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Trial -- Jury Instruction as to Taxability of Personal Injury Award

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ermining the award of damages."[34] The defendant was thus entitled to a new trial before an *impartial* jury, properly instructed as to the factors to be considered in awarding damages.

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TRIAL—JURY INSTRUCTION AS TO TAXABILITY OF PERSONAL INJURY AWARD

In a negligence action the trial judge, over the plaintiff's objection, charged the jury that any award made to the plaintiff as compensation for injuries would not be subject to federal or state income taxes, and these taxes should not be considered by them in making an award. The jury returned a verdict for the plaintiff for less than she had asked, and she appealed from the court's refusal to grant a new trial. *Held*, affirmed: it is proper for the court to instruct the jury in a personal injury suit that any recovery for damages is free from federal or state income taxes. *Poirer v. Shireman*, 129 So.2d 439 (Fla. App. 1961).

The question of whether a jury should be charged with regard to the tax consequences of any award made in a personal injury action is of recent origin.[1] It is settled that any award as compensation for personal injury is not income[2] and, therefore, not subject to taxation under the Internal Revenue Code.[3] Defendants have sought to make juries aware of this, and to have them instructed not to increase the plaintiff's recovery for nonexistent taxes.

The majority of American courts have refused to permit any mention of this tax boon to the jury. Various reasons have been given to support this view. It has been stated that it is wrong to charge a jury with a cautionary instruction on the premise that it will act outside of and contrary to other instructions.[4] Another point is that the tax liability of any given group of people is primarily of legislative concern, and the courts should not interfere.[5] Further, the tax liability of a party is a personal matter, and the defendant should not be allowed to mitigate his potential liability by seeking to prevent a benefit accruing to the plaintiff, especially

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34. Bullock v. Branch, 130 So.2d 74, 77 (Fla. App. 1961).

1. Stokes v. United States, 144 F.2d 82 (2d Cir. 1944); Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N.W.2d 627 (1944). See 11 MIAMI L. Q. 304 (1957).

2. INT. REV. CODE OF 1954, § 104(a) (2).

3. In Pfister v. City of Cleveland, 96 Ohio App. 185, 187, 113 N.E.2d 366, 367-68 (1953), the court said: "Under the Internal Revenue Code compensation for injuries received is tax exempt. . . . Technically, it would seem that compensation for loss of wages should be taxable, but where a verdict is general, there is no way of determining the amount apportionable to wages, so that the entire verdict in practice becomes tax free."

4. Missouri-Kan.-Tex. R.R. v. McFerrin, 279 S.W.2d 410 (Tex. Civ. App. 1955), *rev'd on other grounds*, 156 Tex. 69, 291 S.W.2d 931 (1956); Hardware Mut. Cas. Co. v. Harry Crow & Son, Inc., 6 Wis. 2d 396, 94 N.W.2d 577 (1959).

5. Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955); Hardware Mut. Cas. Co. v. Harry Crow & Son, Inc., 6 Wis. 2d 396, 94 N.W.2d 577 (1959).

when the benefit has been conferred by explicit legislative design.[6] Finally, there are a number of decisions in which the instruction was refused for less specific reasons; *e.g.*, that it would raise more problems than it would settle,[7] that tax liability was too uncertain and conjectural to be dealt with so summarily,[8] that it would mislead the jury,[9] and that the requested charge was discretionary and a refusal to give it was not reversible error.[10]

In *Anderson v. United Air Lines, Inc.*,[11] the trial judge did permit a charge relating to taxation to be read to the jury, and he explained his action by stating: "It is a cautionary instruction with information which can do no harm and will foreclose an area which a jury might conceivably enter unless directly forbidden by an instruction."[12]

The Supreme Court of Missouri had previously expressed the same view, reasoning that the average juror would believe that the award would be subject to income taxes.[13] While admitting that beneficent results were attainable by the use of this instruction, the Missouri court clearly stated that the plaintiff should not be permitted to have the jury charged that *income* earned on any award made to him was subject to taxes.[14] Thus, while it seems anomalous that what was permitted one party should not have been permitted the other, the court thought this instruction "would tend to confuse and distract the jury and lead it into speculating on the amount thereof."[15]

In the instant case,[16] the Second District Court of Appeal relied heavily on the persuasive authority of the Missouri court,[17] the *United Air Lines* decision [18] and on a "particularly well-reasoned article by Morris and Nordstrom."[19] In this article the authors considered and rejected all the contrary arguments, and they expressed the belief that taxes are so commonly known that it becomes necessary to caution the members of the jury regarding the enlargement of an award in the belief that a portion

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6. *Ibid.*
7. Briggs v. Chicago Great W. Ry., 248 Minn. 418, 80 N.W.2d 625 (1957).
8. New York Cent. R.R. v. Delich, 252 F.2d 522 (6th Cir. 1958); Combs v. Chicago, St. P., M. & O. Ry., 135 F. Supp. 750 (N.D. Iowa 1955); Maus v. New York, Chi. & St. L.R.R., 128 N.E.2d 166 (Ohio App. 1955), *aff'd*, 165 Ohio St. 281, 135 N.E.2d 253 (1956).
9. Louisville & Nash. R.R. v. Mattingly, 318 S.W.2d 844 (Ky. 1958).
10. McWeeney v. New York, N.H., & Hart. R.R., 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); New York Cent. R.R. v. Delich, 252 F.2d 522 (6th Cir. 1958); Combs v. Chicago, St. P., M. & O. Ry., 135 F. Supp. 750 (N.D. Iowa 1955); Atherly v. MacDonald, Young & Nelson, Inc., 142 Cal. App. 2d 575, 298 P.2d 700 (1956).
11. 183 F. Supp. 97 (S.D. Cal. 1960).
12. *Ibid.*
13. Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952).
14. *Ibid.*
15. *Id.* at 347, 251 S.W.2d at 46.
16. Poirer v. Shireman, 129 So.2d 439 (Fla. App. 1961).
17. Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952).
18. Anderson v. United Air Lines, Inc., 183 F. Supp. 97 (S.D. Cal. 1960).
19. Morris & Nordstrom, *Personal Injury Recoveries and the Federal Income Tax Law*, 46 A.B.A.J. 274 (1960).

of it will be lost to taxes.[20] The court apparently was persuaded that the better view is to consider the instruction a matter of judicial discretion.[21]

Though the writer believes that the decision in this case is correct, certain closely related questions remain undecided in Florida. For example, should a jury be instructed as to the taxability of income derived from an award?[22] Further, should the plaintiff's earnings before or after taxes be considered the basis for the computation of damages for loss of future earnings?[23] It would be better to attack this area as a whole and propose solutions that would dispose of all these related problems. Despite this shortcoming, the decision represents a beginning in a more realistic approach to a recurrent problem.

HERBERT STETTIN

ADMIRALTY—JURISDICTION UNDER THE FDHSA

The administrator of an estate filed suit in a state court, seeking recovery under the Federal Death on the High Seas Act[1] for the decedent's death which resulted from an airplane accident on the high seas. The defendant moved to dismiss on the ground that jurisdiction under the act was exclusively within the admiralty jurisdiction of the federal courts.[2] From a denial of this motion, the defendant appealed. *Held*, affirmed: absent a clear congressional intent to the contrary, the FDHSA does not withdraw

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20. *Id.* at 275.

21. Poirer v. Shireman, 129 So.2d 439, 444-45 (Fla. App. 1961). The instruction was taken from the Missouri Supreme Court's sample charge in Dempsey v. Thompson, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952), which reads as follows: "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."

22. See, *e.g.*, Margevich v. Chicago & N.W. Ry., 1 Ill. App. 2d 162, 116 N.E.2d 914 (1954); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952).

23. See McWeeney v. New York, N.H., & Hart. R.R., 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); Chicago & N.W. Ry. v. Curl, 178 F.2d 497 (8th Cir. 1949); Southern Pac. Co. v. Guthrie, 180 F.2d 295 (9th Cir. 1949), *rehearing granted*, 186 F.2d 926 (9th Cir. 1950), *cert. denied*, 341 U.S. 904 (1951); Stokes v. United States, 144 F.2d 82 (2d Cir. 1944); Runnels v. City of Douglas, 124 F. Supp. 657 (D. Alaska 1954); Floyd v. Fruit Indus., Inc., 144 Conn. 659, 136 A.2d 918 (1957). In addition, there are several law review articles on this point, representative of which is Daniels, *Measure of Damages in Personal Injury Cases*, 7 MIAMI L. Q. 171, 175-77 (1953).

1. 41 Stat. 537 (1920), 46 U.S.C. §§ 761-67 (1958) (hereinafter referred to as FDHSA).

2. Original jurisdiction in all civil cases of admiralty lies in the United States district courts. This jurisdiction is separate and distinct from other civil cases tried by these courts. 28 U.S.C. § 1333(1) (1958). Cases are usually tried in an admiralty court by a judge sitting without a jury. The purported generosity of jury verdicts must, in all probability, contribute to the desire on the part of plaintiffs' attorneys to obtain trial in other than an admiralty forum.