

1796 DAMAGES: PRESENT VALUE OF FUTURE LOSSES

In determining the amount of damages for any loss of _____ which will be incurred by (plaintiff) in the future, you must determine the present worth in dollars of the future damages.

A lump sum of money received today may be worth more than the same sum paid in installments over a period of months or years. This is because a sum received today can be invested and earn money at current interest rates. By making a reduction for the earning power of money, your answer will reflect the present value in dollars of an award of future damages.

This instruction which asks you to reduce future damages to present value does not apply to that portion of future damages which represents future pain and suffering.

COMMENT

The instruction was approved by the Committee in 1978 and revised in 1985, 1992, and 2002. The last paragraph of the instruction was added in 1981. The comment was updated in 1990 and 1992.

The "present value" instruction is ordinarily required in two different fact situations: (1) Where damages are to be awarded for the loss of or the lessening of earning capacity over a period of time in the future. See Johnson v. Pearson Agri-Systems, Inc., 119 Wis.2d 766, 350 N.W.2d 127 (1984); Kramer v. Chicago, M., St. P. & P. R.R., 226 Wis. 118, 276 N.W. 113 (1937); or for the loss of future support for a dependent (as, for example, a widow) in a wrongful death case, see Sweet v. Chicago & N.W. Ry., 157 Wis. 400, 407, 147 N.W. 1054 (1914); Maloney v. Wisconsin Power, Light & Heat Co., 180 Wis. 546, 193 N.W. 399 (1923); McCaffery v. Minneapolis, St. P. & S.S.M. Ry., 222 Wis. 311, 327, 267 N.W. 326, 268 N.W. 872 (1932); (2) A wrongful death case where damages may be awarded for either the loss of or diminution of a future inheritance or in a personal injury case where damages may be awarded to compensate for a future hospital or medical expense.

Ordinarily, cases under (1) involve lost or lessened payments over a period of time, while cases under (2) involve a payment of a lump sum at a particular date in the future.

The failure to give the "present value" instruction is not deemed prejudicial error unless counsel has specifically requested it. Walker v. Baker, 13 Wis.2d 637, 109 N.W.2d 499 (1961); Bourassa v. Gateway Erectors, Inc., 54 Wis.2d 176, 186, 194 N.W.2d 602 (1972). However, in medical malpractice cases, see Wis. Stat § 893.55(4)(e) and Comment, Wis JI-Civil 1023.

In a period of monetary inflation, the effects of inflation must be taken into account. Cords v. Anderson, 80 Wis.2d 525, 259 N.W.2d 562 (1977). For an instruction on the effects of inflation, see Wis JI-Civil 1797.

The present value of money concept does not apply to an action for breach of contract to loan money where the claimed damage is increased interest payments to be made in the future. Bridgkort Racquet Club v. University Bank, 85 Wis.2d 706, 271 N.W.2d 165 (1978).

It is inappropriate to discount a present sum as if it were a future sum without first accounting for future growth in the asset up to the time of distribution. Bloomer v. Bloomer, 84 Wis.2d 124, 134, 267 N.W.2d 235 (1978).

In Herman v. Milwaukee Children's Hosp., 121 Wis.2d 531, 552, 361 N.W.2d 297 (Ct. App. 1984), the court said it is improper to measure the present value of future losses by using the cost of an annuity contract. But see Bychinski v. Sentry Ins., 144 Wis.2d 17, 423 N.W.2d 178 (Ct. App. 1988), in which the court of appeals said that the decision in Herman "merely upheld the trial court's exercise of its decision in excluding annuity evidence in that case."

The Committee added the third paragraph in 1981 to apprise the jury that an award for future pain and suffering should not be discounted to present value. The supreme court has recognized that pain and suffering cannot be reduced to any hourly basis or daily basis and that no precise mathematical formula is available for this purpose. See Redepenning v. Dore, 56 Wis.2d 129, 201 N.W.2d 580 (1972). In Affett v. Milwaukee & Suburban Transport. Corp., 11 Wis.2d 794, 106 N.W.2d 274 (1960), the court refused to allow counsel to use a mathematical formula to measure pain and suffering:

The difficulty in using a mathematical formula to measure damages for pain and suffering is inherent in the nature of pain and suffering. It cannot be measured by any such mathematical standard. Pain and suffering has no market price. It is not bought, sold, or bartered. It has no equivalent in a commercial sense. We cannot agree with the reasoning in the Ratner case, [111 SO.2d 82, 88 (Fla. 1959)], that the absence of a fixed rule for the measurement of pain and suffering supplies a reason for the use of a mathematical formula. The present rule for measuring damage is as fixed as the nature of the subject matter will permit. True, counsel should be entitled to a reasonable latitude in argument and in commenting on the evidence, its nature and effect, and may make proper inferences which may reasonably arise from the evidence. However, we fail to see where a mathematical formula or a pain-on-a-per-diem or per-month basis has its basis in the evidence, or in logical inferences from the evidence. Such arguments are beyond the scope of proper argumentation.