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Instructing the Jury Not to Consider Income Taxation in Personal Injury Award

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it is conceivable that the result would be financial disaster to both the industry and the state. It is suggested that this is the reason that the legislature saw fit to abrogate that duty.

Florida statute 509.092 has created a conflict between the individual rights and privileges guaranteed by the fourteenth amendment and the economic mandates of the business world. Although the legislature has expressed its preference by enacting the statute, the courts must resolve this conflict.

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INSTRUCTING THE JURY NOT TO CONSIDER INCOME TAXATION IN PERSONAL INJURY AWARD

The attitude of Americans changes in April of each year. Citizens who at other times are as patriotic as the American flag curse the "revenooers" who impose the dreaded income tax. These same citizens sit on juries that measure damages in personal injury actions. The fact that jurors consider income taxes when they formulate a damage award is illustrated by recent cases in which the jury returned from deliberation to ask the trial judge whether the proceeds of the judgment would be subject to income taxation.[1] A federal district judge commented in a personal injury suit that jurors consider income taxes when determining damages, especially around the fifteenth of April.[2]

A federal statute provides that damages awarded in a lawsuit on account of personal injuries or sickness are not subject to income taxation.[3] The existence of this law is probably unknown to most jurors, and there is a definite possibility that they will add to the final award in order to compensate the injured party fully. To avoid this possibility, the trial judge gave the following instruction in *Poirier v. Shireman*:[4]

> " 'You are instructed that any award made to Plaintiff as damages in this case, if any 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.' "

1. Spencer v. Martin K. Eby Constr. Co., 186 Kan. 345, 350 P.2d 18 (1960); Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N.W.2d 627 (1944).

2. Anderson v. United Air Lines, Inc., 183 F. Supp. 97 (S.D. Cal. 1960).

3. INT. REV. CODE OF 1954, §104 (a) (2). Federal courts have construed this section to include awards for loss of earnings because of personal injury or sickness. McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960).

4. 129 So. 2d 439, 442 (2d D.C.A. Fla. 1961), 16 U. MIAMI L. REV. 126.

The Second District Court of Appeal held the giving of this instruction to be within the court's discretion. Although the Florida Supreme Court has not listed income taxes among the relevant factors to be considered in determining damages for personal injuries,[5] it has never faced a case similar to *Shireman*. This note discusses the propriety of giving the instruction approved in *Shireman* and considers several problems arising in connection with it.

The Law in Other Jurisdictions

In *Dempsey v. Thompson*, the first case dealing directly with the point under consideration, the Missouri Supreme Court approved of the exact instruction given in *Shireman*:[6]

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

The Missouri court, however, affirmed the decision of the trial judge, who had refused to give the instruction. The court did so on the ground that, under the circumstances of the case, refusal to give the instruction was within the lower court's discretion. Six years later, the Missouri Supreme Court again affirmed a refusal to give such an instruction.[7] The court held the refusal to be within the discretion of the trial judge because the requested instruction went far beyond the one approved in *Dempsey*; however, it indicated that refusal of the approved instruction would constitute an abuse of discretion.

Other states holding an instruction similar to the one given in *Shireman* to be properly within the court's discretion are Ohio and Wisconsin.[8] The United States Court of Appeals for the Second Circuit has taken the same position,[9] as has a federal district court in California.[10]

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5. Miami Paper Co. v. Johnston, 58 So. 2d 869 (Fla. 1952).

6. 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952).

7. Bowyer v. Te-Co, Inc., 310 S.W.2d 892 (Mo. 1958).

8. Maus v. New York, C. & St. L.R.R., 165 Ohio St. 281, 285, 135 N.E.2d 253, 256 (1956) (concurring opinion); Behringer v. State Farm Mutual Auto Ins. Co., 6 Wis. 2d 595, 95 N.W.2d 249 (1959).

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

10. Anderson v. United Air Lines, Inc., 183 F. Supp. 97 (S.D. Cal. 1960).

A second landmark case in the area is *Hall v. Chicago & N.W. Ry.*,[11] in which counsel for the defendant remarked in his closing statement that any award given to the plaintiff would not be subject to income tax. The Illinois Supreme Court held this to be error and stated:[12]

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

Therefore, even though the question was not before it, the court specifically pointed out that taxation was an improper subject for jury instruction. Courts in the following states hold that an instruction similar to the one given in *Shireman* is improper:[13] Arizona, Georgia, Illinois, Indiana, Kansas, Kentucky, Minnesota, Montana, and Texas. The Sixth Circuit Court of Appeals[14] and a federal district court in Iowa[15] hold likewise.

Desirability of the Instruction

The courts that approve the instruction emphasize the impact of income taxation on the average juror. These courts feel that the possibility that jurors will consider income tax in determining the amount of a personal injury award is sufficient to justify the instruction.[16]

Most courts that hold the instruction improper do so on the ground that it introduces an extraneous matter into the jury's consideration.[17]

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11. 5 Ill. 2d 135, 125 N.E.2d 77 (1955).

12. *Id.* at 152, 125 N.E.2d at 86.

13. Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034 (1956), 10 U. Fla. L. Rev. 98 (1957); Atlantic Coast Line R.R. v. Brown, 93 Ga. App. 805, 92 S.E.2d 874 (1956); Hall v. Chicago & N.W. Ry., *supra* note 11; Highshew v. Kushto, 235 Ind. 505, 134 N.E.2d 555 (1956); Spencer v. Martin K. Eby Constr. Co., 186 Kan. 345, 350 P.2d 18 (1960); Louisville & N.R.R. v. Mattingly, 318 S.W.2d 844 (Ky. 1958); Briggs v. Chicago G.W. Ry., 248 Minn. 418, 80 N.W.2d 625 (1957); Bracy v. Great No. Ry., 136 Mont. 65, 343 P.2d 848 (1959), *cert. denied*, 361 U.S. 949 (1960); Missouri, Kan., Tex. R.R. v. McFerrin, 156 Tex. 69, 291 S.W.2d 931 (1956).

14. New York Cent. R.R. v. Delich, 252 F.2d 522 (6th Cir. 1958).

15. Combs v. Chicago St. P., M. & O. Ry., 135 F. Supp. 750 (N.D. Iowa 1955).

16. McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960); 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); Maus v. New York C. & St. L.R.R., 165 Ohio St. 281, 285, 135 N.E.2d 253, 256 (1956) (concurring opinion); Behringer v. State Farm Mutual Auto Ins. Co., 6 Wis. 2d 595, 95 N.W.2d 249 (1959).

17. New York Cent. R.R. v. Delich, 252 F.2d 522 (6th Cir. 1958); Combs v. Chicago St. P., M. & O. Ry., 135 F. Supp. 750 (N.D. Iowa 1955); Mitchell v.

These courts feel that taxation should concern only the taxpayer and the Government; that it does not concern the jury and therefore should not be considered in fixing the amount of the award. Such a conclusion begs the question. The question is not whether juries *should* consider taxation but whether they *do* consider it and should be instructed not to do so.

One court concludes that the instruction is improper because income taxation is too speculative.[18] If the jurors are instructed to ignore income taxation, it is difficult to understand the pertinency of its speculative nature.

It is submitted that to allow the instruction is the better view. Jurors are intensely aware of the impact of income taxation. The possibility of their considering it in determining an award that will adequately compensate the injured party is sufficient to warrant the instruction.[19] In addition, refusal to give a proper instruction of this type should always constitute an abuse of the trial court's discretion.[20] Such a position seems logical because there are no factual variations among personal injury cases to indicate that the jury will ignore the effect of income taxation in one case and consider it in another.[21] To avoid the possibility of a distorted award, the trial court should always instruct the jury that the final award is not subject to income taxation and that they should not consider income taxation at all.

All of the courts that accept the propriety of the instruction have

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Emblade, 80 Ariz. 398, 298 P.2d 1034 (1956); Atlantic Coast Line R.R. v. Brown, 93 Ga. App. 805, 92 S.E.2d 874 (1956); 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); Louisville & N.R.R. v. Mattingly, 318 S.W.2d 844 (Ky. 1958); Briggs v. Chicago G.W. Ry., 248 Minn. 418, 80 N.W.2d 625 (1957); Missouri, Kan., Tex. R.R. v. McFerrin, 156 Tex. 69, 291 S.W.2d 931 (1956).

18. Bracy v. Great No. Ry., 136 Mont. 65, 343 P.2d 848 (1959), *cert. denied*, 361 U.S. 949 (1960).

19. An interesting discussion of this point appears in Anderson v. United Air Lines, Inc., 183 F. Supp. 97 (S.D. Cal. 1960).

20. This appears to be the position of the Missouri Supreme Court. In Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952), it was held that the instruction should be given in this type of case, but that it would be unjust to subject the plaintiff to this new ruling. The ruling was prospective only. In Bowyer v. Te-Co, Inc., 310 S.W.2d 892 (Mo. 1958), the refused instruction went beyond the one suggested in *Dempsey*. It encompassed *all* taxes and warned the jury not to add to the verdict. The court said: "We are not convinced that the [trial] court abused its discretion in refusing an instruction broader in its terms than that suggested in the *Dempsey* case." *Id.* at 897. The court clearly indicated that had the instruction approved in *Dempsey* been requested, a refusal would have been an abuse of discretion.

21. For a partial discussion of this point, see the dissenting opinion in McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 40 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960).

labeled it cautionary.[22] Traditionally, a cautionary instruction is given at the discretion of the trial judge, who probably knows best whether it is necessary in order to avoid misleading the jurors.[23] Thus, all courts have held that the giving of the instruction is within the trial court's discretion; the Missouri Supreme Court, however, has indicated that refusal to grant a proper instruction will constitute an abuse of discretion.[24]

Loss of Earnings

Certain problems may arise as a result of that portion of the *Shireman* instruction stating "you should not consider such taxes in fixing the amount of any award made Plaintiff, if any you make."

In accordance with this instruction, the jury will neither add to nor deduct from the final award because of an erroneous belief as to the injured party's tax liability. In addition, if the jury follows the broad wording of the instruction, it will not consider income taxation in determining the amount to be awarded for lost earnings or the impairment of future earning capacity. In most jurisdictions[25] the second result would comport with the intent of the court that the jury should not consider income taxation in determining an award for loss of earnings. This seems to be the correct approach. An opposite holding would contravert the apparent intent of Congress to confer a tax benefit on the injured party.[26] The jury would be taking away that which Congress has given.

Two states[27] concur with the English position that only net loss of earnings should be awarded the injured party.[28] The rationale is that damages should place the injured party in the position in which he would have been had the tort not been committed. Since actual earnings are taxable and the damages awarded are not, these states require the jury to deduct probable income tax in determining loss of earnings.

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22. See cases cited note 16 *supra*.

23. *E.g.*, Hall v. State, 78 Fla. 420, 83 So. 513 (1919); Sapp v. State, 59 Fla. 35, 52 So. 2 (1910); Minor v. State, 55 Fla. 71, 45 So. 816 (1908); Day v. State, 54 Fla. 25, 44 So. 715 (1907).

24. See discussion note 20 *supra*.

25. *E.g.*, Southern Pac. Co. v. Guthrie, 180 F.2d 295 (9th Cir. 1949), *cert. denied*, 341 U.S. 904 (1951); Chicago & N.W. Ry. v. Curl, 178 F.2d 497 (8th Cir. 1949); Wagner v. Illinois Cent. R.R., 7 Ill. App. 2d 445, 129 N.E.2d 771 (1955); John F. Buckner & Sons v. Allen, 289 S.W.2d 387 (Tex. Civ. App. 1956).

26. Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955). *But see* Morris & Nordstrom, *Personal Injury Recoveries & the Federal Income Tax Law*, 46 A.B.A.J. 274 (1960).

27. Floyd v. Fruit Indus., Inc., 144 Conn. 659, 136 A.2d 918 (1957); Magnolia Petroleum Co. v. Sutton, 208 Okla. 488, 257 P.2d 307 (1953).

28. British Transp. Comm'n v. Gourley, [1955] 2 Weekly L.R. 41 (H.L.).

No Florida court has held directly on this point. Two factors indicate, however, that the *Shireman* case may support the position that jurors may not consider income tax liability in computing loss of earnings. First, the instruction given in *Shireman* is identical to the one approved in *Dempsey*, in which the court held that probable taxes should not be deducted in determining an award for loss of income. Second, the complaint in *Shireman* contained a count for loss of earnings sustained,[29] and the court did not limit the language of the instruction to the *final* award.

In a jurisdiction following the minority view, the *Shireman* instruction will have to be limited to the final award, and an additional instruction will have to be given concerning the matter of income tax liability in the determination of loss of earnings.

PUNITIVE DAMAGES

Another problem arises in those cases in which the jury may award punitive damages, that is, in those causes of action based on intentional torts or acts of the defendant that are so willful or grossly negligent as to indicate a wanton disregard of the rights of others.[30] Punitive damages awarded in such a case are subject to federal income taxation.[31] Some trial courts may desire to indicate this exception to the jury if the *Shireman* instruction is given. But this exception need not be noted in Florida courts, which hold that the primary purpose of punitive damages is not to benefit the plaintiff but to punish the defendant.[32] The degree of the punishment should not vary with the plaintiff's tax liability. The plaintiff's award should not be increased to compensate for the taxation of punitive damages. This result will be achieved under the basic instruction.

In most jurisdictions it is possible for the jury to award a single sum for both compensatory and punitive damages.[33] A recent revenue ruling indicates that the portion of this sum awarded as punitive damages is taxable.[34] The ruling suggests that this portion can be determined by applying the percentage of the claim requested as punitive damages to the final award. Thus, if the plaintiff sought $50,000 compensatory damages and $25,000 punitive damages but

29. Poirier v. Shireman, 129 So. 2d 439 (2d D.C.A. Fla. 1961).

30. *E.g.*, Carraway v. Revell, 116 So. 2d 16 (Fla. 1959); Ross v. Gore, 48 So. 2d 412 (Fla. 1950); Sauer v. Sauer, 128 So. 2d 761 (2d D.C.A. Fla. 1961).

31. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

32. *E.g.*, Carraway v. Revell, *supra* note 30; Dr. P. Phillips & Sons, Inc. v. Kilgore, 152 Fla. 578, 12 So. 2d 465 (1943); Sauer v. Sauer, *supra* note 30.

33. *E.g.*, Albert v. Miami Transit Co., 154 Fla. 186, 17 So. 2d 89 (1944); MCCORMICK, DAMAGES 295 (1935).

34. Rev. Rul. 418, 1958-2 CUM. BULL. 18.