Duquesne Law Review

Volume 10 | Number 4 Article 12

1972

Damages - Personal Injury - Instruction to the Jury on Federal Income Tax

Francis R. Tunney Jr.

more sophisticated analysis. Novel methods or artifices, regardless of form, should not provide immunity from securities laws.[46] To limit the role of "in connection with" to active purchasers or sellers is an omission to discover whether those investors, who remained inactive as a result of concealment of the scheme, were the real victims of the deception. The purchase or sale should be recognized only as the necessary vehicle in the type of fraud which is under the jurisdiction of a section 10(b) or rule 10(b)-(5) cause of action. But it is those victims of the fraud, whether or not defrauded purchasers or sellers, "in connection with" the purchase or sale of securities who must be recognized as protected within the boundaries of the Act.

Alan C. Klein

DAMAGES—PERSONAL INJURY—INSTRUCTION TO THE JURY ON FEDERAL INCOME TAX—The United States Court of Appeals for the Third Circuit has held that in personal injury actions trial courts must instruct the jury, upon request of counsel, that any award is not subject to federal income taxes, and therefore, it should not add or subtract taxes in fixing the amount of such award.

Domeracki v. Humble Oil & Refining Company, 443 F.2d 1245 (3d Cir. 1971).

Domeracki, a longshoreman, sustained personal injuries while loading Humble's ship. He brought an action in federal district court alleging the ship was unseaworthy. Humble requested the trial court instruct the jury that if any award were made it would not be subject to federal income taxes.[1] The court refused to give the instruction; judgment was entered on a jury verdict in favor of the longshoreman, and the shipowner appealed contending, *inter alia*, that the refusal resulted in prejudice sufficient to warrant a new trial. Although it refused to re-

46. A. T. Brod & Co. v. Perlow, 375 F.2d 393, 397 (2d Cir. 1967).

1. Humble submitted the following charge which the trial court refused:
I charge you, as a matter of law, that any award made 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. 1971).

verse the decision of the district court, the court of appeals held that in future personal injury actions such an instruction must be given upon request of counsel.

In tort actions the primary purpose of the damage award is to compensate the injured party by payment of a sum of money which, ideally, will restore him to the position he would have been in if the wrong had not been committed.[2] The Internal Revenue Code specifically excludes from gross income "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness."[3] Given the compensatory purpose of the damage award and this specific exclusion, defense attorneys have raised two separate issues in personal injury and wrongful death actions. First, in litigation involving loss of earnings as an element of damages they have argued that evidence of plaintiff's income tax liability ought to be admitted so that estimated net earnings (plaintiff's actual loss) will be used to calculate the loss. Secondly, they have asked the court to charge the jury on the tax-exempt status of the award in order to prevent any increase in the award, by the jury, to compensate for nonexistent taxes.

The first, or evidentiary issue arises during a trial in which plaintiff is claiming a loss of earnings because of the injury. The question is whether plaintiff should have lost earnings measured by the gross income evidence he introduces, or whether the defendant should be able to establish estimated net income after taxes which represents the actual loss.[4] Despite the apparent conflict with the compensatory theory of damages, a majority of courts considering the problem have adhered to a gross income approach, refusing to use net income as the measure of recovery.[5] The reason most frequently relied upon to justify a gross income approach is that estimating income tax liability on estimated earnings is too speculative,[6] although other even less persuasive reasons

2. Russell v. Wildwood, 428 F.2d 1176, 1180 (3d Cir. 1970).

3. Int. Rev. Code of 1954, § 104(a)(2). Damages received under state wrongful death statutes are also tax exempt. Rev. Rul. 19, 1954-1 Cum. Bull. 179. *See* Anderson v. United Air Lines, Inc., 183 F. Supp. 97 (S.D. Cal. 1960).

4. *See* Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L.J. 212, 219 (1958), where the author suggests that evidence on plaintiff's tax liability could be introduced by cross-examination of the plaintiff, introduction of prior income tax returns, or questioning the actuary who has testified on the present worth of future income.

5. Scruggs v. Chesapeake and Ohio Ry., 320 F. Supp. 1248 (W.D. Va. 1970) (wrongful death); Gushen v. Penn Central Transp. Co., 280 A.2d 708 (Del. 1971) (wrongful death); Missouri-Kansas-Texas R.R. v. Miller, 486 P.2d 630 (Okla. 1971) (personal injury); Girard Trust Corn Exchange Bank v. Philadelphia Transp. Co., 410 Pa. 530, 190 A.2d 293 (1963) (wrongful death). *See* Annot., 63 A.L.R.2d 1393 § 4 (1959).

6. Stokes v. United States, 144 F.2d 82, 87 (2d Cir. 1944) (personal injury); Abele v. Massi, 273 A.2d 260, 261 (Del. 1970) (wrongful death).

sometimes appear.[7] The speculation argument loses much of its force when used to justify calculation of lost earnings, which arise prior to trial, with gross income. In the latter case, once plaintiff establishes what he would have earned, his income tax liability can be computed using known tax rates, exemptions, and deductions.[8] The speculation argument is only slightly more appealing when impairment of future earnings or earning capacity is considered, since the income tax factor is no more uncertain, speculative or conjectural than many of the other factors the jury considers.[9] Although the majority's use of gross income has been roundly criticized by writers,[10] only a minority of courts have adopted a net income rule.[11]

7. These other arguments have little current vitality and have been persuasively refuted by several writers; for that reason they shall not be treated here. See Burns, *A Compensation Award for Personal Injury or Wrongful Death Is Tax-Exempt: Should We Tell The Jury?* 14 DE PAUL L. REV. 320, 321-24 (1965); Feldman, *Personal Injury Awards: Should Tax-Exempt Status Be Ignored?* ARIZ. L. REV. 272, 273-78 (1966); Nordstrom, *supra* note 4, at 215-30. Recent cases have disposed of the earnings issue by simply stating that the majority of jurisdictions do not allow evidence of income tax liability to be admitted and/or that such liability is too speculative. *See, e.g.*, Gushen v. Penn Central Transp. Co., 280 A.2d 708 (Del. 1971) (wrongful death); Missouri-Kansas-Texas R.R. v. Miller, 486 P.2d 630 (Okla. 1971) (personal injury). The former proposition hardly constitutes persuasive judicial reasoning. The latter proposition is equally unacceptable since judicial scrutiny would reveal persuasive authority to the contrary. See notes 8 and 9 *infra* and accompanying text.

8. Simpson v. Knut Knutsen, O.A.S., 296 F. Supp. 1308 (N.D. Cal. 1969) (wrongful death); Petition of Oskar Tiedemann and Co., 236 F. Supp. 895 (D. Del. 1964) (personal injury and wrongful death); Beaulieu v. Elliot, 434 P.2d 665 (Alas. 1967) (personal injury). *See* Nordstrom, *supra* note 4, at 226. *But cf.* Comment, *Income Taxes and The Computation of Lost Future Earnings in Wrongful Death and Personal Injury Cases*, 29 MD. L. REV. 177, 185 (1969).

9. Moffa v. Perkins, 200 F. Supp. 183, 188 (D. Conn. 1961). In *Brooks v. United States*, 273 F. Supp. 619, 629 (D. S.C. 1967), the court stated: "Assuredly, the incidence of future income taxes is no more 'guess work' and no more difficult of exact calculation than possible future advancement, wage increases, and inflation, all matters to be taken into account in calculating future income." *See* Nordstrom, *supra* note 4, at 226-27.

10. Feldman, *supra* note 7, at 272-78; II HARPER & JAMES, THE LAW OF TORTS § 25.12 (1956); Morris and Nordstrom, *Personal Inury Recoveries and the Federal Income Tax Law*, 46 A.B.A.J. 274, 276-77 (1960); Nordstrom, *supra* note 5, at 218-30. *Contra*, Comment, *Income Tax Effects on Personal Injury Recoveries*, 30 LA. L. REV. 672 (1970); Page, *Comments On Recent Railroad Cases*, 26-27 NACCA L.J. 294 (1961).

11. The net income rule has been most readily accepted in wrongful death actions. Hartz v. United States, 415 F.2d 259 (5th Cir. 1969); Platis v. United States, 288 F. Supp. 254 (D. Utah 1968); Brooks v. United States, 273 F. Supp. 619 (D. S.C. 1967); Furumizo v. United States, 245 F. Supp. 981 (D. Hawaii 1965); Floyd v. Fruit Industries, Inc., 144 Conn. 659, 136 A.2d 918 (1957); Adams v. Duer, 173 N.W.2d 100 (Iowa 1969). There is some authority for using net income in personal injury actions, *see* McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 41 (2d Cir.) *(en banc)*, *cert. denied*, 364 U.S. 870 (1960) where the court stated that when the question was one of federal law, or where applicable state law was silent, a deduction of income taxes from prospective income in either personal injury or wrongful death cases would be appropriate when the relevant income was high but not when it was at the lower or middle end of the income spectrum. For subsequent application of the rule by the Second Circuit see note 32 *infra* and the authorities cited therein. *Accord*, Petition of United States Steel Corp., 436 F.2d 1256 (6th Cir. 1970); Cox v. Northwest Airlines, Inc., 379 F.2d 893 (7th Cir. 1967); Plant v. Simmons Co., 321 F. Supp. 735 (D. Md. 1970). *See also* United States v. Sommers, 351 F.2d 354 (10th Cir. 1965).

The second issue which arises as a result of the tax-exempt status of the award is whether the jury should be instructed on its nontaxability. This issue might arise independently and regardless of the loss of earnings issue.[12] The purpose of the instruction is to obviate a possible misconception on the part of the jury which might lead to an unwarranted increase in the award by the jury to compensate for nonexistent taxes. Such an increase would be improper regardless of whether the jurisdiction followed a gross or or net income approach to the loss of earnings issue and regardless of the elements comprising the damage award.[13] Following the lead of *Hall v. Chicago & Northwestern Ry*,[14] a majority of courts have disapproved of the instruction.[15] Reasons relied upon in denying the requested instruction[16] include the possibility that it might prejudice the plaintiff;[17] that it introduces a collateral matter into the damage issue;[18] and that it is based upon the unjustified assumption that the jury will not follow the court's instructions on the measure of damages.[19] The leading case supporting an in-

12. *See* Feldman, *supra* note 7; Nordstrom, *supra* note 4. That these two issues are independent is evident in *Dempsey v. Thompson*, 363 Mo. 338, 251 S.W.2d 42 (1952), a personal injury action in which the court explicitly rejected a net earnings approach to the loss of earnings issue but also considered and approved of an instruction on the nontaxability of the award.

13. Feldman, *supra* note 7, at 279.

14. 5 Ill. 2d 135, 125 N.E.2d 77 (1955). The issue was considered by the court because of defense counsel's remarks, in his closing argument to the jury, that the award would not be subject to federal income tax.

15. Gorham v. Farmington Motor Inn, Inc., 159 Conn. 576, 271 A.2d 94 (1970); Kawamoto v. Yasutake, 49 Haw. 42, 410 P.2d 976 (1966); Spencer v. Martin K. Eby Constr. Co., 186 Kan. 345, 350 P.2d 18 (1960). *See* Annot., 63 A.L.R.2d 1393 § 6 (1959).

16. For critical analysis of other arguments which have at various times been raised against the propriety of an instruction see Burns, *supra* note 7; Morris and Nordstrom, *supra* note 10; and Roettger, *The Cautionary Instruction on Income Taxes in Negligence Actions*, 18 WASH. & LEE L. REV. 1 (1961).

17. Hall v. Chicago & N.W. Ry, 5 Ill. 2d 135, 151, 125 N.E.2d 77, 86 (1955). Supposedly an instruction on the award's tax-exempt status might lead the jury to subtract from the award or to hold down its size, thus resulting in a smaller verdict than would appear without the instruction. *See* generally Anderson v. United Air Lines, Inc., 183 F. Supp. 97, 98 (S.D. Cal. 1960); Burns, *supra* note 7, at 330-31. *But see* Feldman, *supra* note 7, at 281: "It (the instruction) does not attempt to take away from the plaintiff any damages to which he is entitled. Telling a jury the law and admonishing it not to add or to subtract from the award should not be expected to stimulate the jury to reduce the award."

18. Kawamoto v. Yasutake, 49 Haw. 42, 51, 410 P.2d 976, 981 (1966). This argument might be used in one of two ways. It might be used to mean that taxes are irrelevant to the damage issue. This proposition overlooks the compensatory purpose of the damage award. II HARPER & JAMES, *supra* note 10, at 1327. The other intended meaning might be that an instruction on the award's tax-exempt status would inject an issue (taxes) which the jury would otherwise not consider. The tax-consciousness of the American public warrants the conclusion that the tax question would probably arise anyway. *See* Dempsey v. Thompson, 363 Mo. 338, 251 S.W.2d 42 (1952); Morris and Nordstrom, *supra* note 10, at 275; Roettger, *supra* note 16, at 12.

19. Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 150, 125 N.E.2d 77, 85 (1955); *accord*, Gorham v. Farmington Motor Inn, Inc., 159 Conn. 576, 581, 271 A.2d 94, 97 (1970). It is certainly valid to assume that the jury will not *intentionally* ignore the court's

come tax instruction is *Dempsey v. Thompson*.[20] After noting the tax consciousness of most citizens and the general ignorance of the award's exemption from taxation, the court approved of the instruction stating: "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."[21] Although only a minority of courts considering the problem have approved of the instruction,[22] it has received support from several writers on the ground that if properly worded it will not confuse the jury, complicate the trial, or prejudice the plaintiff.[23]

In *Domeracki* the court was faced with the second issue, the propriety of an instruction on the tax-exempt status of the award. After distinguishing the evidentiary and instruction issues the court held that in future personal injury actions[24] "trial courts in this circuit *must* . . . upon request by counsel, instruct the jury that any award will not be

instructions; however, the jury might in good faith add an amount for taxes, after calculating the award on the reasonable assumption that *the award* will be taxed. Comment, *Personal Injury Awards and the Nonexistent Income Tax—What is the Proper Jury Charge?* 26 FORD L. REV. 98, 101 (1957). Consider Morris and Nordstrom, *supra* note 10, at 275:

> This is the crux of the problem. Can we assume that the jury will follow the general charge and leave behind its common knowledge of tax impact? Or is it more logical to believe that taxes are so commonly known that it becomes necessary to caution the members of the jury that the money given in this case is "different" in that it is probably the only example they will ever know of non-taxed dollars?

That juries do in fact consider the award's taxability is manifest in cases where it specifically asks the court whether the plaintiff would be liable for income taxes on the award. In *Spencer v. Martin K. Eby Constr. Co.*, 186 Kan. 345, 350 P.2d 18, 25 (1960), the court held it was not reversible error for the trial court to additionally instruct the jury, upon its specific inquiry, that it was not to consider whether the award would be taxable. In *Towli v. Ford Motor Co.* 30 App. Div. 2d 319, 292 N.Y.S.2d 8 (1968) the court granted a new trial on the issue of damages because the trial judge answered the jury's specific inquiry about the award's taxability by stating he could not answer since the law did not permit him to instruct on income taxes. The court stated that this answer left the jury in a state of confusion and that the trial judge should have at least instructed the jury that it could not consider income taxes in determining the award.

Instructing the jury not to consider taxes after they have already done so really begs the question. In such situations the most forthright and least confusing approach would be to answer simply and directly that under the law the award is not taxable.

20. 363 Mo. 339, 251 S.W.2d 42 (1952), *overruling* Hilton v. Thompson, 360 Mo. 177, 227 S.W.2d 675 (1950).

21. 363 Mo. at 346, 251 S.W.2d at 45.

22. Anderson v. United Air Lines, Inc., 183 F. Supp. 97 (S.D. Cal. 1960) (wrongful death); State Highway Dep't v. Buzzuto, 264 A.2d 347 (Del. 1970) (wrongful death); Poirer v. Shireman, 129 So. 2d 439 (Fla. App. 1961) (personal injury). *See* Annot., 63 A.L.R.2d 1393 § 6 (1959).

23. *See* Burns, *supra* note 7; Morris and Nordstrom, *supra* note 10; Nordstrom *supra* note 4; Roettger, *supra* note 16.

24. There would appear to be no reason why the court would not extend the rule to cover wrongful death awards which are also tax-exempt, since its only purpose is to prevent an arbitrary increase in the award, by the jury, to compensate for nonexistent taxes. In fact, one court has held failure to give the instruction in a wrongful death action was reversible error. State Highway Dep't v. Buzzuto, 264 A.2d 347 (Del. 1970).

subject to federal income taxes, and that the jury should not, therefore, add or subtract taxes in fixing the amount of any award."[25] The court gave as its reasons for adopting the rule, the absence of complications the instruction would engender, the tax consciousness of the American public, and the general lack of knowledge about the statutory exclusion.[26]

Theoretically the damage award should be the juridical expression of a value equal to the plaintiff's actual loss. *Domeracki* is consonant with this compensatory theory since the required instruction is designed to obviate arbitrary increases in the award which divorce the sum ultimately received from the actual loss, thus frustrating the award's compensatory purpose.

Approval of the instruction, as the court readily recognized, is not dispositive of the first, or evidentiary issue which also arises as a result of the income tax exemption. It is suggested that when this complimentary earnings issue is presented justice and consistency with its present decision should lead the court to approve of a net earnings approach. Justice requires that defendant only be required to replace plaintiff's actual loss; when gross income is used to measure the loss of earnings element in the award formula plaintiff benefits at defendant's expense.[27] Moreover, approval of a net earnings approach would be consistent with the present decision requiring the instruction. If it is desirable to limit the award to the sum of the elements recognized as compensable, the next logical step is to limit the elements comprising the award to amounts actually lost, *i.e.*, net earnings within the context of the two issues raised by the award's tax-exempt status. A net earnings approach, in conjunction with the approved instruction, would aid in rendering a still truer compensatory figure.

Only a minority of jurisdictions have approved of an instruction on the award's nontaxability[28] and, of these, those that have had the additional opportunity to pass upon the loss of earnings issue have balked

25. 443 F.2d at 1251 (emphasis added). Generally, the giving of a cautionary instruction is within the discretion of the trial court. Anderson v. United Air Lines, Inc., 183 F. Supp. 97 (S.D. Cal. 1960). By holding that trial courts *must* issue the instruction upon request, the court has apparently obviated the trial court's discretion and would consider refusal to give the instruction reversible error. Only one other court has taken this position; State Highway Dep't v. Buzzuto, 264 A.2d 347 (Del. 1970) (wrongful death).

26. 443 F.2d at 1251.

27. "The argument for computing damages on estimated income after taxes is a clear one: this will measure the actual loss. If plaintiff gets, in tax free damages, an amount on which he would have had to pay taxes if he had gotten it as wages, then plaintiff is getting more than he lost." II HARPER & JAMES, *supra* note 10, at 1326.

28. See note 22 *supra*.

at adopting net earnings as a general rule.[29] Only the Second Circuit has approved of both an instruction on the award's tax-exempt status and a net income approach. In *McWeeney v. New York, New Haven, and Hartford R.R.*,[30] the court held that an instruction would have been proper if given by the trial court but its refusal was not reversible error. In the same case the court promulgated the rule that gross income should be the measure of recovery in all cases except those where the relevant income was high.[31] The court's reasons for using gross income as a general rule were expediency and compensation. The court reasoned that estimation of future tax liability was too conjectural, and also that in the majority of cases, at the lower and middle end of the income spectrum, use of gross income would not result in overcompensation of the plaintiff because of the erosionary effect on the award of contingent attorney fees, continuing inflation, and the tax payable on the income earned from the award.[32] Apparently, when an exceptional case arose in which the relevant income was high[33] a deduction would be called for since overcompensation would be more likely, and the speculation concerning income tax liability less onerous.[34]

Two other jurisdictions have approved of an instruction, but have declined to adopt a net earnings approach. Both Missouri[35] and Del-

29. On the other hand, Connecticut which was responsible for the landmark decision approving of a net earnings approach in *Floyd v. Fruit Industries, Inc.*, 144 Conn. 659, 136 A.2d 918 (1957), subsequently declined to approve of an instruction on the award's tax-exempt status in *Gorham v. Farmington Motor Inn, Inc.*, 159 Conn. 576, 271 A.2d 94 (1970).

30. 282 F.2d 34 (2d Cir..) (*en banc*), *cert. denied*, 364 U.S. 870 (1960).

31. 282 F.2d at 38-39. See note 11 *supra*.

32. *Id.* at 37-38.

33. In *McWeeney* the court denied a deduction for income taxes. The annual income was only $4800. It has subsequently disallowed the deduction in *Petition of Marina Mercante Nicaraguense, S.A.*, 364 F.2d 118 (2d Cir. 1966) (annual income between $9300 and $11,500); and *Cunningham v. Rederiet Vindeggen A/S and M/S Trolleggen*, 333 F.2d 308 (2d Cir. 1964) (annual income of $6300). The court approved of a deduction in *Le Roy v. Sabena Belgian World Airlines*, 344 F.2d 266 (2d Cir.), *cert. denied*, 382 U.S. 878 (1965) (annual income of $16,000). *See* Petition of Marina Mercante Nicaraguense, S.A., *supra* at 126; Brooks v. United States, 273 F. Supp. 619, 631 n.18 (D. S.C. 1967). The approach of the Second Circuit is traced and critically evaluated in Comment, *supra* note 8.

34. McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 38-39 (2d Cir.) (*en banc*), *cert. denied*, 364 U.S. 870 (1960):

> In such cases (high income), which in proportion are relatively few, the criticism that the whole process of computation is unrealistic has a considerable measure of validity, the projection of future income at such levels being itself extremely conjectural. . . . Such cases are in sharp contrast to the great mass of litigation at the lower or middle reach of the income scale, where future income is fairly predictable, added exemptions or deductions drastically affect the tax and, for the reasons indicated plantiff is almost certain to be undercompensated for the loss of earning power in any event.

35. In *Dempsey v. Thompson*, 363 Mo. 339, 251 S.W.2d 42 (1952), the court considered both issues. Although it rendered the landmark decision approving of the instruction, it declined to adopt a net earnings approach stating: "as a matter of necessity, the general rule that an award of damages for loss of future earnings should be based strictly on actual pecuniary loss cannot be rigidly adhered to insofar as it may be impossible to compute

aware[36] have refused to abandon the gross income approach solely for the expedient reason that determination of future income tax liability is too speculative. No compensatory justifications were even advanced.

It is evident that courts which have approved of an instruction on the award's tax-exempt status have used a standard of compensation and/or expediency when evaluating the complimentary loss of earnings issue. The court in *Domeracki* also used both compensation and expediency as its standard in evaluating the merits of the instruction.[37] It seems likely that when the loss of earnings issue is subsequently presented, the court will employ this same standard of evaluation. It is submitted that if this standard is used the court should abandon the present gross earnings approach and adopt a net earnings rule.

The only compensatory justification for adhering to a gross income approach is that plaintiff is not overcompensated because of the erosionary factors cited in *McWeeney*. The general criticism of using gross income to compensate for these offsetting factors is, that if direct provision is not made for them, the use of gross income in calculating the loss of earnings element is a poor substitute. It compensates for these factors haphazardly, inprecisely, and in favor of plaintiffs with large incomes.[38] Although the *McWeeney* approach circumvents this latter criticism by allowing a deduction when the relevant income is high it is still unacceptable. The only benefit this approach has over a complete gross earnings approach comes at the expense of the higher income plaintiff. If it is desirable to compensate the lower and middle income

---

with reasonable accuracy the amount of income tax liability that may attach thereto." *Id.* at 345-46, 251 S.W.2d at 45.

36. In *State Highway Dep't v. Buzzuto*, 264 A.2d 347 (Del. 1970), the court held that the trial court's refusal to give the instruction in a wrongful death action was reversible error. In *Abele v. Massi*, 273 A.2d 260, 260-61 (Del. 1970) the court rejected the net earnings approach to the loss of earnings issue in a wrongful death action stating:

> It is of course true that since the proper purpose of an award of damages is to compensate adequately a plaintiff for what he has been deprived of, this could be more fairly accomplished by considering net rather than gross income when loss of earnings is being considered. However, to try to determine the income tax on projected future earnings is to engage in a most speculative activity. There are no firm guidelines to follow. Idealism must therefore give way to practicality.

37. Compensatorily, the court noted the tax consciousness of the American public and the general lack of knowledge about the exclusion, and went on to note that the purpose of the instruction is to prevent improper increases in the award, by the jury, because of a mistaken belief it would be taxable. The court's expedient consideration in approving of the instruction was the absence of complications the instruction would engender. Specifically, the court cited a number of things the instruction would not require; no additional evidence; no reference to any Internal Revenue statutes or regulations; no tax experts or tax tables; and no additional computations. 443 F.2d at 1251.

38. Feldman, *supra* note 7, at 276.

plaintiff for these offsetting factors, albeit indirectly, an upper income plaintiff should be equally entitled to receive such consideration.[39]

The principle expedient reason used to justify the gross income approach is the speculation argument. When the loss of earnings issue is presented, this argument will undoubtedly arise. While distinguishing the instruction and loss of earnings issues, the court in *Domeracki* willingly noted that trying to estimate income tax liability might lead to great conjecture at least insofar as prospective earnings were concerned. When the issue is properly presented and the speculation argument thoroughly explored the court will find persuasive authority to the contrary.[40] The court in *Domeracki* also noted, expressly or inferentially, that other problems might arise if evidence of plaintiff's income tax liability were admitted: the possibility that the tax computaton might completely overshadow the basic isues of liability and damages; and the possibility that such evidence might complicate the case or confuse the jury. The court also said that recovery for pain, suffering, and medical expenses is not measured by income. None of these problems offer persuasive support for continued adherence to the gross income approach to the loss of earnings isue.[41]

The proposition that the tax computation might completely overshadow the basic issues really overstates the matter. Undoubtedly consideration of income tax liability would add another dimension to the trial. It might require that the jury make an estimate of the tax liability using prior income tax returns or information adduced from the plaintiff during the trial.[42] It might even entail the use of an expert to aid the court. Yet courts do not balk when it comes to plaintiff's use of medical experts; nor do they hesitate when plaintiff uses experts to show life or work expectancy, or to testify concerning reduction to present worth of anticipated future earnings.[43] Plaintiff is allowed to prove what he would have earned but for the injury. Equity and the compensatory principle would require that defendant be allowed to prove what part of that amount plaintiff would actually have received. Fidelity to the compensatory theory of damages requires no less. The answer to

39. *Cf.* Comment, *Damages—Refusal to Instruct Jury to Calculate Loss of Earnings on the Basis of Net Income After Taxes,* 14 VAND. L. REV. 639, 642 (1961).

40. The weakness of this speculation argument has been discussed above. See notes 6-11 *supra* and accompanying text.

41. For a critical analysis of other reasons which have been advanced in support of the gross income approach, see Feldman, *supra* note 7; Morris and Nordstrom, *supra* note 10; Nordstrom, *supra* note 5.

42. See note 4 *supra.*

43. Morris and Nordstrom, *supra* note 10, at 277.

the proposition that income tax evidence might complicate the trial is that "such contention has the appeal of simplicity. It might aid the judiciary but hardly justice."[44] Of course, the argument that income tax evidence might confuse the jury is not applicable when the trial is conducted without one. Even where a jury is used, however, having it hear evidence on plaintiff's income tax liability and to take it into account when calculating the loss of earnings element, is hardly any more confusing than other issues the jury considers.[45] Finally, as the court noted, recovery for pain, suffering, and medical expenses is not measured by income. This should not preclude admission of evidence of plaintiff's income tax liability. Such evidence is not sought to be admitted for the purpose of affecting these elements. Its admission would be for the sole purpose of limiting one element in the award formula, loss of earnings, to actual loss. Certainly the court can make this explicitly clear to the jury when it is admited, and thus avoid any possible prejudice to the plaintiff.

It is suggested that when the court subsequently is presented with the loss of earnings issue, adoption of a net income approach would be appropriate. Judicial scrutiny of the expedient reasons which have been advanced in support of the gross income rule will reveal their unpersuasiveness. The only compensatory reason for adhering to a gross income rule is that it provides indirect compensation for the several factors which derogate from the award's compensatory purpose. If it is desirable to compensate for these factors, direct provision should be made since the use of a gross earnings approach is at best a poor substitute. The lost earnings or impaired earning capacity element varies so greatly that consistently fair and accurate compensation for these factors is not possible. The court should deal only with the factors it is willing to recognize as compensable. If it views the loss of earnings issue in this manner, the court should approve of a net earnings approach which, in conjunction with the instruction which it has already approved, will aid in rendering a still truer compensatory figure.

Francis R. Tunney, Jr.

44. Brooks v. United States, 273 F. Supp. 619, 630 (D. S.C. 1967) (citation ommitted).

45. When the jury calculates the loss of earnings element in the award formula it estimates what the plaintiff would have earned but for the injury. It would hardly be more confusing to ask the jury to estimate what the plaintiff actually would have received. Nor should the evidence of plaintiff's income tax liability, on which the jury would base its calculation, be precluded because such evidence might be confusing. It is common practice for juries to listen to expert medical testimony on anatomy, surgery and psychiatry. Morris and Nordstrom, *supra* note 10, at 227. It is reasonable to assume that a subject as routine as income taxes would present fewer difficulties.