CHAPTER SEVEN — CHILDREN AND THE TORT SYSTEM

Children Take Their Lumps — The Sorry State Of Children's Tort Recovery

The present lump sum recovery system does not differentiate between children and adults. Yet, the assessment of children's tort damages involves many different assumptions and considerations. This article analyzes these differences and proposes an alternative compensation scheme for children.

> "I am assured by our Merchants, that a Boy or Girl before twelve years old is no saleable commodity; and even then when they come to this Age, they will not yield above three Pounds, or three Pounds and Half a Crown at most, on the Exchange; which cannot turn to Account with Parents or Kingdom. . ."[1]

The present lump sum recovery[2] system reflects and incorporates Swift's low opinion[3] of a child's monetary worth. In 1961, for example, a jury awarded eleven year old Brian May $675,000, then the largest personal injury verdict in California.[4] Brian's injuries left him permanently disabled and unable to care for himself.[5] Before Brian became an adult, however, the entire award was gone, exhausted by medical, legal and living expenses.[6]

As Brian's case illustrates, historically large verdicts are no assurance of adequate compensation. Children's long life expectancies[7] and lack of relevant experience present special economic[8]

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[1] J. SWIFT, *A Modest Proposal,* in JONATHAN SWIFT, POETRY AND PROSE 86-87 (1964).

[2] Lump sum recovery lumps all past, present and prospective damages together and awards them to the plaintiff at one time. *See* notes 16-19 *infra.*

[3] *See* J. SWIFT, *supra* note 1.

[4] Los Angeles Times, Aug. 28, 1978, Part II, at 1, col. 4 [hereinafter cited as L.A. Times].

[5] *Id.* Brian can only move two fingers and the toes on his right foot. He must consciously control his breathing.

[6] *Id.*

[7] The life expectancy of a child born in 1976 was almost 73 years. NAT'L

and medical[9] considerations. These considerations indicate that children's damage claims should receive different treatment in their assessment and award. Yet, under the present lump sum system, they receive no special treatment.[10] This comment reviews the current tort system as applied to children,[11] explores its deficiencies, and analyzes its effect on children. An alternate compensation scheme and implementing legislation then follows.

I. CURRENT METHODS OF CHILDREN'S TORT RECOVERY

The purpose of tort recovery[12] is compensation.[13] Common law jurisdictions attempt to achieve this compensatory goal through the award of monetary damages.[14] Thus, successful tort claimants receive a cash award at the termination of the lawsuit. Two problems exist, however, in the use of a monetary damages system.

CENTER FOR HEALTH STATISTICS, PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, VITAL STATISTICS OF THE UNITED STATES, LIFE TABLES 1976, Vol. II, § 5, at 5-12 (1978)[hereinafter cited as LIFE TABLES].

[8] *See* text accompanying notes 40-76 and 85-94 *infra*.

[9] *See* text accompanying notes 76-84 *infra*.

[10] *See* text accompanying note 18 *infra*. This lack of accomodation is surprising in light of the magnitude of the problem. Twenty million children are injured every year. PUBLIC HEALTH SERVICE, U.S DEP'T OF HEALTH, EDUCATION & WELFARE, THE HEALTH OF CHILDREN - 1970 - SELECTED DATA FROM THE NATIONAL CENTER FOR HEALTH STATISTICS 23 (1973). Three million of these children require almost a full week of hospitalization. *Id.* at 31. Since almost 65% of all seriously injured auto accident victims file some type of claim, U.S. DEP'T OF TRANSPORTATION, ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES 3 (1970), a high probability exists that large numbers of lawsuits are filed annually on behalf of children.

[11] This comment deals only with pecuniary or "special" damages and their relationship with children. Pecuniary damages compensate for losses that may be converted directly into monetary terms. Medical expenses and lost wages are the most common examples in personal injury cases. *See* J. FLEMING, THE LAW OF TORTS 216 (5th ed. 1977).

For treatment of general damages and children, see Note, *Infant Pain and Suffering: The Valuation Dilemma*, 1 PEPPERDINE L. REV. 102 (1973).

[12] Punitive and nominal damages are the sole exceptions to this rule. *See* J. FLEMING, *supra* note 11, at 215.

[13] *See generally* Bussy v. Donaldson, 4 U.S. (4 Dall.) 206, 207-208 (1800); Merlo v. Standard Life & Accident Ins. Co. of Cal., 59 Cal. App. 3d 5, 20, 130 Cal. Rptr. 416, 426 (4th Dist. 1976); J. FLEMING, *supra* note 11, at 215; F. HARPER & F. JAMES, THE LAW OF TORTS 1299 (1956); RESTATEMENT (SECOND) OF TORTS § 910 (Tent. Draft No. 19, 1976).

[14] Money damages are not, however, the only available method of compensation. Hungary and the Soviet Union, for example, allow compensation in kind in appropriate cases. Stoll, *Consequences of Liability: Remedies*, 11 INT'L ENCYCLOPEDIA OF COMP. LAW, Ch. 8, § 25 (1972).

The initial problem involves assessing the economic value of a victim's physical injury; the second concerns the optimal distribution of the award to the victim. Both problems are impediments to effective tort compensation.

A. The Problems of Assessment and Distribution

The assessment of the economic value of a physical injury is problematic because the loss of physical capacity relates only indirectly to a loss of money. A broken leg, for example, cannot be restored to its prior strength and form by any amount of money. A monetary damages system, however, must employ some method to convert the non-monetary loss into monetary terms. Thus, the system must attempt to assess the economic loss caused by each injury. The monetary equivalent of the economic loss then constitutes the damage award. Since the economic loss for a particular injury individually varies,[15] the victim's personal background, occupation and health history are all relevant in determining economic loss. A child, however, has little background or history from which to accurately forecast damages, thus making the assessment process difficult and uncertain.

Assuming that a monetary value can be placed on the loss, the second problem of a monetary damages system is determining the best distribution of the award. If the victim has no future damages, this task is easy, as the damages award should equal all past economic loss. If, however, the victim will incur future loss, the problem becomes whether to award all the damages now, in advance of need, or periodically, as the need arises. Both methods have advantages. While a one time award is easy to administer, a periodic award assures the victim of a steady stream of compensation. Different tort systems choose between these methods for varying reasons.

B. Current Solutions to the Assessment and Distribution Problems

The common law solution to the assessment and distribution problems is the lump sum award model.[16] Under this method, all

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[15] Between two people with identical injuries, the person with the higher paying job will have a greater loss. The lost economic opportunities of that individual are greater, and thus tort law awards greater damages. *See generally* F. HARPER & F. JAMES, *supra* note 13, at 1316.

[16] Fitter v. Beale, 91 Eng. Rep. 1122 (K.B. 1698), was the first pronouncement of the single recovery aspect of the lump sum rule. This case is reported variously as Fitter v. Veal, 88 Eng. Rep. 1506 (K.B. 1699); Fetter v. Beale, 90 Eng.

past, present, and prospective losses are assessed at one time, and the plaintiff receives the total in one lump sum payment.[17] Lump sum assessment and distribution is mandatory in all tort actions,[18] unless specifically altered by statute.[19]

Expenses incurred before judgment, if reasonable,[20] are a pro-

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Rep. 905 (K.B. 1701); Fetter v. Beale, 91 Eng. Rep. 11 (K.B. 1698) and Fetter v. Beale, 91 Eng. Rep. 1361 (K.B. 1701).

In Fetter, the plaintiff sought damages when the defendant caused "a piece of his skull to come out." Fetter v. Beale, 90 Eng. Rep. 905 (K.B. 1701). The problem was that the initial injury had occurred eight years earlier and the plaintiff already had won in a prior suit. Chief Justice Holt noted that this situation had "no parallel in the books." Ferrer v. Beal, 91 Eng. Rep. 1361, 1362 (K.B. 1701). Recovery was denied, however, because the delay was ". . . the plaintiff's fault, for if he had not been so hasty, he might have been satisfied for the loss of his skull also." Fetter v. Beale, 91 Eng. Rep. 1122, 1123 (K.B. 1698).

[17] Courts originally used the merger and bar rules of res judicata to foreclose any future suit. On this theory, all available relief under the cause of action sued upon merged into the final judgment. This judgment then acted as a bar to any further action brought under the same cause of action. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.7 (2nd ed. 1977).

[18] The single payment aspect of lump sum recovery was stated in Slater v. Mexican Nat'l. R.R., 194 U.S. 120,128 (1904); Frankel v. Heym, 466 F.2d 1226, 1228 (3rd Cir. 1972); Smith v. Lewis, 13 Cal. 3d 349, 362, 530 P.2d 589, 598, 118 Cal. Rptr. 621, 630 (1975).

The *Smith* court stated: ". . . in any negligence suit, the court is limited in its remedy to one award of money damages because it lacks the equitable power of contempt to enforce its judgment." *Id.* The lack of the contempt power is historical. Traditionally, a tort action was an action at law. Law judgments were not personal to the defendant and hence, the equitable contempt power did not extend to their enforcement. The plaintiff had to initiate a second and separate action to collect the judgment. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 10 (1973). *See also* the legislative counsel's digest to A.B. 1, 2nd Extraordinary Sess. 1975, *reprinted in* CAL. LEGIS. COUNSEL BUREAU SUMMARY DIGEST 1975 1293 (1975), which states that:"Existing law does not permit a superior court to enter a judgment ordering that damages for loss occurring after the entry of judgment be paid in whole or in part by periodic payment."

But see M&P Stores v. Taylor, 326 P.2d 804 (Okla. Sup. Ct. 1958), where the Oklahoma court affirmed a $36,000 verdict that the jury directed ". . . to be paid at $150 per month for twenty years." *Id.* at 805. Instead of inquiring about the propriety of such an award, the court instead opted to sustain the judgment on the ground that the defendant did not make a timely objection to the form of the verdict.

[19] *See, e.g.*, E. BLAIR, REFERENCE GUIDE TO WORKMEN'S COMPENSATION LAWS § 15.00, at 15-2, n. 1 for the different statutory treatment given to employment related torts.

[20] All damages awarded must be reasonable. CAL. CIV. CODE § 3359 (West 1970); COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA, JURY INSTRUCTIONS - CIVIL - BOOK OF APPROVED JURY INSTRUCTIONS § 14.10 (6th ed. 1977)[hereinafter cited as BAJI].

per item of damages. The economic value of these expenses is easy to determine: the price paid determines the economic loss.[21] Difficulties in assessment arise, however, when prospective damages are an element of recovery.[22] To meet these difficulties, courts have developed at least three analytically different methods to assess the monetary value of future losses.[23]

Courts using the first method simply take the length of the disability, multiply it by the annual cost of the disability,[24] and award the product as a lump sum.[25] A major objection to this method, however, is that it potentially overcompensates plaintiffs. The overcompensation is represented by the amount of interest the unused portions of the future award could earn.[26]

The test of reasonableness of children's verdicts is that a reviewing court "may not interfere with an award unless the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice, or corruption on the part of the jury." Niles v. City of San Rafael, 42 Cal. App. 3d 230, 241, 116 Cal. Rptr. 733, 739 (1st Dist. 1974).

[21] This analysis ignores general damages. *See* note 11 *supra*.

[22] The future loss must be reasonably certain to occur before the court will allow damages for it. CAL. CIV. CODE § 3283 (West 1970); BAJI, *supra* note 20, § 14.60.

[23] The problems addressed by these analytical models are independent of the problems of whether a future loss will occur. These models only apply after the trier of fact determines that the plaintiff has incurred a reasonably certain future loss. *Id.*

[24] Alaska adopted this method in Beaulieu v. Elliott, 434 P.2d 665, 671 (Alas. Sup. Ct. 1967). Judge Wisdom of the Fifth Circuit Court of Appeals recently expressed his preference for it. Freeport Sulphur Co. v. S/S Hermosa, 526 F.2d 300, 308-313, *rehearing en banc vacated after settlement*, (5th Cir. 1976) (Wisdom, J., specially concurring).

This mode of analysis has a basis in economics; the general rates of long term inflation and investment tend to equalize. R. POSNER, ECONOMIC ANALYSIS OF LAW 148 (2d ed. 1977). Problems still exist, however, because an individual tort case requires the analysis of long term trends in just one small sector of the economy. Thus, the trends in a small sector, such as individual wages, are compared against the investment trends in the economy as a whole. If the trends in wages do not track the trends in the larger macroeconomy of price increases, distortions in compensation can occur. To alleviate this problem, Alaska allows the introduction of evidence of merit wage increases in cases of lost earning capacity. Alaska Airlines, Inc. v. Sweat, 568 P.2d 916, 937 (Alas. Sup. Ct. 1977). Evidence of wage increases attributable to general inflationary trends, however, is still not admissible. *Id.*

[25] If, for example, an injured child needs medical tests once a year for five years, tort law would award damages equal to the number of years multiplied by the annual cost of the tests. If each test cost $100, total future damages would equal $500.

[26] Given the facts of note 25 *supra*, and assuming a 5% investment rate, the victim would be overcompensated by $59. The mathematics of this calculation are as follows:

Recognizing that the interest earned constitutes excess compensation, most courts use a second method and reduce the amount obtained by the first method to its present value.[27] Under this method, present value is the amount which, when invested at a particular compound rate of interest, will grow to equal the victim's total amount of economic loss.[28] Readily available tables[29] allow courts to reduce mechanically a sum produced by the first method to present value. Victims then receive this sum as their damages.[30]

A third method adopts the present value analysis but also considers the effects of future inflation. Consideration of inflation not only has the effect of increasing the amount of the award,[31] but

Year	Starting Balance	Expenses	Interim Balance	Interest 5%	Ending Balance
1	$500	$100	$400	$20	$420
2	420	100	320	17	337
3	337	100	237	12	249
4	249	100	149	7	156
5	156	100	56	3	59

[27] Chesapeake & Ohio R.R. v. Kelly, 241 U.S. 485, 490 (1916); BAJI, *supra* note 20, § 14.70.

But see Wilson v. Gilbert, 25 Cal. App. 3d 607, 102 Cal. Rptr. 31 (1st. Dist. 1972); Lumber Terminals v. Nowakowski, 36 Md. App. 82, 90, 373 A.2d 282, 290 (1977) for the view that present value reduction is not mandatory in the absence of a timely request by the defendant.

[28] If, for example, $100 is left in a 5% savings account drawing simple interest, the balance at the end of one year will be $105. Thus, $100 is said to be the present value of $105 for one year at 5%. *See* note 35 *infra* for a mathmatical formula for present value.

[29] *See, e.g.*, ASS'N OF SUPREME COURT JUSTICES, COMMITTEE ON PATTERN JURY INSTRUCTIONS—CIVIL, NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL 717-721 (2d ed. 1974); BAJI, *supra* note 20, App. B.

[30] Using the assumptions of notes 25-26 *supra*, the damages under the second method would be $454. The mathmatics are as follows:

Year	Starting Balance	Expenses	Interim Balance	Interest 5%	Ending Balance
1	$454	$100	$354	$18	$372
2	372	100	272	14	286
3	286	100	186	9	195
4	195	100	95	5	100
5	100	100	0	0	0

[31] The increase is due to the increases in the total amount of expenses. Using the data of notes 25-26 *supra*, for example, total expenses would equal $556,

also reflects more accurately the economic reality of the last thirty years.[32] Hence, most trial courts may allow the jury to consider evidence of inflationary trends.[33] A key problem with the use of inflation evidence, however, is that it renders the calculation of present value more difficult and confusing.[34] On the other hand, proper mathematical analysis[35] can aid the trier of fact by

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assuming a 5% inflation rate.

[32] In 1950, the consumer price index stood at 72.1. By the beginning of 1979, it had risen to 202.0. COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 239 (1979). This represents an average annual increase of 3.75%. *See also* note 46 *infra.*

[33] In the last ten years alone, the following courts have allowed the consideration of inflation: Rodriguez v. McDonnell Douglas Corp. 87 Cal. App. 3d 626, 682, 151 Cal. Rptr. 399, 419 (2d Dist. 1978); Bould v. Touchette, 349 So. 2d 1181, 1185-1186 (Fla. Sup. Ct. 1977); State v. Daley, 153 Ind. 330, 337, 287 N.E.2d 552, 556 (1972); Schnebly v. Baker, 217 N.W.2d 708, 728 (Iowa Sup. Ct. 1974); Johnson v. Int'l Life Ins. Co., 347 So. 2d 1279, 1283 (La. Ct. App. 1977); Lumber Terminals v. Nowakowski, 36 Md. App. 82, 90, 373 A.2d 282, 290 (1977); DeWitt v. Schuhbauer, 287 Minn. 279, 286, 177 N.W.2d 790, 795 (1970); Sanders v. H&S Motor Freight, 526 S.W.2d 332, 339 (Mo. Ct. App. 1975); Resner v. No. Pacific R.R., 161 Mont. 177, 181, 505 P.2d 86, 88 (1973); Tenore v. NuCar Carriers, 67 N.J. 466, 475, 341 A.2d 613, 621 (1975); Stanley v. Ford Motor Co. 49 A.D.2d 979, 980, 341 N.Y.S.2d 370, 372 (1975), *appeal denied,* 38 N.Y.2d 707, 382 N.Y.S.2d 1025 (1975); Rogers v. Worthan, 465 P.2d 431, 440 (Okla. Sup. Ct. 1970); Plourd v. So. Pacific Transport Co., 266 Or. 666, 677, 513 P.2d 1140, 1146 (1973); Markham v. Cross Transportation Co., 118 R.I. 370, 386, 376 A.2d 1359, 1364 (1977); Byre v. Wieczorek, 88 S.D. 183, 188, 217 N.W.2d 151, 158 (1974); Halliburton v. Olivas, 517 S.W.2d 349, 354 (Tex. Ct. Civ. App. 1974); Hinzman v. Palmanteer, 81 Wash.2d 327, 336, 501 P.2d 1228, 1234 (1972); Cords v. Anderson, 80 Wisc.2d 525, 550, 259 N.W.2d 672, 684 (1977).

Consideration of inflation, however, is not new. Over one hundred years ago a New York court stated that:". . . the relative value of money has diminished in recent times." and thus affirmed a historically large veridict. Gale v. N.Y. Central & Hudson River R.R., 13 Hun 1, 5 (N.Y. Sup. Ct. 1878), *aff'd* 76 N.Y. 594 (1878).

Rhode Island recently codified the ability of trial courts to consider inflation evidence in wrongful death actions. *See* R.I. GEN. LAWS § 10-7-1.1.

For a review of the treatment of inflation evidence in the federal courts, *see* Steckler v. United States, 549 F.2d 1372, 1378 (10th Cir. 1977); United States v. English, 521 F.2d 1372, 1373-1374 (9th Cir. 1975); Comment, *Future Inflation, Prospective Damages, and the Circuit Courts,* 63 VA. L. REV. 105 (1977)

[34] *See, e.g.,* Schultz & Schultz, *Structured Settlements - Their Use and Abuse,* CAL. TRIAL LAWYER'S A.J., Summer 1978, at 171; Stone, *Quantifying Damages in Tort Cases,* TRIAL, Jan. 1978, at 44 for examples of how complex the analysis can be. *See also* note 35 *infra.*

[35] The following formula calculates present value while accounting for both inflation and investment opportunities.

demonstrating the effect of different economic assumptions. Advocates could use a series of calculations to show the ramifications of discounting and long term inflation. The trier of fact would then be in a better position to evaluate longterm needs. Thus, when properly applied, the third method stands the best chance of compensating the victim.[36]

As the use of complex and potentially confusing economic evidence is necessary for the proper application of the third model,

$$\text{Present Value} = X\left[\frac{(1+G)}{(1+I)}\right]\left[\frac{1-\frac{(1+G)}{(1+I)}^{-N}}{\frac{(1+G)}{(1+I)}-1}\right]$$

If G=I, multiply X times N to calculate the present value. For painstaking proof of this fact, *see* Pierce v. N.Y.Central R.R., 304 F. Supp. 44, 47-49 (W.D. Mich. 1969).

While the above formula appears complex, it products accurate results. In order to make the mathematics easier, calculate the expression $\left(\frac{1+G}{1+I}\right)$ separately and then substitute it into the equation.

Any period may be used for N as long as the other factors are expressed in similar terms. If, for example, N stands for a number of years, X, G, and I must all be annual figures.

In essence, this formula is a variant of the standard present value formula: Present Value = $\frac{X}{(1+G)^N}$. *See* CRC STANDARD MATHEMATICAL TABLES 643 (21st ed., S. Selby ed. 1973).

This formula was used as part of plaintiff's case in Winterswyk v. City of Ontario, No. CW 8086 (Super. Ct. San Bernardino County, verdict filed Aug. 8, 1975)($1,100,000 verdict) and Palmero v. Murray Products, Inc., No. 109193 (Super. Ct. Riverside County, verdict filed Nov. 7, 1976)($525,000 verdict).

[36] If a 5.4% inflation rate is added to the hypothetical of notes 25-26 *supra*, the third method produces damages of $504. 5.4 percent is chosen because it corresponds to the average annual increase in routine laboratory tests from 1967 to 1976. BUREAU OF LABOR STATISTICS, U.S. DEP'T. OF LABOR, HANDBOOK OF LABOR STATISTICS 1977, at 252 (1977).

The mathematics for this determination are as follows:

some courts reject it as speculative or prejudicial.[37] Most courts, however, recognize the inherent fairness in considering all relevant evidence and use variants of the third method.[38]

II. Inadequacies of the Lump Sum System

The accuracy of the system's results depends on the accuracy and applicability of the premises and assumptions used. In order to realistically assess future damages, consideration of economic projections based upon medical prognosis is necessary. Unfortunately, the use of these economic and medical assumptions injects a level of uncertainty into the process that impedes the compensatory purpose of the tort system.[39] Furthermore, inaccuracies in long-term forcasting, inadequate data bases, and problems peculiar to childhood combine in children's cases to produce a result that fails to compensate.

A. Compensation Inadequacies and Assessment Considerations

The long period of time over which a child's disability may extend, combined with the requirement for the present assessment of all future damages,[40] forces the use of inherently uncertain long-range forecasts. A four year old, for example, has a life expectancy of seventy years and a potential work-life expectancy

Year	Starting Balance	Expenses (5% increase)	Interim Balance	Interest 5%	Ending Balance
1	$504	$100	$404	$20	$424
2	424	105	319	16	335
3	335	111	224	11	235
4	235	117	118	6	124
5	124	124	0	0	0

[37] *See, e.g.*, Williams v. United States, 435 F.2d 804, 807 (1st Cir. 1970); Sleemond v. Chesapeake & Ohio R.R., 414 F.2d 305, 307 (6th Cir. 1969) for cases holding that evidence of future inflation is too speculative for consideration by the trier of fact.

[38] *See* note 33 *supra*.

[39] *See* note 44 *infra*. Even Alaska, *see* note 24 *supra*, adopts this view. Alaska rejects the use of discounting not only on the premise that, in the long run, inflation and discounting will cancel each other out, but also on the premise that inflation and investment evidence will confuse the trier of fact. Beaulieu v. Elliott 434 P.2d 665, 671 (Alas. 1967).

[40] *See* notes 16-19 *supra*.

of approximately forty years.[41] Thus, if that four year old sustains permanent injuries, seventy years' worth of damages must be assessed and compressed into one lump sum.[42] Consequently, any assessment under the lump sum system entails the projection of all losses from the present until some time in the middle of the next century.[43] Given the present state of economic knowledge, such projections cannot be made with any accuracy.[44] The inability to produce accurate forecasts is significant because of the consequences of errors in the initial assumptions. Thus, if the basic assumptions are inaccurate by even a small amount, large errors in compensation can occur.[45]

The reasons for the inability to accurately predict future economic facts are numerous.[46] With respect to future medical care

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[41] In 1976, the life expectancy of a four year old was 70.1 years. LIFE TABLES, *supra* note 7. The work life expectancy of the same child was approximately 41 years. Fullerton & Byrne, *Length of Working Life for Men and Women 1970,* MONTHLY LAB. REV., Feb. 1976, at 31.

[42] *See* notes 18-19 *supra.*

[43] There are many relevant factors in addition to the four listed in note 35 *supra. See, e.g.,* O'Connor & Miller, *The Economist Statistician: A Source of Expert Guidance in Determining Damages,* 46 NOTRE DAME LAW. 341, 368 (1972) for a listing of 21 potentially relevant items of individual socio-economic data along with 16 items of general societal data.

[44] *See* Comment, *Future Inflation and the Undercompensated Plaintiff,* 4 LOY. CHI. L.J. 359, 362 (1973). A recent symposium on the efficacy of long range forecasts concluded:"[T]he predicative value of specific numerical forecasts reaching out further than a few quarters ahead must be heavily discounted." Zarnowitz, *On the Accuracy and Properties of Recent Macroeconomic Forecasts,* 68 AM. ECON. REV., No. 2, 313, 318 (1978). *See also The Signals Are Hard to Read,* BUS. WEEK, April 2, 1979, at 22 and Meisal, *Economist Testimony,* 20 DEF. L.J. 115, 121 (1971).

Nobel laureate Paul Samuelson summed up the present state of the art by stating:"Just as ancient kings had their soothsayers and astrologists, modern tycoons and prime ministers have their economic forecasters." Samuelson, *Economic Forecasting and Science,* MICH. Q. REV., Fall 1965, at 274.

[45] Assuming, for example, a 70 year period of expected disability and a 5% inflation and discount rate, an overcalculation of 1% in the inflation rate results in a 41% increase in the initial award. Similarly, a 1% overcalculation of the discount rate results in a 27% reduction in the initial award. If the disability period is overestimated by ten years, the award will be 23% too large. *See* note 35 *supra.*

[46] This analysis assumes a long term trend of price increases. This is in line with both economic and pragmatic thought. The federal government, for example, operates the social security system on the assumption that prices will rise at least three percent annually for the next 75 years. BD. OF TRUSTEES, FEDERAL OLD AGE AND SURVIVORS INSURANCE AND DISABILITY INSURANCE TRUST FUND, 1977 ANNUAL REPORT, H.R. DOC. NO. 95-150, 95th Cong., 1st Sess. 68 (1977). *See also* Samuelson & Solon, *Analytical Aspects of Anti-Inflation Policy,* in 2 COLLECTED

costs, economic experience shows that individual product and service prices are difficult to forecast accurately, even over the short term.[47] Medical care costs are particularly difficult to predict[48] and have increased sharply in the last thirty-five years.[49] Such extreme variations in prices are bound to significantly distort any forecast which uses them as independent variables.[50]

In addition to problems the unique nature of medical prices present, current economic models do not produce correct predictions even over the short term.[51] In 1973, for example, most economic models not only failed in their predictions of the amount of change in economic activity, but also failed to gauge the direction that the change would take.[52]

Claims for lost earning capacity, the other major component of recovery, run into similar problems. Wages are prices attached to human labor, and, as such, are subject to the same influences as are prices of goods and services.[53] Prevailing wage rates are thus subject to the demand for the particular type of labor and the supply of available laborers. A practical example of this relationship is the current influx of women into the labor force.[54] The

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SCIENTIFIC PAPERS OF PAUL A. SAMUELSON 1372 (G. Stiglitz ed. 1968); Fleming, *Impact of Inflation on Tort Compensation*, 26 AM. J. OF COMP. L. 51, 62 (1978).

[47] Popkin, *Price Forecasting*, 12 BUS. ECON. 33 (1977).

[48] DePamphilis, *Forecasting Medical Care Expenses*, 11 BUS. ECON. 21 (1976).

[49] COUNCIL OF ECONOMIC ADVISORS, *supra* note 32, at 84. In the last several years prices for medical services have increased at twice the rate of overall prices. *Id.* at 106.

[50] *See* note 45 *supra*. In addition to the volatility of the economic areas relevant to personal injury loss, technical innovation also injects uncertainty into any future projection. New products and methods can alter radically consumer purchasing patterns and thus affect overall prices. To illustrate this point, imagine the problems faced by the long term forecaster of 70 years ago. In 1909, the automobile was still a novelty, radio was but ten years old, and television was only a theoretical possibility. Each of these items has had a profound effect on prices and economic life since their introduction. Of course, technical innovation can only be predicted, if at all, in the most general of terms.

In addition, the increasing scarcity of necessary natural resources adds to the uncertainty of future price activity. *See* COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 148 (1978); *Theory Deserts the Forecasters*, BUS. WEEK, June 29, 1974, at 54.

Finally, a major war or depression would affect prices significantly, yet neither can be meaningfully quantified.

[51] See Su, *An Error Analysis of Econometric and Non-Econometric Forecasts*, 68 AM. ECON. REV., No. 2, 306, 311-312 (1978); *Theory Deserts the Forecasters*, *supra* note 50, at 50.

[52] *Theory Deserts the Forecasters*, *supra* note 50.

[53] P. SAMUELSON, ECONOMICS 570 (9th ed. 1973).

[54] EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEP'T OF LABOR, EMPLOY-

effect of this unpredicted change has been to increase the total supply of labor.[55] While overall real average wages may thus decrease, the employment opportunities and the average wages of women will increase.[56] Cases dealing with female children, however, have not uniformly recognized this trend. In *Drayton v. Jiffee Chemical Corp.*,[57] for example, a female child received $500,000 for future lost earning capacity while in *Caron v. United States*,[58] a similarly situated female received only $30,251.[59] This disparity results from the use of widely differing assumptions in the assessment of damages.[60] As each child lost the same opportunities,[61] the compensation received by each should have been the same. One of the effects, however, of projecting economic trends is the generation of different and conflicting economic data about the future.[62] The type of disparity illustrated by *Caron* and

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MENT AND TRAINING REPORT OF THE PRESIDENT 298 (1978); Bednarzik & Klein, *Labor Force Trends: A Synthesis and Analysis*, MONTHLY LAB. REV., Oct. 1977, at 11.

[55] EMPLOYMENT AND TRAINING ADMINISTRATION, *supra* note 54, at 24.

[56] Concerning the present gap in average pay scales of men and women, *see* Ferber & Lowry, *The Sex Differential in Earnings: A Reappraisal*, 29 INDUS. & LAB. REV. 377 (1976). This gap, however, is probably due to sex discrimination, *id.*, at 385-386, and can be expected to disappear once existing barriers to equal pay are eliminated.

[57] 395 F. Supp. 1081 (N.D. Ohio 1975).

[58] 410 F. Supp. 378 (D.R.I. 1976), *aff'd* 548 F.2d 366 (1st Cir. 1976).

[59] *Id.* at 399.

[60] In Drayton v. Jiffee Chemical Corp., 395 F. Supp. 1081, 1096 (N.D. Ohio 1976), the court assumed a 5% wage inflation rate. It also used the average earnings of all workers as a basis for the projection. *Id.* A work life expectancy of 45 years was used. *Id.* Finally, the court assumed that the child plaintiff would not have gone to college and that she might obtain some menial employment in the future. *Id.*

In contrast, the court in Caron v. United States, 410 F. Supp. 378, 396-399 (D.R.I. 1976), *aff'd* 548 F.2d 366 (1st Cir. 1976), refused to consider the effects of future inflation, *id.* at 397, and used the average earnings of females as a basis of projection. *Id.* at 398. Additionally, the court only projected a 37 year work life on the grounds that, as a female, the plaintiff would have left the labor force for ten years to rear children. *Id.*

[61] In Drayton v. Jiffee Chemical Corp., 395 F. Supp. 1081 (N.D. Ohio 1976), a one year old female child sustained facial burns and scarring so severe that she must sleep with her eyes open. *Id.* at 1095. In Caron v. United States, 410 F. Supp. 378 (D.R.I. 1976), *aff'd* 548 F.2d 366 (1st Cir. 1976), a four month old female sustained permanent brain damages because of a negligent innoculation. In both cases, the female plaintiffs were injured permanently at a very young age. There was no showing that either would lose different future opportunities. Thus, their damages for lost earning capacity should have been at least roughly equivalent.

[62] *See* note 60 *supra*. *See also* COUNCIL OF ECONOMIC ADVISORS, *supra* note 32,

Drayton occurs when different courts use different data to project future damages.[63] Unfortunately, the practical effect of such disparity is the unwanted result of either undercompensation or overcompensation. Thus, the cumulative effect of these economic and medical considerations is that long-term forecasting is inherently speculative and unreliable when a child's future is at stake. The trier of fact or a reviewing court faces a thorny dilemma: children are entitled to compensation for future losses, but not more than their provable needs. Unfortunately, economic science cannot accurately prove what those needs are.

The problems of long range forecasting exist independent of any errors in the data base. Even with perfect forecasting methods, if the data used are incomplete or irrelevant, the result is inaccurate.[64] Due to their lack of work experience and developing bodies, children's economic and medical backgrounds do not provide the type of data necessary for accurate long-term projections.

Unlike adults, children generally have no education or work experience upon which to base a projection of lost earning capacity. The lack of work experience is significant since employment histories can provide categories within which to project future earnings. No adequate work history exists for a child; thus the analysis lacks a justifiable starting point. Similarly, the inability to meaningfully project the level of educational achievement can effect the analysis significantly.[65] The possession of a college degree, for example, means that, on average, the holder will receive a 31% higher wage than a person who only has a high school diploma.[66]

American courts[67] solve the work and educational experience problem by using governmental statistics to show the average

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at 103-106 for an illustration of how the quantity and extent of various economic trends can affect individual prices.

[63] *See* note 60 *supra.*

[64] *See* note 45 *supra.*

[65] In Drayton v. Jiffee Chemical Corp., 395 F. Supp. 1081, 1096 (N.D. Ohio 1976), the plaintiff's economist assumed a college education for the child and set the value of lost earning capacity at $887,000. The court, however, felt that there was insufficient evidence to indicate that the child would have gone to college and thus reduced the damages for lost earning capacity to $500,000.

[66] P. TAUBMAN & T. WALES, HIGHER EDUCATION AND EARNINGS 100 (1974). This pay gap widened during the 1960's. *Id.* at 228. The possession of a M.D. degree can mean a difference of 106%. *Id.* at 100.

[67] Steckler v. United States, 549 F.2d 1372, 1378 (10th Cir. 1977); Niles v. City of San Rafael, 42 Cal. App. 3d 230, 242, 116 Cal. Rptr. 733, 739 (1st Dist. 1974).

British courts use the wage base of the parent as an analytical starting point. Taylor v. Bristol Omnibus Co., [1975] 2 All E.R. 1107, 1112.

future earnings of an American.[68] A child thus receives the present value[69] of this "average" person's earnings as compensation for lost earning capacity.

While the lump sum method may require use of averages as the best available method of achieving compensation, the use of averages is objectionable for three reasons. Under a system that uses averages as compensation guidelines, children receive compensation that is not related to their individual losses. Instead, compensation is based on the past experiences of other people. Thus, irrelevant data are used to estimate children's damages, since the proper measure of loss is the value of the lost future opportunities of the particular injured child. Under the present method, children receive compensation based on past statistical categories with which they may have only a coincidental relationship. In *Caron v. United States,*[70] for example, the court used the past average earnings of females to project the future earnings of the child plaintiff.[71] The child received $30,251 as damages for her total lifetime lost earnings.[72] Unfortunately, the court failed to take into account the effect of future trends, such as inflation[73] and the emerging role of women in the job market.[74] Such blind reliance on past experience, without consideration of current economic trends, effectively condemns female and minority children to inadequate compensation.

A second problem inherent in the use of an average lies in the concept of what an "average" is. Setting compensation for all members of one class[75] by the use of one figure creates distortions. In awarding an average figure, the child thus receives an award which bears no relation to personal loss; rather, it represents a best guess at the losses suffered by a hypothetical person. Therefore, if a child would have performed better in the job market,

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[68] *See, e.g.,* BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, TECHNICAL PAPER NO. 16, PRESENT VALUE OF ESTIMATED LIFETIME EARNINGS (1967).

[69] *See* text accompanying notes 27-28 *supra.*

[70] 410 F. Supp. 378 (D.R.I. 1976), *aff'd* 548 F.2d 366 (1st Cir. 1976).

[71] *Id.* at 398.

[72] *Id.* at 399.

[73] *Id.* at 397. In applying Michigan law, the court felt that evidence of inflation was inadmissable. This is puzzling in light of the language of the Michigan Supreme Court in Normand v. Thomas Theater Corp., 394 Mich. 50, 61-62, 84 N.W.2d 451, 457 (1959), that inflation was ". . . so much a matter of common knowledge that judges and juries are entitled to consider [it] although not expressly proved in evidence."

[74] *See* notes 54-56 *supra.*

[75] This is especially true when the classifying criterion bears no direct relationship to lost opportunities.

undercompensation occurs. If the opposite is true, overcompensation occurs. In both situations, the award of an average figure violates the principle that tort awards should compensate for individual losses suffered.[76]

Finally, a lump sum award of future damages based on averages conclusively presumes some future compensable injury. Thus, if the actual future earnings of the child exceed the estimated loss, the defendant cannot receive a rebate.[77] Similarly, if the injury results in more disability than estimated, the child cannot petition for additional compensation.[78] Furthermore, if medical science develops new methods to alleviate the disability, courts cannot compel the return of a proportionate part of the award.

The lack of an adequate data base also creates difficulties in the estimation of future medical expenses. Children's bodies are developing continuously, and injury disrupts this process.[79] What would be a minor injury to an adult quite often has serious repercussions for a child. Head injuries, for example, constitute almost one half of children's hospital admissions.[80] Since the bones of the head do not completely fuse until the age of ten,[81] any permanent diagnosis of a child's head injury is contingent on the effect the injury has on the fusing process. Consequently, in any suit filed before the child reaches the age of ten, the permanent effects of an injury will be unknown.[82] The plasticity of a child's developing nervous system may also effect a permanent diagnosis, as the symptoms of identifiable nervous disorders in children vary from the symptoms usually exhibited by adults.[83] Medical opinion thus indicates that any assessment of the effects of an injury to the

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[76] *See* note 13 *supra.*

[77] *See* notes 16-19 *supra.*

[78] *Id.* Indeed, this is the fact pattern of the seminal case in this area, Fitter v. Beale, 91 Eng. Rep. 1122 (K.B. 1698).

[79] *See generally* Haynes, *Examination of Infants and Young Children,* TRAUMA, Oct. 1976, at 9.

[80] Houts, *Presenting the Medical Research: Head Injuries in Infants and Children,* TRAUMA, April 1977, at 7.

[81] Adams & Salem, *General Aspects of Pathology of Cranial Trauma in Infants and Children,* TRAUMA, April 1977, at 72.

[82] *Compare* Bailey v. Bradford, 244 Ark. 8, 423 S.W.2d 592 (1968) (unknown if seven year old with head injuries would experience future bouts with epilepsy) *with* Feist v. Sears, Roebuck & Co., 267 Or. 402, 517 P.2d 675 (1973)(unknown if four year old with a head related injury would contract meningitis in the future).

[83] Shy, *Plasticity of Nervous System of Early Childhood,* TRAUMA,, Oct. 1976, at 93.

nervous system before the age of eight or nine is unsound.[84] Under the present system, however, the trier of fact must assess the future effects of the injury at the time of trial, regardless of the plaintiff's age.

The mechanics of lump sums, independent of problems associated with questionable and uncertain assumptions, also impede effective children's compensation. The use of present value and inflation evidence[85] injects the mathematics of compound increases or decreases[86] into the analysis. Unfortunately, the use of such complex mathematical concepts presents problems of evidentiary credibility that potentially are harmful to the injured child.

The use of compound increases, such as a set inflation rate, produces results that do not seem to follow intuitively from the assumptions used.[87] In *Niles v. City of San Rafael,*[88] for example, the eleven year old plaintiff suffered grave head injuries. With regard to damages, the opinion is replete with economic testimony regarding the anticipated average rate of inflation for various items needed by the child.[89] The use of these figures, however, produced some questionable results. While the court accepted the testimony that the cost of drugs would remain constant over the remaining fifty-six years of the child's life,[90] it also accepted the contention that the cost of physician's services would rise at a six percent annual rate over the same period.[91] The unarticulated result of these assumptions is that when the plaintiff is sixty-seven, drugs that currently cost $100 will still cost $100, while physician's services currently costing $100 will in-

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[84] *Id.* at 76.

[85] *See* text accompanying notes 27-35 *supra.*

[86] Compound increases are cumulative additions to a fund where the amount added is determined by the fund balance prior to the increase. As each new increase is added to the fund, the balance grows and thus so does the next increase. The most common example of compound increases is the passbook savings account. After the initial deposit, the bank calculates interest on the account balance at the end of the period. Thus, if untouched, the amount of annual interest and the underlying balance will increase over time. Cumulative price increases for a particular product operate in the same manner. The reverse applies to compound decreases.

[87] At 6% compound interest, the initial price will double every 12 years. P. SAMUELSON, *supra* note 53, at 30 n.9. If 6% increases occur over a 72 year life span, prices will be 64 times greater at death than at birth.

[88] 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1st. Dist. 1974).

[89] *See, e.g., id.* at 241-243, 116 Cal. Rptr. at 739-740.

[90] *Id.* at 242, 116 Cal. Rptr. at 740.

[91] *Id.*

crease to $2,613.[92] Thus, defense counsel could discredit the remainder of plaintiff's case by showing the potentially incredulous results of plaintiff's assumptions to the trier of fact.[93]

Compounding is not a problem of improper economic assumptions; rather it is a problem of simple arithemetic. Its genesis lies in the long life expectancies of children. If all the other economic assumptions are correct, the types of figures produced by compounding are also correct. The problem is that the results are too easily disbelieved or discredited by the trier of fact.[94] Consequently, characteristics inherent in childhood effectively impair adequate and accurate compensation for children.

The cumulative effect of these assessment considerations is that the estimation of a child's future damages is wrought with medical and economic uncertainties. Information necessary to compute accurate long-range estimations of need is practically non-existent due to the fact that the child has not had the opportunity to establish earning or health patterns. Thus, the inability of lump sum awards to compensate children is more a function of speculation and chance than of informed and analytical estimation. In addition, distributional considerations exist which further decrease the chances of adequate compensation under the lump sum system.

B. Compensation Inadequacies and Distributional Considerations

Even if a lump sum system could produce accurate forecasts of future need, distributional aspects of the system still remain to thwart effective compensation. Due to investment inexperience, the manner in which attorney's fees are paid, and tax considerations, considerable portions of tort awards are not used for compensation.

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[92] On the same rationale, a $1 hamburger today would cost $26.13 in 2030. *See* note 35 *supra* for the present value formula.

[93] *See, e.g.*, Rodriguez v. McDonnell Douglas Corp., 87 Cal. App. 3d 626, 658, 151 Cal. Rptr. 399, 417 (2d Dist. 1978) where testimony was elicited that a wage of $34,000 in 1977 would increase, under the assumptions used, almost ten-fold during the next forty years.

[94] Most people, for example, do not believe that if a penny is doubled every day for one month the sum on the last day will be $5,368,709.12. F. WORTH, THE TRIVIA ENCYCLOPEDIA 91 (1974). *See also* BD. OF TRUSTEES OF THE FEDERAL OLD AGE AND SURVIVORS INSURANCE AND DISABILITY INSURANCE TRUST FUNDS, 1974 ANNUAL REPORT, H.R. DOC. NO. 93-313, 93d Cong., 2d Sess. 43 (1974) where the Board projected the average social security benefit, then $2220, to rise to $98,089 by 2045. Not surprisingly, this statistic was discontinued in all future reports.

In cases of extensive injury, tort awards are large.[95] These amounts, however, represent the discounted value of all future losses.[96] Thus, the victim must invest the award in order for it to grow to the amount needed in the future.[97] Most award recipients, however, lack the necessary training to manage the award properly.[98] Thus, through the victim's potentially unwise management of the award, compensation may prove to be inadequate.[99]

Another factor contributing to the non-compensatory dissipation of an award is the method of payment for attorney's fees. Most personal injury cases are taken on a contingency fee basis.[100] Under this arrangement, the attorney receives a portion[101] of the award as the fee for handling the case. Thus, a part of the needed compensation never even reaches the injured child.

A final impediment to effective compensation is the tax treatment of the award after the victim receives it. The award's reduction to present value assumes that every dollar of investment income will be used for compensatory purposes. From a tax perspective, however, while the initial award is non-taxable,[102] the income or interest earned on that award after it is received is subject to taxation.[103] Therefore, any rate of return used in the reduction of an award to present value must take into account the tax consequences of all investment income.[104]

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[95] *See, e.g.*, Niles v. City of San Rafael, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1st Dist. 1974), where the court affirmed a verdict of $4,025,000 awarded to an 11 year old quadriplegic.

[96] *See* text accompanying notes 27-35 *supra*.

[97] The necessary investment rate should equal the discount rate selected by the jury. *See* Fleming, *supra* note 46, at 66.

[98] UNIFORM PERIODIC PAYMENTS ACT, Reporter's Prefatory Note, at 1 (Tent. Draft No. 6, 1978)[hereinafter cited as UPPA]; F. HARPER & F. JAMES, *supra* note 13, at 1303; T. ISON, THE FORENSIC LOTTERY 17 (1967).

Reports of the squandering of lump sum awards are not uncommon. *See, e.g.*, H. LUNTZ, ASSESSMENT OF DAMAGES 19 (1974) (loss of award through a fraudulent scheme); 1 U.S. RAILROAD RETIREMENT BD., WORK INJURIES IN THE RAILROAD INDUSTRY 1938-40 at 179 (1947)(loss of award through gambling); *Id.* at Vol. II, Table C-32 (loss of award through bad investments).

The problem is apparently international in scope. *See* McGregor, *Personal Injury and Death*, 11 INT'L ENCYCLOPEDIA OF COMP. LAW, Ch. 9, § 55 (1972).

[99] Harper and James appropriately called this problem the burden of wise investment. F. HARPER & F. JAMES, *supra* note 13, at 1303.

[100] J. O'CONNELL, THE INJURY INDUSTRY 37-53 (1971).

[101] This portion ranges from 25% to 40%. *Id.* at 37-38.

[102] I.R.C. § 104(a)(2); Rev. Rul. 65-29, 1965-1 C.B. 59.

[103] Rev. Rul. 76-133, 1976-1 C.B. 34; Steven Trez v. Comm'r, 35 T.C.M. (CCH) 640, 641-642 (1976).

[104] In children's cases the tax bite can be significant. *See, e.g.*, Niles v. City of San Rafael, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1st Dist. 1974), where

Two factors however, prevent meaningful projection of the estimated tax liability. Initially, since the current tax system is progressive,[105] the applicable tax rate will vary with the amount of investment income. Therefore, instead of one uniform rate, an award is subject to several different rates over the life of the award. Thus, the calculation of present value is highly complex, due to problems in estimating the correct discount rate.

A second reason barring effective estimation is the changing nature of the tax rates. If the rates were stable over the life of the child, planning conceivably could occur. Congress, however, changes the applicable rates frequently,[106] thus placing an element of speculation in any estimation of long term tax rates.[107]

The consequence of improper estimation of tax liability is that the award will not grow to equal expected economic losses. Furthermore, since tax rates change often, the trier of fact cannot adequately account for tax liability in the determination of a lump sum award. The result is undercompensation for children.

In summary, the lump sum system fosters undercompensation in child injury cases. The system fashions awards which experience and reason indicate are insufficient.[108] The requirement of a

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the child received $4,025,000. Assuming a 5% investment rate, the first year's interest would equal $202,000. Even after allowing a $17,000 medical deduction, I.R.C. § 213(a), taxable income would be $185,000. Unless appropriately sheltered, the tax on this amount would be $129,000. *See* I.R.C. § 1.

In abstract terms, if the interest income places the child in the 50% marginal tax bracket, it would take a pre-tax return of 19.61% to yield a 10% after tax gain. *See* Wall St. J., April 9, 1979, at 32, col. 2.

[105] *See* I.R.C. § 1.

[106] Congress has changed the tax brackets four times within the last fifteen years alone. Act of Nov. 6, 1978, Pub. L. No. 95-600, § 101(a), 92 Stat. 2763; Act of May 27, 1977, Pub. L. No. 95-30, Title I, § 101(a), 91 Stat. 127 (repealed 1978); Act of Dec. 30, 1969, Pub. L. No. 91-172, Title VIII, § 803(a), 83 Stat. 678 (repealed 1977); Act of Feb. 26, 1964, Pub. L. No. 88-272, Title I, § 111, 78 Stat. 19 (repealed 1969).

[107] Courts could solve this problem by using municipal bond rates as the rate of discount or investment. Since such interest is tax free, I.R.C. § 103(a)(1), this obviates difficulties in computation. This approach, however, assumes that the tax status of municipal bonds will not change over the life of the child. *See generally* Morris, *Tax Exemptions for State and Local Bonds,* 42 GEO. WASH. L. REV. 526 (1974); Surry, *The Tax Treatment of State and Local Government Obligations - Some Further Observations,* TAX POLICY, Sept. 1969, at 3.

[108] Although studies on the ultimate disposition of tort awards are rare,evidence indicates that most tort awards are dissipated within ten years. *See* Address by John O'Connor & John Glenn, *New Jersey Trial Lawyer's Ass'n Annual Seminar* (May 8, 1976)(on file at U.C. Davis L. Rev.) (estimating that award recipients exhaust their awards within five years); *See also* T. ISON, *supra* note 98, at 15-16 (stating that "it is not unknown for a lump sum recovery for perma-

single determination of damages, when available information is poor and when economic models cannot supply even rough approximations of need, intensifies the problem of assessment. In addition, the system exacerbates the distribution problem by forcing acceptance of final future compensation in advance of need, regardless of the possible occurrence of unanticipated future injury. Ultimately, the burden of this undercompensation rests on both the child and society.[109] Thus, with society's interest in its citizens and its interest in its fiscal integrity at stake, some form of rational revision is in order.

The correction of these deficiencies requires a complete reevaluation of tort damage awards. Both the assessment and distribution phases of the award need to be changed in order to avoid the present trap of institutionalized undercompensation. The legislature needs to consider new alternatives to lump sum recovery in order to fully compensate children and to halt the drain of scarce societal resources[110] that such undercompensation entails.

III. Proposal for Statutory Reform

In order to fully provide for the myriad needs of injured children, a court must have flexible tools with which to fashion appropriate and effective remedies. A lump sum award may be appropriate if the injury is small and has no residual effects.[111] As

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nent disability to be dissipated in a relatively short time"); H. Luntz, *supra* note 98, 15, at 18-19 (indicating that awards "might be rapidly dissipated"); J. Morgan, M. Snider, & M. Sobol, Lump Sum Redemption Settlements and Rehabilitation 100-104 (1959) [hereinafter cited as Lump Sum Settlements] (finding that most lump sum awards were used primarily to pay rent, food bills and other similar expenses); 1 U.S. Railroad Retirement Bd., *supra* note 98, at 176 (concluding that lump sums were inadequate substitutes for actual compensation); Fleming, *Damages: Capital or Rent?*, 19 U. Toronto L. Rev. 295, 300 (1969) (citing authority for the proposition that "preciously little" is known about the ultimate disposition of awards); McGregor, *supra* note 98 (stating that "plaintiffs gradually see their awards diminish in real terms"); Parker, *Address to the Bentham Club*, 18 Current Legal Prob. 1, 5 (1965) (stating that "all those who had recovered five figure damages were drawing National Assistance in a matter of a few years").

[109] The burden on society derives from its role as residual caretaker of the injured. When a tort award is exhausted, the victim must turn to state provided medical and welfare assistance services to survive. Thus, society assumes the added costs instead of the tortfeasor. The result is increased cost to society and its taxpayers. *See* Comment, *Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards*, 64 Iowa L. Rev. 138, 145 (1978).

[110] *Id. See also* Prigosin v. Indus. Comm'n, 113 Ariz. 89, 92, 546 P.2d 823, 825 (1976).

[111] *See* text accompanying note 116 *infra*.

the complexity of the injury increases, however, so does the inability of the lump sum system to adequately and accurately compensate the victim. The system proposed in this section uses a lump sum option along with other recovery vehicles. Specifically, the proposed system incorporates aspects of both periodic payments[112] and deferred damages.[113] Thus, by combining selection aspects of different remedies, the proposed reform increases the probability of accurate and adequate compensation.

A. Operation of the Proposed System

The first step under the proposed system is the establishment of liability.[114] The system provides for three alternate remedies if the plaintiff prevails: lump sum recovery, deferred damages, or periodic payments. Any party, or the judge *sua sponte*, could request a particular disposition; however, the adoption of that

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[112] Periodic payments are continuing disbursements of money as specific intervals. Two types of periodic payments exist. Fixed periodic payments consist of periodic instalments of a set damage award. *See, e.g.*, CAL. CODE CIV. PROC. § 667.7 (West Cum. Supp. 1979)(providing for fixed periodic payments in medical malpractice suits where the future damages exceed $50,000); UPPA, *supra* note 98, § 5(providing for instalment payments of future damage judgments in excess of $100,000).

Variable periodic payments allow the court, after entry of judgment, to vary the amount of payment if the need of the victim changes, or to terminate the obligation if the victim dies. *See, e.g.*, REPR. ACTS W. AUSTL., Motor Vehicle (Third Party Ins.) Act 1972, § 16(4). This system is used widely in Europe. U.S. DEP'T OF TRANSPORTATION, COMPARATIVE STUDIES IN AUTOMOBILE ACCIDENT COMPENSATION 8, 41, 132 (1970); Fleming, *supra* note 108, at 296.

Variation in the award may be mechanical or functional. Mechanical alteration changes the payment amount every time some predetermined external factor changes. Sweden, for example, indexes all periodic awards to inflation. *See* Hellner, *Indexing of Tort Awards in Sweden*, 26 AM. J. COMP. L. 71 (1977). Functional alteration occurs when the touchstone for award modification is individual need. *See, e.g.*, REPR. ACTS W. AUSTL., Motor Vehicle (Third Party Ins.) Act 1972, § 16(4)(b)(i).

[113] A deferred damages system splits tort cases into two phases: liability and damages. The liability phase is tried first with the result operating as a declaratory judgment as to fault. The damages phase, however, is tried only when there is sufficient evidence to render an accurate assessment of damages. The final verdict is in the form of a lump sum. This system is available in South Austraila, PUB. GEN. ACTS S. AUSTL., Supreme Court Act 1935-1975, § 30(a) and was recommended by the English Law Commission, THE LAW COMMISSION, NO. 56, REPORT ON PERSONAL INJURY LITIGATION - ASSESSMENT OF DAMAGES 66 (1973) [hereinafter cited as LAW COMMISSION].

[114] The parties could alter this by approved stipulation if the case clearly warranted a particular type of recovery. *See* text accompanying notes 115-119 *infra*.

remedy would be subject to judicial approval.[115]

An implementing statute should provide trial courts with guidelines for the assessment of cases. If the injury has no residual effects, the statute should provide for a lump sum.[116] In this situation, the child would not need the protection of either deferred damages or periodic payments since there is no future need. Hence, a lump sum would accurately compensate.

Deferred damages are more appropriate where some uncertainty as to the ultimate effect of the injury exists.[117] In such cases, the ability to postpone the assessment of damages allows for the development of necessary medical or economic facts.[118] Thus, by postponing the actual assessment of damages, the court will have adequate and complete information upon which to base its decision.

Finally, complex injuries or injuries requiring sporadic medical

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[115] The decision is not left in the sole discretion of the child because children, or their representatives, are not the only parties with an interest in the remedy granted. Defendants have an interest in the outcome, as it will affect their future financial condition. Society has a stake, in that it is the residual caretaker of the victim if compensation proves inadequate. To this end, the proposed system would allow any party, or the judge *sua sponte,* to request any remedy. The final decision, however, would vest with the special referee. *See* text accompanying notes 125-130 *infra.*

The LAW COMMISSION, *supra* note 113, at 108 authorized deferred damages upon application of the plaintiff only. The more common practice, however, is to vest approval with the court upon application of either party. Fleming, *supra* note 108, at 324.

The judge should be able to overrule the parties in order to reduce the influence of outside interests and to protect society's own interests. Thus, the result would be contrary to the outcome in Hall v. Fare, [1973] W. Austl. 156, 160, where the court, although empowered to award non-lump sum recovery, felt bound to respect the parties wishes as to the award of a lump sum. The head injuries suffered by the child, however, suggested the appropriateness of non-lump sum recovery. *See* text accompanying notes 80-84 *supra.*

[116] Lump sum awards are appropriate when the injury causes no permanent effects. *See, e.g.,* Capelouto v. Kaiser Foundation Hospitals, 7 Cal. 3d 889, 891, 500 P.2d 880, 882, 103 Cal Rptr. 856, 858 (1972)(infant contracted salmonella infection causing great pain but leaving no permanent effects).

See also 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 82.72 (1976).

[117] The English Law Revision Commission divided such cases into "chance" and "forecast" cases. LAW COMMISSION, *supra* note 113, at 64-65. Chance cases occur when an injury may be exacerbated in the future, but medical science cannot predict when. Forecast cases are those instances where it is difficult, if not impossible, to forecast accurately all future damages.

[118] *See, e.g.,* Cirjak v. Todd, 17 S. Austl. St. R. 316 (1977) (child plaintiff sustained massive facial scarring; liability found but damages deferred until plastic surgery was medically safe.).

care suggest the appropriateness of variable[119] periodic payments.[120] This method assures that the victim receives exactly the correct amount of compensation and also prevents the defendant from overpaying.[121] Thus, the proposed system, instead of requiring speculation as to the present value of all future damages, fashions flexible awards appropriate to the needs of the individual situation.

The present lump sum system requires only minimal modifications to incorporate the proposal.[122] A major change would give courts the equitable power of contempt to enforce their traditional common law judgments.[123] With the contempt power, courts could retain jurisdiction over child injury cases until majority.[124] Consequently, courts could use lump sums, deferred damages, or periodic payments in fashioning awards. As a result, children would receive more accurate compensation.[125]

A further optional change would create special referees to supervise the continuing jurisdiction of child injury cases. These referees would administer all aspects of the child's case after the establishment of liability.[126] These referees also would bring both specialization and expertise to the problem of what type of recov-

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[119] The proposed system adopts variable periodic payments because they are better able to compensate accurately. *See* Comment, *supra* note 109, at 143; UPPA, *supra* note 98, Minority Report, at 25-26.

[120] The unstable nature of the need mandates the periodic treatment. Many paralyzed accident victims, for example, are extremely vulnerable to urinary infections which require great time and expense to heal, yet are unpredictable. *See, e.g.*, L.A. Times, *supra* note 4.

Also, periodic payments would be appropriate when it is probable that the plaintiff would be imprudent with the award. *See* McGregor, *supra* note 98.

[121] If the victim dies soon after judgment, the defendant is not required to make any further payment.

[122] A similar reform in Western Austraila required only one page in the statute books. REPR. ACTS W. AUSTL., Motor Vehicle (Third Party Ins.) Act 1972 § 16(4).

[123] This change thus meets the objection of Smith v. Lewis, 13 Cal. 3d 349, 362, 530 P.2d 589, 598, 118 Cal Rptr. 621, 630 (1975), that courts could not properly supervise non-lump sum awards. *See* note 18 *supra*.

[124] California courts already retain jurisdiction over the actual tort award until majority. CAL. PROB. CODE § 1510 (West Cum. Supp. 1979). Jurisdiction is not, however, retained over the tortfeasor. The difference between current law and the proposed system is that under the proposal, courts would retain jurisdiction over the tortfeasor and not just over the money paid.

[125] The retention of jurisdiction also allows courts to correct past mistakes of counsel. *See* T. ISON, *supra* note 98, at 16.

[126] This analysis assumes the desirability of a non-lump sum recovery. If the lump sum option is appropriate, the original trier of fact is competent to determine total damages.

ery to use.[127] This expertise would expedite and improve the proper assessment of interim or periodic damages.[128] Finally, in order to provide needed disincentives to inappropriate settlements and fully complement the power of retained jurisdiction,[129] any change should give referees the power of approval over both attorney's fees and settlement agreements.[130]

B. Benefits of the Proposed System

The addition of deferred damages and periodic payments options significantly increases the accuracy of compensation awards by decreasing assessment problems.[131] Since courts may postpone the assessment of damages, the time over which damages must be forecast is reduced. In turn, this reduction eliminates many of the problems of economic and medical forecasting by minimizing long-term forecasting errors.[132] The lengthened period between the determination of liability and assessment of damages has multiple benefits. The first benefit is that a child is given sufficient time to develop a concrete data base. Thus, when damages are assessed, the court will be able to avoid unnecessary guess-

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[127] Many factors weigh in the decision of which type of recovery is best suited to the child's particular needs. Actual lump sum recovery, for example, provides for only approximately 10% of total economic loss in cases where losses exceed $25,000. U.S. DEP'T OF TRANSPORTATION, *supra* note 8, at 51. Thus, the potential for large damages might be one indication of the need for non-lump sum recovery. In this vein, Sweden does not allow lump sums to be awarded in cases where there is more than 10% permanent disability. McGregor, *supra* note 98, § 63. Other factors might be the medical certainty of the child's injuries, the seriousness of any possible developments, the stability of the victim's condition, and the chances of recovery. *See* Ikonomos v. Lesiuk, 6 S. Austl. St. R. 111, 114 (1973).

[128] Specialization would remove some of the guesswork and confusion inherent in the assessment of damages. *See* Braybrooke, *The Motor Vehicle (Third Party Insurance) Act 1966 - A Nonprincipled Development in Western Austrailan Law*, 8 U.W. AUSTL. L. REV. 204, 220 (1967).

A 1970 study demonstrated that when the number of cases each judge must serve increases, settlements also increase. U.S. DEP'T OF TRANSPORTATION, AUTOMOBILE ACCIDENT LITIGATION 52 (1970). The addition of special referees would reduce the pressure to settle and would allow a more considered disposition of the increased number of adjudicated cases. All of these effects result in more accurate compensation.

[129] *See, e.g.*, CAL. PROB. CODE §§ 1431, 1510 (West Cum. Supp. 1979).

[130] The power of approval acts as a strong disincentive to form inappropriate settlements. *See* 3 A. LARSON, *supra* note 116, § 82.71 at 15-574.

[131] South Austrailan courts have recognized this fact for deferred damages alone. Ikonomos v. Lesiuk, 6 S. Austl. St. R. 111, 113 (1973); Nathan & James v. Vos, [1970] S. Austl. St. R. 455, 466.

work and conjecture.[133] A further benefit is that in cases where an "average" figure is the most equitable method of assessing damages, the court can postpone the assessment of damages and wait for the development of statistics relevant to the individual child. Thus, women and minority children will receive the benefit of current economic trends.[134] Finally, the reduction of time over which the court assesses damages also reduces the size of compounding errors.[135]

Elimination of the rule requiring payment of damages in advance of loss also increases the likelihood of accurate compensation by reducing distributional problems. The use of either deferred damages or periodic payments relieves the victim of the burden of wise investment,[136] since all administrative burdens of the award shift to the defendant.[137] Thus, victims cannot dissipate their awards due to poor investment decisions.[138]

Another benefit of leaving the award with the defendant lies in the allocation of the tax burden.[139] Any interest earned while the corpus of the award remains with the defendant is taxable to the defendant as legal owner. Thus, since a periodic award approximates periodic need,[140] the plaintiff loses no part of the award through the bite of taxation.

In addition to reducing assessment and distribution problems, the proposed system has additional advantages. A reduced incen-

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[132] *See* text accompanying notes 40-63 *supra*.

[133] *See* text accompanying notes 64-66 and 79-84 *supra*.

[134] *See* text accompanying notes 67-78 *supra*. *See also* McGregor, *supra* note 98, § 129.

[135] *See* text accompanying notes 85-94 *supra*.

[136] *See* text accompanying notes 95-99 *supra*.

[137] The proposed shift of the burden of wise investment squares with current legal thought. As between two individuals, the law prefers the innocent over the wrongdoer. *See* W. PROSSER, LAW OF TORTS, § 4 at 16-19 (4th ed. 1971). Since the tortfeasor will have caused the child's injury, and since the plaintiff will not have harmed the defendant, the law should allocate any burdens arising from the wrong to the defendant.

Practical considerations also indicate the desirability of the shift. Large insurance companies insure the majority of defendants. UPPA, *supra* note 98; McGregor, *supra* note 98, § 57. These companies bring a wealth of expertise along with the ability to spread fixed costs of investment to the problem of wise investment. UPPA, *supra* note 98. Thus, both practical and equitable considerations indicate that the defendant should shoulder the burden of wise investment.

[138] *See* note 98 *supra*.

[139] *See* text accompanying notes 102-107 *supra*.

[140] The periodic award will be non-taxable to the victim, as each payment will represent the continuing obligation to compensate the plaintiff. *See* I.R.C. § 104; UPPA, *supra* note 98.

tive for defendants to declare bankruptcy and extinguish the plaintiff's claim exists because the defendent is liable only for small periodic liabilities instead of one large sum.[141] Thus, victims receive increased probabilities of continuing compensation. Also, since more victims will receive adequate compensation, there is less possibility of individual resort to public assistance.[142] This prevents shifts in compensation responsibility from the tortfeasor to the government,[143] and hence reduces social welfare costs.

A further benefit, derived from the optional corps of special referees, is increased competence in the area of damage assessment.[144] Referees could also help reduce backlogs in the courts by more efficiently handling children's tort cases.[145] Finally, special referees would bring more individualized and considered attention to the complexity of child injury cases.

In summary, the proposed system has many benefits. Children would receive better chances of accurate and lasting compensation. Defendants would not be bankrupted or forced to overcompensate injured children. Despite these improvements, however, the proposed system may still give rise to some objections.

C. Potential Objections to the Proposed System

Lump sum payments seemingly enjoy widespread popularity.[146] Hence, any attempt to substitute alternate forms of recovery may fail due to avoidance or non-use.[147] The actual strength of the lump sum preference, however, does not indicate that alternate means of recovery should be rejected. A key finding of a study on worker's compensation awards, for example, was that the preference for periodic or alternate compensation increased with the seriousness of the injury.[148] In addition, the apparent lack of pref-

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[141] *See* H. LUNTZ, *supra* note 98, at 21.

[142] *See* Comment, *supra* note 109, at 145.

[143] The Arizona Supreme court recognized this rationale in worker's compensation cases involving periodic payments. Prigosin v. Indus. Comm'n, 113 Ariz. 89, 92, 546 P.2d 823, 825 (1976).

[144] *See* note 128 *supra.*

[145] *See* Comment, *supra* note 109, at 153.

[146] H. LUNTZ, *supra* note 98, at 20; J. O'CONNELL, *supra* note 100, at 20; Fleming, *supra* note 108, at 297.

[147] The LAW COMMISSION, *supra* note 113, at 10 stated that: "[T]he introduction of a system of periodic payments would meet with vehement opposition from almost every person or organization actually concerned with personal injury litigation." In addition, in most continental countries with periodic payments systems, lump sum settlements are the rule. Fleming, *supra* note 108, at 279; Hellner, *supra* note 112, at 58.

[148] LUMP SUM SETTLEMENTS, *supra* note 108, at 149.

erence for non-lump sum recovery may be traceable to lack of information with which to make an informed choice.[149] Presumably, if more were known about the potential benefits of non-lump sum recovery, victims would request it more often.[150] Evidence that many worker's compensation claimants regretted choosing a lump sum award[151] and evidence of the decreasing resistance to non-lump sum awards[152] support this conclusion. The lack of reliable and relevant information thus prevents the drawing of any broad conclusions regarding the specific preferences of victims.[153] In fact, evidence exists that in certain cases, victims prefer non-lump sum recovery.[154]

A similar problem involves the preference of those occupations intimately involved in the tort recovery process. Lawyers[155] or insurance companies[156] may attempt, at the time of trial, to coerce the plaintiff into accepting an inappropriate lump sum because their interests would be served by a onetime payment.[157] Since these groups are concerned only derivately with compensation, the legislature can build disincentives into the system to lessen their influence on the ultimate award. Court approval of attorney's fees[158] or the provision for the lump sum payment of fees,[159] for example, could act as an effective check on the legal profession. Insurance interests[160] could be protected by the estab-

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[149] *See* Comment, *supra* note 109, at 149.

[150] *Id.*

[151] LUMP SUM SETTLEMENTS, *supra* note 108, at 56-63; Comment, *supra* note 109, at 149 n.82. In addition, another study found that 54% of all seriously injured victims believed their lump sum settlements were inadequate. A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ, & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 9 (1964) [hereinafter cited as ACCIDENT COSTS].

[152] *See generally* Fuller, *Paying Tommorrow's Claims With Today's Dollars*, LITIGATION, Winter 1976, at 29; Stevenson, *An Alternate to Lump Sum Damages: The Exactly Adequate Award*, 24 DEF. L.J. 455 (1975).

[153] *See* Comment, *supra* note 109, at 150.

[154] *See* note 151 *supra*.

[155] *See* 3 A. LARSON, *supra* note 116, § 82.71; J. O'CONNELL, *supra* note 100.

[156] *See* H. LUNTZ, *supra* note 98, at 21; Comment, *supra* note 109, at 155-156.

[157] Lawyers prefer lump sums because they facilitate a large lump sum fee. *See* note 155 *supra*. Insurance companies prefer lump sums because they are administratively convenient and do not necessitate additional projection of future risks. *See* note 156 *supra* and McGregor, *supra* note 98, § 53.

[158] *See* CAL. PROB. CODE §§ 1431, 1510 (West Cum. Supp. 1979) for the current method of approval. *But cf.* Niles v. City of San Rafael, 42 Cal. App. 3d 230, 244, 116 Cal. Rptr. 733, 741 (1st Dist. 1974)($4,025,000 verdict) where the court uncritically denied a defendant standing to challenge a 25% contingent fee.

[159] *See, e.g.*, Tex. Employers Ins. Ass'n v. Motley, 491 S.W.2d 395, 397 (Tex. Sup. Ct. 1973) where the court judicially approved such a system.

[160] The preference of the insurance industry for lump sums, *see* Comment,

lishment of a pooling fund[161] for claimant's awards. Indeed, the accumulation of such reserves could conceivably constitute a long-term benefit for the insurance company.[162] In the final analysis, however, adherence to the goal of compensation and strong administration by the special referees are the best checks at the trial level against the influence of derivative interests.[163]

In sum, the objection that parties with an interest in tort recovery do not prefer non-lump sum recovery has little force. The proposed system can accommodate the changing and uncertain nature of victims' preferences along with the purely pecuniary motives of derivative interests. Other objective considerations, however, potentially impede the adoption of the proposed system.

As individualized consideration of cases increases, so does potential cost.[164] A common objection to systems similar to the one proposed is that the added costs of maintenance are disproportionate to the benefits gained.[165] The current system is already quite expensive.[166] Thus, the amount of any potential cost increase, along with its purported justification, requires close scrutiny.

The cost of retained jurisdiction and the cost of increased administration are two potential areas of increased cost in the proposed system. Increased administrative costs are tied directly to increased individual consideration.[167] In the proposed system, the corps of special referees represent this cost increase. Several considerations, however, mitigate any potential cost increase. A large

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supra note 109, at 154-155, is somewhat odd. Insurance is based on actuarial projection and the pooling of losses. The day to day handling of uncertainty is their business. H. LUNTZ, *supra* note 98, at 21. Thus, with their accumulated knowledge and leverage, *see* UPPA, *supra* note 98, it would seem to be in the insurance industry's interest to retain the money and attempt to make some profit from it. H. LUNTZ, *supra* note 98, at 21.

French insurance companies seem to be indifferent between lump sums and periodic payments. McGregor, *supra* note 98, §57 n.182.

[161] *See, e.g.*, N.Y. WORK. COMP. LAW § 25-a.1 (McKinney 1965) for a scheme of pooling to fund reopened worker's compensation cases.

[162] *See* note 160 *supra*.

[163] *See* 3 A. LARSON, *supra* note 116, § 82.71 at 15-574.

[164] *See* ACCIDENT COSTS, *supra* note 151, at 104-105.

[165] The specter of increased cost weighed heavily in the British rejection of periodic payments. LAW COMMISSION, *supra* note 113, at 9-10.

[166] In 1968 alone, $121,000,000 was spent in state and local courts for automobile accident claims. U.S. DEP'T OF TRANSPORTATION, *supra* note 128, at 44. These costs represent only 17% of all judge time, *id.*, and are exclusive of attorney's fees and insurance costs. Given the age of the study, it is not unreasonable to assume costs have increased since it was published.

[167] *See* note 164 *supra*.

supervisory bureacracy, for instance, already exists with respect to injured children.[168] Thus, the use of special referees does not entail creating new costs but rather involves restructuring old ones. Indeed, by transferring the duty of supervision from courts of general jurisdiction to specialized courts, the proposed system may save money through increased efficiency.[169] Furthermore, the instigation of optional recovery plans may actually remove case backlogs by reducing litigation uncertainty.[170] The system would thus reduce court operating costs by reducing the ratio of trials per judge. Consequently, the additional costs of administrative changes do not warrant the rejection of the proposed plan; indeed, several factors considered above indicate possible cost savings.

The cost of retained jurisdiction is subject to similar considerations. The increased court time necessary to process award modification petitions represents this cost in the proposed system. The amount of this cost is uncertain; however, some analogies can be drawn. In California worker's compensation, for example, the ability to modify the award by reopening it[171] or commuting it to a lump sum[172] has not produced excessive litigation.[173] Furthermore, Germany's use of a pure periodic payments system has not resulted in excessive costs.[174] If, however, there is some cost increase, the system could incorporate several refinements designed to reduce cost. The introduction of presumptive categories, for example, could reduce some cost increases. Head injuries[175] or extensive scarring[176] would trigger deferred damages treatment automatically, while catastrophic injuries, such as quadriplegia,[177] would result in the award of periodic payments. These

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[168] A California court must, for example, supervise the child's award until majority and must approve personally all withdrawls until that time. CAL. PROB. CODE § 1510 (West Cum. Supp. 1979).

[169] *See* Comment, *supra* note 109, at 153.

[170] The elimination of stalling by defendants would reduce backlogs and increase certainty. One rationale behind stalling strategies is that the one time nature of the award makes it necessary to wait for all available information. See Fleming, *supra* note 108, at 319-320; Comment, *supra* note 109, at 153-154.

[171] CAL. LAB. CODE § 5410 (West 1971).

[172] CAL. LAB. CODE § 5100 (West Cum. Supp. 1979).

[173] In Hulse v. Worker's Comp. Appeals Bd., 63 Cal. App. 3d 221, 226, 133 Cal Rptr. 678, 681 (1st Dist. 1976), the court noted that "reported commutation decisions . . . are few in number. Judicial precedent on the subject is virtually nonexistant."

[174] Fleming, *supra* note 108, at 320.

[175] *See* text accompanying notes 80-81 *supra*.

[176] *See* Cirjak v. Todd, 17 S. Austl. St. R. 316 (1977).

[177] *See* Niles v. City of San Rafael, 42 Cal. App. 3d 230, 116 Cal Rptr. 733 (1st

presumptions would not be irrebuttable; either party could overcome the initial presumption by adducing sufficient proof that another method is in the child's best interest. Another refinement would place a maximum on the number of modification petitions that victims could file annually.[178] Again, this restriction would act as a disincentive to use scarce court time to relitigate a decided issue.[179] These safeguards would assure that cases coming before special referees will warrant the additional consideration they receive.

The proposed system thus meets the objection of excessive cost in two ways. Initially, it assures that when increased costs are incurred, there is more than a counterbalancing benefit to the injured victim or the defendant. Increased accuracy of compensation then provides the second cost savings. If tort awards accurately compensate, victims will not need to resort to public assistance or welfare as often. Thus, the proposed system will reduce total government expenditures. These two considerations consequently mitigate any objection regarding excessive cost.[180]

In conclusion, the proposed system combines elements of lump sum recovery with other recovery vehicles. The result of this added flexibility is more accurate compensation for injured children. In turn, this increased compensation weakens the objections that alternative recovery methods would be little used and too costly. The proposed system thus merits legislative consideration.

IV. Conclusion

Each year, large numbers of children are injured. The present tort recovery system allows for only an inflexible single payment for losses suffered. For economic and medical reasons, a child's award of damages for permanent disability under this system is speculative. This speculation leads ultimately to massive undercompensation of the child victim. In such cases, the burden of the

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Dist. 1974); L.A. Times, *supra* note 4.

[178] *See* 3 A. Larson, *supra* note 116, § 81.20; McGregor, *supra* note 98, §§ 94-102.

[179] To account for bona fide changes in condition, a cause or need exception could be incorporated. In Germany, a change in need of 20% usually is sufficient to warrant revision. McGregor, *supra* note 98, § 98.

[180] The ultimate feasibility of the proposed system could be tested by an experimental implementation in a selected two or three county area. *See, e.g.*, Cal. Code Civ. Proc. §§ 1823-1833.2 (West Cum. Supp. 1979) for an authorization of an experimental program in litigation alternatives.

child's loss shifts from the tortfeasor to both the public and the child.

Solutions to this problem are legislative in nature. Through the use of already existing common law concepts, such as deferred damages and periodic payments, a hybrid system of tort recovery can be implemented without radical alteration of the present system and without prohibitive cost.

The purpose of any tort system should be the secure compensation for losses. If a legal system is to provide adequate and lasting compensation, the reform is necessary to secure the future of the injured child.

Bruce A. Markell