

PERIODIC PAYMENT OF FUTURE DAMAGES IN MEDICAL MALPRACTICE CASES

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In 2003, in House Bill 4, the Texas Legislature enacted Subchapter K of Chapter 74 of the Texas Civil Practice and Remedies Code.¹ This statute inaugurated a new regime that health care providers can invoke to pay out portions of their liability for future damages in periodic future payments.² This was an abrogation of over 100 years of common law requiring that tort damages be determined based upon “what sum[, if] paid now in cash would [fairly and reasonably] compensate” the plaintiff for damages “that in reasonable probability will be sustained in the future.”³ As will be seen, it also impacts over 170 years of Texas law and Rule 156 of the Texas Rules of Civil Procedure, which requires that even “[w]hen a party in a jury case dies

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1. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 864 (codified at TEX. CIV. PRAC. & REM. CODE § 74.501).

2. *Id.*

3. *Russel Stover Candies, Inc. v. Elmore*, 58 S.W.3d 154, 156 (Tex. App.—Amarillo 2001, pet. denied); *S. Traction Co. v. Dillon*, 199 S.W. 698, 699 (Tex. Civ. App.—Dallas 1917, writ ref’d); *Galveston, H. & S. A. Ry. v. Harris*, 172 S.W. 1129, 1134 (Tex. Civ. App.—San Antonio 1915, writ ref’d); *St. Louis Sw. Co. of Tex. v. Garber*, 108 S.W. 742, 745 (Tex. Civ. App.—Dallas 1908, no writ) (holding that “[i]t is sufficient that the evidence shows that there is a reasonable probability of” future damages).

between verdict and judgment . . . judgment shall be rendered and entered as if all parties were living.”⁴ Hence, the statute is likely to be strictly construed.⁵ To date, there are only four Texas cases published in the *South Western Reporter* of precedential value construing the statute at all.⁶ Most of these cases deal primarily with tangential issues under the statute not necessary to the decision in the particular case.⁷

I. BASIC OPERATION OF SUBCHAPTER K

The relevant portions of the statute provide that in a health care liability claim involving an award of future damages exceeding a present value of \$100,000:

- (a) At the request of a defendant physician or health care provider or claimant, the court shall order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by lump-sum payment.
- (b) At the request of a defendant physician or health care provider or claimant, the court may order that future damages other than

4. TEX. R. CIV. P. 156; see *Gunn v. McCoy*, 554 S.W.3d 645, 678 (Tex. 2018) (citing the Texas Rules of Appellate Procedure to the effect that, “[i]f a party to a civil case dies after the trial court renders judgment but before the case has been finally disposed of on appeal, the appeal may be perfected, and the appellate court will proceed to adjudicate the appeal as if all parties were alive. The appellate court’s judgment will have the same force and effect as if rendered when all parties were living,” but acknowledging that “the outcome may well be different had the trial court awarded McCoy periodic payments of future medical expenses” if the defendant requested them); *St. Joseph Reg’l Health Ctr. v. Hopkins*, 393 S.W.3d 885, 885–86 (Tex. App.—Waco 2012, pet. denied).

5. See *Gunn*, 554 S.W.3d at 679.

6. See *id.*; *Hopkins*, 393 S.W.3d at 886; *Chesser v. LifeCare Mgmt. Servs., L.L.C.*, 356 S.W.3d 613, 643–45 (Tex. App.—Fort Worth 2011, pet. denied); *Christus Health v. Dorriety*, 345 S.W.3d 104, 116–17 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

7. *Gunn v. McCoy* is the most recent case, and is a Texas Supreme Court case, that affirms the 170-year rule about the death of plaintiffs and discusses the statutory scheme as indicated in this Article *infra*, although the defendant did not invoke the statute in that case. *Gunn*, 554 S.W.3d at 679. Like *Gunn*, *St. Joseph Regional Health Center v. Hopkins* affirmed that a judgment for future damages survives a plaintiff’s death, and while the periodic payments statute might abrogate that rule where periodic payments are ordered, the defendant-hospital withdrew its request for such payments to be ordered. *Hopkins*, 393 S.W.3d at 885–86. *Chesser v. Lifecare Management Services, L.L.C.* held that the defendant in that case waived any right to complain of the annuity approved by the trial court to fund periodic payments. *Chesser*, 356 S.W.3d at 645. *Christus Health v. Dorriety* is a published, full opinion interpreting the statute. *Dorriety*, 345 S.W.3d at 117. *Christus Health Gulf Coast v. Houston* is a memorandum opinion and thus not officially published. See generally *Christus Health Gulf Coast v. Houston*, No. 01-14-00399-CV, 2015 WL 9304373 (Tex. App.—Houston [1st Dist.] Dec. 22, 2015, no pet.). *Prabhakar v. Fitzgerald* is a case where the Dallas Court of Appeals issued an opinion in 2012, which was mooted by settlement of the case on appeal and subsequent action by the court vacating its own judgment and that of the district court, remanding the case to the trial court “with instructions to dismiss the case with prejudice, and dismiss the appeal.” See *Prabhakar v. Fitzgerald*, No. 05-10-00126-CV, 2016 Tex. App. LEXIS 11566, at *1–2 (Tex. App.—Dallas Oct. 25, 2016, no pet.).

medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump sum payment.

- (c) The court shall make a specific finding of the dollar amount of periodic payments that will compensate the claimant for the future damages.
- (d) The court shall specify in its judgment ordering the payment of future damages by periodic payments the:
 - (1) recipient of the payments;
 - (2) dollar amount of the payments;
 - (3) interval between payments; and
 - (4) number of payments or the period of time over which payments must be made.⁸

“Periodic payment” is defined as “the payment of money or its equivalent to the recipient of future damages at defined intervals.”⁹ Should the plaintiff die while payments are still to be made under the judgment, the right of her estate to receive further periodic payments for future damage other than loss of “future earnings” evaporates, while payments for “loss of earnings” continue into her estate as per the judgment.¹⁰ This is how the statutory scheme conflicts with 170 years of Texas common law and Rule 156. Also, when the defendant’s obligation to make payments expires under the judgment, whether by payment in full or by the death of the plaintiff, any security given reverts to the defendant.¹¹

Two of the operative words in the statute are “shall” and “may,” in that if all legal requirements are met, the court “shall” order payment of future medical, health care, or custodial services “paid in whole or in part in periodic payments rather than by a lump-sum payment,” but the court only “may” do so with respect to other elements of future damages.¹² It is important to note however that, even with respect to the mandatory award of future medical, health, and custodial costs in periodic payments, the court is only required to do so “in whole or in part.”¹³ Thus, while some portion of such costs must be awarded periodically, how much and under what circumstances are left to the sound discretion of the trial court.¹⁴

8. TEX. CIV. PRAC. & REM. CODE ANN. § 74.503 (West 2017).

9. *Id.* § 74.501.

10. *Id.* § 74.506(a)–(b).

11. *Id.* §§ 74.505(c), .506(d).

12. *Id.* §§ 74.503(a)–(b), .506(b).

13. *Id.* § 74.503(a).

14. *Christus Health Gulf Coast v. Houston*, No. 01-14-00399-CV, 2015 WL 9304373, at *9 (Tex. App.—Houston [1st Dist.] Dec. 22, 2015, no pet.) (holding that while “the court does not have discretion as to whether it must order periodic payments for *at least a portion* of the damages for medical care,” the portion to be ordered periodically is discretionary with the trial court and reviewed only upon an abuse of that discretion) (alteration in original omitted) (citing CIV. PRAC. & REM. § 74.503).

As an example of the discretionary type of damages other than medical, health care, or custodial services that “may” take the form of periodic payments, the Fourteenth Court of Appeals has held that “pecuniary” losses, including loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of an actual economic value, sustained by a plaintiff are not compensation for “medical, health care, or custodial services.”¹⁵ Thus, the damages are not subject to the mandatory provision of the statute, but they “may” be awarded in the form of periodic payments.¹⁶ Indeed, one court has held that unlike medical, health care, and custodial expenses, a trial court’s decision whether to make these other types of payments to compensate for future damages periodic, rather than lump-sum, is “completely discretionary.”¹⁷

II. PROCEDURAL PREREQUISITES TO PERIODIC PAYMENTS

The court may not award periodic payments of future damages unless certain statutory prerequisites are met.¹⁸ The first of these prerequisites is that “the court shall require a defendant who is not adequately insured to provide evidence of financial responsibility in an amount adequate to assure full payment of damages awarded by the judgment.”¹⁹ There is only one case construing this requirement, and it is of little or no precedential value.²⁰ In an opinion where the case was settled on appeal and the court vacated the appeal and its prior disposition on the merits, the Dallas Court of Appeals concluded that “to ‘provide evidence of’ financial responsibility” did not necessarily mean the defendant needed to “‘demonstrate,’ ‘establish,’ or ‘prove’ financial responsibility,” but rather that the plaintiff must have “supplied or furnished[] evidence of financial responsibility.”²¹

In that case, *Prabhakar v. Fritzgerald*, the trial court held a hearing at the defendant’s request at which the doctor’s wife–manager testified that, in addition to a liability insurance policy providing for \$200,000, the doctor had a savings account of over \$600,000, a line of credit for \$2.5 million whose entire amount was available to pay the judgment, and another account of over \$2.5 million that “would be available to satisfy the judgment.”²² She further

15. *Christus Health v. Dorriety*, 345 S.W.3d 104, 117 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (denying that pecuniary loss is custodial in nature).

16. *Id.*

17. *Christus Health Gulf Coast*, 2015 WL 9304373, at *10 (holding that a trial court’s decision whether to make these other types of payments to compensate for future damages periodic rather than lump-sum is “completely discretionary”).

18. *See* CIV. PRAC. & REM. § 74.505.

19. *Id.* § 74.505(a).

20. *See Prabhakar v. Fritzgerald*, No. 05-10-00126-CV, 2012 Tex. App. LEXIS 7154, at *19 (Tex. App.—Dallas Aug. 24, 2012, no pet.), *vacated*, 2016 Tex. App. LEXIS 11566 (Tex. App.—Dallas Oct. 25, 2016, no pet.).

21. *Id.* at *21–23.

22. *Id.* at *24.

testified that, as a result of his financial condition, if the trial court ordered the doctor “to put \$5 million into the registry of the court for purposes of periodic payments that he would be able to do so.”²³ This testimony was un rebutted.²⁴

The court of appeals held that the appropriate standard of review in such cases is under the abuse of discretion standard, and because of the unrefuted evidence of financial ability, the trial court should have ordered that *some portion* of the future medical expense award be paid in future periodic payments.²⁵ The court rejected the plaintiff’s claim that the doctor had failed to show “that this money will be available 30 days from now, 60 days from now, a year from now, two years from now,” and held that “speculation that the funds might not be available in the future is not evidence and does not refute the testimony that the funds were available and will be used to pay the judgment.”²⁶ This reasoning, even if it were of any precedential value, is certainly flawed when viewed within the context of the entire statutory scheme.²⁷

First, it misconceives the “judgment” that the defendant must prove its ability to pay.²⁸ Section 74.505(a) states that “[a]s a condition to authorizing periodic payments of future damages, the court *shall* require a defendant who is not adequately insured to provide evidence of financial responsibility in an amount adequate to assure *full payment of damages awarded by the judgment.*”²⁹ There is only one judgment: *the judgment.*³⁰ Section 74.503(d) contemplates that the court will “specify *in its judgment* ordering the payment of future damages by periodic payments the . . . ; (2) dollar amount of the payments; (3) interval between payments; and (4) number of payments or the period of time over which payments must be made.”³¹

Thus, the “judgment” under Subchapter K of Chapter 74 is a judgment that contains an order of periodic payments specifying the interval, frequency, and amount of the future payments.³² Moreover, under § 74.505(b), “[*t*]he judgment *must* provide for payments to be funded by: (1) an annuity contract . . . (2) an obligation of the United States; (3) applicable and collectible liability insurance . . . ; or (4) any other satisfactory form of funding approved by the court.”³³ This year, the Texas

23. *Id.*

24. *See id.*

25. *See id.* at *20.

26. *Id.* at *28–29.

27. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.505 (West 2017); *Prabhakar*, 2012 Tex. App. LEXIS 7154, at *28–29.

28. *See Prabhakar*, 2012 Tex. App. LEXIS 7154, at *27–29.

29. CIV. PRAC. & REM. § 74.505(a) (emphasis added).

30. *See id.*

31. *Id.* § 74.503(d) (emphasis added).

32. *See id.* § 74.505.

33. *Id.* § 74.505(b) (emphasis added).

Supreme Court agreed with this understanding of the word “judgment” as used in the statute.³⁴ In *Gunn v. McCoy*, the Court explained that “[w]hen periodic payments are ordered, the court must make specific findings as to the amount of periodic payments, and *the court’s judgment* must specify the amount, the timing of payments, and the number of payments or time period over which payments are to be made.”³⁵

Taking these provisions together, they mean that each defendant desiring that future damages be awarded in a judgment by periodic future payments must:

- (1) Make an appropriate and timely request for such a judgment and the findings that would support it;³⁶
- (2) Support the details of that request by a preponderance of evidence (including as to the interval, duration, and amount of such payments);³⁷
- (3) Demonstrate by a preponderance of evidence that the payments will be funded by some form of annuity, whether government issued or otherwise;³⁸ and
- (4) If their liability insurance policy is insufficient to fund all payments contemplated, demonstrate by a preponderance of evidence that they have sufficient financial responsibility to fund the annuity and guarantee all future payments under the judgment.³⁹

A. Due Process Requirements

What is an appropriate and timely request? Rule 94 of the Texas Rules of Civil Procedure requires a defendant to affirmatively plead any “matter constituting an avoidance or affirmative defense.”⁴⁰ Because over 100 years of Texas common law requires the submission of future damages on the basis of reasonable probability and in a sum certain “if paid now in cash,” the defendant is required to plead and notify the court and the plaintiff that it will seek to avoid the usual lump-sum award and have future damages paid in periodic installments.⁴¹ To meet federal due process requirements, the plaintiff must be given reasonable notice and an opportunity to be heard to rebut any such claim or defense by the defendant with appropriate controverting evidence.⁴² And the Texas Constitution has its own, even more restrictive due course of law clause requiring that “[n]o citizen of this State

34. *See id.* § 74.505; *Gunn v. McCoy*, 554 S.W.3d 645, 679 (Tex. 2018).

35. *Gunn*, 554 S.W.3d at 679 (emphasis added).

36. *See id.*

37. *See* CIV. PRAC. & REM. §§ 74.503(d), .505(a).

38. *See id.* §§ 74.503(d), .505(a).

39. *See id.* § 74.505(a).

40. TEX. R. CIV. P. 94.

41. *See, e.g.*, *Galveston, H. & S. A. Ry. v. Harris*, 172 S.W. 1129, 1134 (Tex. Civ. App.—San Antonio 1915, writ ref’d).

42. *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.”⁴³ The Texas Constitution also has retained, through every iteration since 1836, the Open Courts Provision, emphasizing the same declaration of rights averring that “[a]ll courts shall be open, and [that] every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”⁴⁴ These Texas due course provisions have been interpreted to be broader than the federal Due Process Clause.⁴⁵ As one court of appeals stated:

The constitutional guarantee of procedural due course of law requires the government, at minimum, to provide notice that it is depriving a citizen of a liberty or property interest as well as “an opportunity [for the citizen] to be heard at a meaningful time and in a meaningful manner.” In the hearing, the citizen’s challenge to the deprivation must be determined “according to law.” In this way, our due course of law guarantee empowers courts to resolve disputes about whether officials are legitimately exercising governmental power within the democratically established limits of the law.⁴⁶

Apart from the pleading requirement, Rule 194.2 requires that any and all testifying expert witnesses and persons with knowledge of relevant facts be timely designated in response to an appropriate request for disclosures, and Rule 193.6 automatically excludes evidence from witnesses or experts not timely designated in response to a request for disclosures.⁴⁷ The only exception is where the defendant establishes good cause for failure to timely designate, or the lack of unfair surprise and unfair prejudice.⁴⁸ Pleading requirements and these procedural rules protect plaintiffs from being subjected to a trial by ambush after a verdict under circumstances where the jury has already been discharged, and any evidence relied upon by the defendant is not subject to deposition or other discovery and may not even be identified until a post-verdict motion that seeks for the first time to convert a lump-sum jury verdict into future installments.⁴⁹ In attempting to avoid these requirements of the rules and of due process, defendants cannot be heard to say that they should be allowed to circumvent all these laws because the

43. TEX. CONST. art. I, § 19.

44. TEX. CONST. art. I, § 13. For the unscathed survival of the Open Courts Provision, see *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986).

45. See, e.g., *Turner v. Robinson*, 534 S.W.3d 115, 129 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (Busby, J., concurring).

46. *Id.* (alterations in original) (quoting *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929–30 (Tex. 1995); *Freeman v. Ortiz*, 153 S.W. 304, 304 (Tex. 1913)).

47. TEX. R. CIV. P. 193.6, 194.2.

48. See *id.* 193.6.

49. See TEX. CONST. art. I, §§ 13, 19; TEX. R. CIV. P. 94, 193.6, 194.2; *Turner*, 534 S.W.3d at 129 (Busby, J., concurring).

periodic payment rubric only comes into play if the defendant loses and the damages are found to be in excess of \$100,000.⁵⁰ The same can be said of *any matter of affirmative defense or avoidance*.⁵¹ For example, Chapter 33's contributory causation scheme, including the entire concept of contributory negligence, is superfluous unless the defendant is first found liable by the fact finder, yet no court would accept an argument that such matters need not be pleaded or proven until after trial.⁵² Indeed, in *Chesser v. LifeCare Management Services, L.L.C.*, the defendant had no problem filing prior to trial a "Conditional Request for Periodic Payments of Future Damages," nor did the defendant complain on appeal of any difficulty associated with doing so.⁵³ Also, Rule 265 requires that trial of causes before a jury "shall proceed" with all parties introducing all of their evidence in the case during the trial and, thereafter, be "confined to rebutting testimony on each side."⁵⁴

B. Right to Trial by Jury Requirements

There are also other constitutional provisions relevant to this inquiry, including two more specific jury trial guarantees in the Texas Constitution. One provides: "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."⁵⁵ The other, contained in the judiciary article, provides:

In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature.⁵⁶

The rules of procedure further require that, in any case where the jury fee is paid, all contested issues of fact shall be submitted to the jury.⁵⁷ Specifically, Rule 277 requires that in a jury case, "the [trial] court shall, whenever feasible, submit the cause upon broad-form questions . . . [and] shall submit such instructions and definitions as shall be proper to enable *the jury to render a verdict*."⁵⁸ The Texas Supreme Court has construed these provisions of the Texas Constitution and rules of procedure as follows:

50. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.502, .503 (West 2017).

51. See, e.g., *id.* § 33.001.

52. *Id.* § 33.001-.017.

53. *Chesser v. LifeCare Mgmt. Servs., L.L.C.*, 356 S.W.3d 613, 643 (Tex. App.—Fort Worth 2011, pet. denied).

54. TEX. R. CIV. P. 265.

55. TEX. CONST. art. I, § 15.

56. *Id.* art. V, § 10.

57. TEX. R. CIV. P. 277.

58. *Id.* (emphasis added); see *id.* 216.

The right to jury trial is one of our most precious rights, holding “a sacred place in English and American history.” Even where a party does not timely pay the jury fee, courts have held that a trial court should accord the right to jury trial if it can be done without interfering with the court’s docket, delaying the trial, or injuring the opposing party.⁵⁹

C. Jury Submission Under Statutory Framework

If the amount and frequency of any periodic award of future damages is not submitted to the jury to render a verdict, then § 74.507 of the statute would make no sense.⁶⁰ That section requires the court to determine the present value of any periodic payments “[f]or purposes of computing the award of attorney’s fees when the claimant is awarded a recovery that will be paid in periodic payments.”⁶¹ The legislature expressly requires that attorney fees be paid in cash and based on the present value of the award for periodic payments, which the jury must determine prior to judgment.⁶² Otherwise, this provision is nonsense. If the jury already determined the future damage award “if paid now in cash,” there is nothing for the court to reduce to present value.⁶³ The calculation must have already been made by the jury.⁶⁴

Without a jury determination of damages, whether in lump sum or otherwise, the entire statutory scheme is (1) in violation of the separation of powers between the judiciary and legislature as embodied in the Texas Rules of Civil Procedure and the statutes of this state; (2) unconstitutionally vague; and (3) plagued with other constitutional problems.⁶⁵

The separation of powers argument is one of independent constitutional validity.⁶⁶ As the Fourteenth Court of Appeals in Houston has held:

Our Texas Constitution also limits governmental power, and it goes even further than its federal counterpart by including “an explicit Separation of Powers provision to curb overreaching and to spur rival branches to guard

59. *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997) (quoting *White v. White*, 196 S.W. 508, 512 (Tex. 1917); *Allen v. Plummer*, 9 S.W. 672, 673 (Tex. 1888) (“[T]he failure to make [a timely jury fee payment] does not forfeit the right to have a trial by jury when such failure does not operate to the prejudice of the opposite party.”) (alterations in original)) (citing *Dawson v. Jarvis*, 627 S.W.2d 444, 446–47 (Tex. App.—Houston [1st Dist.] 1981, writ ref’d n.r.e.); *Childs v. Reunion Bank*, 587 S.W.2d 466, 471 (Tex. Civ. App.—Dallas 1979, writ ref’d n.r.e.); *Aronoff v. Tex. Tpk. Auth.*, 299 S.W.2d 342, 344 (Tex. Civ. App.—Dallas 1957, no writ); *Erbach v. Donald*, 170 S.W.2d 289, 294 (Tex. Civ. App.—Fort Worth 1943, writ ref’d w.o.m.)).

60. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.507 (West 2017).

61. *Id.*

62. *Id.*; *Galveston, H. & S. A. Ry. v. Harris*, 172 S.W. 1129, 1134 (Tex. Civ. App.—San Antonio 1915, writ ref’d).

63. *Galveston*, 172 S.W. at 1134.

64. *See id.*

65. *See Turner v. Robinson*, 534 S.W.3d 115, 129 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (Busby, J., concurring); *Galveston*, 172 S.W. at 1134.

66. *See Turner*, 534 S.W.3d at 129.

their prerogatives.” In addition, as noted above, the Texas Bill of Rights expressly recognizes the role of courts in providing due course of law.⁶⁷

It would be impermissible and unconstitutional speculation for any court to order that a lump-sum verdict be paid in future installments.⁶⁸ Such an enterprise would involve the court in the determination of discount rates, life expectancies, intervals of installment payments, and other matters ill-suited to the judicial function, and would infringe upon the proper and constitutional role of the jury in this state.⁶⁹ Subchapter K is further unconstitutionally vague and impossible to apply because, after accounting for an award of attorneys’ fees and expenses from the total present value of the damages, there is no way to calculate the value of the future damages over the claimant’s projected life expectancy from the remaining balance of the award to arrive at a judgment that compensates the claimant for the future damages.⁷⁰ Should the balance of the damages after payment of attorneys’ fees and expenses be calculated as a single sum and paid as they are incurred, until the full amount of the balance future value of the award is reached, even if that is not the claimant’s full projected life expectancy? Should they be paid over the course of the full period of projected life expectancy as they are projected? If the latter, how should attorneys’ fees be accounted for since they were paid based on present value, but the future payments are not based on present value?

Absent relevant jury question responses, none of these questions, which are critical to applying the statute to calculate an award that justly compensates the claimant for her future damages, can be answered from the language of the statute.⁷¹ Thus, the vagueness of the statute offends due process and due course of law in two ways: first, it fails to give citizens constitutionally adequate notice of their rights, duties, obligations, and remedies for breaches of the law; and second, by providing no meaningful guidelines for how to apply it to actual awards, it allows judges to enforce the statute according to their own personal predilections and speculations without the benefit and limitation provided by a jury verdict.⁷² Without such a verdict, a judgment for periodic payment of future damages also violates the Open Courts Provision because it disregards the lump-sum award of the jury, reducing all future damages to present value, and it deprives the plaintiff

67. *Id.* (quoting *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 808 n.39 (Tex. 2014)) (citing TEX. CONST. art. I, § 19).

68. *See id.*

69. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.507 (West 2017).

70. *See id.* § 74.501–.507.

71. *See id.*

72. *See supra* Section II.A (exploring due process requirements); *supra* notes 60–70 and accompanying text (explaining how the failure to submit the issue of damages to a jury renders the statute unconstitutional).

of a substantial amount of the future damages found by the jury if those damages are not “paid now in cash.”⁷³

III. PERIODIC PAYMENTS IN FEDERAL COURT

There is one reported Fifth Circuit case dealing with this statute. In *Lee v. United States*, the Fifth Circuit held that the district court—in a Federal Tort Claims Act case—had to fashion a damages award similar to the Texas Periodic Payment statutory scheme, including the use of a reversionary trust.⁷⁴ Under a reversionary trust, the trustee can make periodic payments to the plaintiff at the frequency, amounts, and time set by the trial court.⁷⁵ Importantly, this remedy is *only* available to the United States in a Federal Tort Claims Act case because the United States cannot be subject to ongoing obligations, and the Federal Tort Claims Act specifically authorizes courts to craft a remedy that “sufficiently mirror[s]” state law.⁷⁶ Sometimes the underlying state law conflicts with federal law, or a remedy cannot be crafted to mirror the state law.⁷⁷ For that reason, the Fifth Circuit held that, unlike Texas, Louisiana law does not provide the United States a periodic-payment remedy.⁷⁸

In *Lee*, the United States failed to properly raise the periodic payments issue until after the trial.⁷⁹ The court held this was not a waiver because it was a “purely legal issue” and without need for factual proof.⁸⁰ This is not true. There are many factual issues the trial court must address: Who is best qualified to be trustee?⁸¹ Who should be administrator?⁸² What period of payments is appropriate?⁸³ How much should those payments be?⁸⁴ Because the judge is the only fact finder in a Federal Tort Claims Act case, the jury trial issues that are problematic in state court proceedings are not present.⁸⁵ However, the failure to properly plead and prove the periodic-payments issue in federal court still wastes the court’s resources and time. In *Lee*, between the Fifth Circuit’s mandate issue and final judgment, nearly a year passed and

73. *Galveston, H. & S. A. Ry. v. Harris*, 172 S.W. 1129, 1134 (Tex. Civ. App.—San Antonio 1915, writ ref’d); see TEX. CONST. art. I, § 13.

74. *Lee v. United States*, 765 F.3d 521, 530 (5th Cir. 2014); see 28 U.S.C.A. § 2671–80 (West 2019) (establishing periodic payment scheme in federal law). The authors wish to thank Kirk L. Pittard who provided helpful briefing from his prior CLE article on the Federal Tort Claims Act and the *Lee* case upon which a portion of this Section is based.

75. *Lee*, 765 F.3d at 529.

76. *Id.* at 527, 529.

77. See, e.g., *Vanhoy v. United States*, 514 F.3d 447, 455–56 (5th Cir. 2008).

78. *Id.*

79. *Lee*, 765 F.3d at 525 n.1.

80. *Id.* at 525 (citing *Lucas v. United States*, 807 F.2d 414, 418 (5th Cir. 1986)).

81. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.503(d)(1) (West 2017).

82. See *id.*

83. See *id.* § 74.503(d)(4).

84. See *id.* § 74.503(d)(2).

85. See 28 U.S.C.A. § 2402 (West 2019).

the court ordered a mediation, heard two evidentiary hearings, and ruled on three motions.⁸⁶

IV. CONCLUSION

One reason there may be such a paucity of authority construing the Texas Health Care Liability Periodic Payment Statute is that defendants do not often raise it as a defense, or do not do so timely. In any event, the statute must be construed in conformity with other substantive and procedural rules, not the least of which are constitutional in magnitude.

86. *Lee v. United States*, No. SA-08-CA-531-OG, 2013 WL 12094219, at *1–2 (W.D. Tex. July 22, 2013).