

**PRESENTED AT**  
2022 Car Crash Seminar

August 25-26, 2022  
Austin, TX

## **Basics of Future Damages in Texas**

**John D. Plumlee**

## Basics of Future Damages in Texas

### Introduction

Most personal injury claims have some future damages component. Thus, it is critical to be aware of how to evaluate these damages and present evidence of future damages to a jury.

This paper will go over the history of future damages; the classic arguments for and against future damages; and lastly will provide strategies for handling future damages claims. The following is intended for attorneys that are new to personal injury litigation, but hopefully, this paper contains useful information for attorneys of all experience levels.

There are three main takeaways from this paper: 1. the burden of proof required in Texas is that there must be a reasonable probability that the plaintiff will incur future damages; 2. Courts mostly leave future damages up to the jury precisely because they are difficult to determine; and 3. Texas affords great leeway in the types of evidence that can be used to present future damages claims.

### A. History of Future Damages

The subject of future damages is an area of law that was mostly settled during the latter half of the 1800s. The concept of future damages was developed in common law and this short summation of early decisions is a helpful review in that it shows how the law surrounding future damages claims developed into what it is today.

#### i. Common Law / Federal Law

##### *Curtis v. Rochester & Syracuse R.R. Co.*, 18 N.Y. 534 (N.Y. 1859)

*Curtis v. Rochester & Syracuse R.R. Co.*, 18 N.Y. 534 (N.Y. 1859) is one the first frequently cited cases discussing the topic of future damages and the case that created the burden of proof required that is still used in many jurisdictions today.

*Curtis* concerned a passenger that was injured when a train ran off the track. *Id.* at 545. It should be noted that railroad and passenger ship accidents are a common theme in these early cases and that cases concerning automobile collisions began to overshadow these common carrier cases in the 1950s.

In *Curtis*, the railroad company defendant appealed a lower court decision in part because the jury charge included an instruction allowing the jury to award damages for "the bodily pain and suffering which the plaintiff suffered or was likely to suffer, in consequence of the neglect of the defendants." *Id.* at 542. By objecting to this, there were two issues for the *Curtis* court to clarify: 1. Can a Plaintiff seek future damages for pain and suffering; and 2: what is the burden of proof for future damages?

Regarding the first issue Judge Selden wrote:

There is no doubt that bodily pain and suffering is a proper item of damages in such cases. Nor is the estimate necessarily limited to suffering, which is past, where the proof renders it reasonably certain that future pain and suffering is inevitable. In estimating the pecuniary loss in such cases, all the consequences of the injury, future as well as past, are to be taken into

consideration; and there seems to be no reason why a different rule should prevail in respect to bodily pain and suffering.”

*Id.* (Internal Citations Omitted).

Though J. Seldon agreed with the concept of future pain and suffering damages, he found the original instruction erroneous because it allowed for merely probable future damages. *Id.* However, J. Seldon found that the trial judge corrected the charge issue by instructing the jury “that future damages could only be awarded when it is rendered reasonably certain, from the evidence, that such damages will inevitably and necessarily result from the original injury.” *Id.*

J. Seldon’s opinion in *Curtis* put forward the *Reasonably Certain* standard that is still in use in Federal Court and in many other states. Under this view, the jury can only award future damages if it was reasonable to assume that the future damages are inevitable.

***R. R. Co. v. Barron, 72 US 90 (1866)***

An early Supreme Court case that references the concept of future damages is *R. R. Co. v. Barron, 72 US 90 (1866)*, a wrongful death claim.

In *Barron*, a father brought forward a wrongful death claim after his son was killed while trying to flee a train due to an impending collision. *Id.* at 91. A key fact in this case was that the deceased was a former judge about to go back into the practice of law, thus the father could not prove future lost income. *Id.* The plaintiff filed suit under a wrongful death statute that allowed for the filing of a claim as if the claimant was a representative of the estate (the statute allowed for a verdict not to exceed \$5,000, about \$91,000 today). *Id.* at 104-105.

The Defendant argued that the Plaintiff should not have won because Plaintiff had the burden of proving that he had a financial interest in his son’s life and the plaintiff did not do so. *Id.* at 105. The Supreme Court determined that the wrongful death statute was valid and acted to place the Plaintiff in the same status as a representative of the estate; thus, the burden of proof was much lower. *See id.* at 105-106.

This case demonstrates the challenges of proving future losses under the *Reasonably Certain* standard. The deceased was a bachelor in the middle of switching careers and so the plaintiff would have a difficult time proving that his son’s law practice would be successful. *Id.* at 92. In addition, the Plaintiff was the father of the deceased, so it would have difficult for him to prove with reasonable certainty that he would have benefited from his son’s estate. However, by stepping into the shoes of the son as a representative of the estate, the Plaintiff had a very simple case.

Additionally, this case shows that courts do not want to disturb the judgment of the jury with respect to verdicts. *Id.* at 105. Determining damages is challenging and the Courts do not want to step into the jury’s shoes if they do not have to.

***The “City of Panama,” 101 U.S. 453 (1879).***

*The “City of Panama,” 101 U.S. 453 (1879)* concerns a passenger that was injured on a vessel. Much of this case delves into a convoluted area of admiralty law that does not concern this paper, but what is noteworthy for purposes of this paper is that the plaintiff was awarded damages, in part, due to an injury that left her disabled for life (i.e. future damages). *Id.* at 463.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: Basics of Future Damages in Texas

First appeared as part of the conference materials for the  
2022 The Car Crash Seminar session  
"Proving Up Future Damages"