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A COMPENSATION AWARD FOR PERSONAL INJURY OR WRONGFUL DEATH IS TAX-EXEMPT: SHOULD WE TELL THE JURY?

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What is't to us if taxes rise or fall?
Thanks to our Fortune, we pay none at al†

IN THE United States, by statute, damage awards for personal injury or wrongful death are not includable in the gross income of the recipient. The Internal Revenue Code of 1954, in section 104(a)(2), specifically exempts from gross income the "amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness."[1]

The exemption embraces loss of earnings[2] and includes recoveries obtained in wrongful death actions.[3] Apparently, the intent of Congress was to treat personal injury or wrongful death awards as restorations of lost capital.[4] The passage of section 104 of the Code did not, however, disentangle the income tax from the personal injury verdict. In an ordinary personal injury suit plaintiff can recover compensation for the value of his lost past earnings and the value of his impaired "future earning capacity."[5] In a wrongful death action the survivor or statutory representative (depending on the jurisdiction) is entitled to recover the present value of prospective earnings that decedent might have earned but for his death (loss *of* estate) and in some juris-

[1] INT. REV. CODE OF 1954, § 104(a)(2); Treas. Reg. § 1.104-1(c) (1956).

[2] McWeeney v. New York N.H. & A.R. Co., 282 F.2d 34 (2d Cir. 1960), *cert. denied* 364 U.S. 870 (1960).

[3] Anderson v. United Air Lines, 183 F. Supp. 97 (S.D. Cal. 1960); Rev. Rul. 19, 1954-1 CUM. BULL. 179.

[4] 31 OPS. ATT'Y GEN. 304, 308 (1918); Starrels v. Commissioner, 304 F.2d 574 (9th Cir. 1962); *cf.* Note, 69 HARV. L. REV. 1495 (1956).

[5] *Cf.* McCORMICK, DAMAGES § 1 (1935); RESTATEMENT, TORTS § 924 (1939).

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dictions the present value of the estate that decedent might have accumulated and eventually might have left to his widow or representative had he not died prematurely (loss *to* estate).[6] The common denominator of actions for personal injury and for wrongful death is the amount that the plaintiff may receive, in large measure represents earnings[7] or income that *would* have involved income tax consequences had plaintiff not been injured or killed.

It was quite natural, therefore, to expect defense counsels to make attempts to inject the issue of income tax saving on direct examination with the introduction of evidence, on cross examination, in final argument, in proffered instructions, and by means of various combinations of these to reduce one of the principal determinants of the size of the award. This article will deal with attempts to get the jury to consider the effects of income taxes for the purpose of influencing the jury's determination of the amount of damages and the question of whether a jury may be told by counsel or instruction that any award rendered will be non-taxable to the recipient.

In this country the majority view is that in computing damages for accrued loss of earnings or for impairment of future earning capacity because of personal injuries, income tax consequences may not be taken into consideration. Any award based on the gross earnings or earning capacity of the plaintiff will not be reduced because of any tax saving occasioned by injury or death.[8]

The principal reasons in the majority of states why juries will not

[6] Loss *of* estate is that amount which decedent might have earned had he lived. Loss *to* estate represents recovery for "savings" that decedent might have accumulated had it not been for his untimely death. McCormick states that different courts adopt different tests for loss *to* estate. (1) The present worth of probable net earnings over the lifetime, that is, gross earnings less individual living expenses; or (2) The present worth of savings over the lifetime; or (3) Aggregate gross earnings. See McCormick, *op. cit. supra* note 5, § 96; 10 U. Fla. L. Rev. 153, 173 (1957).

[7] The word "earnings" is certainly a very equivocal word in a personal injury or wrongful death suit. Courts are hopelessly lost on whether "earnings" means "gross" income before any deductions or taxes at all, "adjusted gross income," taxable income after deductions but before taxes, or "net income after taxes" (take-home pay). *Cf.* Annot., *Propriety of Taking Income Tax into Consideration in Fixing Damages on Personal Injury or Death Action*, 63 A.L.R.2d 1393 (1959); 16 NAACA L.J. 212 (1955); Jolowicz, *Damages and Income Tax*, 17 Camb. L.J. 86 (1959).

[8] For a summary of state cases, see Annot. *supra* note 7. *Cf.* Spencer v. Martin & Eby Const. Co., 350 P.2d 18 (1960). The best article on the subject contains important citations of state decisions. See Nordstrom, *Income Taxes and Personal Injury Awards*, 19 Ohio L.J. 212, n. 3 at 213 (1958). Apparently the federal courts are split. For a collection of cases and articles see the opinion in Meehan v. Central R. Co., 181 F. Supp. 594, 614 (2d Cir. 1960).

be permitted to consider evidence of the income tax effect on future earnings in an injury or death suit are the following:

(1) Payment of income taxes is a matter between the plaintiff and his government and not a relevant concern of the wrongdoers;[9]
(2) Evidence, argument, or instruction on taxes is unnecessary;[10]
(3) Evidence, argument, or instruction relating to taxes would be too conjectural or speculative.[11]

In most instances the determination of the present worth of the loss of future earnings has been the setting for attempts to bring forth the consequential effect of income taxes. No real attempt has been made by the courts to distinguish the propriety of direct evidence from the propriety of cross examination, or of either from that of argument of counsel before the jury, or any of these from the propriety of an instruction that a jury may consider in their damage determination those tax amounts that plaintiff, or his decedent, would have owed on the "lost" earnings.

Note that past income tax returns are of course admissible to show what the plaintiff or his decedent earned *before* the injury or death (gross, adjusted gross, or net income) as tending to show what he might have earned in the future. But no evidence, argument, or instruction, in the majority of states, is permissible to show what taxes might have had to been paid in the future, or that past earnings are

[9] This was the view taken in the Illinois case of Hall v. Chicago & N.W. Ry. Co., 5 Ill. 2d 135, 125 N.E.2d 77 (1955). Jurisdictions have sometimes said that to account for taxes would violate established precedent. This contention received the treatment it deserved in Professor Nordstrom's article, *supra* note 8. The emphasis on the wrongdoer's escape of liability to high-bracket plaintiffs, were the policy otherwise, is a penal reason most often associated with a vested interest. See 16 NAACA L.J. 212-17 (1955).

[10] This could occur in a setting where defendant (1) attempted to put a tax expert on the stand to explain influence of future taxes, or (2) tried to argue tax policy, or (3) sought an instruction on taxes. Plaintiff has on occasion sought to qualify an expert to go behind and explain the unreality of past tax returns showing gross earnings for tax purposes (which a jury considers in estimating loss of prospective earnings or earning power). See Schnedl v. Rich, 137 So. 2d 1 (Fla. App. 1962). In this Florida wrongful death action involving a plane crash, the trial judge excluded proferred testimony of an income tax expert with reference to the interpretation of income tax returns of plaintiff's decedent. On appeal the court said that the tax returns spoke for themselves and were presumably within the comprehension of the ordinary juror.

[11] The feeling is that tax rates, exemptions, and permissive deductions are subject to change and that calculations or prophecies could not be made of the effect of future taxes on future earnings without speculation. Also because of the fixed rule of singleness of recovery, were tax rates later reduced, plaintiff could not return to the court and ask for an offsetting increase in damages.

"unrealistic" in determining future earnings because of saving not now or then available but available in future taxable years.[12]

The attitude of most of these courts is that the jury must estimate what plaintiff or decedent lost by way of his ability to earn in the future, what he could have or would have earned or saved,[13] or some combination of these, but that in determining these amounts, tax consequences have no place, in evidence, argument, or instruction.

> Inquiries at a trial into the incidents of taxation in damage suits of the character we have here would open up broad and new matters not pertinent to the issues involved. Such subject matter would involve intricate instructions on tax and non-tax liabilities with all the regulations pertinent thereto. No court could, with any certainty, properly instruct a jury without a tax expert at its side.[14]

The fear that a personal injury suit will become a trial by tax experts is real and courts are understandably reluctant to permit direct testimony. The reasons are not unlike those for which some courts will not allow a suit for negligence based solely on a claim for emotional suffering. These courts will not distinguish alternative methods of injecting the tax consequences sought by the defense counsels.

Yet academically speaking, an instruction that jury may or should deduct estimated future taxes from any award would seem no more speculative than the other imponderables presented to the jury in an injury or death case. These include future pain and suffering, the work-life span of the plaintiff, future accumulations, future savings, future contributions to the family, and ultimate gifts to the widow upon death in normal but due course.[15]

In England it was once the rule that the taxability of future earn-

[12] For instance when used in determining future earnings based on past earnings before taxes but after expenses, the past income tax returns of a plaintiff self-employed in the construction business might show a five-year average income of $50,000 per year, which would have been $150,000 but for annual depreciation write-offs of $100,000 per year as permitted and encouraged by Section 167 of the Internal Revenue Code of 1954. Can plaintiff introduce evidence or witnesses, or argue that since these depreciation amounts will not be future expenses, his past returns are unrealistic?

[13] *Supra* note 6.

[14] Highshew v. Kushto, 235 Ind. 505, 505, 134 N.E.2d 555, 556 (1956), taken from Professor Nordstrom's article, *supra* note 8, at 224.

[15] In the future tax rates could rise, fall, or remain the same. However it would seem no more unfair to assume that the tax rate payable on future earnings would have remained the same than to assume that they would have gone up. Plaintiffs have a good deal more success in law trials with charts and chatter about the shrinking purchasing power of the dollar than defendants have had with tax tables based on an assumption that tax rates would remain precisely the same.

ings, reduced to present value for award purposes, was not a matter for the consideration of the jury in personal injury actions.[16] The *Gourley* decision[17] changed matters. Lord Goddard, speaking for the majority, held that income tax consequences must be considered in fixing damages for loss of earnings, or impaired earning capacity,[18] for had plaintiff not been injured, but had earned the amounts represented by such award, these earnings would have been subject to taxes. The court therefore allowed income tax consequences to affect the amount of the award for earning loss, past[19] and future.

In this country sporadic authority follows the English practice.[20]

> It would be difficult to conceive of a more unjust, unrealistic, or unfair rule than one which would lead a jury to base their allowance of reasonable compensation for the destruction of earning capacity on the hypothesis that no income taxes would be paid on net earnings. For all practical purposes the only usable earnings are net earnings after payment of such taxes.[21]

DAMAGES AND WRONGFUL DEATH

The conceptual injustice of computing the present value of the loss of future earnings without reference to income taxes[22] that would have been owing is heightened or aggravated in the wrongful death action. Typically, the statutory representative recovers expected earnings over a normal work-life span, had decedent lived, plus, in a number of states, "savings" that the deceased might have accumulated and left by way of dower or estate to the widow.[23] A representative state-

[16] Bellingham v. Hughes, 1 K.B. 643 (C.A. 1949). See Comment, *Evidence or Instructions Concerning Taxes in Personal Injury Actions*, 8 Sw. L.J. 97, 100 (1954).

[17] British Transport Comm. v. Gourley, [1956] A.C. 185, 3 All. E.R. 796, *overruling* Bellingham v. Hughes, *supra* note 16. See 69 HARV. L. REV. 1495-97 (1955).

[18] See *supra* note 7. The English reason that loss of earnings means of probable net earnings in the ordinary sense of the word. See 21 U. CHI. L. REV. 156 (1953).

[19] Past earnings represent amounts that could been earned from date of injury to trial. Determining "net income after taxes" would of course be easier for past earnings than for future or prospective earnings.

[20] Floyd v. Fruit Industries, 144 Conn. 659, 136 A.2d 918 (1957) (wrongful death); Meehan v. Central R. Co., 181 F. Supp. 594 (S.D.N.Y. 1960) (wrongful death in N.J.); O'Connor v. U.S., 269 F.2d 578, 583 (2d Cir. 1959); *but see* Jennings v. U.S., 178 F. Supp. 516, 532 (D.C.M.D. 1959); Moffa v. Perkins Trucking Co., 200 F. Supp. 183 (D.Conn. 1961).

[21] Floyd v. Fruit Industries, *supra* note 19. In this wrongful death action the average income of a cotton broker for five years preceding his death was in excess of $50,000. In one of those years his federal income tax was $35,000.

[22] *Cf.* rejection of the "net pecuniary loss theory." See 14 NAACA L.J. 409 (1954); 8 ARK. L. REV. 174 (1954); 2 HARPER & JAMES, TORTS § 25.16 (1956).

[23] See *supra* note 6.

ment of what a jury may consider as damages in such an action would read as follows:[24]

> The jury may properly take into consideration her loss of the comfort, protection and society of the husband in the light of all the evidence in the case relating to the character, habits and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death; and they may also consider his services in assisting her in the care of the family, if any, but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the result of the injury. She is also entitled to recover reasonable compensation for the loss of support which her husband was legally bound to give her, based upon his probable future earnings and other acquisitions, and the station or condition in society which he would probably have occupied according to his past history in that respect, and his reasonable expectations in the future; his earnings and acquisitions to be estimated upon the basis of the deceased's age, health, business capacity, habits, experience, energy, and his present and future prospects for business success at the time of his death. All these elements are to be based upon the probable joint lives of herself and husband. She is also entitled to compensation for the loss of whatever she might reasonably have expected to receive in the way of dower or legacies from her husband's estate, in case her life expectancy be greater than his. The sum total of all these elements to be reduced to a money value, and its present worth to be given as damages. . . . Within these limits the jury exercises a reasonable discretion as to the amount to be awarded, based upon the facts in evidence and the knowledge and experience possessed by them in matters of common knowledge and information.

Thus, damages in a wrongful death action are inherently "uncertain," "conjectural," and "speculative." As one court put it: "There can be no fixed formula or mathematical certainty with reference to many items which should be considered by a jury in assessing damages in a case of this kind."[25]

In the majority of states there is no ceiling limit to recovery for wrongful death.[26] Yet in determining what the widow or representative should be awarded for lost estate or earnings should not the offsetting factor of probable income tax be considered? There is no reason why a court could not accept evidence of a mean or representative

[24] Florida Cent. & P.R. v. Foxworth, 41 Fla. 1, 76, 25 So. 338, 348 (1899).

[25] Frazier v. Ewell Engineering & Contracting Co., 62 So. 2d 51, 54 (Fla. 1952), *approved in* U.S. v. Compania Cubana de Aviacion, S.A., 224 F.2d 811 (5th Cir. 1955).

[26] 3 BELLI, MODERN TRIALS 2392 (1954). Chapman states that as of 1961 only thirteen states besides Illinois have monetary limits to wrongful death recovery. Among other things he cites monthly averages of the shrinking purchasing power of a dollar as proof that the Illinois limit is "unrealistic." Chapman, *Should Compensation in Wrongful Death Actions Be Limited?* 50 ILL. B.J. 782 (1962).

tax rate.[27] It does not seem *too* conjectural, uncertain, speculative, or irrelevant for the judge to take judicial notice of an average, or to admit evidence of payment that a deceased would have been required to make, with a precautionary instruction to the jury in the light of possible changes in exemptions, dependents, and other factors that might not be susceptible of exactitude. In a given case involving a decedent who had been in a high tax bracket prior to his death, an instruction might be left to the sound discretion of the trial judge.[28] The authorities today make no distinction between earnings before tax in a death action and the analogous computation in an ordinary personal injury suit.[29] In this, an age of escalation, the wrongful death suit is marked by double standards.[30] The jury is permitted great latitude in determining damages which are uncertain and incapable of mathematical exactitude, but for nearly the same reason savings based on taxes that probably would have been paid by the decedent are absolutely excluded from direct evidence, argument, or disinterested instruction.[31]

[27] This could be done in much the same way as a court takes notice of accepted mortality tables concerning the probable duration of decedent's life span though there is no direct evidence on whether the deceased person could have lived for a shorter or a longer period but for the wrongful death.

[28] This was the position taken by the court in the case of Montellier v. U.S., 315 F.2d 180 (2d Cir. 1963). Here in a wrongful death suit under the Tort Claims Act the court said that the trial judge was not in error in making no deduction, but would not have erred had he deducted from decedent's projected income the tax that decedent probably would have had to pay.

[29] For a criticism of the failure to distinguish "earnings" in the two actions, see *Symposium on Damages for Personal Injury*, 19 OHIO ST. L.J. 155, 157 (1958).

[30] See the opinion of the late Judge Frank in one of the earliest cases involving an attempt to introduce evidence of the amount of taxes that an individual would have had to pay but for the permanent injury. In an affirmation of one sentence he said: "We see no error in the refusal to make a deduction for income taxes in the estimate of expected earnings; such deductions are too conjectural." Stokes v. U.S., 144 F.2d 82, 87 (2d Cir. 1944). *Cf. Symposium, supra* note 29, at 214. Contrast the above opinion with another of Judge Frank, from a Florida wrongful death action: "But even aside from that error, we think that the court below erred in not permitting the case to go to the jury. The Florida cases have not laid down any strict group of criteria against which to measure the damages to the estate. Proof of earnings is a factor to be taken into consideration on a determination of the value of the estate the decedent would have accumulated. But it is not an indispensible factor. [Citing a case allowing recovery for savings though none were shown and decedent had earned nothing for the four years prior to her death.] The evidence as to the health, habits, and industry of the decedent was sufficient to permit the jury to make a determination. It was error to dismiss the complaint." Herzig v. Swift, 146 F.2d 444, 446 (2d Cir. 1945).

[31] On occasion, tax consequences of prospective earnings have been used to test whether an award for lost earnings was "excessive." *Cf.* Annot., *Propriety of Taking*

INSTRUCTIONS TO DISREGARD TAX CONSEQUENCES

The point has been made that the wall between tax and damage computation is not entirely justified on grounds that tax rates or incidents would be too speculative, particularly so in death actions. Now, while no real attempt has been made to explore appropriate avenues for expression of what ought to be a relevant item of damage computation, or to distinguish the feasiblity of direct evidence, from argument or instruction, let it be assumed that *all* evidence of tax savings should be totally excluded from the damage computation as a necessary deterrent to "trial complexity." Would telling this to the jury in the following instruction be appropriate?

You are instructed as a matter of law that any award made to the plaintiff in this case is not income to the plaintiff within the meaning of the federal income tax law. Plaintiff is entitled to an award of damages. You are to follow the instruction already given by this court in measuring these damages, and in no event should you either add to or subtract from that award on account of federal income taves.[32]

Note several distinguishing features of this kind of instruction:

(1) It is not an argument of counsel stating that any award would be non-taxable.[33]
(2) It does not state that the jury should, must, or may consider taxes in determining what this tax-exempt award should be.[34]
(3) It does not state *merely* that any award would be non-taxable.
(4) It might be argued that such an instruction tends to take the subject of income taxes out of the case.[35]

Such an instruction has received divided treatment in this country.[36]

Income Tax into Consideration in Fixing Damages on Personal Injury or Death Action, 63 A.L.R.2d 1393, (1959); Southern Pacific Co. v. Guthrie, 180 F.2d 295 (9th Cir. 1949), *cert. denied* 341 U.S. 904 (1951), *aff'd on rehearing* 186 F.2d 926 (9th Cir. 1951); De Vito v. United Airlines, 98 F. Supp. 88 E.D.N.Y. 1951).

[32] This was taken from Anderson v. United Air Lines, 183 F. Supp. 97 (S.D.Cal. 1960).

[33] This would be improper if there were no evidence or instruction to consider tax consequences. See Annot., *supra* note 31, at 1418.

[34] Nor would it necessarily tend to so state unless one assumes that a jury would disregard the cautionary language of the instruction.

[35] This was the position taken by the court in Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952).

[36] The view prevailing in the majority of states is that in the very least a party is not entitled to such instruction. Briggs v. Chicago Great W. Ry. Co., 248 Minn. 418, 80 N.W.2d 625 (1957). Spencer v. Martin K. Eby Construction Co., 186 Kan. 345, 350

The majority of courts, including those of Illinois,[37] Ohio,[38] Kansas,[39] Indiana,[40] Minnesota,[41] and Wisconsin,[42] have denied the propriety of such an instruction, on the authority of *Hall v. Chicago & N.W. Ry. Co.*,[43] where the Illinois Supreme Court said:

> We are of the opinion that the incident of taxation is not a proper factor for a jury's consideration imparted by oral argument or written instruction. It introduces an extraneous subject, giving rise to conjecture and speculation.[44]

The leading minority decision of *Dempsey v. Thompson*[45] had overruled its prior decision[46] in holding that such an instruction was entirely proper.[47]

> Present economic conditions are such that most citizens, most jurors, are not only conscious of, but acutely sensitive to, the impact of income taxes. Under the Federal and State income tax laws of both Arkansas and Missouri the net income of all persons is taxable except such as is specifically exempted. Few persons, other than those who have had special occasion to learn otherwise, have any knowledge of the exemption involved in this case. It is reasonable to assume the average juror would believe the award involved to be subject to such taxes. It seems clear, therefore, that in order to avoid any harm such a misconception could bring about, it would be competent and desirable to instruct the jury that an award of damages for personal injuries is not subject

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P.2d 18 (1860) (following the majority view). In the Kansas case the jury asked whether or not the damages would be taxable, and the trial court stated that the jury was not to consider whether or not the award would be taxable. See Hardware Mut. Cas. Co. v. Harry Crow & Sons, Inc., 6 Wis. 2d 396, 94 N.W.2d 577 (1959); Louisville Nashville R. Co. v. Mattingly, 318 S.W.2d 844 (Ky. App. 1958); Wagner v. Illinois Cent. R. Co., 7 Ill. App. 2d 445, 129 N.E.2d 771 (1955); Combs v. Chicago St. P. M. & O. R. Co., 135 F. Supp. 750, 756-57 (N.D. Iowa 1955); Missouri-Kansas-Texas R. Co. v. McFerrin, 279 S.W.2d 410 (Tex. Civ. App. 1955); Maus v. New York C. & St. L.R. Co., 73 Ohio Law Abst. 595, 128 N.E.2d 166 (1955).

[37] Hall v. Chicago & N.W.R. Co., 5 Ill. 2d 135, 125 N.E.2d 77 (1955).

[38] Wagner v. Illinois Cent. R. Co., 7 Ill. App. 2d 445, 129 N.E.2d 771 (1955).

[39] Spencer v. Martin K. Eby Const. Co., 186 Kan. 345, 350 P.2d 18 (1960).

[40] Highshow v. Kushto, 235 Ind. 505, 134 N.E.2d 555 (1956), *pet. to withdraw opinion denied*, 235 Ind. 509, 135 N.E.2d 251 (1956).

[41] Briggs v. Chicago Great W. Ry. Co. 248 Minn. 418, N.W.2d 625 (1957).

[42] Hardware Mut. Cas. Co. v. Harry Crow & Son, Inc., 6 Wis. 2d 396, 94 N.W.2d 577 (1959).

[43] *Supra* note 37.

[44] *Supra* note 9, at 149-51, 125 N.E.2d at 85, *approved and requoted in* Spencer v. Martin K. Eby Const. Co., *supra* note 39.

[45] 363 Mo. 339, 251 S.W.2d 42 (1952).

[46] *Ibid.*

[47] Hilton v. Thompson, 360 Mo. 177, 227 S.W.2d 675 (1950).

to Federal or State income taxes. The instruction could be in substantially this form: "You are instructed that any award made to plaintiff as damages in this case, if any award is made, is not subject to Federl or State income taxes, and you should not consider such taxes in fixing the amount of any award made plaintiff, if any you make."

Can there be any sound reason for not so instructing the jury? We can think of none. Surely, the plaintiff has no right to receive an enhanced award due to a possible and, we think, probable misconception on the part of a jury that the amount allowed by it will be reduced by income taxes. Such an instruction would at once and for all purposes take the subject of income taxes out of the case.

We are now convinced and hold that an instruction substantially in the form above outlined should have been given in this case. . . .[48]

The highest court in Illinois disagreed:

[I]t may be conceded that the possibility of harm exists if the jury is left uninformed on this matter; on the other hand, it is conceivable that the plaintiff could be prejudiced if they were told of this law. In either case, however, the possibility is speculative and conjectural, and such being the case, it is better to instruct the jury on the proper measure of damage and then rely on the presumption that they will properly fulfill their duty by following said instructions.[49]

An instruction to a jury that any award received for personal injury or death will be non-taxable *and* that the jury should not consider taxes in fixing the amount of damages could influence the jury to lower the award to a figure smaller than the figure that they might have given on the mistaken notion that taxes would have to be paid on the award.[50] On the other hand, it is possible that the jury will follow the instruction of the court and exclude consideration of taxes in making the award. Illinois and the majority of states have it both ways. The proferred instruction is refused because:

(1) It is better to instruct the jury on the "proper" measure of damages, and rely on the presumption that they will fulfill their duty properly by following the given instruction,[51] (leaving the possibility that the jury will add an amount for taxes), and,

[48] *Supra* note 45, at 346, 251 S.W.2d at 45.

[49] *Supra* note 9 at 150, 125 N.E.2d at 85-86.

[50] *Cf. infra* note 52, an arguable example of a situation where two wrongs might make a right.

[51] "Further, the jury was correctly instructed on the measure of damages, being told specifically the elements that they should consider in awarding damages. Hence, unless it be assumed that they might not follow the instructions, there could be no purpose in mentioning anything about the award not being subject to Federal income tax. However, by the very nature of the jury system this court cannot indulge the presumption that juries do not follow the instructions of the courts." *Supra* note 9, at 150, 125 N.E.2d at 85.

(2) It is better not to instruct the jury on the "proper" measure of damages, because it cannot be presumed that the jury will fulfill their duty properly and exclude taxes from consideration in determining the award.[52]

Suppose that the instruction merely read, ". . . and in computing damages you are not to take income taxes into account." This of course would be highly suspect, for a jury might add a figure "to take care of claimant's tax liabilities." Loss of prospective or future earnings or savings are major items of damage in personal injury actions and particularly in death actions. A good case could be made for deducting from the award of damages the taxes that the plaintiff or decedent would have been required to pay. But the majority of courts, following the *Hall* decision, exclude tax considerations from the evidence offered to the jury because of complexity, speculation, and conjecture, but refuse to tell as much to the jury by instructions for the same reasons.

In the final analysis these courts confuse two problems. The first is whether evidence of tax incidence should be admitted to diminish an award. The second problem is unrelated. It is whether a litigant is entitled to an instruction which adequately excludes, in the making of the award, *all* consideration of taxes, pro and con. As Professor Nordstrom puts it,[53] "Once these are confused the court can then point out how 'confused' the jury would be with this added bit of information."[54] To wit:

You are instructed that any award made to plaintiff as damages in this case, if any award is made, is not subject to federal or state income taxes, and you should not consider such taxes in fixing the amount of any award made plaintiff, if any you make.

Without such instruction the jury erroneously *might* add a tax consideration.[55] On the other hand, knowing from the instruction that the

[52] It may be conceded that the possibility of harm exists if the jury is left uninformed on the matter; on the other hand, it is conceivable that the plaintiff could be prejudiced if they were told of this law." *Supra* note 9, at 151, 125 N.E.2d at 85-6.

[53] Associate Dean and Professor of Law, in the Ohio State University College of Law, author of *Income Taxes and Personal Injury Awards,* 19 OHIO ST. L.J. 212 (1958).

[54] *Supra* note 53, at 231-32.

[55] The Illinois Appellate Court, in the *Hall* case, *supra* note 9, which was overruled, put it this way: "In reaching their decision, the jury in all likelihood will consider how much of an award the plaintiff will actually get net, not an amount from which income taxes will have to be deducted. If the jury determine that $50,000 is the correct amount, they will presumably award that sum if they feel there will be no income tax; on the other hand, if they believe there is to be an income tax paid on that amount under the law, they will award a much larger sum in the hope that after the tax has been paid, plaintiff will still be able to retain $50,000. In the circumstances, the jury are entitled to be reminded, or informed, of these facts." 349 Ill. App. 175, 190, 110 N.E.2d 654, 660 (1953).

award would be non-taxable to its recipient, the jury *might* subtract from the verdict, though in disregard of "the presumption that a jury will apply the proper measure of damages."[56] Query, which is worse? Is it worse that a jury, in disregard of instructions and presumptions, will reduce an award which in natural justice should have been reduced by taxes that would have been owed, or that the jury will compound an injustice, already present because gross earnings for damage purposes take no account of taxes, by adding still another windfall in the erroneous belief that no exemption exists for injury awards? What is sauce for the jury goose may be sauce for the court gander.[57] It is difficult to see how a court can "presume" that the jury wll conscientiously follow a damage standard which is neutral to tax considerations, and yet "presume" that the same jury will not follow an instruction to this effect, unless the latter presumption is based on a surmise that juries do not do what they are told to do. A cautionary instruction that in a personal injury or death action any award will be non-taxable, obviating *de facto* tax consideration, and that taxes ought not be taken into account in making such an award, obviating *de jure* tax consideration, is not speculative, distracting, or irrelevant. The refusal to adopt such an instruction is based on simple judicial conjecture.[58] It must be concluded that the majority of courts, following the

[56] "It is a fair inference that if juries are allowed to speculate on whether or not their award is subject to Federal Income Tax, as they undoubtedly do, with the probable misconception on their part that the amount awarded will be so reduced, much larger verdicts will frequently result. The injured party should not be entitled to an additional amount for tax obligations which do not exist in fact or in law." *Id.* at 190, 110 N.E.2d at 660-1.

[57] Adapted from an old English proverb attributed to John Ray, 1670. See A NEW DICTIONARY OF QUOTATIONS 1060 (Mencken ed. 1942).

[58] In the *Hall* case the court reasoned that the following would or could occur if the instructions were given: "It does not necessarily follow that the argument is proper because it correctly states the law. For if the defendant's argument is proper on the basis that it tells the jury what the law is then what objection can there be for plaintiff's counsel to state that the expense of trial is not provided for in the instruction concerning damages, that the cost of medical witnesses is not paid by the defendant, that the expense of taking depositions, as well as court reporting at the trial, must be borne by the individual litigants, that the fees of plaintiff's attorney are not recognized as an element, that the defendant can deduct any award that it pays from its income and excess profits tax returns and that the amounts of awards are allowed as expenses in providing for increasing railroad fares? This could be developed *ad infinitum*, and all this is the law." *Supra* note 9, at 151, 125 N.E.2d at 86. Several things are to be noted about this argument of the court. (1) It assumes that the instruction is proper because it correctly states the law. The instruction is proper because in common with every cautionary instruction it tells the jury what it should *not* consider. The law statement is necessary to do this adequately (*i.e.* without it a jury might add taxes.) (2) Expenses of trial, medical witnesses, court reporting expenses and and attorney fees are not relevant to plaintiff's damage computations but an instruc-

Hall case, are guilty of the speculation and conjecture from which they seek so assiduously to insulate the jury. It is hoped that those courts which have not yet considered whether such a cautionary instruction is mandatory upon the request of a litigant,[59] discretionary with the trial judge,[60] or reversible error if given,[61] will ponder the separateness of the proposition that the jury take tax incidence into account in "determining" an award based on loss of earning power or future earnings, and the proposition that the jury ought to be told not to consider taxation at all, by instructions drafted in a manner calculated to so inform them.

The latter instruction should be but a minimum. The former proposition is fully deserving of further study, exploration, and comment.

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tion would invite a jury to consider them and add a figure. The instructions on taxes certainly invite no additions. They demand neutrality. For the jury will realize, under proper instructions, that claimant will not have to pay taxes on an award based on proper standards. (3) How many courts strike an award, otherwise just, because a portion obviously represents attorney's fees? The great variation in attorney's fees makes an instruction concerning them most impractical. It seems that courts silently permit such additions, perhaps with good reason. But there is no good reason why a court, tacitly or otherwise, should permit an additional amount for taxes that will never have to be paid. (4) That a defendant can "deduct" an award or add it to the Railroad's base rate is irrelevant to what standards a jury should use in making the award. An instruction to exclude taxes in determining an award is relevant to what a jury should consider as well as obviating what they in error might have considered in making the award.

[59] The point has not been settled in most states. Florida can serve as an example. Only in 1961, after years of litigation involving these questions, did a Florida court settle (affirmatively) the question of whether a trial judge, in his discretion, could give instructions that the award of damages would be non-taxable, and that no consideration should be given to taxes in determining the award. Poirier v. Shireman, 129 So. 2d 439 (Fla. App. 1961). See 16 U. MIAMI L. REV. 126, 128 (1961). Note that most cautionary instructions are discretionary.

[60] *E.g.*, Atherley v. MacDonald, Young & Nelson, Inc., 142 Cal. App .2d 575, 298 P.2d 700 (1956); New York Cent. R. Co. v. Delich, 252 F.2d 522 (6th Cir. 1958); Combs v. Chicago St. P.M. & O. Ry. Co., 135 F. Supp. 750 (N.D. Iowa 1955); Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034 (1956). *Cf.* Annot., *Propriety of Taking Income Tax into Consideration in Fixing Damages in Personal Injury or Death Action*, 63 A.L.R.2d 1393 (1959); Anderson v. United Airlines, 183 F. Supp. 97 (S.D. Cal. 1960).

[61] See Wagner v. Illinois Cent. R. Co., 7 Ill. App. 2d 445, 129 N.E.2d 771 (1955). The *Wagner* case was followed in the *Combs* case, *supra* note 60, but was not followed in the *Anderson* case, *supra* note 60.