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Personal Injuries: Creditors v. Victim, Claim and Award

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I. Introduction

Compensation[1] in personal injury cases introduces a myriad of subjective inquiries[2] and speculative valuations,[3] making damages difficult to establish. It is arguable that the objective of personal injury recoveries—to make the man whole[4]—cannot be achieved by a monetary award.[5] Nevertheless, legislatures and courts have erected a protective

1. Compensation, repairing plaintiffs' injuries or making them as whole as possible by a money award, is the essence of damages in Anglo-American law. C. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES §§ 20, 137 (1935); 1 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 29 (9th ed. 1912); 1 J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES §§ 1, 12 (4th ed. 1916).

2. Compensatory damages in personal injury actions include pecuniary losses, such as loss of earning capacity or earnings, specific harm to business or property, and reasonable medical expenses, and nonpecuniary losses such as mental and physical distress, loss of reputation and impairment of senses or faculties. James, *Damages in Accident Cases*, 41 CORNELL L.Q. 582 (1956). The nonpecuniary losses are fully comprehended only by the injured party and are the most difficult to prove and to value. 2 S. LIEBOWITZ, PERSONAL INJURY DAMAGES (1971); Olender, *Proof and Evaluation of Pain and Suffering in Personal Injury Litigation*, 1962 DUKE L.J. 344; Note, *What is Life Worth Now?*, 10 TRIAL L.Q. 62 (1973).

3. It has been strongly urged that compensation for pain and suffering should not be permitted due to the arbitrariness of the evaluation and the lack of economic loss. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219 (1953); Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476 (1959).

The jury's evaluation of life expectancy, future employee status and wages, and duration of future employment involves s further speculation. An award for loss of future earnings capacity necessitates some proof of permanence of the injury. C. MCCORMICK, DAMAGES § 86 (1935). A further difficulty in setting damages for future earnings is in reducing them to present value.

> [T]his is an attempt to award plaintiff that amount of money which, if invested at a reasonable return, would annually give the plaintiff the value of the decrease in his earning capacity and which would, at the end of the determined expectancy, be reduced to zero value.

For a consideration of theory, purpose and proof, see Leasure, *How to Prove Reduction to Present Worth*, 21 OHIO ST L.J. 204 (1960).

4. The remedy should be commensurate to the injury sustained. Rockwood v. Allen, 7 Mass. 254, 256 (1811); Mahoning Valley Ry. Co. v. De Pascale, 70 Ohio St. 179, 187, 71 N.E. 633, 635 (1904).

5. An award of money damages can in no sense make the plaintiff whole, nor undo the suffering which has been undergone. Money can in no sense be considered an equivalent for pain and suffering.

> The theory of money compensation for pain and suffering and physical injury must therefore be founded upon the fact that a money judgment operates to afford the plaintiff feelings of satisfaction, pleasure or gratification which, in the eyes of the law, will operate to offset the pain which has been undergone. In other words, the possession, control, ownership and purchasing power of money is deemed to afford the plaintiff the power of gratifying other desires and of pursuing happiness, and of resulting in feelings of contentment or of an otherwise pleasurable nature.

Dernham, Gdn. v. Cincinnati Traction Co., 21 Ohio N.P. (n.s.) 418, 421 (1919). *See* RESTATEMENT (FIRST) OF TORTS § 903, comment *a* (1939).

shell around the ultimate recovery in personal injury actions. The Internal Revenue Code of 1954 specifically excludes personal injury awards from federal taxation.[6] Additionally, the injured party's cause of action against the tortfeasor is traditionally not attachable by or assignable to the benefit of creditors,[7] and thus will not vest in a trustee in bankruptcy.[8] In some areas, such as workmen's compensation, creditors are statutorily precluded from initiating judicial process against the proceeds of a personal injury recovery.[9] This comment examines the judicial and legislative insulation of the personal injury cause of action and award, and the impenetrability of that insulation in the face of valid challenges.

II. Exclusion of Personal Injury Awards from Federal Taxation

A. Nature of the Exclusion

The Internal Revenue Code of 1954[10] provides for exclusion from gross income of "the amount of any damages received . . . on account of personal injuries or sickness."[11] Damages awarded by suit or settlement,[12] for both physical and nonphysical[13] personal injuries,[14] are thereby excludable. One can understand the basic rationale for the exclusion by examining concepts such as "income,"[15] "capital,"[16] and "gain."[17] Nevertheless, the scope of the exclusion, extending as it does to *all* elements of personal injury recoveries,[18] is at variance with the tax treatment accorded other damage awards.[19]

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6. INT. REV. CODE OF 1954, § 104(a).

7. *See* notes 81-111 and accompanying text *infra.*

8. *See* notes 149-82 and accompanying text *infra.*

9. *See* notes 183-220 and accompanying text *infra.* Recent automobile no-fault acts are another area of legislative exemption. *See, e.g.*, PA. STAT. ANN. tit. 40, § 1009.106(d) (Supp. 1976).

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

11. Damages received under state wrongful death statutes are also tax exempt. Rev. Rul. 19, 1954-1 CUM. BULL. 179. Treas. Reg. § 1.104-1(b) (1960).

12. Treas. Reg. § 1.104-1(c) (1960); Raytheon Prod. Corp. v. Commissioner, 144 F.2d 110 (1st Cir. 1944); Edward H. Clark, 40 B.T.A. 333 (1939).

13. Starrels v. Commissioner, 304 F.2d 574 (9th Cir. 1962) (right of privacy); McDonald v. Commissioner, 9 B.T.A. 1340 (1928) (breach of promise to marry); Hawkins v. Commissioner, 6 B.T.A. 1023 (1927) (libel); Rev. Rul. 74-77, 1974 INT. REV. BULL. NO. 7, at 9 (alienation of affections).

14. 'Personal injury' means injury to the person rather than to property. It applies primarily in cases based on negligence, but also may refer to injuries resulting from violations of intangible personal rights such as the right of privacy, of good reputation, and the like.

H. OLECK, DAMAGES TO PERSONS AND PROPERTY § 9 (1961).

15. INT. REV. CODE OF 1954, § 61.

16. INT. REV. CODE OF 1954, § 1221.

17. INT. REV. CODE OF 1954, § 1001.

18. While all elements of recovery are generally excludable, exclusion is prohibited for certain medical expenses deducted in a prior tax year under section 213, and for receipts from a retirement pension or annuity measured by the employee's age or length of service or by an employer's prior contributions. Treas. Reg. § 1.104-1(a), (b) (1960). Additional limitations are placed upon life and health insurance. Treas. Reg. § 1.104-1(d), T.D. 6722, 1964-1 CUM. BULL. 144.

19. Harnett, *Torts and Taxes*, 27 N.Y.U.L. REV. 614 (1952). *See* Cutler, *Taxation of the Proceeds of Litigation*, 57 COLUM. L. REV. 470 (1957).

The Income Tax Law of 1913[20] appeared to provide a simple, clear and all-inclusive definition of taxable "income."[21] The concept went unchallenged until, in 1918, the tax rate was increased for the second time[22] and a "period of avoidance set in."[23] In 1920 the Supreme Court attempted in *Eisner v. Macomber*[24] to clarify the definition by dubbing income "the *gain* [derived] from capital, from labor, or from both combined."[25] Since then, the Internal Revenue Service and taxpayers have engaged in an ongoing battle concerning the exact scope of the Court's pronouncement.

In *Hawkins v. Commissioner*[26] a taxpayer who had settled a libel and slander suit was deemed to have received no "gain." "Such compensation as general damages adds nothing to the individual, for the very concept which sanctions it prohibits that it shall include a profit. It is an attempt to make the plaintiff whole as before the injury."[27] Since the section 104 exclusion applies to personal damage recoveries, it is essential, particularly in libel and slander suits, to determine accurately whether one has incurred injury to a personal or business interest. In *Nathan Agar v. Commissioner*[28] a settlement recovery was held to be taxable income. It was questionable whether the "damages" were paid as extra compensation to the former employee for long years of service or in settlement of a proposed libel suit. The court held that even if the settlement argument were adopted, the damages would still be includable in income because the injury was to the taxpayer's business rather than to his personal reputation. The Tax Court reasoned that compensation was for past and future income which had been, or would be, lost due to the injury.

In *Knuckles v. Commissioner*[29] a taxpayer's employment contract was terminated by reason of his alleged incompetence. The taxpayer first brought suit for breach of the employment contract, later initiated an action

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20. Income Tax Law of Oct. 3, 1913, H.R. 3321.

21. The net income of a taxable person shall include gains, profits and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of ownership or use of or interest in real or personal property; also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, *or gains or profits and income derived from any source whatever.*

Income Tax Law of Oct. 3, 1913. H.R. 3321, § II, sub. B (emphasis added).

22. Revenue Act of 1918, 40 Stat. 1056.

23. H. HADEN, FUNDAMENTALS OF FEDERAL TAXATION 1 (1959).

24. 252 U.S. 189 (1920).

25. *Id.* at 198 (emphasis added). Thus, unless a gain of some sort results, no income is realized. The Court has repeatedly disavowed a static definition of income. In United States v. Kirby Lumber Co., 284 U.S. 1 (1931), the Court specifically abandoned the search for a precise definition of income. Since then there has been a case by case determination of "income," with reference to accounting concepts, common usage and administrative goals. Surrey & Warren, *The Income Tax Project of the American Law Institute: Gross Income, Deductions, Accounting, Gains and Losses, Cancellation of Indebtedness*, 66 HARV. L. REV. 761, 769-75 (1953).

26. 6 B.T.A. 1023 (1927).

27. *Id.* at 1025.

28. 19 CCH TAX CT. MEM. 116 (1960), *aff'd*, 290 F.2d 283 (2d Cir. 1961).

29. P-H TAX CT. REP. & MEM. DEC. ¶64,033 (1964), *aff'd*, 349 F.2d 610 (10th Cir. 1965).

sounding in tort, and eventually settled with the employer. Although the settlement terms failed to specify what the payment represented, the taxpayer contended that the payments were compensation for his injured reputation. The Tax Court decided that the settlement represented compensation due under the contract, and was thus includable in gross income. In affirming the decision, the Tenth Circuit emphasized that the tort action was only an afterthought and that the employer-payor had denied any tort liability.[30] Since the facts, circumstances and pleadings[31] did not weigh in the taxpayer's favor, the entire award was considered taxable income.[32]

Damages awarded for invasion of one's right of privacy[33] have also been closely examined. The right of an individual to be let alone is essentially a personal rather than a property right, involving a nonphysical personal recovery which would appear to be subject to the section 104 exclusion.[34] In *Starrels v. Commissioner*[35] the Ninth Circuit dealt with a taxpayer's receipt of money from Loew's, Incorporated, in consideration for her consent to the production of a film portraying her deceased father, herself, and other family members. Arguing that the funds compensated invasion of her privacy, the taxpayer asserted that they were properly excluded from taxation. The court, while indicating that damages for a past invasion of privacy would not be taxed, held that payments in exchange for consent to a future "invasion" were not excludable.[36] Essentially, the individual had made a sale, netting a taxable gain.[37]

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30. 349 F.2d at 613.

31. "The [settlement] fund involved must be considered in the light of the claim from which it was realized and which is reflected in the petition filed" to determine if it is capital or income. Farmers' & Merchants' Bank v. Commissioner, 59 F.2d 912, 913 (6th Cir. 1932). *Accord*, Durkee v. Commissioner, 162 F.2d 184 (6th Cir. 1947); Swastika Oil & Gas Co. v. Commissioner, 123 F.2d 382 (6th Cir. 1941), *cert. denied*, 317 U.S. 639 (1942).

32. It has been suggested that an employment termination fund's exemption from taxation depends upon the nature of the claim settled, not its validity. Seay v. Commissioner, 58 T.C. 32 (1972), *acquiesced in*, 1972 INT. REV. BULL. NO. 37, at 5. Since the company's payments are deductible as "ordinary and necessary" business expenses under section 162(a) no matter how the employee's award is tagged, the opportunity for collusion in categorizing the award is apparent. *See* Comment, *Tax Treatment of Post-Termination Personal Injury Settlements*, 61 CAL. L. REV. 1237 (1973).

33. "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to another." RESTATEMENT (FIRST) OF TORTS § 867 (1939).

34. There are no direct holdings regarding the nontaxability of damages received for past invasion of privacy. There are, however, several strong indications that non-physical personal injury awards for invasion of privacy are excludable from income under section 104. Starrels v. Commissioner, 304 F.2d 574 (9th Cir. 1962), *aff'g*, 35 T.C. 646 (1961); Meyer v. United States, 173 F. Supp. 920 (E.D. Tenn. 1959).

35. 304 F.2d 574 (9th Cir. 1962).

36. The court held that it would be an unwarranted liberalization of the Internal Revenue Code's personal injury exclusion to permit the exclusion of funds received from an agreement dealing with a right of privacy that was never invaded. It would be difficult to label a subsequent invasion tortious.

In Roosevelt v. Commissioner, 43 T.C. 77 (1964) the Tax Court directed that advance waiver payments of possible future damages for personal injuries would not be excludable from gross income.

37. *Accord*, Ehrlich v. Higgins, 52 F. Supp. 805 (S.D.N.Y. 1943). Funds received by a widow from a producer making a film about her husband's life were held taxable. The court

These recoveries, ostensibly representing nonphysical personal injuries within the ambit of section 104, have been closely examined by the courts to determine for what losses the plaintiff is being compensated. In cases involving no personal injury,[38] the examination has been equally objective.

In antitrust litigation an injured party may receive treble damages,[39] two-thirds of which is clearly taxable as punitive damages.[40] The remainder is subjected to an "in lieu" test.[41] If it compensates for lost profits, it is taxed as the profits would have been.[42] If, however, the damages represent a recovery of capital, they will be taxed only to the extent that they exceed the value of the basis of the destroyed capital.[43]

Patent infringement recoveries ordinarily represent lost gains or profits and are thus fully taxed.[44] But if the facts disclose that the compensation is for damage to capital or good will, the recovery constitutes a nontaxable return of capital.[45]

In an action for trespass to property, an award for damage to the property itself is deemed a nontaxable return of capital.[46] On the other hand, compensation for the removal of a resource that might otherwise have been sold is held taxable as ordinary income, with due allowance for expenses and depletion incurred by the injured party.[47]

Considering these illustrations of tort recovery, it is evident that the facts and circumstances of each case determine the nature of the loss that has been compensated and the subsequent tax treatment. In *Commissioner*

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rejected the invasion of privacy rationale, finding that the payment primarily covered the use of certain letters, notes and effects of the deceased.

38. "Non-personal" compensatory awards are those based on contract or tortious injury to property and property rights.

39. 15 U.S.C. § 15 (1973).

40. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955); Treas. Reg. § 161-14(a) (1957).

41. Spangler v. Commissioner, 323 F.2d 912, 916 (9th Cir. 1963); Raytheon Prod. Corp. v. Commissioner, 144 F.2d 110, 113 (1st Cir.), *cert. denied*, 323 U.S. 779 (1944).

42. Carter Estate, 298 F.2d 192 (8th Cir. 1962); Raytheon Prod. Corp. v. Commissioner, 144 F.2d 110 (1st Cir. 1944); Swastika Oil & Gas Co. v. Commissioner, 123 F.2d 382 (6th Cir. 1941); H. Liebes & Co. v. Commissioner, 90 F.2d 932 (9th Cir. 1937); Sternberg v. Commissioner, 32 B.T.A. 1039 (1935).

43. The amount of recovery would be applied to reduce the capital. INT. REV. CODE OF 1954, § 1016.

44. Mathey v. Commissioner, 10 T.C. 1099 (1948), *aff'd*, 177 F.2d 259 (1st Cir. 1949), *cert. denied*, 339 U.S. 943 (1950).

In Kurlan v. Commissioner, 343 F.2d 625 (2d Cir. 1965), a copyright infringement award was deemed ordinary income similar to royalties. *See* Magnus v. Commissioner, 259 F.2d 893 (3d Cir. 1958); Danskin Inc. v. Commissioner, 40 T.C. No. 38 (1963) (trademark infringement damages taxable as recovery of lost income).

45. Farmers' & Merchants' Bank v. Commissioner, 59 F.2d 912 (6th Cir. 1932).

"Care must be taken in such cases to avoid taxing recoveries for personal injuries to good will or loss of capital." 1 R. PAUL & J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 6.48 (1934-35). When the entire business and good will are destroyed, compensation for lost good will in excess of cost is gross income. Messer v. Commissioner, 438 F.2d 774 (3d Cir. 1971); Raytheon Prod. Corp. v. Commissioner, 144 F.2d 110 (1st Cir. 1944).

46. Strother v. Commissioner, 55 F.2d 626 (4th Cir.), *aff'd*, 287 U.S. 308 (1932).

47. *Id.*

v. Glenshaw Glass Co.[48] Chief Justice Warren said that the Court had given a "liberal construction" to the definition of "gross income" provided by the Internal Revenue Code of 1939[49] "in recognition of the intention of Congress to tax all gains except those specifically exempted."[50] Although section 104 contains no mandate that all lost wages and diminution or destruction of future earning capacity be excluded from federal taxation, the provision has been so construed.[51] The body and spirit of the individual might be viewed as capital assets, and injury to them as a depletion or destruction of their value. Personal compensatory damages reimburse the injured party and restore the status quo ante rather than increasing the individual's net worth. By contrast to the strict analysis employed in awarding most tort recoveries, an injured party's compensation for lost taxable income is excluded from taxation, and an all-inclusive tax break is granted.

Typically, juries award lump sum recoveries for physical injuries without apportioning the award among past and future pain and suffering, medical expenses, lost time, and decreased future earning capacity. If physical personal injury awards were dissected as are other damage recoveries,[52] that portion compensating for lost wages and future earnings would be subject to taxation as a mere substitution for income rather than untaxed as a return of capital. In physical injury cases, conversely, strict tax logic is not applied. As one commentator has observed, the injured party's tax break is obviously grounded in the public policy determination that "the victim is more to be pitied . . . than taxed. . . . The great social feeling engulfs the tax logic."[53]

B. *Admissibility of Testimony or Instructions on Federal Tax Exclusions in Personal Injury Actions*

Defendants' attorneys have repeatedly urged that juries be permitted to consider the federal tax exclusion in fixing personal injury damages.[54]

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48. 348 U.S. 426 (1955). The issue in that case was whether money received as exemplary damages for fraud or as the punitive two-thirds portion of an antitrust recovery must be reported as taxable income. The case is now cited as broad authority for the taxability of all exemplary, including punitive, damages. *Accord*, Thomson v. Commissioner, 406 F.2d 1006 (9th Cir. 1969); Morse v. United States, 371 F.2d 474 (Ct. Cl. 1967).

49. 53 Stat. 9, 53 Stat. 574, 26 U.S.C. § 22(a). The language closely paralleled that of the Income Tax Law of 1913.

50. Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430 (1955). *Accord*, Helvering v. Clifford, 309 U.S. 331, 334 (1940); Helvering v. Midland Mut. Life Ins. Co., 300 U.S. 216, 223 (1937); Douglas v. Willcuts, 296 U.S. 1, 9 (1935); Irvin v. Gavit, 268 U.S. 161, 166 (1925).

51. *See* note 77 *infra* (illustrating the typical stance).

52. *See generally* Bloomenthal, *Taxation of Damages*, 21 U. PITT. L. REV. 25 (1959); Harnett, *Torts and Taxes*, 27 N.Y.U.L. REV. 614 (1952); Note, *Taxation of Damage Recoveries from Litigation*, 40 CORNELL L.Q. 345 (1955); Note, *Federal Income Tax Consequences of Tort Recovery*, 23 N.Y.U. INTRA. L. REV. 194 (1968).

53. Harnett, *Torts and Taxes*, 27 N.Y.U.L. REV. 614, 627 (1952).

54. Many commentators have deemed the issue worthy of analysis. *E.g.*, Feldman, *Personal Injury Awards: Should Tax Exempt Status be Ignored?*, 7 ARIZ. L. REV. 272 (1966); Morris & Nordstrom, *Personal Injury Recoveries and the Federal Income Tax Law*, 46 A.B.A.J. 274 (1960); Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L.J.

Since the purpose of the injury award is compensation, plaintiff's recovery should closely approximate his or her actual pecuniary loss. Advising the jury of the tax ramifications would tend to eliminate the windfall that damage recipients presently enjoy under the exclusion.[55] It would necessitate a delineation of the total award, identifying the portion that would normally be taxed as wages.[56]

1. Exclusion of the Total Award under Section 104.—Courts rely primarily on three arguments in refusing to instruct juries on the tax-exempt status of the total personal injury recovery.[57] One argument is that Congress intended to benefit the recipient of such damages and courts should not negate that benefit.[58] This is based on the assumption that personal injury recoveries are funds that Congress could have taxed but chose not to.[59] Since, however, the original personal injury exclusion was

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212 (1958); Comment, *The Taxability of Recoveries in Personal Injury Cases*, 39 MARQ. L. REV. 56 (1955); Note, *Estimated Income Taxes Must be Deducted from Damages for Loss of Earning Capacity*, 69 HARV. L. REV. 1495 (1956); Note, *Income Taxation and Damages for Personal Injuries*, 50 KY. L.J. 601 (1962); Note, *Personal Injuries: Should Non-Taxability of Judgments Decrease Award?*, 8 TULSA L.J. 242 (1972); Note, *Damages—Refusal to Instruct Jury to Calculate Loss of Earnings on the Basis of Net Income After Taxes*, 14 VAND. L. REV. 639 (1961).

55. "The purpose . . . of personal injury compensation is neither to reward the plaintiff, nor to punish the defendant, but to replace plaintiff's losses." Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245, 1250 (3d Cir.), *cert. denied*, 404 U.S. 883 (1971) (permitting cautionary instruction).

56. An essential distinction between an instruction and an offer of evidence must be noted:

> *[E]vidence* [of past earnings and tax] seeks to lower the amount of the award by decreasing the size of one of its primary factors [but] the *instruction* (or argument to the jury at the close of the case) attempts to prevent the jury from erroneously believing that the government will claim fifty percent or more of the award made to the plaintiff and thereby increasing that award because of this mistaken belief.

Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L.J. 212, 231 (1958). Many courts have confused the two. *See, e.g.*, Combs v. Chicago, St. Paul, Minn. & Omaha Ry., 135 F. Supp. 750 (N.D. Iowa 1955); Highshew v. Kushto, 235 Ind. 505, 134 N.E.2d 555 (1956); Briggs v. Chicago Great Western Ry., 248 Minn. 418, 80 N.W.2d 625 (1957); Maus v. New York, Chicago & St. Louis R.R., 73 Ohio L. Abs. 595, 128 N.E.2d 166 (Ohio App. 1955), *aff'd*, 165 Ohio St. 281, 135 N.E.2d 253 (1956). *But see* Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245 (3d Cir. 1971).

57. A typical cautionary instruction is found in Dempsey v. Thompson, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952).

> 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.

58. "[I]f the jury were to mitigate the damages of the plaintiff by reason of the income tax exemption accorded him, then the very Congressional intent of the income tax law to give an injured party a tax benefit would be nullified." Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 151-52, 125 N.E.2d 77, 86 (1955). *Accord*, Dixie Feed & Seed Co. v. Byrd, 52 Tenn. App. 619, 376 S.W.2d 745 (1963), *appeal dismissed*, 379 U.S. 15 (1964). *See* Morris & Nordstrom, *Personal Injury Recoveries and the Federal Income Tax Law*, 46 A.B.A.J. 274 (1960) (negating congressional beneficence theory); 69 HARV. L. REV. 1495 (1956) (arguing congressional beneficence).

59. The original exclusion for personal injury recoveries appeared in the Revenue Act of 1918, ch. 18, § 213(b)(6), 40 Stat. 1066 (1919). At first there were doubts whether tort damages were "income" within the meaning of the sixteenth amendment. Such amounts were to be taxed similarly to proceeds of insurance. Treas. Reg. 33 § 25 (1918). But the Attorney General replied to the Treasury Department that insurance proceeds were "capital" rather than receipts of income. 31 OP. ATT'Y GEN. 304, 308 (1918). The Commissioner reversed

rooted in congressional doubts concerning the constitutionality of taxing personal injury recoveries, no strong proof of a beneficient purpose can be seen. The sole proof of Congress' beneficence lies in its repeated adoption of the basic exclusion without modification or restriction. Moreover, a finding of such beneficence would not logically dictate that the nontaxability of the ultimate recovery should affect the method used to establish the amount of the award.

Viewing the tax exclusion as an additional pecuniary benefit to the plaintiff introduces a second basis for denial of the instruction, the collateral source rule.[60] The rule mandates that, although the plaintiff may be the recipient of benefits from an insurer, employer, or other third party, the tortfeasor will not be permitted to offset such benefits from damages assessed against him. In denying a cautionary instruction as to the nontaxability of the lump sum award, courts have held that defendants would otherwise receive a windfall and appropriate a benefit intended for his victim.[61] Yet, if plaintiffs are permitted to receive an amount purposely fixed above the compensatory level, the goal of making victims whole is ignored. Thus the theories based upon congressional intent and the collateral source rule, which have been viewed as implicitly precluding the jury's consideration of the tax question, are both easily attacked.

A third reason advanced for denial of a cautionary instruction is that the whole tax matter is peripheral to the litigation at bar.[62] The tax status of the plaintiff or of any part of the recovery is viewed as a matter between the plaintiff and the government, having nothing to do with the defendant. Certainly this easily disposes of the matter, but the validity of this logic is questionable. A group of twelve laymen from different walks of life, with various incomes, will inevitably be somewhat versed in federal tax matters, and will invariably assume that any award made will be subject to tax.[63] The jury, out of sympathy for the injured plaintiff, will often pad a

himself, establishing both insurance proceeds and personal injury recoveries as return of capital, not income. 20 TREAS. DEC. INT. REV. 457 (1918). The ultimate decision was thus subsequently embodied in the statutory exclusion. *See* Morris & Nordstrom, *Personal Injury Recoveries and the Federal Income Tax Law*, 46 A.B.A.J. 274 (1960).

60. The collateral source rule, deeply rooted in tort, has received substantial acceptance in spite of widespread criticism. *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.22 (Supp. 1968); Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1482-83; James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537 (1952); Schwartz, *The Collateral-Source Rule*, 41 B.U.L. REV. 348 (1961); West, *The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall*, 16 OKLA. L. REV. 395, 397-410 (1963); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964).

61. Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955).

62. McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir. 1960), *cert. denied*, 364 U.S. 870 (1960); Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034 (1956); Kawamoto v. Yasutake, 410 P.2d 976 (Hawaii 1966); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955); Chicago, R.I. & P.R.R. v. Kinsey, 372 P.2d 863 (Okla. 1962).

63. [The cautionary instruction] assumes that the jury will not confine itself to the evidence nor the court's charge but will consider and take into account matters not mentioned therein. This is to assume that there will be misconduct on the part of the jury, an assumption in which we cannot indulge.

Missouri-Kansas-Texas R.R. v. McFerrin, 279 S.W.2d 410, 419 (Tex. Civ. App. 1955).

recovery to accommodate a misconceived tax obligation.[64] With verdicts, particularly in malpractice suits, hitting astronomical heights, this padding can result in a substantial windfall for the plaintiff and exert an excessive punitive effect upon the defendant.

Permitting a cautionary jury instruction would not unduly burden trial court proceedings.[65] No additional time would be consumed and no additional evidence required.[66] Nevertheless, few courts have agreed to instruct the jury that the personal injury award is nontaxable.

The Third Circuit, in *Domeracki v. Humble Oil & Refining Co.*,[67] ordered that trial courts within its jurisdiction permit a cautionary ruling if requested by counsel.[68] In contrast, although the jurors specifically requested an instruction regarding taxation, the Fifth Circuit refused in *Greco v. Seaboard Coast Line Railroad Co.*[69] to permit the instruction, simply stating that its holding was in accord with the court's prior decisions.[70] The hesitancy shown by the Fifth Circuit to permit comment on the nontaxability of plaintiff's total award remains typical of the majority of courts.[71]

Accord, Henninger v. Southern Pac. Co., 250 Cal. App. 2d 872, 59 Cal. Rptr. 76 (1967); Atherley v. MacDonald, Young & Nelson, Inc., 142 Cal. App. 2d 575, 298 P.2d 700 (1956); Davis v. Fortino & Jackson Chevrolet Co., 32 Colo. App. 222, 510 P.2d 1376 (1973). For decisions recognizing that jurors may indeed be moved by the misconceived tax burden to befall plaintiff, see Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245 (3d Cir. 1971); Anderson v. United Air Lines, Inc., 183 F. Supp. 97 (S.D. Cal. 1960); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952).

64. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.12 (1956).

In Greco v. Seaboard Coastline R.R., 464 F.2d 496 (5th Cir. 1972), the court held it not improper to refuse a cautionary instruction, though the concurring Chief Justice pointed out that after the trial court's receipt of the verdict, a juror on post trial motion admitted the damages were boosted substantially to accommodate taxes. *Id.* at 497 n.1.

65. Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245, 1251 (3d Cir. 1971). *Contra*, Combs v. Chicago, St. Paul, Minn. & Omaha Ry., 135 F. Supp. 750 (N.D. Iowa 1955).

66. Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245, 1251 (3d Cir. 1971).

67. *Id.*

68. *Id.*

69. 464 F.2d 496 (5th Cir. 1972).

70. Cunningham v. Bay Drilling Co., 421 F.2d 1398 (5th Cir. 1970); Prudential Ins. Co. of America v. Wilkerson, 327 F.2d 997 (5th Cir. 1964). *Contra*, Towli v. Ford Motor Co., 30 App. Div. 2d 319, 292 N.Y.S.2d 8 (1968) (holding that, as a matter of law, upon the jury's request, the trial court should have instructed the jury not to consider tax in determining the award; no decision as to the propriety of granting an instruction requested by counsel).

71. *See, e.g.*, Rouse v. Chicago, R.I. & P.R.R., 474 F.2d 1180 (8th Cir. 1973) (refusal not reversible error, but propriety left open for future decision); Raycraft v. Duluth M. & I.R.R.R., 472 F.2d 27 (8th Cir. 1973); Greco v. Seaboard Coastline R.R., 464 F.2d 496 (5th Cir. 1973); Payne v. Baltimore & O.R., 309 F. Supp. 1248 (W.D. Va. 1970); Altemus v. Pennsylvania R.R., 32 F.R.D. 7 (D. Del. 1963); Combs v. Chicago, St. Paul, Minn. & Omaha Ry., 135 F. Supp. 750 (N.D. Iowa 1955); Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034, *modified on other grounds*, 81 Ariz. 121, 301 P.2d 1032 (1956); Atherly v. McDonald, Young & Nelson, Inc., 142 Cal. App. 2d 575, 298 P.2d 700 (1956); Gorham v. Farmington Motor Inn, Inc., 159 Conn. 576, 271 A.2d 94 (1970); Atlantic Coast Line R.R. v. Braz, 182 So. 2d 491 (Fla. App. 1966); St. Johns River Terminal Co. v. Vaden, 190 So. 2d 40 (Fla. App. 1966); Kawamoto v. Yasutake, 410 P.2d 976 (Hawaii 1966); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955); Highshew v. Kushto, 235 Ind. 505, 134 N.E.2d 555 (1956); Briggs v. Chicago Great Western Ry., 248 Minn. 418, 80 N.W.2d 625 (1957); Bracy v. Great Northern Ry., 343 P.2d 848 (Mont. 1959); Maus v. New York, Chicago & St. Louis R.R., 165 Ohio St. 281, 135 N.E.2d 253 (1956); Pfister v. City of Cleveland, 96 Ohio App. 185, 54 Ohio Op. 249, 113 N.E.2d 366, *appeal dismissed*, 159 Ohio St. 580, 112 N.E.2d 657 (1953); Chicago, Rock Island

2. Consideration of Taxation in Fixing Damages for Loss of Past Wages and Future Earning Capacity.—The second problem that arises if recognition of the exempt status of the recovery is permitted is how to determine what portion of the award compensates for lost wages and partial or total destruction of future earning capacity. Again, many courts have refused to allow the introduction of personal income tax records or other evidence tending to establish the plaintiff's net income after taxes[72] rather than his or her gross income. These courts have stressed the conjectural nature[73] of this analysis and the possible confusion of jurors.[74] Others,

& Pac. R.R. v. Kinsey, 372 P.2d 863 (Okla. 1962); Missouri-Kansas-Texas R.R. v. McFerrin, 291 S.W.2d 931 (Tex. 1956); Norfolk S. Ry. v. Rayburn, 213 Va. 812, 195 S.E.2d 860 (1973); Crum v. Ward, 122 S.E.2d 18 (W. Va. 1961); Behringer v. State Farm Mut. Auto. Ins. Co., 6 Wis. 2d 595, 95 N.W.2d 249 (1959).

Contra (allowing the instruction), Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245 (3d Cir. 1971); Anderson v. United Air Lines, Inc., 183 F. Supp. 97 (S.D. Cal. 1960); Abele v. Massi, __ Del. __, 273 A.2d 260 (1970); State Highway Dept. v. Buzzuto, __ Del. __, 264 A.2d 347 (1970); Poirer v. Shireman, 129 So. 2d 439 (Fla. App. 1961); Stager v. Florida East Coast R.R., 163 So. 2d 15 (Fla. App. 1964); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952); Towli v. Ford Motor Co., 30 App. Div. 2d 319, 292 N.Y.S.2d 8 (1968).

72. *E.g.* (excluding evidence), Stokes v. United States, 144 F.2d 82 (2d Cir. 1944); Frankel v. United States, 321 F. Supp. 1331 (E.D. Pa. 1970); Plant v. Simmons Co., 321 F. Supp. 735 (D. Md. 1970); Christopher v. United States, 237 F. Supp. 787 (E.D. Pa. 1965); Leming v. Oil Fields Trucking Co., 44 Cal. 2d 343, 282 P.2d 23 (1955) (dictum); Seaboard Coast Line R.R. v. Thomas, 125 Ga. App. 716, 188 S.E.2d 891, *aff'd*, 229 Ga. 301, 190 S.E.2d 898 (1972); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955); Briggs v. Chicago Great Western Ry., 248 Minn. 418, 80 N.W.2d 625 (1957) (dictum); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952); Pfister v. City of Cleveland, 96 Ohio App. 185, 54 Ohio Op. 249, 113 N.E.2d 366 (1953) (dictum); Texas & N.O.R.R. v. Pool, 263 S.W.2d 582 (Tex. Civ. App. 1953); Hinzman v. Palmanteer, 81 Wash. 2d 327, 501 P.2d 1228 (1972).

Contra (admitting evidence), Hartz v. United States, 415 F.2d 259 (5th Cir. 1969); Cox v. Northwest Airlines, Inc., 379 F.2d 893 (7th Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968); LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir.), *cert. denied*, 382 U.S. 878 (1965); McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); Furumizo v. United States, 245 F. Supp. 981 (D. Hawaii 1965); Petition of Oskar Tiedemann & Co., 236 F. Supp. 895 (D. Del. 1964); Nollenberger v. United Air Lines, Inc., 216 F. Supp. 734 (S.D. Cal. 1963); Moffa v. Perkins Trucking Co., 200 F. Supp. 183 (D. Conn. 1961) (Connecticut's damages calculations always use net rather than gross income); Beaulieu v. Elliott, 434 P.2d 665 (Alas. 1967); British Transp. Comm'n v. Gourley [1955] 3 All E.R. 796 (Ch.).

73. Stokes v. United States, 144 F.2d 82, 87 (2d Cir. 1944). *Stokes*' concise reasoning, that "such deductions are too conjectural," is reiterated in most decisions refusing to permit the evidence. One court enumerated the speculative factors: the number of dependents, the amount of charitable contribution, the marital status, the additional deductions at age sixty-five, and legislative changes. Texas & N.O.R.R. v. Pool, 263 S.W.2d 582, 591 (Tex. Civ. App. 1953), *overruled* as to form of jury instruction in Missouri-Kansas-Texas Ry. v. McFerrin, 291 S.W.2d 931 (Tex. 1956).

74. *E.g.*, Highshew v. Kushto, 235 Ind. 505, 509, 134 N.E.2d 555, 568 (1956); Pfister v. City of Cleveland, 96 Ohio App. 185, 54 Ohio Op. 249, 113 N.E.2d 366.

> [W]here 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. Perhaps for absolute exactitude and justice, the jury should be so told and instructed to make an allowance in its general verdict for such item, but the formula for determining such tax element is so complicated that an instruction with respect to it would be most confusing to the jury and at best most difficult of ascertainment.

Id. at 187, 54 Ohio Op. at 250, 113 N.E.2d at 368.

The Fifth Circuit held in a death action that while in personal injury actions before a jury it is appropriate to ignore the incidence of taxation, such does not hold true in non-jury cases. In "a judge tried case . . . there is no problem of articulating a difficult charge to the trial court to weigh this [tax on earnings] along with all the other factors where the proven income is very substantial. . . ." Hartz v. United States, 415 F.2d 259, 265 (5th Cir. 1969). *Contra*, Cunningham v. Rederiet Vindeggen A/S, 333 F.2d 308, 315 (2d Cir. 1964).

emphasizing their belief that Congress intended to benefit victims,[75] have reasoned that any chance over-compensation is justified by the fact that the plaintiff can receive no direct award for litigation expenses.[76]

The central argument favoring jury consideration of the tax exemption in fixing damages for lost earnings is that the plaintiff is otherwise over-compensated. Net income after taxes is what the victim would have had if the injury had not occurred, and a plaintiff need be restored only to that position. While the calculation of future earnings is necessarily speculative, as is the computation of many elements of personal injury awards,[77] lost past wages are readily ascertainable.[78] The plaintiff's tax status, employment status, and wage level are known and should logically be considered. As for future earnings, juries could presume that the plaintiff's present tax status would continue, taking into account any likely changes, concerning which litigants should be afforded an opportunity to present evidence.[79]

Other arguments, that an instruction on taxation would waste time and create confusion, are more easily refuted. If the court's intent is to arrive at just compensation, then consumption of time is simply not a valid legal justification for ignoring the substantial inadequacy of the present method of measuring damages. If the difference between the usual plaintiff's gross and net income were only a few dollars, this plea, coming from the heavily docketed judiciary, would merit consideration. But courts cannot justify granting substantial windfalls to plaintiffs in order to satisfy their desire for expediency.[80] Were the testimony of expert witnesses introduced to clarify tax records and evaluate the plaintiff's tax status, it would create no more confusion among jurors than do the medical testimony, X-rays, charts and aids universally admissible at this time.

Though many reasons are suggested by the courts for their jealous protection of plaintiffs' benefits under section 104 of the Internal Revenue

75. Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 151-52, 125 N.E.2d 77, 86 (1955); Dixie Feed & Seed Co. v. Byrd, 52 Tenn. App. 619, 376 S.W.2d 745 (1963), *appeal dismissed*, 379 U.S. 15 (1964).

76. McWeeney v. New York, N.H. & H. R.R., 282 F.2d 34 (2d Cir. 1960).

77. 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. Nor is it to be forgotten that mathematical precision in fixing damages is not demanded. . . . Unless such damages take income tax into consideration, the beneficiaries will accordingly be receiving more than they would have had the deceased lived.

Brooks v. United States, 273 F. Supp. 619, 629 (D.S.C. 1967) (wrongful death).

78. Petition of Oskar Tiedemann & Co., 236 F. Supp. 895 (D. Del. 1964); Beaulieu v. Elliott, 434 P.2d 665 (Alas. 1967).

79. Note, *Personal Injuries: Should Non-Taxability of Judgments Decrease Award?*, 8 TULSA L.J. 242, 251 (1972).

80. Several courts have indicated that consideration of the tax factor in establishing the award becomes particularly appropriate if substantial earnings are involved. Hartz v. United States, 415 F.2d 259 (5th Cir. 1969); Cox v. Northwest Airlines Inc., 379 F.2d 893 (7th Cir. 1967); LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir. 1965); McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir. 1960); Anderson v. United Air Lines Inc., 183 F. Supp. 97 (S.D. Cal. 1960); Adams v. Deur, __ Iowa __, 173 N.W.2d 100 (1969).

Code, few are supported by practical experience or logic. A judicial gloss now surrounds the original 1918 congressional decision not to tax personal injury damages, beneath the verbiage of which one can detect sincere judicial sympathy for the injured plaintiff.

III. Attachment by or Assignment to Creditors

Whether a creditor may attach a debtor's cause of action in tort or contract depends upon whether the action is assignable. If an action can be prosecuted only by the original owner and cannot voluntarily be assigned, involuntary deprivation will not be permitted.[81] Although courts have traditionally refused to permit assignment of personal injury claims,[82] with the enactment of survival statutes[83] some courts began to allow it.[84] This section examines that development and attempts to show the fallacy of reasoning that assignability necessarily follows from the creation of survivor's actions. In addition, attention is focused on the bankruptcy courts' definition of "property" to exclude personal injury claims and recoveries. Finally, the legislative exemption of Workmen's Compensation recoveries from creditor attachment will be analyzed.

A. Assignability

1. Assignability of the Cause of Action.—The judiciary was traditionally hostile to the assignment of a cause of action,[85] but after equity courts began to recognize assignment of contract actions[86] law courts followed suit.[87] Contract damages were deemed more certain and more easily ascertainable than tort recoveries. Gradually tort actions for damage to property or infringement of property rights became assignable, but not

81. Note, *Availability to Creditor of Debtor's Tort Cause of Action Against Third Party*, 44 YALE L.J. 530 (1935).

82. Putnam v. Continental Air Transp. Co., 297 F.2d 501 (7th Cir. 1961); Simmons v. Zimmerman, 144 Cal. 256, 79 P. 451 (1904); National Bond & Invest. Co. v. Midwest Fin. Co., 156 Kan. 531, 134 P.2d 639 (1943); Beall v. Farmers Exch. Bank, 76 S.W.2d 1098 (Mo. 1934); State *ex rel.* Park Nat'l Bank v. Globe Indem. Co., 332 Mo. 1089, 61 S.W.2d 733 (1933).

83. At common law death gave rise to no cause of action and terminated all causes for personal torts. All jurisdictions have modified the common law to some extent so that causes of action for injuries to all tangible property survive the death of both parties. In essence, the survival statute enables a transfer of title of decedent's claim to his administrator for prosecution on behalf of the estate. Survival statutes vary in their treatment of personal injury claims. W. PROSSER, THE LAW OF TORTS § 126 (4th ed. 1971).

84. *E.g.*, Jolly v. General Accident Gp., 382 F. Supp. 265 (D.S.C. 1974); Kithcart v. Kithcart, 145 Iowa 549, 124 N.W. 305 (1910); Wells v. Edwards Hotel & City Ry., 96 Miss. 191, 50 So. 628 (1909); Mitchell v. City of Shawnee, 167 Okla. 582, 31 P.2d 552 (1934); Doremus v. Atlantic Coast Line R.R., 242 S.C. 123, 130 S.E.2d 370 (1963); Gulf C. & S.F. Ry. v. Eldredge, 35 Tex. Civ. App. 467, 80 S.W. 556 (1904); Harvey v. Cleman, 65 Wash. 2d 853, 400 P.2d 87 (1965).

85. Glenn, *The Assignment of Choses in Action; Rights of a Bona Fide Purchaser*, 20 VA. L. REV. 621 (1934).

86. *E.g.*, Pierce v. McKeehan, 3 Pa. 136 (1846); Young v. Garred, 90 W. Va. 767, 112 S.E. 181 (1922).

87. *E.g.*, Delaware County v. Diebold Safe & Lock Co., 133 U.S. 473 (1890); LaRue v. Groezinger, 84 Cal. 281, 24 P. 42 (1890); State St. Furniture Co. v. Armour & Co., 345 Ill. 160, 177 N.E. 702 (1931).

personal injury claims.[88]

Refusal to enforce attempted assignment of personal injury actions has been a matter of judicial policy.

> On grounds of public policy, the sale or assignment of actions for injuries to the person are void. The law will not consider the injuries of a citizen whereby he is injured in his person to be, as a cause of action, a commodity of sale.[89]

To permit trafficking in pain and suffering[90] would be highly inappropriate, but a more substantial hurdle to free assignability is concern over the speculative nature[91] of the potential recovery and fear that plaintiffs will sell their causes of action, deriving immediate consideration that may be grossly inadequate compared with the injured party's possible recovery from prosecuting the claim.[92]

In the absence of a statutory prohibition, a personal cause of action that has been reduced to judgment is assignable.[93] But prior to final judgment, even at the verdict stage, a plaintiff has no title to the award since the action "hasn't terminated but is still pending."[94] It has been suggested that injured parties can more vigorously prosecute their personal causes of action than can third parties.[95] This justification would apply with equal force to actions that are held assignable. Yet, if third parties stand to benefit by their efforts in prosecuting others' claims, they are apt to expend substantial effort to protect their "investment." If, on the other hand, only a portion of the recovery is assigned[96] and the assignee is obligated to return

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88. *See* note 85 *supra*. For a general history of assignability of causes of action see 8 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 115 (2d ed. 1937); Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816 (1916).

89. North Chicago St. Ry. v. Ackley, 171 Ill. 100, 108, 49 N.E. 222, 225 (1897).

90. Harleysville Mut. Ins. Co. v. Lea, 2 Ariz. App. 538, 410 P.2d 495 (1966).

91. It was deemed a fundamental principle of law "applicable to all assignments, that they are void, unless the assignor has either actually or potentially the thing which he attempts to assign. A man cannot grant or charge that which he has not." Rice v. Stone, 83 Mass. (1 Allen) 556, 569 (1861). *Accord*, Stathos v. Murphy, 26 App. Div. 2d 500, 276 N.Y.S.2d 727 (1966).

92. The cry of "champerty" has long been heard in the defense of nonassignability. Champerty is "unlawful maintenance of a suit in consideration of a bargain to have a part of the thing in dispute, or some profit out of it, and the promise to pay the expenses or costs," that seem essential to constitute it. Sapp v. Davids, 176 Ga. 265, 269, 168 S.E. 62, 64 (1933). Champerty was penalized at common law to prevent "the traffic of merchandising in quarrels [and] huckstering in litigious discord." City of New York Ins. Co. v. Tice, 159 Kan. 176, 180, 152 P.2d 836, 839 (1944) (holding the doctrine inapplicable in property indemnity insurance).

93. "An assignment of a claim against a third person . . . is illegal and ineffective if the claim is for . . . (d) damages for an injury the gist of which is to the person rather than to property, unless the claim has been reduced to judgment." RESTATEMENT OF CONTRACTS § 547 (1932).

94. Gamble v. Central R.R. & Banking Co., 80 Ga. 595, 7 S.E. 315 (1888).

95. Bethlehem Fabricators v. H.D. Watts Co., 286 Mass. 556, 190 N.E. 828 (1934).

96. Partial assignment of a personal cause of action would seem a natural incident to recognition of assignment. For example, South Carolina, having recognized assignment of personal claims, subsequent to enactment of a survival statute, has judicially upheld partial assignment. Doremus v. Atlantic Coastline R.R., 242 S.C. 123, 130 S.E.2d 370 (1963) (guardian *ad litem* assigned 1/100 of minor's claims and became party plaintiff); Heape v. Sullivan, 246 S.C. 218, 143 S.E.2d 366 (1965) (assignment of 1/100 interest upheld though it extinguished federal diversity jurisdiction).

the excess to the assignor, the assignee's efforts may well fail to guarantee more than the assigned interest.

In examining assignability, a distinction must be drawn between tort and contract actions. A contract action involves mutual, voluntarily assumed obligations, the identity of the parties often having no bearing on full and satisfactory performance. Thus substitution of a party or assignment creates no problems.[97] In tort actions, conversely, the parties have not voluntarily assumed their positions. Unlike a contract, a personal tort is a subjective reality. Pain, suffering, humiliation and anxiety are not easily put into evidence or delegated values,[98] but to the injured victim they are realities that must be established by concrete evidence. The victim alone has experienced loss at the defendant's hands, and that subjective, immeasurable loss cannot as readily be transferred to another person as can an objective, liquidated contractual loss. The unique position of personally injured plaintiffs permits them to present their causes of action against tortfeasors fully and vigorously, netting maximum recovery.[99]

With the enactment of survival statutes permitting decedents' causes of action to be assumed by survivors or personal representatives, many courts have departed from the rule of nonassignability,[100] often substituting careful analysis of the results to be encouraged or proscribed with the simplistic test of survivorship.[101] No court adopting the survivability-assignability equation has offered a firm basis for its decision.

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97. Generally a party may assign all his beneficial rights in the contract, provided there is no special confidential relation or exceptional personal skill or knowledge involved. In other contracts, performance of a duty by anyone other than obligor would so differ from the contract that performance may not be delegated via assignment. RESTATEMENT (FIRST) OF CONTRACTS § 160(3)(a) (1932). Still, a cause of action for breach of such contract is assignable.

98. *See* Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219 (1953); Olender, *Proof and Evaluation of Pain and Suffering in Personal Injury Litigation*, 1962 DUKE L.J. 344; Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200 (1958); Comment, *Damages—Pain and Suffering—Use of a Mathmatical Formula*, 60 MICH. L. REV. 612 (1962).

99. In refusing to equate assignment and survivability, the court held in Sherman v. Harris, 36 S.D. 50, 153 N.W. 925 (1915), *aff'd on rehearing*, 40 S.D. 341, 167 N.W. 325 (1918), that the true criterion for assignability should be whether assignment of a particular chose is contrary to express provisions of law, to policy of law, or to good morals. *See* Simons v. Kidd, 73 S.D. 280, 41 N.W.2d 840 (1950).

A peculiar Texas statute enacted in 1889 conceives of no such legal, policy, or moral hurdles.

> The sale of a judgment, or any part thereof, of any court of record, *or the sale of any cause of action*, or interest therein, after suit has been filed thereon, shall be evidenced by a written transfer. . . . This Article shall apply to *any and all judgments, suits, claims and causes of action, whether assignable in law and equity or not.*

VERNON'S ANN. CIV. STAT. art. 6636 (1969) (emphasis added).

100. *See* note 88 *supra*.

101. "The opinions follow a set pattern in declaring that in as much as the claim would survive the injured person's death, it is therefore assignable during his lifetime." Southern Farm Bur. Cas. Ins. Co. v. Wright Oil Co., 248 Ark. 803, 807, 454 S.W.2d 69, 71 (1970). The court further stated that whenever reasoning was used, the decisions normally held that "survivability . . . does not attract assignability in its wake." *Id. See, e.g.*, Harleysville Mut. Ins. Co. v. Lea, 2 Ariz. App. 538, 410 P.2d 495 (1966); Forsthove v. Hardware Dealers Mut. Fire Ins. Co., 416 S.W.2d 208 (Mo. App. 1967). The *Southern Farm* court proudly joined the ranks of courts that reject an automatic equation between assignment and survival.

In *Harvey v. Cleman*,[102] the Supreme Court of Washington, noting that the test of assignability in that state is whether or not the claim survives,[103] held the alleged assignment of an action for pain and suffering to be invalid. Although the court admitted that the survival-assignment tie was an "archaic and oft criticized rule"[104] and that the reason or lack of reason for the rule could be found in the state's case precedent,[105] it held that, absent legislative direction, the rule would be followed.[106] A United States district court held in *In re Schmelzer*[107] that

> in accord with enlightened public policy . . . the mere existence of a survival statute which extends to administrators and its survivors the right to bring a wrongful death action for tort done to the person of the decedent, does not create by implication the right of free assignability of personal injury claims in tort.[108]

Essentially, the survival test appears to be an unintended stronghold.[109] The facts that actions concerning property rights were held assignable and likewise survived, and that personal injury awards were held capable of neither, have been given undeserved emphasis. With the upsurge of survival statutes, few courts thoroughly analyzed the reasons underlying the traditional nonassignability of personal damage claims, but grasped instead at an easy analogy. Some survival statutes, anticipating that survival and assignment might be equated, specifically provided that common law nonassignability was not thereby altered.[110]

In personal injury cases there is clearly a fundamental difference between the assumption of a cause of action by personal representatives on behalf of a decedent's estate and the assignment of such action to a disinterested third party. The estate may incur substantial unpaid medical bills stemming from the decedent's injury. If the obligations are already paid by the deceased, the estate is diminished accordingly. By permitting survival of the claim, the compensation for the injury benefits the injured party's heirs. An assignee, however, does not prosecute an action as

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102. 65 Wash. 2d 853, 400 P.2d 87 (1965).
103. *Id.* at 856, 400 P.2d at 88.
104. *Id.*
105. *See* Cooper v. Runnels, 48 Wash. 2d 108, 291 P.2d 657 (1955). The court did not try to refute the attack or even discuss its merits.
106. 65 Wash. 2d 853, 856, 400 P.2d 87, 88 (1965). Though generally included in coverage of survival statutes, pain and suffering damages are sometimes expressly excluded. In states permitting assignment of personal claims incident to survival statutes, the assignment of a pain and suffering claim is not easily justified. It is the most subjective of the injured party's damages, and the most difficult to establish or value. A creditor would reap reward from another's bad fortune and ill health, contrary to common law and public policy, if attachment were permitted.
107. 350 F. Supp. 429 (S.D. Ohio), *aff'd*, 480 F.2d 1074 (6th Cir. 1973).
108. *Id.* at 439. The Supreme Court of Arkansas similarly declared, "We have no hesitancy in joining those courts which hold that a survival statute does not confer the power of assignment upon the holder of an unliquidated tort claim for personal injuries." Southern Farm Bur. Cas. Ins. Co. v. Wright Oil Co., 248 Ark. 803, 809, 454 S.W.2d 69, 72 (1970).
109. *See* note 101 and accompanying text *supra*.
110. *See* note 118 *infra*.

representative of the assignor.[111] There is no identity of interest, the injured party being unconcerned with the assignee's recovery since he retains no stake therein. In a partial assignment, the assignor may have a greater interest in full prosecution than the assignee.

2. *Assignability and Subrogation.*—Subrogation,[112] often referred to as equitable assignment,[113] has only recently been accepted in the personal injury area.[114] Subrogation clauses in insurance contracts, especially those covering medical expenses, are in wide use and are judicially enforceable.[115] Additionally, in many jurisdictions, enabling legislation permits subrogation in the areas of no-fault and uninsured motorist coverage.[116] The essence of personal injury subrogation is that after injury the insured victim gets immediate satisfaction from his insurer for necessary medical expenses. By entering into a subrogating insurance contract,[117] often at reduced premiums,[118] the insured agrees that the

111. By assigning the claim, the original party is completely divested of rights and interest in the action; the assignee prosecutes the claim and retains the recovery.

112. Subrogation is the substitution of another for a creditor, to whose rights the subrogee succeeds in relation to the debt; it gives the subrogee all the rights, remedies, liens, and securities of the creditor. Freeman v. Equitable Life Assur. Soc., 304 Ill. App. 517, 26 N.E.2d 714 (1940); Weber v. United Hardware & Implement Mut. Co., 75 N.D. 581, 31 N.W.2d 456 (1948); State Farm Mut. Auto. Ins. Co. v. De Wees, 143 W. Va. 75, 101 S.E.2d 273 (1957).

113. Truss v. Miller, 116 Ala. 494, 22 So. 863 (1897).

114. *See* Fleming, *The Collateral Source Rule & Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1502 (1966), observing that there was at that time "no disposition to exploit this device [contractual subrogation clauses] systematically." Recently, however, the use of such clauses has flourished. *See* Reed, *Insurance Subrogation in Personal Injury Actions: The Silent Explosion*, 12 AM. BUS. L.J. 111 (1974).

115. *E.g.*, Alabama Farm Bureau Mut. Cas. Ins. v. Anderson, 263 So. 2d 149 (Ala. Civ. App.), *cert. denied*, 263 So. 2d 155 (1972); Higgins v. Allied Am. Mut. Fire Ins. Co., 237 A.2d 471 (D.C. App. 1968); DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224 (Fla. App.), *aff'd*, 202 So. 2d 561 (Fla. 1967); Damhesel v. Hardware Dealers Mut. Fire Ins. Co., 60 Ill. App. 2d 279, 209 N.E.2d 876 (1965); Imel v. Travelers Indem. Co., 152 Ind. App. 104, 281 N.E.2d 919 (1972); Kroeker v. State Farm Mut. Auto. Ins. Co., 466 S.W.2d 105 (Mo. App. 1971); State Farm Mut. Auto. Ins. Co. v. Roark, 517 S.W.2d 737 (Ky. App. 1974); National Union Fire Ins. Co. v. Grimes, 278 Minn. 45, 153 N.W.2d 152 (1967); Davenport v. State Farm Mut. Auto. Ins. Co., 81 Nev. 361, 404 P.2d 10 (1965); Busch v. Home Ins. Co., 97 N.J. Super. 54, 234 A.2d 250 (1967); Smith v. Motor Club of Am. Ins. Co., 54 N.J. Super. 37, 148 A.2d 37, *aff'd*, 56 N.J. Super. 203, 152 A.2d 369 (1959); Motto v. State Farm Mut. Auto. Ins. Co., 81 N.M. 35, 462 P.2d 620 (1969); Silinsky v. State-Wide Ins. Co., 30 App. Div. 2d 1, 289 N.Y.S.2d 541 (1968); Travelers Indem. Co. v. Godfrey, 12 Ohio Misc. 143, 41 Ohio Op. 2d 166, 230 N.E.2d 560 (1967); Travelers Ins. Co. v. Lutz, 3 Ohio Misc. 144, 210 N.E.2d 755 (1964); Demmery v. National Union Fire Ins. Co., 210 Pa. Super. 193, 232 A.2d 21 (1967); Travelers Indemnity Co. v. Rader, 152 W. Va. 699, 166 S.E.2d 157 (1969); Associated Hosp. Serv. v. Milwaukee Auto. Mut. Ins. Co., 33 Wis. 2d 170, 147 N.W.2d 225 (1967).

116. For a listing of these statutes in various jurisdictions, see Reed, *Insurance Subrogation in Personal Injury Actions: The Silent Explosion*, 12 AM. BUS. L.J. 111 (1974).

117. Many decisions have emphasized the parties' freedom of contract as an argument for judicial validation of subrogation clauses. *E.g.*, Michigan Med. Serv. v. Sharpe, 339 Mich. 574, 64 N.W.2d 713 (1954). The court concluded that to hold "that the subrogation clause gave plaintiff [insurer] no rights whatsoever is to read it out of the agreement by rendering it meaningless. This a court may not do." *Id.* at 577, 64 N.W.2d at 714. *Accord*, National Fire Ins. Co. v. Grimes, 278 Minn. 45, 153 N.W.2d 152 (1967).

118. Two decisions emphasizing the insured's reduced premium as a substantial reason for enforcement of the insurer's subrogation rights are National Union Fire Ins. Co. v. Grimes, 278 Minn. 45, 153 N.W.2d 152 (1967) and Associated Hosp. Serv. v. Milwaukee Auto. Ins. Co., 33 Wis. 2d 170, 147 N.W.2d 225 (1967). The court in DeCepedes v. Prudence

insurer will be reimbursed from any damages subsequently obtained from a third party.

Many courts have been reluctant to accept insurer subrogation clauses and, after equating them with impermissible assignments, have refused to enforce them.[119] Other courts have recognized that assignment and subrogation are essentially different.[120]

> When there is an assignment of an entire claim there is a complete divestment of all rights from the assignor and a vesting of those same rights in the assignee. In the case of subrogation, however, only an equitable right passes to the subrogee and the legal title to the claim is never removed from the subrogor, but remains with him throughout.[121]

Personal injury subrogation, although accused of lifting "the lid on a Pandora's box . . . [of] practical and legal problems,"[122] is easily accepted by courts that recognize the assignment of personal injury claims.[123] Other courts have emphasized the inherent differences between the two concepts.[124] Still other decisions have turned on a consideration of equities,[125] noting that a subrogee receives no more than he has paid the insured, is not a mere volunteer, and is precluded from receiving a windfall. The clearest advantage for a personal injury victim is that he is guaranteed compensation for emergency medical expenses without awaiting final adjudication of his claim against a third party.[126]

Nevertheless, subrogation is not without difficulties.

Mut. Cas. Co., 193 So. 2d 224 (Fla. App. 1967) noted that, at times, subrogation provisions have resulted in a windfall for the insurer because premium rates generally are not lower. *See* E. PATTERSON, ESSENTIALS OF INSURANCE LAW § 33 (2d ed. 1957); 2 G. RICHARDS, LAW OF INSURANCE § 183 (5th ed. 1952).

119. *E.g.*, Harleysville Mut. Ins. Co. v. Lea, 2 Ariz. App. 538, 410 P.2d 495 (1966); Peller v. Liberty Mut. Fire Ins., 220 Cal. App. 2d 610, 34 Cal. Rptr. 41 (1963); Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418 (Mo. App. 1965); Hardware Dealers Mut. Fire Ins. Co. v. Krueger, 486 P.2d 737 (Okla. 1971).

120. *E.g.*, Higgins v. Allied Am. Mut. Fire Ins. Co., 237 A.2d 471 (D.C. App. 1968); Damhesel v. Hardware Dealers Mut. Fire Ins. Co., 60 Ill. App. 2d 279, 209 N.E.2d 876 (1965); Imel v. Travelers Indem. Co., 152 Ind. 104, 281 N.E.2d 919 (Ind. App. 1972); Demmery v. Nat'l Union Fire Ins. Co., 210 Pa. Super. 193, 232 A.2d 21 (1967).

121. Kroeker v. State Farm Mut. Auto. Ins. Co., 466 S.W.2d 105, 110 (Mo. App. 1971) (upholding claim of uninsured motorist coverage carrier).

122. Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418, 425 (Mo. App. 1965).

123. *E.g.*, Davenport v. State Farm Mut. Auto. Ins. Co., 81 Nev. 361, 404 P.2d 10 (1965); Motto v. State Farm Mut. Auto. Ins. Co., 81 N.M. 35, 462 P.2d 620 (1969); Travelers Ins. Co. v. Lutz, 3 Ohio Misc. 144, 210 N.E.2d 755 (1964).

124. *See* note 120 *supra*.

125. *E.g.*, National Union Fire Ins. Co. v. Grimes, 278 Minn. 45, 153 N.W.2d 152 (1967); Silinsky v. State-Wide Ins. Co., 30 App. Div. 2d 1, 289 N.Y.S.2d 541 (1968); Travelers Ins. Co. v. Lutz, 3 Ohio Misc. 144, 210 N.E.2d 755 (1964); Associated Hosp. Serv. v. Milwaukee Auto. Mut. Ins. Co., 33 Wis. 2d 170, 147 N.W.2d 225 (1967). These cases especially emphasized elimination of duplicative recovery by the injured party.

126. For general discussion of personal injury subrogation's pros and cons, see Capwell & Greenwald, *Legal and Practical Problems Arising from Subrogation Clauses in Health and Accident Policies*, 54 MARQ. L. REV. 255 (1971); Kimball & Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841 (1962); Procaccia, *The Effect and Validity of Subrogation Clauses in Insurance Policies*, 1973 INS. L.J. 573 (1973); Procaccia, *Denying Subrogation in Personal Injury Claims*, 15 WM. & MARY L. REV. 93 (1973); Walsh, *Subrogation Under Uninsured Motorist Insurance*, 10 B.C. IND. & COM. L. REV. 77 (1968).

> There are several practical problems concerning the division of proceeds between the subrogated insurer and the individual claimant when a liable tortfeasor has limited financial responsibility or a liability insurance contract with applicable limits less than the total size of the claim or claims.[127]

If an injured insured brings suit against a tortfeasor for $60,000 following receipt of $5,000 for past medical expenses from his insurer, apportionment of a $30,000 total recovery becomes a problem. One method would be to give the insurer his full $5,000. This approach ignores the fact that the plaintiff presumably got a much smaller recovery for medical expenses that he sought, and tends to diminish the portions of the award that compensate pain and suffering and lost wages. A second approach would be to grant the insurer 50 percent of the benefits paid, since the insured has recovered only 50 percent of his loss through litigation. The few cases that have dealt with this problem agree that this pro rata method is more equitable,[128] but query whether pro rata distribution is ideal. With a typical lump sum recovery, one does not know what dollar values have been placed upon particular elements of damages. If subrogation is to be strictly pursued, the insurer should not be permitted to share pro rata in the total unlabeled award, but, in addition to being limited in recovery to the benefit paid to the insured, should recover no more than the amount awarded for the relevant element of damages, less attendant costs.[129]

Subrogation has built-in safeguards since it is not available to a mere volunteer[130] and there is a definite limit on the amount a subrogee can recover. The injured party retains his cause of action and prosecutes it, but is not forced to defer gratification of necessities created by the injury. More importantly, in securing the rights of the injured party, courts must limit the source of the subrogee's recoupment to the damages covering the loss for which he has spoken.[131] Only by apportioning personal injury awards can this be guaranteed.

3. Assignability of the Proceeds.—Several courts[132] have main-

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127. Capwell & Greenwald, *Legal and Practical Problems Arising from Subrogation Clauses in Health and Accident Policies*, 54 MARQ. L. REV. 255, 281 (1971).

128. Blue Cross of Fla., Inc. v. O'Donnell, 230 So. 2d 706, 709 (Fla. App. 1970) (dictum); Germer v. Public Serv. Mut. Ins. Co., 99 N.J. Super. 137, 238 A.2d 713 (191967) (subrogated auto insurer entitled to one-sixth of total medical expenses paid to insured who recovered one-sixth judgment against tortfeasor).

129. It has been urged that the insurer's recovery should be reduced by the total cost of attorney's fees and court costs. Since, however, the insured recovers all damages other than those for which the insurer holds subrogation rights, the equitable approach is to apportion the costs over the total recovery. In Germer v. Public Serv. Mut. Ins. Co., 99 N.J. Super. 137, 238 A.2d 713 (1967), the insurer's share of the litigation proceeds was reduced by one-third of the attorney's fees and one-thirtieth of the court costs.

130. *See* note 112 *supra.*

131. " 'Subrogation' implies the restoration of the amount paid by a surety or other similar person, and restoration of that amount only." 16 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 61.18 (2d ed. R. Anderson 1966).

132. Aponte v. Maritime Overseas Corp., 300 F. Supp. 1075 (S.D.N.Y. 1969); Block v. California Physicians Serv., 244 Cal. App. 2d 266, 53 Cal. Rptr. 51 (1966); Bernardini v. Home & Auto. Ins. Co., 64 Ill. App. 2d 465, 212 N.E.2d 499 (1965); Damhesel v. Hardware Dealers

tained that a fundamental distinction exists between the assignment of a cause of action and the assignment of the proceeds of the action.[133] The assignment of proceeds is held to constitute an enforceable equitable assignment.[134] The cause of action itself is not transferred, nor is there party substitution. An assignee's right comes to fruition only at judgment, with an appropriation of the proceeds.[135] Courts that have rejected the alleged distinction[136] say that since the cause of action is not assignable, a grant of an interest in the proceeds of that contingent claim is likewise void.[137]

New York is one jurisdiction that has clearly favored assignment of proceeds[138] and yet has continued to hold personal causes of action nonassignable.[139] In *Richard v. National Transportation Co.*[140] an injured party's assignment to a hospital of the proceeds of any settlement or judgment paid by the tortfeasor was held to be valid.[141] Although both at common law and by statute the cause of action for personal injuries was nonassignable, assignment of a share of the resultant judgment was permitted.[142] The Southern District Court of Appeals for New York has recently emphasized the clear difference between assignment of a claim

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Mut. Fire Ins. Co., 60 Ill. App. 2d 279, 209 N.E.2d 877 (1965); Bernstein v. Allstate Ins. Co., 56 Misc. 2d 341, 288 N.Y.S.2d 646 (1968); Richard v. National Transp. Co., 158 Misc. 324, 285 N.Y.S. 870 (1936); *In re* Behm's Estate, 117 Utah 151, 213 P.2d 657 (1950).

133. To rule that I cannot assign the cause of action, but that I can transfer 100 per cent of its proceeds sounds anamolous. It is tantamount to saying that I can transfer the substance but must retain the shell; that I can give the *right to recovery*, but I must hold the *right to recover.*

However, repeated precedents of many years' standing tell us this is the law.

Richard v. National Transp. Co., 158 Misc. 324, 327, 285 N.Y.S. 870, 873-74 (1936).

134. Although a cause of action for personal injuries is not assignable, an assignment of the share of the proceeds to be recovered has been regarded as enforceable as an equitable assignment. . . . [T]he assignment could not attach or become a legal judgment and an appropriation of the proceeds [because] only in equity, and . . . all the law gives the assignee is a right to demand that the assignor take proper steps to enforce the cause of action.

3 NEW YORK JURISPRUDENCE § 17 (1958).

135. *Id.*

136. For cases refusing to draw a distinction between assignment of a personal injury claim and assignment of its proceeds, see Southern Farm Bureau Cas. Ins. Co. v. Wright Oil Co., 248 Ark. 803, 454 S.W.2d 69 (1970); Fiefield Manor v. Finston, 54 Cal. 2d 632, 354 P.2d 1073, 7 Cal. Rptr. 377 (1960).

137. In Southern Farm Bureau Cas. Ins. Co. v. Wright Oil Co., 248 Ark. 803, 454 S.W.2d 69 (1970), personal injury claimants had assigned their unliquidated claims to a creditor. The assignee notified the liability insurer of its interest, but a settlement was effected with the assignors. Denying the assignees relief, the court said, after rejecting the validity of assignment of the cause of action,

[W]e also reject the appellee's secondary argument that the proceeds of such a claim should be assignable before judgment, even though the cause of action itself is not. The only value of a cause of action is its possible conversion into a collectible money judgment; . . . [T]here is no sound basis for distinguishing between a cause of action and its proceeds as far as assignability is concerned.

Id. at 809, 454 S.W.2d at 72.

138. Williams v. Ingersoll, 89 N.Y. 508 (1882); Silinsky v. State-Wide Ins. Co., 30 App. Div. 2d 1, 289 N.Y.S.2d 541 (1968); Grossman v. Schlosser, 19 App. Div. 2d 893, 244 N.Y.S.2d 749 (1963). *See* note 135 *supra.*

139. N.Y. GEN. OBLIGATIONS LAW § 13-101 (McKinney 1964).

140. 158 Misc. 324, 285 N.Y.S. 870 (1936).

141. *Id.* at 329, 285 N.Y.S. at 878.

142. *Id.*

and assignment of proceeds. In *McCormack v. Bloomfield Steamship Co.*[143] an injured seaman brought suit against the owner-operator of the vessel on which his injuries were sustained. As part of a $195,000 settlement, the seaman reserved his rights against the former vessel owner and assigned them to the settling insurance company. In a suit against the former owner, the court refused the assignee's claim that only an assignment of proceeds was involved,[144] holding that plaintiff had taken all "right, title and interest in any and all causes of action,"[145] for which he was given the right to prosecute and collect all damages. The court found the object of assignment to be the cause of action, not yet reduced to judgment, and thus held it invalid.[146]

If a needy injured party could provide a lender with a legally enforceable guarantee of reimbursement from his ultimate award, his borrowing power would be substantially increased.[147] The assignor of a share of the potential proceeds is acting voluntarily, while maintaining and prosecuting the cause of action; the assignee merely gambles on the action's success. At present, few cases endorse the distinction between assignment of the personal injury cause of action and assignment of the proceeds.[148] Yet acceptance of the assignment of proceeds in personal injury actions could greatly benefit injured parties without violating the deeply rooted principle of nonassignability of personal injury claims.

IV. Rights of the Trustee in Bankruptcy

Under section 70(a)(5) of the Bankruptcy Act,[149] unliquidated causes of action pass to the trustee in bankruptcy only if they are "subject to attachment, execution, garnishment, sequestration, or other judicial process"[150] in accordance with applicable state law. Federal bankruptcy legislation has never clearly delineated the trustee's rights to personal

143. 399 F. Supp. 488 (S.D.N.Y. 1974).

144. *Id.* at 489.

145. *Id.* The contract in issue is appended to the court's decision. *Id.* at 491-94.

146. *Id.* at 491.

147. The rationale here is very similar to the policy considerations favoring insurance subrogation and to the reasoning supporting the exception of employers from workmen's compensation creditors' exemption provisions. *See* notes 214-20 and accompanying text *infra*. While both of these have been widely accepted, the assignment of proceeds from personal injury actions is not generally favored. One distinction is that, while the subrogee's and employer's claims necessarily arise from the same transaction as the funds they later claim, the assignee of proceeds may be a past creditor. It is thus conceivable that the assigning injured party will receive no compensation at all, even for general damages, though successful in the suit against the tortfeasor.

148. *See* note 136 *supra*.

149. 11 U.S.C. § 110 (1953).

150. Section 70(a) provides in part that

> rights of action ex delicto for libel, slander, injuries, to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process. . . .

Bankruptcy Act § 70(a), 11 U.S.C. § 110(a) (1953).

injury recoveries.[151] Ambiguous judicial construction of this legislation has added to the uncertainty.[152]

Section 70(a)(5) of the Bankruptcy Act of 1898 did not explicitly prohibit the passage of a personal injury cause of action to the trustee in bankruptcy,[153] but was so interpreted.[154] In 1938 the Chandler Act amendments added a proviso to section 70(a)(5) making it possible, depending upon applicable state law, for the action to vest in the trustee.[155] Most states hold, however, that the personal injury cause of action is not subject to judicial process prior to judgment,[156] and accordingly forbid the passage of the action to the bankrupt's trustee.[157]

In *Sibley v. Nason*[158] the court refused to permit a personal injury cause of action to vest in the trustee, stating, "It is not, and never has been, the policy of the law to coin into money for the profit of his creditors the bodily pain, mental anguish or outraged feelings of a bankrupt."[159] To accurately comprehend the bankrupt's position, however, it is necessary to consider the purposes of the Bankruptcy Act. There are two conflicting interests that must be balanced. One purpose of section 70(a)(5) is "to secure for creditors everything of value the bankrupt may possess in alienable or leviable form. . . ."[160] On the other hand, the bankruptcy process seeks to furnish the debtor with a "new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[161]

In *Lines v. Frederick*[162] the Supreme Court examined the meaning of the term "property" to determine whether the bankrupt's earned but unpaid vacation pay should pass to the trustee under section 70(a)(5). The test for passage of an asset was determined to be whether it is "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt's

151. For a review of bankruptcy legislation, see 40 TENN. L. REV. 508 n.5 (1973).

152. A provision in the 1841 Act authorized vesting in the trustee in bankruptcy of "all the property, and rights of property of every kind and nature . . . and all suits in law or in equity in which such bankrupt is a party. . . ." Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 440. Though this would seem to embrace personal tort actions, it was not so interpreted in Comegys v. Vasse, 26 U.S. (1 Peters) 193 (1828).

153. [T]he trustee . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged bankrupt . . . to all . . . (5) property which prior to filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, . . . (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

Act of July 1, 1898, ch. 541, 30 Stat. 565-66.

154. Ruebush v. Funk, 63 F.2d 170 (4th Cir. 1933).

155. For an analysis of other changes wrought by the Chandler Act see 1 H. REMINGTON, TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 10 (5th ed. 1950).

156. *See* note 82 *supra.*

157. *E.g.*, Buda v. Buda, 323 F.2d 748 (7th Cir. 1963); Saper v. Delgado, 146 F.2d 714 (2d Cir. 1945); ; *In re* Schmelzer, 350 F. Supp. 429 (S.D. Ohio 1972), *aff'd*, 480 F.2d 1074 (6th Cir. 1973); *In re* Anderson, 345 F. Supp. 840 (E.D. Tenn. 1972).

158. 196 Mass. 125, 81 N.E. 887 (1907).

159. *Id.* at 130, 81 N.E. at 889.

160. Segal v. Rochelle, 382 U.S. 375, 379 (1966).

161. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

162. 400 U.S. 18 (1970).

ability to make an unencumbered fresh start that it should be [considered] property."[163] The court expressed concern for "the economic survival of the debtor"[164] and for the protection of his rightful "fresh start," while reaffirming the right of creditors to secure alienable and leviable assets.[165] It was held that vacation pay owing to the bankrupt did not pass to the trustee because to permit it to pass would defeat the purpose of the Act.[166]

A district court held in *In re Schmelzer*[167] that a bankrupt's personal injury claim did not vest in the trustee in bankruptcy under Ohio law.[168] The court cited the trustee's tenuous relationship to the claim and consequent inability to assert it on behalf of the bankrupt's estate.[169] More importantly, however, the court adopted the *Lines* rationale[170] that the meaning of "property" is circumscribed by the fundamental interest in balancing the creditor's rights with those of the bankrupt. The court stated that

> an uncompensated claim for personal injury may seriously complicate the injured's ability to function in the future. . . . [T]o allow such a claim, either by way of creditor's bill or petition in bankruptcy, to pass freely to one not directly involved in the pain and suffering usually attendant upon such accidents would be to unfeelingly minimize the extent to which the injured person is reduced, physically, psychologically, and as to future earning capacity, by such accidents.[171]

Schmelzer, though construing state law, placed particular emphasis upon the goals of the national Bankruptcy Act and the inherent public policy concern with alienation of unliquidated personal injury claims. A Ninth Circuit decision, *Carmona v. Robinson*,[172] applied California law[173] in resolving the same issue, but affirmed the trustee's right to assume the bankrupt's action.[174] It is suggested that neither the absolute vesting nor the total exemption view is proper.[175] Personal injury awards are composed of several elements, each of which should be treated differently.

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163. *Id.* at 20.
164. *Id.*
165. *Id.*
166. The Court in *Lines* took a much more lenient view toward the bankrupt's receipt of payments for lost worktime. In Legg v. St. John, 296 U.S. 489 (1936), the Court held that the bankrupt's right to receive future disability payments under an insurance contract passed to the trustee. The payments were not exempt as future earnings since "[t]hey [were] not the fruit of anything . . . done by Legg after the adjudication." *Id.* at 495. The decision evidences no concern for the bankrupt's "fresh start."
167. 350 F. Supp. 429 (S.D. Ohio 1972), *aff'd*, 480 F.2d 1074 (6th Cir. 1973).
168. For an overview of Ohio law previous to the *Schmelzer* decision, see 18 W. RES. L. REV. 1025 (1967).
169. 350 F. Supp. 429, 435 (S.D. Ohio 1972).
170. *Id.*
171. *Id.* at 436-37.
172. 336 F.2d 518 (9th Cir. 1964).
173. CAL. CIV. PRO. CODE § 688.1 (West 1955), *as amended*, CAL. CIV. PRO. CODE § 688.1 (West Supp. 1976).
174. 336 F.2d 518, 521 (9th Cir. 1964).
175. *See* Comment, *Bankruptcy: The Disposition of the Debtor's Unliquidated Cause of Action for Personal Injuries*, 63 CAL. L. REV. 579 (1975).

Lost wages have deep roots in the pre-bankruptcy past. Subject to exemptions under state law,[176] wages accrued but unpaid at the date of bankruptcy pass to the trustee. Compensation for lost wages should be handled in the same manner.[177] Post-bankruptcy wages, however, demand different treatment. There is no connection between them and the pre-bankruptcy past, and to deny the exemption deprives a bankrupt of the "same footing as others similarly situated. . . ."[178] Past medical expense recovery is deeply rooted in the pre-bankruptcy period and may, indeed, have been the incentive for filing the bankruptcy petition. If the bankrupt retains this element of recovery, and concurrently receives a discharge from his past medical bills, he receives a windfall. In contrast, an award covering future medical expenses should be exempt under the "fresh start" theory. Debts embracing future necessities will not be discharged by the bankruptcy proceeding. The debtor who is not accorded the exemption may be forced to draw on future earnings to meet these obligations.

By permitting the total exemption of unliquidated tort claims, if state law proscribes judicial process in relation thereto, the Bankruptcy Act goes beyond what is necessary for protection of the bankrupt's "fresh start."[179] The trustee is denied access to elements of the cause of action to which he is entitled under the Supreme Court's analysis in *Lines v. Frederick*[180] and its progeny. It is especially interesting to note that the proposed Bankruptcy Act unreservedly exempts "proceeds, benefits, or other rights to which the debtor is entitled as a result of any personal injury."[181] While current decisions protecting the interests of the injured bankrupt concern *unliquidated* claims, further protection to the "proceeds" and "benefits" of a *liquidated* claim are contemplated by the proposed act. Again, no distinction is made between those assets rooted in the bankrupt's past and those to compensate for future losses. Current and proposed legislation, as well as many decisions, extend greater protection to the personally injured bankrupt than is merited. Truly, "the Act [has] ultimately favor[ed] the debtor which invokes its protection."[182]

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176. 11 U.S.C. § 24 (1966).

177. *In re* Aveni, 458 F.2d 972 (6th Cir. 1972) (regular wages earned prior to bankruptcy, sufficiently rooted in pre-bankruptcy past and little entangled with bankrupt's ability to make unencumbered fresh start, pass to trustee).

178. *Id.* at 973.

179. Comment, *Bankruptcy: The Disposition of the Debtor's Unliquidated Cause of Action for Personal Injuries*, 63 CAL. L. REV. 579 (1975). *Compare In re* Kanter, 345 F. Supp. 1151 (C.D. Cal. 1972) (total personal injury claim vests in trustee) *with In re* Schmelzer, 350 F. Supp. 429 (S.D. Ohio 1972), *aff'd*, 480 F.2d 1074 (6th Cir. 1973) (total personal injury claim remains with bankrupt victim).

180. 400 U.S. 18 (1970). Assets must be regarded as "property" under the Act unless their transfer to the trustee will interfere with the ability of the bankrupt to make an "unencumbered fresh start." *Id.* at 20.

181. BANKRUPTCY LAWS COMMISSION REPORT, H.R. DOC. NO. 137, pt. 2, 93d Cong., 1st Sess. 125-26, § 4-503(c)(8) (1974).

182. *In re* Schmelzer, 350 F. Supp. 429, 435 (S.D. Ohio 1972).

V. Exemption of Workmen's Compensation from Attachment

Workmen's compensation acts aim to protect injured employees and their dependents and to allow employers to acquire full insurance protection on employee work-related injuries as a part of the total cost of doing business.[183]

After a worker has presented his claim to a workmen's compensation board and the administrative details are resolved in his favor, the issue arises whether the employee's award is subject to general creditors' claims. Pennsylvania law, in accord with general policy, provides a statutory exemption from levy, execution, or attachment of any "claims" for workmen's compensation,[184] and such exemption cannot be waived. Other states exempt "claim[s] or payment due."[185] From statutory verbiage to judicial decree is, once again, an uncertain and winding road. Judicial protection afforded the worker in some courts appears to go beyond the applicable statute's requirements.[186] Other courts severely limit the protection,[187] seemingly forgetting the purpose of the exemption to supply the worker with a substitute for wages during his term of disability in order to prevent him from becoming a charge on society.

A. Form of Payment

The form of payment that the worker's recovery takes has been held, at times, to have substantial significance in deciding whether the payment will be exempt from creditors' claims. In *Arsenault v. Lepage*[188] the court construed an exemption statute referring to "weekly payments due" to include a lump sum award still in the employer's hands.[189] This award was

183. The aim of workmen's compensation law is to replace the uncertainties of litigation at common law or under employer's liability laws with a definite scale of benefits payable regardless of fault. Such benefits are in part indemnity for wages lost as a result of injury, in part medical services made necessary by the injury. Legal formalities are minimized and the issue of negligence is virtually eliminated. Industrial injuries are regarded as part of the productive process, and their costs are therefore held a proper charge against the cost of production.
A. REEDE, ADEQUACY OF WORKMEN'S COMPENSATION xxi (1947).

184. PA. STAT. ANN. tit. 77 § 621 (Supp. 1976).

185. *E.g.*, N.J. STAT. ANN. § 34:15-29 (1959); IOWA CODE ANN. § 627.13 (1950); LA. REV. STAT. ANN. § 23:1205 (1964).

186. *See* note 200 *infra.*

187. *Compare* Vukovich v. Ossic, 50 Ariz. 194, 70 P.2d 324 (1937) (exemption of deceased worker's compensation funds extended to dependents); Surace v. Danna, 248 N.Y. 18, 161 N.E. 315 (1928) (exemption for benefits or payments "due" protected money received and deposited with trust company); *and* Frierson & Co. v. Union Nat'l Bank, 285 S.W. 941 (Tex. Civ. App. 1926) (funds deposited in bank by widow protected from deceased's creditors) *with* Hawthorn v. Davis, 140 So. 56 (La. App. 1932) (exemption not applicable to funds received and deposited); Martin v. Lamb, 228 Mich. 396, 200 N.W. 160 (1924) (exemption not applicable to property purchased with proceeds); Beierlein v. Faulkner, 15 N.J. Misc. 313, 190 A. 853 (1937) (exemption not applicable to workmen's compensation check deposited in bank); Merchants Bank v. Weaver, 213 N.C. 767, 197 S.E. 551 (1938) (exemption does not shift from funds to property purchased with it); *and* Wartella v. Osick, 108 Pa. Super. 589, 165 A. 660 (1933) (exemption not applicable to funds received and deposited in bank account).

188. 84 N.H. 497, 152 A. 475 (1930).

189. Exemption of payments still in the payor's hands is almost universally accepted. A

not judge-rendered, but negotiated by the parties. To effectuate the purposes of the Act, the court held that liberal statutory construction was mandated.[190] A decision seeking to save the worker from himself rather than insistent creditors, *Senske v. Fairmont & Waseca Canning Company*,[191] reviewed an order of the Industrial Commission of Minnesota denying a petition for approval of a lump sum payment. In affirming, the court emphasized that the workman's stated intent was to use $1,200 of the recovery to discharge a debt. The court felt that to grant the request would sanction circumvention of the statute[192] holding workmen's compensation payments exempt from seizure or sale for payment of debtor liability. The court did observe that, in exceptional cases, part payment might be reasonably and providently devoted to payment of certain debts, as when a lien exists on the disabled employee's home and loss is threatened absent payment.[193] It is submitted that this court's supervision of the workman's spending habits was exaggerated beyond the statute's dictates. Involuntary discharge of debts with workmen's compensation funds should certainly be prohibited in order to guarantee employees the full benefit of the act. But to police his voluntary allocation of the award is beyond the pale of judicial obligation or ability.

Substituted benefits derived from action against a third party have also been held to be exempt from attachment. *Scheer v. City of Syracuse*[194] dealt with proceeds received by an employee in an action against a tortfeasor. The applicable statute specified that, in cases involving a successful action against third parties, the worker would be entitled to receive from the compensation carrier the deficiency between the amount of the award as finally determined and the amount of the tort recovery. The court denied several of the worker's judgment creditors access to the proceeds. While the proceeds of the suit were not literally benefits due under the statute in the sense that they did not come from the insurer, they were received in an action authorized by statute and their disposition was statutorily regulated. Because they took the place of benefits due under the act, the proceeds were accorded exempt status.[195]

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true hardship is worked on the employee by those few courts that hold that creditors may attach the proceeds immediately upon receipt by the payee. *Compare* Vukovich v. Ossic, 50 Ariz. 194, 70 P.2d 324 (1937) (exemption continues after receipt of funds) *with* Beierlien v. Faulkner, 15 N.J. Misc. 313, 190 A. 853 (1937) (exemption dissipates upon worker's receipt of funds).

190. 84 N.H. 497, 498, 152 A. 475, 476 (1930).

191. 232 Minn. 350, 45 N.W.2d 640 (1951).

192. *Id.* at 363, 45 N.W.2d at 648.

193. *Id.*

194. 53 Misc. 2d 80, 277 N.Y.S.2d 866 (1967).

195. *Accord, In re* Fontheim's Estate, 171 Misc. 24, 11 N.Y.S.2d 819 (1939), *aff'd on rehearing*, 174 Misc. 477, 21 N.Y.S.2d 452 (1940). *Contra*, McCormick v. McDougal-Hartmann Co., 111 Ill. App. 2d 346, 249 N.E.2d 275 (1969) (employee's recovery from third party tortfeasor not "compensation payment" under statute—employer refused credit against his liability to worker).

B. *Exemption after Payment*

Generally, workmen's compensation funds deposited in a bank account are held exempt from garnishment.[196] Much of the discrepancy between decisions evaluating the exempt status of payments after receipt centers on statutory terms such as "payment"[197] and "payment or claim due and owing."[198] Since courts construing "payment" are less bridled by modifiers, greater protection follows workmen's compensation funds into the recipient's hands.[199] One court construed the exemption to cover a house[200] purchased principally with compensation funds, while another,[201] construing a very similar statute, rejected a widow's claim that real estate purchased by workmen's compensation funds should be exempted from sale under a writ of execution. The latter court maintained that once the form of the compensation had changed and investment had occurred, the exemption was dissipated.[202]

To permit the exemption to continue in the recipient's hands is vital in order to make him whole, to save him from destitution due to ancient debts,[203] and to prevent his disability from resulting in a drain on the public coffers.[204] One court's view,[205] that the exemption was accorded in the interest of avoiding confusion in the administration of workmen's compensation and of relieving the bureau of the burden of extra bookkeeping, is grossly shallow. The injured victim, who has possibly sustained a permanently disabling injury, would be denied all benefit of the recovery, including lost future earnings, were a past creditor permitted to take advantage of the victim's dilemma.

C. *Government Claims*

Government claims constitute a general exception to the exemption

196. Vukovich v. Ossic, 50 Ariz. 194, 70 P.2d 324 (1937); East Moline Works Credit Union v. Linn, 51 Ill. App. 2d 97, 200 N.E.2d 910 (1964); Surace v. Danna, 248 N.Y. 18, 161 N.E. 315 (1928); *In re* Allen's Guardianship, 182 Okla. 512, 78 P.2d 700 (1938); Frierson & Co. v. Union Nat'l Bank, 285 S.W. 941 (Tex. Civ. App. 1926); Graddy v. First Nat'l Bank, 283 S.W. 277 (Tex. Civ. App. 1923). *Contra*, Hawthorn v. Davis, 140 So. 56 (La. App. 1932); Beierlein v. Faulkner, 15 N.J. Misc. 313, 190 A. 853 (1937); Wartella v. Osick, 108 Pa. Super. 589, 165 A. 660 (1933).

197. *E.g.*, East Moline Works Credit Union v. Linn, 51 Ill. App. 2d 97, 200 N.E.2d 910 (1964). "Payment" denotes that which has been paid, the court held. Thus the exemption covered what had been received as well as what was or would become due.

198. *E.g.*, Beierlein v. Faulkner, 15 N.J. Misc. 313, 190 A. 853 (1937). The court construed "payments due" very strictly. In this case the exemption was held not to protect a workmen's compensation check deposited in a bank since it was no longer a claim or a payment due.

199. *E.g.*, Merchants Bank v. Weaver, 213 N.C. 767, 197 S.E. 551 (1938). The court held that the exemption did continue into the hands of the employee; but after he elects to part with the payment itself, the exemption dissipates. *Accord*, Martin v. Lamb, 228 Mich. 396, 200 N.W. 160 (1924).

200. DiDonato v. Rosenberg, 221 App. Div. 624, 225 N.Y.S. 46 (1927); Tosti v. Sbano, 170 Misc. 828, 11 N.Y.S.2d 321 (1939).

201. Ball v. Smiddy, 249 S.W.2d 715 (Ky. 1952).

202. *Accord*, Martin v. Lamb, 228 Mich. 396, 200 N.W. 160 (1924) (furniture and business of roominghouse purchased).

203. Scheer v. City of Syracuse, 53 Misc. 2d 80, 277 N.Y.S.2d 866 (1967).

204. *Id.*

205. Beierlein v. Faulkner, 15 N.J. Misc. 313, 190 A. 853 (1937).

provisions of workmen's compensation statutes.[206] In *United States v. Ocean Accident & Guarantee Corp.*[207] it was held that workmen's compensation benefits held by an insurer for a worker who was delinquent in taxes were not beyond the reach of a claim initiated by the United States.[208] While normally the benefits are free from all creditors' claims, the exemption could not be used against the government. In a similar case, *Fried v. New York Life Insurance Co.*,[209] it was held that the state had no ability to interfere with congressional power to levy and collect taxes and that, therefore, the statutory exemption was ineffective against a federal lien.[210]

The Supreme Court of Connecticut, in *State v. Reed*,[211] permitted the Welfare Commissioner to garnish proceeds in the hands of a nonresident workman's lawyer. Welfare assistance furnished to the employee's wife and children was not classed as normal credit subject to the exemption.[212] In reaching their decision, the judges emphasized that the very thrust of the workmen's compensation statute and exemption provision was to provide financial support for the recipient and his family.[213]

D. Employer's Claim

While the employee is awaiting the administrative proceeding on his claim for workmen's compensation, his employer often advances funds to him by way of either a formal pension plan or an informal allocation. While the employer's attempts to recover have often been successfully resisted under the exemption provision,[214] statutes typically provide for attachment of workmen's compensation benefits by employers[215] who have made advances[216] pending receipt of the award. "Employers should be encour-

206. The statutes of most states appear not to exclude governmental claims from the exemption provisions specifically, yet courts have generally held to the contrary.

207. 76 F. Supp. 277 (S.D.N.Y. 1948).

208. *Id.* at 278.

209. 241 F.2d 504 (2d Cir.), *cert. denied*, 354 U.S. 922 (1957).

210. *Id.* at 506-07.

211. 5 Conn. Cir. 69, 241 A.2d 875 (1967).

212. *Id.* at 70, 241 A.2d at 877.

213. In the same spirit, workmen's compensation awards are held subject to alimony and support lien or garnishment. *E.g.*, Industrial Comm'n v. Oden, 68 Ariz. 234, 204 P.2d 849 (1949); Petrie v. Petrie, 41 Mich. App. 80, 199 N.W.2d 673 (1972); Steller v. Steller, 97 N.J. Super. 493, 235 A.2d 476 (1967); Hilmantel v. Hilmantel, 157 Misc. 649, 282 N.Y.S. 918 (1935); Commonwealth v. Peterson, 100 Pa. Super. 600 (1930).

214. *E.g.*, Southwestern Bell Tel. Co. v. Siegler, 240 Ark. 132, 398 S.W.2d 531 (1966); Caston v. Combined Ins. of Am., 308 So. 2d 287 (La. App. 1975).

215. The logical extension of this reasoning is to permit the employer's subrogation or reimbursement rights to be transferred to his insurance carrier. For example, the Pennsylvania legislature in the Workmen's Compensation Law, Act of June 2, 1915, P.L. 736, Art. III, § 319, PA. STAT. ANN. tit. 77 § 671 provided for subrogation in favor of an employer against a wrongdoer. In Neal v. Buffalo R. & P. Ry. Co., 103 Pa. Super. 218, 158 A. 305 (1931), the right of subrogation was extended to cover the employer's workmen's compensation insurer.

216. This prevents over-compensation of the employee. Sears, Roebuck & Co. v. Bree, 4 Conn. Supp. 1 (1936); Frank C. Sparks Co. v. Huber Baking Co., 48 Del. 9, 96 A.2d 456 (1953). Employer reimbursement via subrogation prevents a windfall to the tortfeasor. Ianire v. University of Delaware, 255 A.2d 687 (Del. Super. Ct. 1969).

aged to advance such sums to employees who are awaiting settlement; if employers are not permitted to attach such compensation benefits they will be discouraged from making such advances, rendering an unnecessary hardship upon injured employees.''[217] Certainly this argument is well taken. This exception to the exemption furthers both the employer's interest in being guaranteed reimbursement and the employee's need of immediate and necessary financial help. Caution must be exercised in determining if particular contributions by employers may be recovered by involuntary reimbursement. Funds given gratuitously,[218] or not properly and timely presented before the court according to administrative procedure, have been held nonrecoverable. Funds given via a formal pension plan may not be recouped;[219] but once an award is made, the employer may reduce the prospective benefits of a privately awarded pension.[220]

The recognition of employers' rights to assert claims for compensatory payments made to employees does not ignore the Act's general creditor prohibition. Reimbursing the employer goes further than merely inducing him to make advances to the needy worker. It guarantees that the employer will not pay twice and that the worker will be compensated without receiving a windfall.

Workmen's compensation exemptions have generally been extended beyond the mere goal of compensation in order to secure to the worker an opportunity to allocate the award for the purposes for which it is granted. Thus creditors' claims for past debts may not consume the injured worker's proceeds.

VI. Conclusion

Personal injury claims and awards have been carved out as an exception to the legal norm. Since true restoration of a lost limb or sight cannot possibly be achieved in any system, legal goals have been reduced, of necessity, so that some pecuniary award—insufficient, arbitrary and speculative as it might be—is granted to the victim. It is undoubtedly this inadequacy that has spurred the creation of legislative and judicial protections to be afforded claimant, claim, and award in the injured party's search for compensation. First, federal and state income tax exclusions guarantee a successful claimant his entire award tax free, no matter what portion represents wages that are normally taxed. Second, a victim has traditionally been refused the opportunity effectively to assign his personal injury claim, and concurrently has been spared creditor attachment. Third, by holding the personal cause of action nonassignable, most states permit an insolvent victim to retain his injury claim and thereby be afforded a ''fresh

217. Caddie Homes Inc. v. Falic, 211 Pa. Super. 333, 341, 235 A.2d 437, 441-42 (1967).
218. *E.g.*, Pope v. Coney, 119 So. 2d 136 (La. App. 1966).
219. Crane Co. v. Loome, 25 Ill. App. 2d 61, 165 N.E.2d 728 (1960).
220. *See, e.g.*, Parsons v. Granite City Steel Co., 41 Ill. App. 2d 396, 190 N.E.2d 644 (1963); Renshaw v. United States Pipe & Foundry Co., 30 N.J. 458, 153 A.2d 673 (1959).

start.'' Fourth, legislatures have elected to exempt some personal injury recoveries such as workmen's compensation from all creditors' actions.

This comment has examined these areas in an attempt to discern their underlying rationale. In each area, the effectiveness of the protection varies from legislature to legislature and from court to court. Some illustrations have shown that the plaintiff receives an award in excess of compensation as, for instance, when gross earnings are used in calculating lost wages and jurors are not instructed not to inflate the final award to reflect a misconceived tax burden. Still, an insolvent victim may be divested of all his rights in a personal injury claim, or a subrogated insurer may be reimbursed from a general award, resulting in the diminution of the injured's compensatory damages recovery.

At present there are inconsistencies in the statutes and case law attesting to the admitted inadequacy of legislatures and courts in rendering a personally injured victim whole. While the injured party is in a precarious position calling for some leniency in the treatment of his claim, the ultimate goal of compensating him must be kept in sight. ''The great social feeling'' of sympathy should not lead to an abrogation of the established legal norm of compensation, but should encourage a more careful and exhaustive effort to achieve it.

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