] *Id.* at 105, 188 N.E. at 269.

The *Restatement of Torts* suggests that the rate of discount be "based upon the current return upon long-term investments if the prospective losses are long continued."[28] In many states other than New York it is left to the jury to determine and use the rate which persons without financial skill can safely secure on investments,[29] although in some states it is the "average current rates according to standard investment practices" that are to be used.[30] The Court of Appeals for the Second Circuit has stated that in any event the minimum discount factor should be four per cent.[31]

COST OF ANNUITY

In some jurisdictions, the defendant will attempt to show the value of lost future earnings by introducing in evidence the cost of providing an annuity for the injured person. In a leading Florida case permitting the admission of annuity cost,[32] the court after recounting general rules of damages[33] stated that "courts in this country have generally approved a sum that would purchase an annuity equal to the value of the pecuniary aid which the dependents would have derived from the deceased, in other words, the present worth of such an amount as would accrue to the beneficiaries based on his or her life expectancy."[34] There is lack of agreement, however, as to whether under proper instruction the jury should be given evidence of these costs.[35]

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[28] RESTATEMENT, TORTS § 924, comment *d* (1939).

[29] *E.g.*, O'Connor v. United States, 269 F.2d 578 (2d Cir. 1959); Southern Pac. Co. v. Klinge, 65 F.2d 85 (10th Cir.), *cert. denied*, 290 U.S. 657 (1933); Western & Atl. R.R. v. Townsend, 36 Ga. App. 70, 135 S.E. 439 (1929); Chesapeake & O. Ry. v. Callahan, 209 Ky. 348, 272 S.W. 880 (1925).

[30] Humphreys v. Ash, 90 N.H. 223, 230, 6 A.2d 436, 441 (1939).

[31] Conte v. Flota Mercante del Estado, 277 F.2d 664, 670 (2d Cir. 1960); Alexander v. Nash-Kelvinator Corp., 271 F.2d 524, 527 (2d Cir. 1959).

[32] Cudahy Packing Co. v. Ellis, 105 Fla. 186, 140 S.E. 918 (1932).

[33] The court pointed out that in assessing future damages for wrongful death, the jury is

> not limited to a consideration of the age and probable life expectancy of the dependents, neither are they limited to a consideration of the age, earning power, and probable life expectancy of the deceased. They may consider the probable increased needs of the dependents and the probabilities of the deceased contributing to such increased needs.

Id. at 188, 140 S.E. at 919.

[34] *Ibid.*

[35] A number of courts have upheld the use of annuity costs as a factor in fixing personal injury damages. See St. Louis Iron Mt. & So. Ry. v. Needham, 52 Fed. 371 (8th Cir.

Problems exist in permitting admission of annuity cost. In most jurisdictions, the annuity cost includes overhead and profit for the insurance company which are not items of damage and, secondly, these costs do not reflect the particular life expectancy and data of the particular plaintiff. Where annuity costs are used in fixing or analyzing damages, it has been held that a distinction should be drawn between refund annuities and straight annuities, it being proper to use the cost of the latter but not the cost of the former.

INCOME TAXES

In *McWeeney v. New York, N.H. & H.R.R.*,[36] the Second Circuit Court of Appeals held that refusal of the trial court to instruct the jury that, in calculating future loss of earnings, they should consider only the employee's net income after deduction of income taxes was not error,[37] although such an instruction might be proper in the case of a plaintiff with great earning power.[38] The court, acknowledging that an award for personal injuries is not taxable income to the plaintiff under federal law or under New York law, also held that while an instruction that the jury should not add to the award any amount for taxes would be proper, the verdict herein did not indicate that the jury had included such allowance in the award. Thus, failure to give the cautionary instruction below was not reversible error.[39]

Judge Friendly, writing for the majority, set out the rationale for the court's first holding. In cases of total disability, loss of earning power is determined usually by considering normal future earning

1892); McNair v. Berger, 92 Mont. 441, 15 P.2d 834 (1932); Houston & Tex. Cent. Ry. v. Willie, 53 Tex. 318 (1880); Gulf, Colo. & S.F. Ry. v. Hampton, 358 S.W.2d 690 (Tex. Civ. App. 1962); Dunphy v. Norfolk & W. Ry., 82 W. Va. 123, 95 S.E. 863 (1918); Annot., 53 A.L.R.2d 1454 (1954). *Contra,* Farmers Union Federated Co-op. Shipping Ass'n v. McChesney, 251 F.2d 441 (8th Cir. 1958) (annuity includes profit to insurer); Phillips v. London S.W. Ry., [1879] 5 Q.B. 78 (annuity fails to encompass contingency such as recipient's early death); Bateman v. County of Middlesex, [1913] 27 Ont. 122, 6 D.L.R. 533. See generally Annot., 53 A.L.R.2d 1454 (1954).

[36] 282 F.2d 34 (2d Cir.), *cert. denied,* 364 U.S. 870 (1960).

[37] *Id.* at 35.

[38] *Id.* at 38.

[39] *Id.* at 40. Plaintiff brought a personal injury action under the Federal Employers' Liability Act. His medical expenses were in excess of $10,000; his earnings loss to the date of trial was $14,000; and his future earnings potential discounted approached $100,000. The $87,000 verdict for the plaintiff did not indicate to the court that the jury had included an allowance for income tax on the award.

power, life expectancy, and the discount factor. Judge Friendly pointed out the difficulty the jury would have in estimating future income tax liability on the sum allocated for loss of future wages. Plaintiff was a thirty-six-year-old bachelor at the time of the accident. He was earning 4,800 dollars a year. The court demonstrated that the jury would have to determine not what McWeeney's tax was on 4,800 dollars, but what it would be over his expectancy. In the lower brackets the amount of tax and its percentage relation to earnings are greatly affected by the number of exemptions. If McWeeney married and filed a joint return, his annual tax would be decreased from 773 dollars to 620 dollars per annum. If his lady brought two children with her, or bore them, the tax would be cut in half to 380 dollars. A tax saving of 110 dollars would follow with every child, so that a total of five would make the tax nominal. The court queried whether the jury in each case was to speculate or hear testimony on the procreative proclivities and potentialities of the plaintiff and his spouse. The court concluded that it would adhere to its prior ruling in *Stokes v. United States*,[40] which denied a deduction for income taxes against the United States under the Suits in Admiralty Act as "too conjectural."[41]

Chief Judge Lumbard, dissenting in *McWeeney*, would have reversed because of the trial judge's refusal "to advise the jury that any sum awarded the plaintiff is not subject to tax."[42] To Judge Lumbard this refusal necessitated a new trial, as the requested charge was simple and required no calculation. He also disagreed with Judge Friendly on the "net income" charge, which he felt should be granted where the defense has presented some foundation for it.[43] Chief Judge Lumbard opined that the majority opinion greatly overestimated the burden on the jury from such a charge—all it required was estimation of future income loss on the basis of McWeeney's net income at the time of the accident rather than his gross income. Chief Judge Lumbard felt that it was beside the point to conjure up, as Judge Friendly did, all the additional complicating factors which might arise. Since all the factors of damage involve an element of guesswork, this element alone should not be fatal to a net income charge. The Chief Judge would treat McWeeney as a bachelor evermore.

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[40] 144 F.2d 82 (2d Cir. 1944).

[41] *Id.* at 87.

[42] McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 40 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960).

[43] *Id.* at 41.

This case again emphasizes the frustrating dilemma of attempting to compute future damage, but leaves us with the general rule that income tax is not a factor to be considered by the jury unless the plaintiff's earnings are in a high tax bracket, in which case an instruction to consider income taxes may be proper.[44]

PROPOSED SOLUTION: SPECIAL FINDINGS

It would appear that the most workable solution to charging the doctrine of present value is to require the jury to make a special verdict or special findings of fact with respect to the application and rate of discount. This leaves the factfinding function to the jury and is the only way in which the trial court can be assured that "reasonable allowance" has been made for the discount factor. It is a constitutionally acceptable method and one which had been used in New Hampshire for some years.[45] In the United States, submission of special interrogatories to accompany the general verdict is generally recognized as proper.[46] Most states authorize special interrogatories by statute and some states even require their use.[47] In Massachusetts, courts have held that special interrogatories may be used without express statutory provision.[48] In the federal courts, submission of interrogatories is within the broad discretion of the trial judge.[49] Some states, New York for example, have adopted the federal rule with modifications.[50]

If a special verdict or special findings are used, the trial court applies the law to fact found by the jury. The special verdict obviates the need for charging the jury concerning complicated legal principles with respect to present value, rate of discount, impact of annuity value, and the effect of federal and state taxation upon the verdict. A pattern charge for such occasion has been proposed in a recent publication dealing with jury instructions prepared by a committee of New

[44] *Accord,* Cunningham v. Rederiet Vindeggen A/S, 333 F.2d 308 (2d Cir. 1964); Montellier v. United States, 315 F.2d 180 (2d Cir. 1963).

[45] *E.g.,* Adams v. Severance, 93 N.H. 289, 41 A.2d 233 (1945); Thibeault v. Brown, 92 N.H. 235, 29 A.2d 461 (1942); Humphreys v. Ash, 90 N.H. 223, 6 A.2d 436 (1939).

[46] See Annot., Am. & Eng. Ann. Cas. 469 (1910).

[47] Comment, 18 U. CHI. L. REV. 321, 323 (1950).

[48] Burgess v. Giovannucci, 314 Mass. 252, 49 N.E.2d 907 (1943).

[49] FED. R. CIV. P. 49(b).

[50] N.Y. CIV. PRAC. LAW § 4111.

York judges.[51] Use of special findings has the added advantage that retrial will not be required, no matter what the ultimate holdings of the appellate court may be concerning the rate of interest to be used. If the court rejects the rate of interest which the jury finds to be expected from reasonably safe investments made by a person of ordinary prudence, it may substitute its own rate without otherwise disturbing the verdict and ordering a new trial. The court may use the facts found in the special verdict to apply present value tables, as suggested in *New York Pattern Jury Instructions*, as follows:

PRESENT VALUE TABLES

The variables involved in reducing future earnings to present value are (1) the length of time the earnings would continue, (2) the rate of interest during that period, (3) the amount estimated as earnings for each segment (year or month) of the period. For a case in which the reduction remains constant, the calculation, with the use of a compound discount table is quite simple. The steps necessary are (1) determine the amount per year by which earnings will be reduced; (2) fix the number of years the reduction will continue; (3) fix the rate of interest; (4) using the number of years and rate of interest fixed, ascertain from the discount table the present value of one dollar payable

[51] MEYER, HENRY, LAWLESS, MARTUSCELLO & WITMER, NEW YORK PATTERN JURY INSTRUCTION-CIVIL (1965).

A lump sum received today is worth more than the same total amount paid in installments over a period of time, because the lump sum received today can be invested and will earn interest. The amount which you fix as the diminution of plaintiff's earning capacity in the future must, therefore, be reduced to present cash value in order to make allowance for the earning power of money. I shall not impose upon you the burden of making the mathematical calculations involved, but in order to provide the court with the basis for making those calculations will ask that when you report your verdict, you answer the following questions, which will be submitted to you in writing:

(1) State the total amount included in the verdict for diminution of earning capacity in the future.

(2) State how long you find the diminution will continue.

(3) State the breakdown of the amount referred to in (1) over the period of years in (2); that is, the amount by which you find earnings will be diminished in each year.

(4) State the rate of interest which is fairly to be expected from reasonably safe investments made by a person of ordinary prudence but who does not have particular financial skill or experience, and if you find that such rate will vary during the period the diminution will continue, state the rate you fix for each year.

Of course, the fact that those questions are asked is not to be taken as an intimation that you should find for plaintiff or find that plaintiff is entitled to recover for diminution of future earnings. Only if you find that he is so entitled need you answer the questions. If you do so find, your answers will be stated on the form which will be supplied to you and each juror will sign in the appropriate place on the form to indicate his agreement or disagreement with the answer stated. At least ten of the twelve of you must concur in your answers.

annually in the future; (5) multiply the number of dollars determined in step (1) by the value per dollar determined in step (4). The difficulty with that approach is that in almost every tort case, future earnings or the future cost of a medical service can be expected to increase or decrease. When earnings do vary, the proper method is to estimate the loss for each year, discount that loss to present value based on the number of years in the future that it would have been payable and the proper rate of interest and then total the discounted sums for all of the years that it is found that the loss will continue . . . .[52]

CONCLUSION

In most trial courts of the United States the matter of assessing future damages is left to the jury after the court instructs as to how the computation should be made and how the result should be reduced to present value. It is obvious that the assessment of damages is inherently speculative. In addition, the adjustment may introduce other variables depending upon whether the entire sum is reduced by a fixed rate of discount or whether each year's loss is taken up separately, adjusted to present value, and totaled.

In difficult negligence cases we believe that it is not realistic for the court to expect a jury to test credibility, to resolve close questions of liability, and then to compute damages with accurancy and precision.[53] We urge, therefore, that whenever possible trial courts require the jury either to render special verdicts in which they answer specific questions put by the court, or to answer interrogatories in addition to the general verdict where a general verdict is taken. We believe there is merit in having the court itself reduce gross future damage to present value. The court is certainly in a better position to determine a reasonable rate of discount and perhaps might adopt a rule stating in advance what the rate will be where no rate is fixed by statute. The court will be able to consider whether federal and state tax adjustments are in order and whether serious consideration should be given to the cost-of-annuity value.

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[52] *Id.* at 569.

[53] This problem was expressly recognized in Matanuska Valley Lines, Inc. v. Neal, 255 F.2d 632, 636 (9th Cir. 1957). The Court of Appeals, Ninth Circuit, disapproved of an instruction given to the jury as part of a very long set of instructions on the case as a whole. In that case the trial judge gave the jury a formula for computing present worth and two illustrations for its use. The court of appeals found that the form of the charge was "unintelligible."

These conclusions are necessarily based on the assumption that our American trial courts will continue to employ a lump-sum verdict rule in fixing future damages. Obviously, many of the problems described in this article would be averted if scheduled awards were provided by statute. Mr. Justice Holmes was not far wrong when he referred to the process as one of "mere guess."