

# Structured Judgments and Periodic Payments in Missouri: Uncertainty on the Meaning of Tort Reform

**In 1986, along with a number of states, Missouri enacted § 538.220, RSMo, which allowed defendants who have been found liable for damages in medical malpractice actions to request a post-trial hearing at which periodic payments of the award will be scheduled. Section 538.220 also allows for termination of periodic payments for life care if the claimant dies before all payments have been made. However § 538.220 offers very little guidance as to how such payments should be scheduled. This paper examines the specific provisions of § 538.220 and the five reported cases that invoke § 538.220, and considers how an economic expert can be of assistance to litigating parties under this section of Missouri law.**

## **I** INTRODUCTION

Section 538.220, RSMo, was adopted in 1986. This section allows for a structured judgment and periodic payments to satisfy medical malpractice claims. Missouri's statute is limited to medical malpractice cases and has no effect on other types of tort actions. The number of cases interpreting its meaning is limited and the whole statute can be printed on one page with five sections. The first section indicates that the statute applies only to medical malpractice. The second section, § 538.220(2), RSMo 2000, reads as follows:

At the request of any party to such action made prior to the entry of judgment, the court shall include in the judgment a requirement that future



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damages be paid in whole or in part in periodic or installment payments if the total award of damages in the

action exceeds one hundred thousand dollars. Any judgment ordering such periodic or installment payments shall specify the recipient, the amount of each payment, the interval between payments, and the number of payments. The parties shall be afforded the opportunity to agree on the manner of payment of future damages, including the rate of interest, if any, to be applied, subject to court approval. However, in the event the parties cannot agree, the unresolved issues shall be submitted to the court for resolution, either with or without a post-trial evidentiary hearing which may be called at the request of any party or the court. If a defendant makes the request for payment pursuant to

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This paper owes a great debt to Anthony R. Riccardi. Much of the material included in this paper was originally part of a paper presented by Anthony Riccardi and this author at the Western Economic Association meetings in Vancouver, British Columbia in July 2000 and then again, in substantially revised form, at the winter meetings of the National Association of Forensic Economics at Puerto Vallarta, Mexico. The original paper included both New York and Missouri. Reviewers suggested that separate papers should be written about the two states and we made the decision to do that. There is a separate, jointly-authored paper about New York's structured judgment laws. However, because he felt he had made relatively little contribution to the Missouri portions of our joint paper, Anthony Riccardi requested that this paper be solely credited to this author. However, much of what this author needed to know to write this paper came from Anthony Riccardi, who was tirelessly generous with this time and who is a true master in the area of annuity analysis. It is typical of Dr. Riccardi's generosity that he would make the request he made. Any errors are this author's responsibility, but any wisdom conveyed is a joint product.

this section, such request shall be binding only as to such defendant and shall not apply to or bind any other defendant.

The third section, § 538.220(3), RSMo 2000, indicates that “the court may require a judgment debtor who is not adequately insured to post security or purchase an annuity adequate to assure full payment of such damages awarded by the judgment.” The fourth section deals with attorney’s fees and indicates that the attorney for the claimant has the choice between being paid immediately or in periodic payments corresponding to those of the claimant. No formula for determining the present value of the judgment is provided.

The fifth section, § 538.220(5), RSMo 2000, deals with the differences between categories of harm and establishes an actuarial basis for future medical damages:

Upon the death of a judgment creditor, the right to receive payments of future damages, other than future medical damages, being paid by installments or periodic payments will pass in accordance with the Missouri probate code unless otherwise transferred or alienated prior to death. Payment of future medical damages will continue to the estate of the judgment creditor only for as long as necessary to enable the estate to satisfy medical expenses of the judgment creditor that were due and owing at the time of death, which resulted directly from the injury for which damages were awarded, and do not exceed the dollar amount of the total payments for such future medical damages outstanding at the time of death.

This section means that both economic damages and non-economic damages must be paid in full, however they are scheduled, but the obligation to make payments for life care costs terminates when the claimant dies if all periodic payments have not been made by that time.

The Missouri act provides for periodic payments following both personal injury and wrongful death medical malpractice judgments. There have been only five reported decisions under § 538.220 in the 13 years since enactment. Four of those five have involved personal injuries and only one has involved a wrongful death. In practice, however, there is a very big distinction between the two types of cases. Since life care costs are not involved with a wrongful death circumstance, being able to schedule periodic payments is, by law, not a way to reduce the present value of the damages a defendant is expected to pay. Essentially, § 538.220 provides an opportunity for the defendant to schedule payments to the survivors bringing the action over time, but court decisions make it clear that this scheduling should not reduce the total present value of the payments that must be made. It is conceivable that defendants might find some advantage through arguing for having low, legally-mandated interest rates added to future payments in the payment structure, but the important questions relating to § 538.220 arise in the context of personal injury and not wrongful death.<sup>2</sup>

In personal injuries, there can be savings to defendants if claimants die before all payments scheduled for life care have been made. Thus, it is in this area that litigating parties are likely to have their greatest conflicts. Depending on how payments for future life care have been scheduled under § 538.220, the early death of a claimant could, under some circumstances, substantially reduce the ultimate liability of the defendant. Scheduled payments for lost earnings and intangible losses would be the same as in a wrongful death case, and any conflicts between the litigating parties are likely to center on the scheduling of payments for future life care costs, not other elements of damages. The nature of the potential savings to the defendant will be illustrated

in later sections with specific examples.

There is a great deal of uncertainty among judges and attorneys in Missouri about the meaning of § 538.220 and ways the parties might seek to address that section. This means that an economic expert may be asked what it might be reasonable to do in a case when given only the limited instruction available in the statute and five cases as guidance. The purpose of this paper is to provide a partial answer to that question. In Missouri, New York and a number of states, lawmakers have instituted structured judgment laws concerning the nature of periodic payments that will be received by plaintiffs who have won awards in wrongful death and personal injury actions. Laws in the various states are quite different, but contain several important common elements.<sup>3</sup> Economic experts are being called upon to provide a new type of expertise for post-trial hearings. Structured judgment laws often result in testimony by economic experts in post-trial hearings before judges asked to rule on judgment motions made by the litigating parties. This new type of expertise and testimony has important elements in common with the type of expertise needed to assess structured settlement proposals that are sometimes offered to plaintiffs to settle cases before trial. The key difference is that structured judgments are legally mandated for verdicts in certain circumstances and the assessment rules may be spelled out by statute.

## II. THE POSSIBLE RATIONALES FOR STRUCTURED JUDGMENT AND PERIODIC PAYMENT LAWS

In the broadest sense, a structured judgment is simply a financial scheme that distributes a verdict award to a claimant and his/her attorney over a period of time. In the typical structured judgment approach, at least some of the award is distributed via immediate cash distributions, known as lump sums, with

<sup>2</sup>For example, if a defendant could persuade a judge to add 4.0 percent interest to future scheduled payments at a time when the defendant could easily invest money at a rate substantially above 4.0 percent, the defendant will gain from having continued use of funds lost through the verdict at what amounts to a 4.0 percent borrowing rate to the defendant.

<sup>3</sup>Currently, 17 states have binding statutory provisions requiring periodic payment of verdict damages for at least medical malpractice cases, and 12 other states have statutes that, in some sense, address the issue of periodic payment of damages. (See; Health Care Liability Alliance and American Tort Reform Association web sites.)

the rest of the award distributed through periodic payments. The procedures and applications are different in each state that has adopted structured judgment legislation. Missouri's statute deals only with medical malpractice cases, which is apparently typical of most states. New York goes much further than any other state, mandating periodic payments for all damage elements if the total of future damages exceeds \$250,000.<sup>4</sup> However, like all financial schemes, specific structured judgment schemes are idiosyncratic and often create problems that could not be anticipated by the legislators who developed them.

To understand these laws, one must begin with a consideration of the goals legislators may have had in mind when developing them. The emphasis on medical malpractice suggests a focus on the fact that claimants may not survive through the term specified by a tort verdict. This is of particular importance when awards include a large sum for long term life care needed by an injured party because of an injury. In cases involving catastrophic injuries, future life care costs are often a very large element of damages. If the injured person has a significantly shortened life and does not survive through the period assumed by a jury, the remainder of the funds allocated to life care becomes part of the injured person's estate and is passed on to heirs in what would amount to a windfall gain to the heirs.

As suggested earlier, the adversarial process of litigation can increase the probability of such windfall gains. A catastrophic injury can often reduce the annual survival probabilities of the injury victim. At trial, plaintiffs will try not to present testimony concerning reduced probabilities of life care needs so that juries will not reward smaller damages for life care. Defendants will not want to argue for shortened lives because doing so puts them in a bad light. In fact, doing so

amounts to the defendants claiming they owe less money to the plaintiff because the injury caused by the defendants means that the plaintiff is less likely to live as long. What may then happen is that claimants are awarded recovery amounts far in excess of the actual life care needs of the plaintiff. Thus, it appears that legislators were concerned to have defendants pay for life care only as long as it was needed.

A second related concern seems to be that a care giver of a severely injured claimant should not have access to all monies provided for life care at the same time. There seems to be general concern that claimants or care givers in charge of their funds do not do well with large sums of money and that waste or exploitation often results, with particular concern in cases of medical malpractice. If individuals waste the proceeds of tort awards for life care, the responsibility for care falls back on states to provide future life care. This provides an incentive for state legislators to have concerns that life care funds are only distributed as needed. Missouri's provisions do not require scheduling of payments, but allow defendants to request such scheduling. In this same vein, Missouri has separate laws regulating how money allocated to a care giver can be spent in cases involving children or adults incapable of handling their own affairs.

A third consideration is the tax leverage offered by the annuity contract, which is a standard feature related to the periodic payment aspect of a structured judgment. Generally, periodic payments from properly qualified annuity contracts to settle personal injury lawsuits or as a result of court orders are exempted from taxation. The tax exemption of such payments effectively provides an after tax increase in the amount that is structured into the payment process. Thus, if a judge orders periodic payments to satisfy a verdict under § 538.220, those payments do not become liable to tax until constructively received

by the claimant.

A fourth consideration appears to be that periodic payments may make it easier for defendants to arrange for an orderly transfer of funds to the claimant.

### III. REPORTED CASES UNDER § 538.220

The following are the five reported cases that interpret § 538.220. They provide only limited instruction as to the meaning of the statute.

*Adams v. The Children's Mercy Hospital*<sup>5</sup> deals with a minor child with a catastrophic injury. In this case, future medical damages are awarded in the amount of \$4,947,311, with this element consisting of 25 percent of the total amount awarded, more than half of which was based on a \$10,000,000 award for future non-economic damages. The \$10,000,000 in non-economic damages was, under Missouri law, reduced to a cap of \$430,000 per liable defendant, of whom there were apparently five. This meant that the \$10,000,000 was automatically reduced to \$2,150,000 (or perhaps less). The 1992 case focuses on challenges to the \$430,000 cap on non-economic damages, which the Supreme Court of Missouri upholds as constitutional. The 1993 case holds that the trial court's determination that testimony by an annuitist is unreliable, irrelevant and inadmissible is not reversible error and indicates that periodic payments on the award are appropriate, but offers no guidance as to how they should be structured.

*Baker v. Guzon, M.D.*<sup>6</sup> is a wrongful death case brought by the husband and children of a deceased patient. In this case, the only reason for periodic payments would have to be the secondary goal of § 538.220 of easing the financial difficulties of the defendant for making required payments. The plaintiffs are being compensated for past losses and there is no issue of a life care plan that will not be

<sup>4</sup> Riccardi, Anthony R. & Ireland, Thomas R., *Structured Judgments and Periodic Payments in New York: A Unique and Complex System for Tort Awards*. To be published in a forthcoming issue of J. LEGAL ECON. (2001).

<sup>5</sup> *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. banc 1992) and *Adams v. Children's Hosp.*, 848 S.W.2d 535 (Mo. App. W.D. 1993).

<sup>6</sup> *Baker v. Guzon*, 950 S.W.2d 635 (Mo. App. E.D. 1997).

needed at some point in the future.

*Vincent v. Johnson*<sup>7</sup> is a case involving a minor, but future medical costs represent only \$250,000 out of a \$2,000,000 judgment. From that standpoint, only one-eighth of the total award would be subject to any concern about the injured minor dying before the projected life care needs had been required, leading to a windfall by the parents of the child. If the minor had died the next day, the remaining \$1,750,000 of the judgment would still be owed. And even if periodic payments were utilized to facilitate payments by defendants, there would be no argument for reducing the present value of the award by more than \$250,000. The specific issue of possible windfalls to the parents does not even come up in the court's ruling, even though the court is concerned about how the interests of the minor with respect to the \$1,000,000 awarded for the child's lost earnings would be protected from possible misuse by the parents.

*Roesch v. Ryan*<sup>8</sup> deals with a medical malpractice suit brought by a patient and the patient's husband. It does not involve a minor, but does focus very specifically on an interest rate of 4.32 percent over the period of periodic payments, which are required to be paid over a five-year period rather than the patient's 35-year life expectancy. This case is like *Vincent* (discussed above) in that future medical damages consist of only \$80,000 out of a total judgment of \$600,000. The court draws a sharp distinction between this case and both *Vincent* and *Adams*, saying:

This case is . . . very different from both *Vincent* and *Adams*, where the child plaintiffs were expected to require intensive medical care for the

rest of their lives as a result of medical malpractice. Maureen Roesch is not an infant or small child such as the plaintiffs in *Vincent* and *Adams*, for whom assets must be conserved, so that future needs will be met and who requires court protection against squandering of assets.<sup>9</sup>

Thus, the court was not willing to stretch out the award over time, but required payment over five years, with the unpaid balance being increased at 4.32 percent per year over that period.

*Wyatt v. United States*<sup>10</sup> is a case involving future medical and life care expenses for an adult whose injuries may well have a life-shortening impact. This case makes the point that "the payment of attorney's fees must be taken into account in fixing the . . . lump sum payable at the time the judgment becomes final, which may include a significant portion of future damages in addition to past damages." The court is not specific as to how the periodic payments are to be made, but suggests they would be appropriate. The court specifically mentions avoidance of windfall to the heirs of the injured party, but also says, "The Court is also inclined to the view that the periodic payments should not stretch over the entire life expectancy of the plaintiff."<sup>12</sup>

*Analysis of Reported Cases:* There seems to be logical consistency among these cases. Section 538.220 allows periodic payments in all cases, but the nature of the periodic payments must be such that the present value of the award must not be reduced, with a key exception for future medical care made necessary because of the injury. In that instance, periodic payments specifically for future

medical treatments (presumably including all life care costs) may be reduced if a child (and presumably a dependent adult) dies before the medical treatments are needed. This special treatment of future medical care is specifically to avoid a windfall to the parents or guardian of the child (or dependent adult) in the form of unused payments for future medical care. Further, in calculating the amount of periodic payments relating to specific instances of future medical care, attorney fees and settlements involving other defendants must be taken into account.

#### IV. AN ILLUSTRATION OF THE POTENTIAL CONFLICT UNDER § 538.220

Assume the following circumstances: A 12-year-old boy has been seriously damaged by a health condition for which the jury has found a doctor and a hospital liable. After hearing trial testimony, the jury has awarded \$500,000 for the boy's lost future earning capacity, \$500,000 for the boy's past and future pain and suffering, and \$4.0 million for future life care costs over the boy's lifetime. Assume further that only the plaintiff presented expert testimony, that the jury used the life care planning expert's projection of \$100,000 per year in life care costs for a 40-year "life expectancy,"<sup>13</sup> and that the plaintiff's economic expert presented "total offset" testimony for the life care plan such that the future value was the same as present value at \$100,000 for each year.<sup>14</sup> (Note, however, that there is no requirement that the payments have to be equal in each year, subject to approval of the judge. The payments could be scheduled to increase by a certain percentage each year as long

<sup>7</sup> *Vincent v. Johnson*, 833 S.W.2d 859 (Mo. banc 1992).

<sup>8</sup> *Roesch v. Ryan*, 841 F. Supp. 288 (E.D. Mo. 1993).

<sup>9</sup> *Id.*

<sup>10</sup> *Wyatt v. United States*, 939 F. Supp. 1402 (E.D. Mo. 1996).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Forensic economists and lawyers often use the term "life expectancy" in a casual manner. Courts will typically provide instructions to jurors requiring that the claimant's pre-injury life expectancy be considered in the period over which injury-related encumbrances, such as life care, are to be paid. However, a "life expectancy" is a single, point-in-time estimate of the number of years to an individual's age of death, subject to an underlying distribution of annual probabilities of survival, which may be substantially altered after a personal injury. As such, this paper will avoid use of the term "life expectancy," referring instead to "reduced annual probabilities of survival."

<sup>14</sup> The author does not suggest that "total offset" is reasonable for ordinary life care costs, but total offset in this case simplifies the points being made. By implication in this example, 4.5 percent compound interest is being paid until a periodic payment is made, but the future value is being reduced to present value at the same 4.5 percent interest. This means that if life care costs increase at 4.5 percent a year or less, the amounts being paid will be sufficient to cover cost increases.

as the present value of the total stream remains equal to the jury verdict.) Assume further that the defendant has invoked § 538.220 and requested a post-trial hearing to schedule future payments. At this stage, the defendant produces an economic expert who argues for scheduling payments at \$100,000 per year over 40 years, with the addition of 4.5 percent compound interest for future payments. The plaintiff does not retain an economic expert, but argues for scheduling five years of periodic payments of \$800,000 per year and is willing to accept the defendant's 4.5 percent rate of compound interest on future payments.

Assume further that the defendant's medical expert has predicted in deposition testimony that the boy has a distribution of mortality probabilities consistent with a likelihood that the boy will live another eight years. Both the plaintiff attorney and the defense attorney believe this medical expert is probably correct, but the defendant resisted presenting that testimony at trial to avoid arousing the jury, given the nature of the malpractice being alleged. Under these circumstances, defense attorney wants to schedule out the periodic payments as far in the future as is possible, viewing 40 years as the maximum period the judge might consider, while the plaintiff attorney wants to schedule the periodic payments over as short a period as possible, viewing five years as the shortest period the judge might consider. If the plaintiff attorney wins on the five years, the 4.5 percent interest will be very significant, even though the plaintiff attorney could have argued for as much as 6.0 percent. In this situation, if the plaintiff has a complete victory and the defendant's medical expert is correct, the entire award of \$4.0 million will have been paid out by the time the boy dies. If the defendant has a complete victory and payments are scheduled over 40 years, the defendant will only have had to pay \$800,000 (plus 4.5 percent interest) of the \$4.0 million award by the time of the boy's death. If the judge took an intermediate position—equal payments for 20 years of \$200,000 per year – \$1.6 million (plus 4.5 percent interest) would have been paid out in the

eight years of the boy's life, still saving the defendant \$2.4 million of the amount awarded by the jury for life care. If the judge decided on 10 years at \$400,000 per year, \$3.2 million of the \$4.0 million would have been paid out by the boy's death.

There are good reasons why the litigating parties will take the post-trial hearing quite seriously under these circumstances.

## V. THE ATTORNEY FEE ISSUE INHERENT IN § 538.220

In a § 538.220 case involving life care costs or any other periodic payment law that allows for a termination of payments upon the death of a beneficiary, there is an inherent problem of how to handle attorney fees. The typical arrangement between a claimant and an attorney is a contingency fee in the form of a percentage of the amount recovered by the claimant. The percentage in the arrangement varies, but 30 percent is a common arrangement. In a § 538.220 case, the question becomes, "30 percent of what?" Is it 30 percent of the amount awarded by the jury in the verdict or 30 percent of the value of the amount the plaintiff is actually likely to receive? Given the range of possibilities that might be accepted by the trial court judge, there can be an enormous difference. If the attorney fee is based on the verdict, which included \$1.0 million for lost earnings and intangibles, which are paid with certainty, and \$4.0 million that may be paid in a life contingent manner, the attorney fee would be \$1.5 million. However, if it is based on the actual benefit received by the claimant, the 30 percent could be assessed a wide range of possible values, depending on the decision of the judge about periodic payments. If the judge accepted the 40-year payout period, the attorney fee would be based on the \$1.0 million for lost earnings and intangibles plus \$800,000 actually paid for life care. If the judge accepted the plaintiff's request for a five-year payout, the attorney fee would be based on the full amount of the jury verdict. This is a range from \$540,000 with the 40-year payout to \$1.5 million with the five-year payout.

This can have a very serious impact on

the fairness of the arrangement. As noted in the discussion of reported cases, the courts seem to prefer that attorney fees be paid immediately and to apparently be based on the amounts in the jury verdict rather than the amount the claimant ultimately receives. Going back to the sample case, suppose that the judge chooses the compromise of a 20-year payout program, but orders attorney fees of 30 percent to be paid immediately, with all subsequent payments to the claimant reduced by 30 percent. On the surface, this might seem to be fair, but it will be useful to examine what happens if the boy lives the predicted eight years. The attorney fee will be based on the verdict amount of \$1.5 million. The claimant will receive 70 percent of the \$1.0 million paid for lost earnings and intangibles, or \$700,000. The claimant will also receive 70 percent of the \$1.6 million paid out over the eight years of the boy's life, or \$1.12 million (plus 4.5 percent interest on the payments for each year into the future). This means that the amount actually realized by the claimant will be \$1.82 million, compared with the \$1.5 million received by the attorney, for a total value of \$3.32 million. The attorney's \$1.5 million is thus 45.18 percent of the value actually achieved in the case.

If the judge were to accept the defense argument in the example and schedule the payments over 40 years, the attorney would still receive \$1.5 million if the basis was the jury's verdict. The claimant (or the claimant's estate) would still receive \$700,000 from the \$1 million for lost earnings and intangibles, but now only \$800,000 would have been paid out for life care by the time the boy died. That amount would have been reduced by 30 percent for the attorney's fees, to \$560,000, and the total received by the claimant would be \$1.26 million. This is a total benefit of \$2.76 million, of which the attorney will have received 54.35 percent.

This creates an inherent potential conflict of interest between the claimant and the claimant's attorney. The claimant (or his guardians) might wish to agree to a lower payment than the jury verdict in order not to have the payment structured

as periodic payments under § 538.220. Suppose, for example, that both sides think the judge is likely to accept the 20-year payment schedule as a compromise. The benefit to the claimant, net of attorney's fees and as calculated above, is \$1.82 million. That value could be achieved in a lump sum settlement of \$2.6 million, 70 percent of which is \$1.82 million. Assume that the defendant offers to settle for a lump sum of \$3.0 million, which is less than the \$3.32 million the defendant expects to pay if the judge rules as expected. This would increase the realized proceeds to the claimant from \$1.82 million to \$2.1 million (ignoring possible interest differentials). However, it has the effect of reducing the claimant's attorney fees from \$1.5 million to \$900,000. One may assume that the claimant's attorney might not favor this result.

This attorney fee problem is inherent in any structured judgment arrangement in which part of the award becomes life contingent and attorney fees are based on anything other than the true expected payout of benefits to the claimant.

## VI. POSSIBLE ROLES OF A FORENSIC ECONOMIST

The lack of specificity in the reported cases that interpret § 538.220 means that an economic expert is likely to be asked what might be "reasonable" given only the limited instruction available in the statute and five cases as guidance. The examples that will be presented here are based on actual experiences of the author, but in redacted form. These examples should not be viewed as the "correct" way to proceed.

*Case A.* This case involves the wrongful death of a woman in her early 50s. She was the primary wage earner in her family. Her older husband was the primary claimant, though adult children were also parties to the case. Both litigants relied upon the earnings loss and fringe benefit projections

of the defendant's economic expert, and the jury had accepted those projections as being accurate.<sup>15</sup> The award amounts were as follows:

Past economic damages — \$ 78,239  
Past non-economic damages— \$ 0  
Future economic damages— \$266,855  
Future non-economic damages  
— \$254,906  
Total damages — \$600,000

The economic expert's report showed annual figures for wage loss from the date of death, reduced to present value for the future, with 15 percent added at the end of worklife expectancy for fringe benefits. The jury used the figure at the end of 1999 from the economist's table to project annual wage loss values of \$78,239 as the figure for past economic damages, meaning that fringe benefits for the past were assigned to future economic damages. Since there were no life contingent elements in this award, the only issue was scheduling periodic payments for the convenience of the defendant. (In New York, the non-economic damages would have been paid in the form of a life contingent annuity, based on the life of the survivor claimant.)

The advantage to the defendant for scheduling payments had to do with the risk-free discount rate used by the economist to project future earnings loss. The economist had projected the present value of the losses at a gross discount rate based on municipal AAA bonds at about 5.7 percent. The ultimate payer of damages was an insurance company that could earn substantially more than 5.7 percent per year. The role of the economist was to make the following adjustments: (1) Subtract out the attorney's contingency fee, which must be paid immediately; (2) adjust the future payment stream so that the amounts paid out over the projected worklife of the decedent included the amount awarded by the jury for past fringe benefits; and (3) apply the same

methodology used for future economic damages to future non-economic damages over a fixed period equaling the life expectancy (not survival distribution) of the surviving spouse. Effectively, this was creating a payment stream similar to a stream that might have been used in a structured settlement before the trial.

The case settled just before the post-trial hearing for an amount that was less than the amount of the jury verdict, but with all payments to both attorney and claimant made in lump sums.

*Case B.* The second case involved a catastrophically injured child, who was not expected to live long. The litigants did not expect the child to live for more than five years, but the jury apparently believed the plaintiff's economic expert whose life care figure was based on a 15-year life care cost period. In fact, the child lived less than one year, but was still alive at the time of the jury's decision and the post-trial hearing. The jury's verdict was as follows:

Past economic losses, including past medical damages — \$442,455  
Past non-economic damages  
— \$20,000  
Future medical damages — \$4,000,000  
Future non-economic damages  
— \$750,000  
Total Damages — \$5,212,455

This case was further complicated by the fact that one of the defendants had settled out of the case prior to trial. The jury assessed responsibility as 43 percent for the remaining defendant and 57 percent for the settling defendant, so that the remaining defendant who requested the application of § 538.220 was responsible for 43 percent of each damage category. Thus, each category needed to be reduced by 57 percent to account for the division of responsibility. The 43 percent residuals then needed to be reduced for the attorney's contingency fee and the residual divided into periodic payments appropriate to the

<sup>15</sup> The plaintiff originally had an economic expert who used total offset calculations, which the plaintiff later decided not to use. At trial, both litigants agreed to accept the calculations of the defense expert, whose calculations were presented from deposition testimony. Neither party had presented testimony about loss of household services, which were thus not an issue in the case.

circumstances. The judge ruled after the post-trial hearing that the liability of the remaining defendant was as follows:

Past economic losses, including past medical damages — \$190,256

Past non-economic damages — \$8,600

Future medical damages — \$1,720,000

Future non-economic damages

— \$ 322,500

Total Damages — \$2,241,356

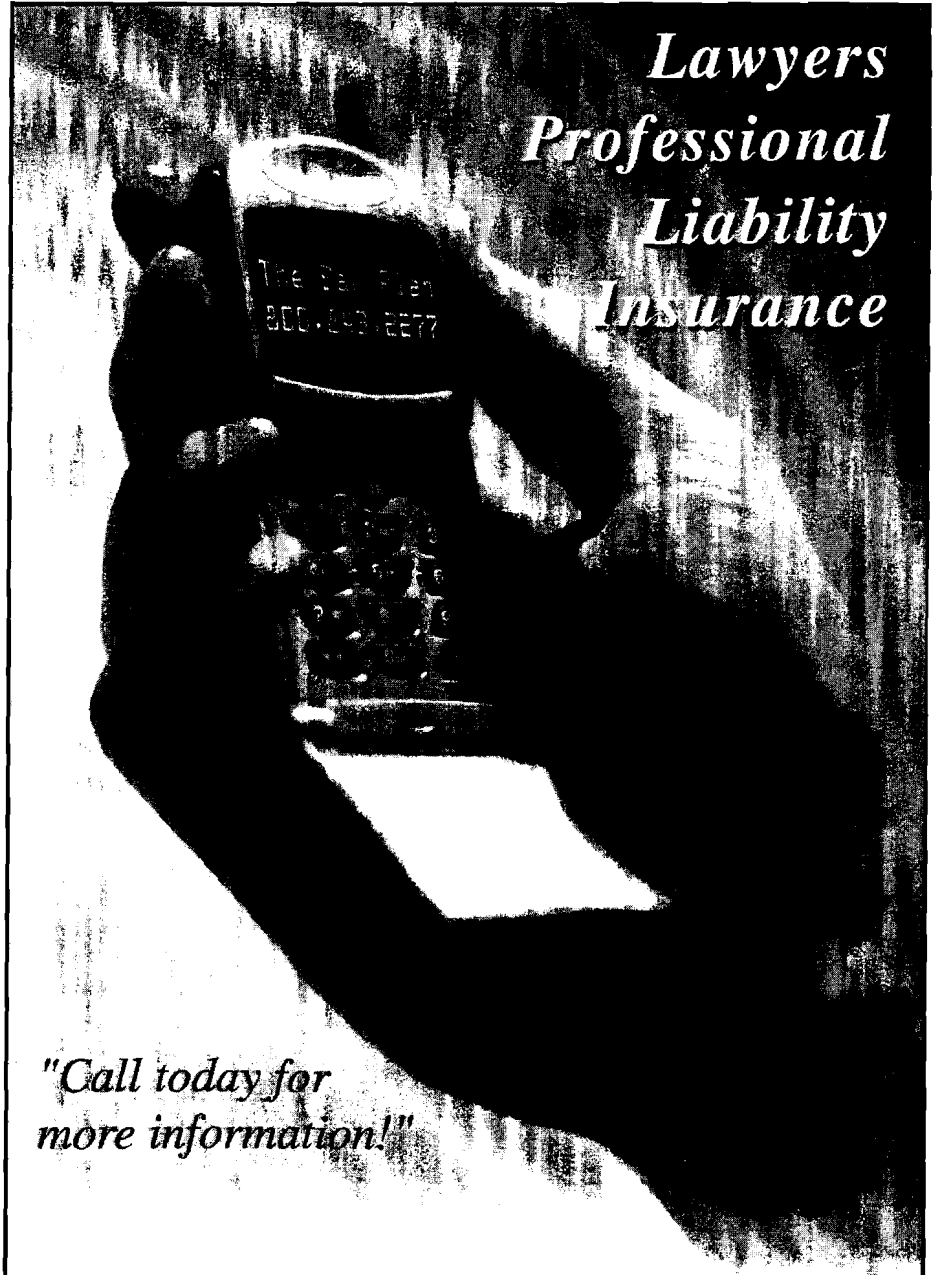
At the post trial hearing, the plaintiff asked for immediate payment of all damages. The defendant presented economic expert testimony that scheduled annually increasing payments over a 20-year period, based on 43 percent of the amounts needed for life care, as projected by the plaintiff's economic expert, starting from \$103,028 in the first year and increasing by the nineteenth year to \$263,225. The judicial order scheduled an immediate payment of \$1,015,856 and annual payments for 10 years of \$102,664, with 5.5 percent interest on that amount for each year added to the amount to be paid in that year. The judicial order did not contain a specific assignment of attorney fees.<sup>16</sup> In effect, the judge took a middle-of-the-road position, using a 10-year payout period instead of zero or 20 years, and having almost half of the amount owed paid immediately, with the other half scheduled over the a 10-year period.

## VII. CONCLUSION

The Health Care Liability Alliance (HCLA) reports that 17 states have binding statutory provisions requiring periodic payment of verdict damages for at least medical malpractice cases, and 12 other states have statutes that, in some sense, address the issue of periodic payment of damages. (This information is available at the HCLA web site, [www.hcla.org](http://www.hcla.org).) If that information is correct, some form of structure judgments and/or periodic payments are relevant in 29 of the 50 states. The current author was the co-author of a paper that addressed the system in the state of New York (Riccardi and Ireland, 2001) and the co-authors of that paper plan to do future research on some of the other states that have legislation in this area. Missouri and New York, the states that have been covered,

are substantially different, but there are common elements. Perhaps the most important element is the significance of the post-trial hearing. Hopefully, this paper has added understanding to the role that a forensic economist can play in that hearing.

<sup>16</sup> One interesting aspect of this case was that the plaintiff argument in favor of a very short payout period was that attorney fees subtracted from the amount actually needed to pay for life care. Therefore, the plaintiff attorney argued, the claimant needed more than the amounts that would be scheduled under the verdict to meet actual costs and that the payment scheme should take that fact into account.



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