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TORT LAW — UPON REQUEST, JURORS IN A PERSONAL INJURY CASE MUST BE INSTRUCTED THAT THE DAMAGES AWARDED ARE NOT SUBJECT TO FEDERAL AND STATE INCOME TAXES. *Blanchfield v. Dennis,* 292 Md. 319, 438 A.2d 1330 (1982).

After receiving unnecessary chemotherapy treatment, the patient sued her physician for negligent diagnosis.[1] At the conclusion of the trial the judge refused to grant the physician's request to instruct the jury that any damages awarded to the plaintiff would not be subject to income taxes.[2] The jury awarded the patient $800,000[3] and the physician appealed, contending that the court erred in not giving the requested jury instruction. Maryland's intermediate appellate court held in favor of the defendant and remanded the case for retrial on the damages issue.[4] The Court of Appeals of Maryland granted certiorari and ruled that upon request, jurors in a personal injury case must be instructed that any damages awarded are not subject to federal and state income taxes.[5]

The issue of whether a jury should consider the effect of income taxes, when determining lost income or awarding damages, has been examined by a substantial number of courts since World War II.[6] Most courts generally have been reluctant to inject tax considerations into jury deliberations in personal injury and wrongful death actions.[7] The majority view has its genesis in *Hall v. Chicago & North Western Rail-*

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1. After noticing a problem with her vision, the patient entered a hospital where her physician administered tests. After release from the hospital, her physician informed her that she was suffering from terminal multiple myeloma and only had a short time to live. In an effort to retard the progress of the disease, the physician initiated chemotherapy treatment, which caused the patient to become so ill that she had to retire from her job. The physician discontinued the chemotherapy treatment after one month. Subsequently the patient sought a second medical opinion from the Sloan-Kettering Memorial Cancer Center in New York. There, after 20 days of laboratory tests, she was informed that she never had multiple myeloma and should never have been subjected to chemotherapy. Blanchfield v. Dennis, 292 Md. 319, 321-22, 438 A.2d 1330, 1331-32 (1982).
2. Federal law provides that gross income does not include "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." I.R.C. § 104 (a)(2) (1976). Maryland law states that "[t]he taxable net income of an individual taxpayer of this State shall be that taxpayer's federal adjusted gross income as defined in the laws of the United States." MD. ANN. CODE art. 81, § 280(a) (1980).
3. The verdict was reduced to $400,000 through remittitur. Blanchfield v. Dennis, 292 Md. 319, 320 n.1, 438 A.2d 1330, 1331 n.1 (1982).
4. Blanchfield v. Dennis, 48 Md. App. 325, 428 A.2d 80 (1981), *aff'd,* 292 Md. 319, 438 A.2d 1330 (1982).
5. Blanchfield v. Dennis, 292 Md. 319, 438 A.2d 1330 (1982).
6. The recent focus on the propriety of considering income tax in fixing damages in personal injury or death cases is probably attributable to the high level of income tax and the increase in damage verdicts occurring since the end of World War II. Annot., 63 A.L.R.2d 1393, 1395 (1959).
7. *E.g.,* Highshew v. Kushto, 235 Ind. 505, 134 N.E.2d 555 (1956); Eriksen v. Boyer, 225 N.W.2d 66 (N.D. 1974).

way Co.,[8] in which the Supreme Court of Illinois held that a jury was properly instructed to disregard any reference made to the tax exempt status of a jury award. The *Hall* court based its holding on three considerations: (1) a tax exempt instruction would have been extraneous;[9] (2) the parties' status in a lawsuit is immaterial because the plaintiff's disposition of an award is of no concern to the jury;[10] and (3) this instruction would nullify the congressional intent to bestow a benefit on the victim.[11]

By contrast, the minority view is represented by *Dempsey v. Thompson*.[12] In *Dempsey*, the Supreme Court of Missouri concluded that most jurors, while aware of the impact of taxes upon income, are generally ignorant of the laws which exempt taxes from personal injury and wrongful death awards.[13] The court reasoned that the average juror might erroneously inflate an award to compensate the victim on the mistaken belief that the award would be reduced by income taxes. The *Dempsey* court therefore concluded that an instruction which correctly stated the law would help to prevent possible jury misunderstanding.[14]

The issue in *Blanchfield* of whether to instruct the jury that damages for personal injuries are exempt from federal and state income tax was one of first impression in Maryland.[15] The Court of Special Appeals of Maryland, however, had previously ruled in *Lumber Terminals v. Nowakowski*[16] that a jury should not consider evidence of income tax consequences when fixing damages for loss of past earnings or for impairment of future earning capacity because of personal injuries.[17] Although *Lumber Terminals* was confined to this issue, the intermediate appellate court stated in dictum that "[t]axes are strictly between the plaintiff as taxpayer and the government as collector, and are of no legitimate concern of the defendants. . . . The tax exemption was intended by Congress to benefit the injured party, not the wrongdoer."[18]

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8. 5 Ill. 2d 135, 125 N.E.2d 77 (1955). For a complete survey of the states, *see* Annot., 63 A.L.R.2d 1393, 1398-1416 (1959 & Later Case Service 1976 & Supp. 1983).
9. Hall v. Chicago & N.W. Ry. Co., 5 Ill. 2d 135, 152, 125 N.E.2d 77, 86 (1955).
10. *Id.* at 151-52, 125 N.E.2d at 86.
11. *Id.* at 152, 125 N.E.2d at 86.
12. 363 Mo. 339, 251 S.W.2d 42 (1952).
13. *Id.* at 346, 251 S.W.2d at 45.
14. *Id.*
15. Dennis v. Blanchfield, 48 Md. App. 325, 337, 428 A.2d 80, 87 (1981), *aff'd,* 292 Md. 319, 438 A.2d 1330 (1982).
16. 36 Md. App. 82, 373 A.2d 282 (1977). A stevedore was injured when a lumber carrier ran over his foot. At trial, the employer objected to the trial judge's refusal to permit expert testimony as to the plaintiff's net wages.
17. *Id.* at 96-97, 373 A.2d at 291. The *Lumber Terminals* court stated "the award of damages should be based upon the plaintiff's gross earnings or earnings capacity and should not be reduced because of any income tax savings which may result to the plaintiff from the fact that the damages will be exempt from income tax." *Id.* at 97, 373 A.2d at 291-92.
18. *Id.* at 98, 373 A.2d at 291-92.

The court of appeals in *Blanchfield v. Dennis*[19] found separate the issues of the jury instruction concerning the tax exempt status of jury awards and the propriety of evidence pertaining to tax consequences upon lost income. *Blanchfield* thus avoided overruling *Lumber Terminals* based on this distinction.[20]

The *Blanchfield* court relied heavily on the 1980 United States Supreme Court case of *Norfolk & Western Railway Co. v. Liepelt.*[21] The *Liepelt* Court held that evidence relating to the effect of taxes on the decedent's past and future earnings was admissible to reduce a Federal Employer's Liability Act (FELA) award based on those earnings,[22] and the jury should also be instructed, upon request, that any award would not be subject to taxation as income.[23] The portion of the *Liepelt* decision concerning admission of tax evidence to estimate proper damages was not presented to the *Blanchfield* court.[24] The court of appeals, though, strictly conformed to the second holding of *Liepelt*, reasoning that since the instruction was a plain statement of law, it would help to prevent a jury from mistakenly inflating an award and overcompensating a plaintiff.[25] The *Blanchfield* court agreed with the *Liepelt* Court's conclusion that the average juror would be under the false assumption that an award would be subject to taxes and that the requested instruction would dispel that erroneous belief.[26] While acknowledging that it was adopting the minority view, *Blanchfield* suggested that the majority view might now be overruled because many of the majority holdings were rendered in FELA actions; since *Liepelt* now controlled the disposition of all FELA cases, precedent was sub-

19. 292 Md. 319, 438 A.2d 1330 (1982).

20. *Id.* at 323 n.5, 438 A.2d at 1332-33 n.5; *accord* Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 341 A.2d 613 (1975). The *Tenore* court stated:

> The matter of income taxes has concerned the courts in two ways: (1) should future taxes be deducted from future wages in estimating losses from deprivation of future earnings; (2) should juries be told the fact that awards of damages are not subject to income taxes. Different considerations apply to these questions but the courts have frequently dealt with them together. The first problem is addressed to precision in estimating loss of future earnings; the second, to the matter of dissuading the jury from increasing a verdict on the mistaken assumption that the damages are taxable and a desire to make the plaintiff whole as against such tax imposition.

Id. at 485, 341 A.2d at 623.

21. 444 U.S. 490, *reh'g. denied,* 445 U.S. 972 (1980). In *Liepelt,* a fireman employed by the railroad was killed in a locomotive collision. In the subsequent wrongful death action, the trial court refused to permit the railroad to introduce evidence showing what the decedent's net income would have been after taxes and denied the requested jury instruction that any award would not be subject to income taxes. *Liepelt*, 444 U.S. at 492.

22. *Id.* at 493-96.

23. *Id.* at 496-98.

24. Blanchfield v. Dennis, 292 Md. 319, 323 n.5, 438 A.2d 1330, 1332-33 n.5 (1982).

25. *Id.* at 324, 438 A.2d at 1333 (citing Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 498 (1980)).

26. *Blanchfield,* 292 Md. at 324, 438 A.2d at 1333.

ject to rejection.[27] The court of appeals concluded that the effect of the brief cautionary instruction would not complicate the case, confuse the jury, or introduce irrelevant matters at trial.[28]

While the *Blanchfield* decision is logical and should discourage inflated jury awards in personal injury cases, the court of appeals neglected to address a fundamental concern of the plaintiff. The plaintiff argued that by exempting damage awards from income taxation in personal injury cases, Congress intended to bestow a benefit upon the injured victim. Consequently, if instructed that any award it gives is tax free, the jury may erroneously reduce an award and thereby deprive the victim of the intended congressional benefit.[29] The majority in *Liepelt*, though, found nothing in the legislative history or the language of the applicable federal statute[30] to suggest that this tax exclusion was to impact on the measurement of damages.[31] in *Lumber Terminals*, the court of special appeals had previously rejected a preference for bringing tax considerations before the jury.[32] In addition, *Lumber Terminals* intimated that Congress intended the tax exemption for jury awards in personal injury cases as a benefit to the injured party.[33] Therefore, unlike the Supreme Court, Maryland found that Congress intended such a benefit.

The *Liepelt* Court permitted the admission of tax evidence to estimate true earnings loss.[34] This position had been specifically rejected earlier by *Lumber Terminals*.[35] Although the issue of admission of tax evidence was not presented to the *Blanchfield* court, the court of appeals did assert that it would recognize the *Lumber Terminals* decision and would express no view concerning its propriety.[36]

The *Blanchfield* decision does contain attractive logic and common sense. A jury instruction that damages in a personal injury case are exempt from federal and state taxation will reduce jury misconception and confusion when determining the proper amount of damages.[37] As

27. *Id.* at 327, 438 A.2d at 1334.
28. *Id.* at 326, 438 A.2d at 1334.
29. Brief for Appellant at 15-16, Blanchfield v. Dennis, 292 Md. 319, 438 A.2d 1330 (1982).
30. I.R.C. § 104(a)(2) (1976).
31. The majority stated that "we see nothing in the language and are aware of nothing in the legislative history of [I.R.C.] § 104(a)(2) to suggest that it has any impact whatsoever on the proper measure of damages in a wrongful-death action." Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 496 n.10 (1980).
32. Lumber Terminals v. Nowakowski, 36 Md. App. 82, 373 A.2d 282 (1977).
33. *Id.* at 98, 373 A.2d at 292.
34. Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 493-96 (1980).
35. Lumber Terminals v. Nowakowski, 36 Md. App. 82, 373 A.2d 282 (1977).
36. Blanchfield v. Dennis, 292 Md. 319, 323 n.5, 438 A.2d 1330, 1332 n.5 (1982).
37. *See, e.g., id.* at 321, 438 A.2d at 1332-33, in which the court of appeals approved the instruction that "any damages awarded to the plaintiff are not income to her within the meaning of federal and state income tax laws, and no income tax will be owed or paid thereon." In *Liepelt,* the Supreme Court permitted the following instruction: "your award will not be subject to any income taxes, and you should

such, the court of appeals should not reject *Lumber Terminals* by expanding *Blanchfield.* Overruling *Lumber Terminals* would create enormous problems for the court and the jury. For example, juries would be given the task of calculating complex tax issues, expert tax testimony would often become necessary, and tax evidence would transform simple tort actions into unnecessarily complicated trials.[38] Thus, the positive effects of the *Blanchfield* decision, simplicity and clarity, must be retained by Maryland courts.

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not consider such taxes in fixing the amount of your award." *Liepelt,* 444 U.S. at 492.

One of the main concerns suggested by the patient was that juries, upon hearing the instruction on the tax exempt status of damages in personal injury actions, might mistakenly reduce the award and thereby negate the tax exemption benefit to the victim. The instruction set forth below may prevent the loss of this benefit:

> I charge you, as a matter of law, that any award to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the federal income tax law. Should you find that plaintiff is entitled to an award of damages, then you are to follow the instructions already given to you by this Court in measuring those damages, and in no event should you either add to *or subtract* from that award on account of federal income taxes.

Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245, 1248-49 (3d Cir.) (emphasis supplied), *cert. denied,* 404 U.S. 883 (1971). This instruction seems to emphasize that the tax exemption plays no role in the awarding of damages. *See also* Morris, *Should Juries in Personal Injury Cases Be Instructed That Plaintiffs' Recoveries Are Not Within The Meaning Of Federal Tax Law?,* 3 DEF. L.J. 3 (1958) (detailed discussion of the benefits of such jury instructions).

38. Comment, *Income Taxation And The Calculation of Tort Damage Awards: The Ramifications of Norfolk & Western Railway v. Liepelt,* 38 WASH. & LEE L. REV. 289 (1981).