Washington and Lee Law Review

Volume 38 | Issue 1 Article 21

Winter 1-1-1981

Income Taxation and the Calculation of Tort Damage Awards: The Ramifications of Norfolk & Western Railway v. Liepelt

INCOME TAXATION AND THE CALCULATION OF TORT DAMAGE AWARDS: THE RAMIFICATIONS OF *NORFOLK & WESTERN RAILWAY V. LIEPELT*

Benjamin Franklin once noted that nothing is certain in this world except death and taxes.[1] Although death is certain, selected provisions of the Internal Revenue Code (Code) diminish the certainty of taxation. Section 61 of the Code defines gross income as all income from whatever source derived, unless otherwise specifically excluded.[2] Section 104(a)(2) of the Code excludes recoveries of personal injury or sickness damages from gross income.[3] The tort award exclusion applies to wrongful death awards,[4] personal defamation awards,[5] and lost income recovered in personal injury actions.[6] The income that a tort victim receives from the investment of a tort damage award, however, is taxable.[7]

Defendants often attempt to inform juries in personal injury actions, through both evidence and jury instructions, that damage awards are not taxable. In *Norfolk & Western Railway v. Liepelt*,[8] a wrongful death

---

[1] Letter from Benjamin Franklin to M. Leroy (1789), *reprinted in* J. BARTLETT, FAMILIAR QUOTATIONS 423 (14th ed. 1968).

[2] I.R.C. § 61(a); Treas. Reg. § 1.61-1(a) (1960). The Supreme Court has held that the Code's definition of gross income indicates a congressional intent to tax all pecuniary gains except those specifically excluded. Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430 (1955). By avoiding restrictive categories of taxable receipts, the Code's definition of gross income allows Congress to exert the full measure of its taxing authority. *Id.* at 429.

[3] I.R.C. § 104(a)(2); Treas. Reg. § 1.104-1(c) (1970). Section 104(a)(2) expressly excludes "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." I.R.C. § 104(a)(2). The § 104(a)(2) exclusion applies to both compensatory and punitive damages awarded in personal injury actions. Rev. Rul. 45, 1975-1 C.B. 47, 47. The exclusion, however, does not apply to reimbursements of medical expenses that the taxpayer has deducted previously on his income tax return. I.R.C. § 104(a).

[4] Norfolk & W. Ry. v. Liepelt, 444 U.S. 490, 496 (1980); Anderson v. United Air Lines, Inc., 183 F. Supp. 97, 97 n.1 (S.D. Cal. 1960). *See also* Rev. Rul. 19, 1954-1 C.B. 179, 180.

[5] William Q. Wolfson, 37 T.C.M. (CCH) 1847-14, 1847-21 (1978); Dorothy E. Wallace, 35 T.C.M. (CCH) 954, 959 (1976). In 1958, the Internal Revenue Service ruled that although the compensatory portion of a personal defamation award is excludable, the punitive portion of a personal defamation award is taxable. *See* Rev. Rul. 418, 1958-2 C.B. 18, 19. Revenue Ruling 45, 1975-1 C.B. 47, however, recognized that § 104(a)(2) excludes "any damages," whether compensatory or punitive, recovered in personal injury actions. *Id.* at 47; *see* I.R.C. § 104(a)(2). Since recoveries in personal defamation suits come within the meaning of damages for personal injuries under § 104(a)(2), punitive damages in personal defamation suits are excludable. Therefore, the Service's position in Rev. Rul. 418, 1958-2 C.B. 18, that punitive damages for personal defamation are taxable, is erroneous. Awards for defamation of one's business reputation, however, are taxable. Mason K. Knuckles, 23 T.C.M. (CCH) 182, 184-85 (1964), *aff'd*, 349 F.2d 610 (10th Cir. 1965).

[6] Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1249 (3d. Cir.), *cert. denied*, 404 U.S. 883 (1971).

[7] Stephen Trez, 35 T.C.M. (CCH) 640, 641 n.3 (1976); Rev. Rul. 29, 1965-1 C.B. 59, 59.

[8] 444 U.S. 490 (1980).

action under the Federal Employer's Liability Act[9] (FELA), the Supreme Court addressed two questions concerning the role of taxes in damage award calculations.[10] The first question was whether evidence of the effect of taxes on the decedent's past and estimated future earnings is admissible to reduce an FELA award based on those earnings.[11] The second question was whether trial courts can refuse a requested jury instruction on the nontaxability of an FELA award.[12] Although both of these questions involve the effect of income taxes on the calculation of damage awards, the two questions are analytically distinct.[13] Defendants offer tax evidence in an attempt to reduce lost income awards to an amount that represents the tort victim's lost after-tax income.[14] Defendants request nontaxability instructions, however, to prevent juries from improperly inflating awards under the mistaken belief that awards are taxable.[15] Since the admissibility of tax evidence and the need for the

---

[9] 45 U.S.C. §§ 51-60 (1976). The Federal Employers' Liability Act (FELA) governs the financial responsibility of interstate railroads for injured employees and supersedes all state law actions otherwise available to such employees. Missouri Kan. & Tex. Ry. v. Wulf, 226 U.S. 570, 576 (1913). The FELA authorizes a wrongful death action for the benefit of the survivors of railroad employees negligently killed in the course of their employment. *See* 45 U.S.C. § 51 (1976); note 87 *infra*.

[10] 444 U.S. at 491. Although *Liepelt* dealt specifically with a wrongful death action under the FELA, the case will have a direct impact on actions brought under certain other federal tort-type statutes. *See* text accompanying notes 85-94 *infra*.

[11] 444 U.S. at 491. In an FELA wrongful death action, the measure of damages is that portion of the decedent's lost gross income that would have gone to the support of his family. *Id.* at 493.

[12] *Id.* at 491.

[13] *See* Burlington N., Inc. v. Boxberger, 529 F.2d 284, 296 (9th Cir. 1975); Dempsey v. Thompson, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952). Numerous commentators have recognized the distinction between the tax evidence issue and the jury instruction issue. *See, e.g.*, Burns, *A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell the Jury?*, 14 DE PAUL L. REV. 320, 330 (1965); Feldman, *Personal Injury Awards: Should Tax-Exempt Status Be Ignored?*, 7 ARIZ. L. REV. 272, 280 (1966); Morris and Nordstrom, *Personal Injury Recoveries and the Federal Income Tax Law*, 46 A.B.A.J. 274, 275 (1960) [hereinafter cited as Morris]; Nordstrom, *Income Taxes and Personal Injury Awards*, 19 OHIO ST. L.J. 212, 212-15 (1958) [hereinafter cited as Nordstrom]; Roettger, *The Cautionary Instruction on Income Taxes In Negligence Actions*, 18 WASH. & LEE L. REV. 1, 2 (1961) [hereinafter cited as Roettger]; Note, *Computation of Lost Future Earnings in Personal Injury and Wrongful Death Actions*, 11 IND. L. REV. 647, 667 (1978).

Several courts, however, have erroneously confused the two issues. *See, e.g.*, St. Johns River Terminal Co. v. Vaden, 190 So. 2d 40, 42 (Dist. Ct. App. Fla. 1966); Highshew v. Kushto, 235 Ind. 505, 505, 134 N.E.2d 555, 556 (1956). In *Highshew*, the Illinois Supreme Court rejected a nontaxability instruction after finding that the charge would involve complex tax matters requiring expert assistance. 235 Ind. at 505, 134 N.E.2d at 556. The *Highshew* court's rationale confused the jury instruction issue with the tax evidence issue. Although the use of tax evidence to reduce lost income awards creates problems of complexity, the nontaxability instruction is not complicated. *See* note 40; text accompanying notes 43-46 *infra*.

[14] *See* note 27 *infra*.

[15] *See* text accompanying notes 36-39 *infra*.

nontaxability instruction are distinct issues, a court may exclude tax evidence and still instruct the jury that a damage award is nontaxable.[16]

In *Liepelt*, a fireman employed by Norfolk & Western Railway Company (N&W) was killed in a locomotive collision.[17] The administratrix of the fireman's estate, Liepelt, brought a wrongful death action under the FELA against N&W.[18] At the trial, N&W sought to introduce evidence showing what the decedent's net income would have been after taxes.[19] N&W also requested a jury instruction that any award would not be subject to income taxes.[20] The trial court refused to admit the tax evidence and denied the requested jury instruction.[21]

On appeal, the Appellate Court of Illinois affirmed the trial court's rulings on both the evidentiary and jury instruction issues.[22] The United States Supreme Court granted certiorari after the Illinois Supreme Court denied N&W leave to appeal.[23] The Supreme Court reversed the Illinois Appellate Court and held that the trial court erred in refusing to admit the tax evidence and in refusing to give the nontaxability instruction.[24]

Addressing the evidentiary question, the *Liepelt* majority reasoned that the measure of recovery in an FELA wrongful death action is the amount of money that the decedent would have contributed to the sup-

---

[16] In Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952), the Missouri Supreme Court rejected the use of tax evidence, but held that the nontaxability instruction was required. *Id.* at 346, 251 S.W.2d at 45. Similarly, the Third Circuit in Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245 (3d Cir. 1971), required a nontaxability instruction, but indicated in dictum that it would reject the use of tax evidence. *Id.* at 1250. Although evidence of the effect of taxes on lost income is limited to cases involving awards for lost income, the nontaxability instruction also is applicable to actions involving any type of nontaxable damages. For instance, a defendant might request a nontaxability instruction to prevent the jury from improperly inflating an award of medical expenses.

[17] 444 U.S. at 491.

[18] *Id. Liepelt* was tried in the Circuit Court of Cook County, Illinois. *Id.* Although federal substantive law controls actions under the FELA, a plaintiff may bring an FELA action in either a federal or state court. Castro v. Chicago, Rock I. & P. R.R., 81 Ill. App. 3d 233, 236, 401 N.E.2d 5, 7 (1980).

[19] 444 U.S. at 492. N&W offered to prove through the testimony of an actuary that federal income taxes would have reduced the decedent's future earnings by $57,000. *Id.* N&W offered this evidence to reduce the amount of the award necessary to compensate the victim's family for lost pecuniary benefits. *See* text accompanying notes 25-27 *infra*.

[20] 444 U.S. at 492. N&W requested that the trial judge instruct the jury: "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." *Id.*

[21] *Id.*

[22] Liepelt v. Norfolk & W. Ry., 62 Ill. App. 3d 653, 668-69, 378 N.E.2d 1232, 1245 (1978), *reversed*, 444 U.S. 490 (1980). Noting that the federal circuit courts differed on the tax evidence and jury instruction questions, the Illinois Appellate Court relied on earlier Illinois decisions to uphold the *Liepelt* trial court. *Id.*

[23] 444 U.S. at 491.

[24] *Id.* at 490-98. Justice Stevens wrote for the *Liepelt* majority. *Id.* at 490. Justice Blackmun and Justice Marshall dissented. *See id.* at 498-504 (Blackmun, J., dissenting).

port of his family if he had survived.[25] The Court noted that income taxes reduce the amount of money that a wage-earner can contribute to the support of his family.[26] After-tax income, rather than gross income, therefore, provides the more realistic measure of the pecuniary loss to the decedent's survivors.[27] The majority concluded that since the decedent's after-tax income was the proper measure of damages, N&W's income tax evidence was admissible.[28]

The *Liepelt* majority rejected the plaintiff's argument that evidence on the effect of future income taxes is too speculative and complex for the jury.[29] The majority reasoned that juries already engage in extensive speculation when they calculate awards for lost future earnings.[30] Additionally, the majority stated that the courts and the trial bar have developed effective methods for presenting complex issues, such as future tax consequences, to juries in an understandable manner.[31]

The plaintiff also argued that income tax evidence should not be admissible because the courts do not compensate successful FELA plaintiffs for attorney's fees.[32] The *Liepelt* majority rejected the compensa-

---

[25] *Id.* at 493; *accord*, Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 70 (1913).

[26] 444 U.S. at 493; *accord*, Burlington N., Inc. v. Boxberger, 529 F.2d 284, 291 (9th Cir. 1975). In calculating FELA wrongful death awards, courts deduct the portion of the decedent's lost income that the decedent would have spent for personal expenditures. *See* Kansas City Ry. v. Leslie, 238 U.S. 599, 604 (1915). Courts deduct estimated personal expenditures because such expenditures would not have gone to the support of the decedent's survivors. 444 U.S. at 494.

[27] *Id.* at 493. The purpose of compensatory tort damages is to place the tort victim in the position in which he would have been had the tort not occurred. Burlington N., Inc. v. Boxberger, 529 F.2d 284, 291 (9th Cir. 1975). *See generally* Nordstrom, *supra* note 13, at 215-18. Proponents of the admissibility of tax evidence argue that basing lost earnings awards on lost gross income, rather than lost net income, overcompensates the plaintiff. *See id.* at 219. If the tort had not occurred, income taxes would have reduced the victim's earnings to the after-tax amount. The use of gross income in calculating the award, therefore, overcompensates the victim by replacing both his net income and the taxes that he no longer needs to pay. *Id.*

[28] 444 U.S. at 493-96.

[29] *Id.* at 494. A common objection to the use of tax evidence is the complicated, conjectural nature of such evidence. For instance, the Second Circuit has reasoned that use of lost net income, rather than lost gross income, would require intensive speculation on questions of future tax exemptions, deductions, credits and tax rates. McWeeney v. New York, New Haven & H. R.R., 282 F.2d 34, 36-37 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960). *See also* Taenzler v. Burlington N., 608 F.2d 796, 802 (8th Cir. 1979); Johnson v. Penrod Drilling Co., 510 F.2d 234, 236-37 (5th Cir. 1975), *cert. denied*, 423 U.S. 1245 (1976); text accompanying notes 45-52 *infra*.

[30] 444 U.S. at 494. Courts and juries engage in speculation when they estimate damage elements such as the victim's future employment, earnings and personal expenditures. Additionally, future inflation and interest rates are areas of estimates and predictions. *See id.*

[31] *Id.* The *Liepelt* majority did not explain how courts and lawyers could present tax evidence to juries in an understandable form. *See id.*; note 46 *infra*.

[32] 444 U.S. at 495. The failure of courts to reduce awards to lost after-tax income arguably is offset by the failure of courts to compensate tort victims for their attorney's fees. McWeeney v. New York, New Haven & H. R.R., 282 F.2d 34, 38 (2d Cir. 1960).

tion argument, reasoning that under the traditional "American Rule" attorney's fees are not essential to the full compensation of the prevailing litigant.[33] The majority indicated that courts should not ignore the relevant factor of income taxes to offset an unfair rule regarding attorney's fees.[34] The *Liepelt* majority held, therefore, that the tax evidence was admissible.[35]

Addressing the question of whether the trial court erred in refusing N&W's nontaxability instruction, the *Liepelt* majority noted that few individuals are aware of the statutory exclusion for personal injury awards.[36] Since most jurors do not know of the exclusion, a jury might improperly inflate an award to offset an imaginary tax.[37] The majority also noted that the amount of the plaintiff's damage award greatly exceeded the dollar figure that the plaintiff's expert witness had computed at trial.[38] The majority, therefore, assumed that the *Liepelt* jury improperly inflated the award to offset imaginary taxes.[39] Considering the risk of improper inflation and the simple,[40] harmless[41] nature of the nontaxa-

---

[33] 444 U.S. at 495. Under the "American Rule," a court generally will not award attorney's fees to a successful plaintiff in the absence of statutory authorization. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-50 (1975).

[34] 444 U.S. at 495-96.

[35] *Id.* at 493-96.

[36] *Id.* at 496-97; *accord*, Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1251 (3d Cir. 1971); Dempsey v. Thompson, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952).

[37] 444 U.S. at 496-97. The courts that have required the nontaxability instruction assume that juries occasionally increase awards to offset imaginary taxes. *See, e.g.*, Burlington N., Inc. v. Boxberger, 529 F.2d 284, 297 (9th Cir. 1975); Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1251 (3d Cir. 1971); Dempsey v. Thompson, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952). Conversely, the courts that have refused the instruction assume that juries will not go beyond their specific instructions. *See, e.g.*, McWeeney v. New York, New Haven & H. R.R., 282 F.2d 34, 39-40 (2d Cir. 1960); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 150-51, 125 N.E.2d 77, 86 (1955).

[38] 444 U.S. at 497. At trial the plaintiff's expert witness computed damages of $302,000 plus the value of the care and training that the decedent would have provided to his children. *Id.* The *Liepelt* jury, however, awarded the plaintiff $775,000. *Id.* The *Liepelt* dissent argued that the discrepancy in the amount was not necessarily the result of a mistaken belief that the award was taxable. *Id.* at 503 (Blackmun, J., dissenting). The dissent suggested that the increase in the award could have been due to either the value of training and care which the decedent would have provided to his children, or to the jury's belief that the defendant was insured or obligated for substantial attorney's fees. *See id.*

[39] *Id.* at 497; *see* notes 37 & 38 *supra*.

[40] A nontaxability instruction would require neither expert testimony nor complicated inquiries into the plaintiff's future exemptions, deductions, marital status, or tax brackets. *See* Nordstrom, *supra* note 13, at 231. A court could give the instruction in two or three nonconfusing, carefully worded sentences. *Id. See also* Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1250-51 (3d Cir. 1971). The instruction, therefore, would not burden the court or the jury. Burlington N., Inc. v. Boxberger, 529 F.2d 284, 297 (9th Cir. 1975).

[41] Some courts have argued that knowledge that the award is tax exempt might influence juries to decrease the award improperly. *See, e.g.*, Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 151, 125 N.E.2d 77, 86 (1955); Wagner v. Illinois Cent. R.R., 7 Ill. App. 2d 445, 445, 129 N.E.2d 771, 772 (1955). *See also* Note, *Propriety of Comment on Non-Taxability of Personal Injury Verdicts*, 21 U. CHI. L. REV. 156, 157 (1953).

bility instruction, the *Liepelt* majority held that the nontaxability instruction was required.[42]

Prior to *Liepelt*, a majority of the courts that had considered the issue had excluded income tax evidence.[43] The *Liepelt* majority's decision to allow the use of tax evidence in FELA damage award calculations has both practical and theoretical drawbacks.[44] In terms of practicality, *Liepelt* will force juries to make complex and conjectural tax computations, which in turn will require the assistance of extensive expert testimony.[45] The *Liepelt* majority did not respond convincingly to the argument of several trial lawyers associations that tax evidence will transform simple tort actions into complicated tax trials.[46] Since the

---

In *Wagner*, the Illinois Appellate Court reversed a lower court decision because the lower court had given a nontaxability instruction. 7 Ill. App. 2d 445, 445, 129 N.E.2d 771, 772 (1955). At the first *Wagner* trial, the jury returned a $130,000 verdict for the plaintiff. *Id.* On retrial, the second jury, which received a nontaxability instruction, awarded the plaintiff only $80,000. *Id.* In reversing, the Illinois Appellate Court reasoned that the nontaxability instruction was prejudicial to the plaintiff. *Id.* The difference in the awards, however, might have resulted from the first jury improperly inflating the recovery by $50,000 to offset an imaginary tax on the award. *See* Morris, *supra* note 15, at 276. Commentators have suggested that careful wording of a nontaxability instruction will avoid problems of prejudice to either party. *See id.*; Nordstrom, *supra* note 13, at 237; Roettger, *supra* note 13, at 14-16. *See also* text accompanying notes 72-74 *infra*.

[42] 444 U.S. at 496-98.

[43] Most federal circuits have refused to allow the use of tax evidence in damage award calculations. *See, e.g.*, Taenzler v. Burlington N., 608 F.2d 796, 802 (8th Cir. 1979); Kalavity v. United States, 584 F.2d 809, 812-13 (6th Cir. 1978); Kennett v. Delta Air Lines, Inc., 560 F.2d 456, 463-64 (1st Cir. 1977); Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 178 (3d Cir. 1977); Johnson v. Penrod Drilling Co., 510 F.2d 234, 236-37 (5th Cir. 1975); McWeeney v. New York, New Haven & H. R.R., 282 F.2d 34, 35-39 (2d Cir. 1960). *But see* Mosley v. United States, 538 F.2d 555, 558-59 (4th Cir. 1976); Burlington N., Inc. v. Boxberger, 529 F.2d 284, 294 (9th Cir. 1975). Similarly, most state courts have refused to allow the use of tax evidence to reduce awards. *See, e.g.*, Rodriguez v. McDonnell Douglas Corp., 87 Cal. App. 3d 626, 667-68, 151 Cal. Rptr. 399, 422 (1978); Lumber Terminals, Inc. v. Nowakowski, 36 Md. App. 82, 97, 373 A.2d 282, 291 (1977); Geris v. Burlington N., Inc., 277 Or. 381, 386, 561 P.2d 174, 180 (1977). *But see* Adams v. Deur, 173 N.W.2d 100, 105 (Iowa 1969); Floyd v. Fruit Indus., 144 Conn. 659, 666-67, 136 A.2d 918, 925-26 (1957). *See generally* cases cited in Annot., 63 A.L.R.2d 1393 (1959 & Supp. 1976).

[44] *See* text accompanying notes 45-65 *infra*.

[45] The use of tax evidence at trial will overshadow completely the basic issues of liability and damages. *See* McWeeney v. New York, N.H. & H. R.R., 282 F.2d 34, 36-37 (2d Cir. 1960). *See generally* Nordstrom, *supra* note 13, at 228-29. The difficulty of predicting the future of the Code, the unknown individual decisions of the taxpayer, and the innumerable variables that enter into tax liability make the required tax calculations too complex for most jurors. *See* Huddell v. Levin, 395 F. Supp. 64, 89-90 (D.N.J. 1975), *vacated on other grounds*, 537 F.2d 726 (3d Cir. 1976). *See generally* Johnson v. Penrod Drilling Co., 510 F.2d 234, 236-37 (5th Cir. 1975); Rodriguez v. McDonnell Douglas Corp., 87 Cal. App. 3d 626, 667-68, 151 Cal. Rptr. 399, 422 (1978).

[46] *See* text accompanying note 31 *supra*. The Association of Trial Lawyers of America opposes the use of tax evidence in damage award calculations on the grounds that tax evidence is too complex to present effectively to juries. *See* Brief *Amicus Curiae* for the Association of Trial Lawyers of America at 16-17, Norfolk & W. Ry. v. Liepelt, 100 S. Ct. 755 (1980). *See also* Brief *Amicus Curiae* for 34 State Trial Lawyers Associations at 11-12, Norfolk & W. Ry. v. Liepelt, 444 U.S. 490 (1980).

calculation of a tort victim's lost after-tax earnings is extremely complex, *Liepelt* will result in greater litigation costs and longer trials.

Furthermore, the *Liepelt* majority's decision to allow tax evidence opens the door to other complicated calculations.[47] In *Liepelt* the majority indicated that plaintiffs may introduce evidence of the effect of taxes on the income that discounted lump-sum awards theoretically earn.[48] Plaintiffs would offer this evidence to decrease the discount rate that courts use in reducing lost income awards to present value.[49] Alternatively, plaintiffs would introduce this evidence to increase their discounted awards by the amount of the taxes on the income that their discounted awards theoretically earn.[50] In either case, consideration of the effect of future taxes on the income that discounted awards theoretically earn will compound the problems of complexity under *Liepelt*.[51]

Since *Liepelt* holds that evidence of the effect of federal income taxes on lost earnings is admissible, defendants may argue that evidence of other payroll deductions is also admissible. Defendants may attempt to present evidence of state and local income taxes, social security taxes,

---

[47] *Liepelt* will cause additional problems of complexity in cases where a tort victim has outside sources of income, such as investments, which continue to generate earnings after the tort. *See* Nordstrom, *supra* note 13, at 229-30. A tort victim's future outside income will affect the tax rate applicable to his lost future wages. The jury, therefore, must consider income, which continues after the tort, in calculating the lost earnings award. *Id.* at 230.

[48] *See* 444 U.S. at 495; text accompanying note 7 *supra*. Courts discount FELA wrongful death awards to present value. Gulf, Colo. & S.F. Ry. v. Moser, 275 U.S. 133, 135-36 (1927). The present value of an award is that amount which, if reasonably invested, will allow the plaintiff to withdraw annually a sum equal to one year's lost pecuniary benefits, over a period equal to the decedent's life expectancy. *Id.*; *see* note 49 *infra*.

[49] *See* note 48 *supra*. Consider the following example. Assume that a decedent would have contributed $50,000 a year to the support of his family for a period of 20 years. Assume further that the decedent's survivors can earn 10% interest by investing the award proceeds. The present value of the survivor's lost benefits is $425,860, a sum which, if invested at 10%, will fully compensate the survivors by allowing them to withdraw $50,000 at the end of each year for 20 years. *See* DAVIDSON, HANDBOOK OF MODERN ACCOUNTING, app. 4 (1970). Taxes, however, will decrease the actual rate of return on the investment of the lump-sum award of $425,860. *See* text accompanying note 7 *supra*. Consequently, the court must adjust the 10% discount rate downward to reflect the after-tax interest that an investment of the award will earn. *See generally* 444 U.S. at 495; *see also* text accompanying note 50 *infra*.

[50] The admissibility of the plaintiff's tax evidence will require the jury to add back into the award an amount to compensate for the taxes due on the interest. *See* Nordstrom, *supra* note 13, at 227. *See generally* 444 U.S. at 495; McWeeney v. New York, New Haven & H. R.R., 282 F.2d 34, 37 (2d Cir. 1960); Frankel v. United States, 321 F. Supp. 1331, 1348 (E.D. Pa. 1970), *aff'd*, 466 F.2d 1226 (3d Cir. 1972). Since the add-back represents compensation for future taxes, the jury also must reduce the add-back to present value.

[51] Even a certified public accountant would have difficulty calculating the adjustment necessary to account for the tax liability on the income. Scruggs v. Chesapeake & O. Ry., 320 F. Supp. 1248, 1251 (W.D. Va. 1970). The amount of the tax adjustment depends on the income recipient's future tax liability, since the income recipient, rather than the decedent, will pay the taxes on the income. Consequently, the jury would have to consider not only the decedent's future income taxes, but also the survivor's future taxes on the income that the award earns.

and unemployment insurance deductions. Although courts may exclude evidence of some payroll deductions as de minimis,[52] the adjustment of awards to account for the more substantial payroll deductions will involve further speculation and complexities.

Liepelt also may indirectly affect the admissibility of inflation evidence in damage award calculations. Prior to *Liepelt*, the Supreme Court, in *Grunenthal v. Long Island Railroad*,[53] refused to set aside a damage award that provided for inflationary increases in the plaintiff's lost income.[54] Despite the use of inflation evidence in *Grunenthal*, several circuits have continued to exclude evidence of inflation.[55] One of the principal reasons that courts refuse evidence of inflation is that the evidence is too speculative.[56] The *Liepelt* majority, however, indicated that evidence of inflation is no more speculative than evidence of future taxes.[57] The *Liepelt* decision, therefore, may force courts that have refused inflation evidence to revise their positions. The use of complex inflation evidence at trial, however, will further complicate the calculation of lost earnings damage awards.

Aside from the practical problems that *Liepelt* creates, the majority's decision to allow the use of tax evidence to reduce the tort-feasor's liability violates the collateral source rule. Under the collateral source rule, a tort-feasor cannot reduce the amount of his liability by showing that the tort victim has received compensation from other sources as a result of the tort.[58] Under present tax law, Congress may tax awards of lost earnings in personal injury actions.[59] Congress' refusal to do so

---

[52] *See* 444 U.S. at 494-95 n.7.

[53] 393 U.S. 156 (1968).

[54] *Id.* at 160. The award in *Liepelt* provided for annual five percent increases in the decedent's lost income. 444 U.S. at 492.

[55] *See, e.g.*, Johnson v. Penrod Drilling Co., 510 F.2d 234, 235-41 (5th Cir. 1975) (inflation evidence too speculative, not predictable); Williams v. United States, 435 F.2d 804, 807 (1st Cir. 1970) (inflation evidence too speculative). *But see* Burlington N., Inc. v. Boxberger, 529 F.2d 284, 287 (9th Cir. 1975) (expert testimony on inflation not speculative).

[56] *See* note 55 *supra*; II F. HARPER & F. JAMES, THE LAW OF TORTS, 1325-26 (1956).

[57] *See* 444 U.S. at 494.

[58] Thompson v. Milam, 115 Ga. App. 396, 396, 154 S.E.2d 721, 722 (1967). *See generally* Sedler, *The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach*, 58 KY. L.J. 36, 38-40 (1969); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 741 (1964). The purpose of the collateral source rule is to prevent the tort-feasor from benefitting from the relief that the tort victim receives from other sources. Feeley v. United States, 337 F.2d 924, 926-27 (3d Cir. 1964). As a result of the collateral source rule, however, the tort victim recovers an amount beyond that necessary to make him whole. *Id.* at 926. The collateral source rule, therefore, is an exception to the general rule that compensatory tort damages should replace only the tort victim's actual losses. *See also* text accompanying notes 64-65 *infra*.

[59] As a general rule, Congress may tax any gain, including that portion of a damage award which represents lost income. *See* Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430 (1955); Phoenix Coal Co. v. Commissioner, 231 F.2d 420, 422-23 (2d Cir. 1956); Raytheon Prod. Corp. v. Commissioner, 144 F.2d 100, 113 (1st Cir.), *cert. denied*, 323 U.S. 779 (1944). Awards for lost income that a plaintiff recovers in a non-personal injury action are taxable.

bestows a collateral benefit on tort victims equal to the amount of taxes that the victims otherwise would have to pay.[60] Although Congress' intent in giving tort victims this benefit is unclear,[61] the use of tax evidence effectively deprives the tort victim of the benefit.[62] Since the use of tax evidence allows tort-feasors to reduce their liability by the taxes that the government has decided to forego, *Liepelt* violates the collateral source rule.[63]

Admittedly, refusing to admit tax evidence may overcompensate the tort victim.[64] Congress could avoid overcompensation of the tort victim and eliminate the use of tax evidence by repealing the statutory exclusion of lost income awards. Since Congress has not repealed section 104(a)(2), however, Congress apparently has chosen to allow overcompensation of plaintiffs.[65] The *Liepelt* majority ignored this congressional decision and therefore erred in holding tax evidence admissible.

The *Liepelt* majority's decision to require the offered nontaxability instruction, however, was correct.[66] Although no good method exists for

---

See 231 F.2d at 422-23; Watkins v. Commissioner, No. 319-79 T (Ct. Cl. April 11, 1980); Rev. Rul. 341, 1972-2 C.B. 32, 32.

[60] Huddell v. Levin, 395 F. Supp. 64, 87 (D.N.J. 1975); *see* note 61 *infra*. *See also* 444 U.S. at 500-01 (Blackmun, J., dissenting).

[61] Congress originally excluded personal injury damage awards because Congress did not consider tort damages to be taxable income within the meaning of the sixteenth amendment. *See* H.R. REP. No. 767, 65th Cong., 2d Sess. 9-10 (1918); 31 Op. Att'y Gen. 304, 308 (1918). Under present tax law, however, Congress could tax lost income awarded in personal injury actions. *See* note 59 *supra*. Several courts and commentators have suggested that the continued existence of the exclusion is the result of a congressional intent to bestow a humanitarian benefit on tort victims. *See, e.g.*, 444 U.S. 501 (Blackmun, J., dissenting); Kalavity v. United States, 584 F.2d 809, 812-13 (6th Cir. 1978); Huddell v. Levin, 395 F. Supp. 64, 89 (D.N.J. 1975); Note, *Income Tax Effects on Personal Injury Recoveries*, 30 LA. L. REV. 672, 685 (1970); 69 HARV. L. REV. 1495, 1496 (1956). The administrative problems that would result from taxing lost income awarded in personal injury actions also may have influenced Congress' decision to continue to allow the exclusion. *See* 444 U.S. at 501 (Blackmun, J., dissenting).

[62] *See* Huddell v. Levin, 395 F. Supp. 64, 87 (D.N.J. 1975) (citing Epmeier v. United States, 199 F.2d 508, 511 (7th Cir. 1952)).

[63] *See generally* Kalavity v. United States, 584 F.2d 809, 812-13 (6th Cir. 1978); Huddell v. Levin, 395 F. Supp. 64, 87 (D.N.J. 1975); RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 914(a), Comment b. at 136 (Tent. Draft No. 17, 1973). Several commentators also have adopted the collateral source rationale for rejecting the use of tax evidence. *See, e.g.*, Yorio, *The Taxation of Damages: Tax and Non-Tax Policy Considerations*, 62 CORNELL L. REV. 701, 734 (1977) [hereinafter cited as Yorio]; Comment, *Income Tax Effects on Personal Injury Recoveries*, 30 LA. L. REV. 672, 685 (1970); 69 HARV. L. REV. 1495, 1496 (1956). *But see* Nordstrom, *supra* note 13, at 222-23.

[64] *See* note 27 *supra*. *But see* note 58 *supra*.

[65] *See* note 63 *supra*. The *Liepelt* dissent reasoned that the majority's decision to allow tax evidence violated Congress' intent to exclude lost income awards. 444 U.S. at 502 (Blackmun, J., dissenting). *See also* 69 HARV. L. REV. 1495, 1496 (1956).

[66] The *Liepelt* dissent reasoned that Illinois procedural law governed the jury instruction issue. 444 U.S. at 503-04 (Blackmun, J., dissenting). Since the Illinois courts did not require the nontaxability instruction, the dissent concluded that the trial court's failure to

determining what takes place in the jury room,[67] several cases indicate that jurors, on their own initiative, consider taxes when calculating awards.[68] Defendants, therefore, face a significant risk that jurors will inflate awards improperly to offset imaginary taxes.[69] Since the need to prevent improperly inflated awards outweighs the minimal burden of giving the nontaxability instruction,[70] courts should give the nontaxability charge.[71]

Since *Liepelt* requires a nontaxability instruction, if a party requests such a charge, courts must consider what constitutes a proper instruction. Two commentators have suggested an instruction which directs the jury to neither add to nor subtract from an award on account of taxes.[72] The suggested instruction eliminates the possibility of prejudice to plaintiffs by expressly forbidding juries to subtract from the award

---

give the charge was not error. *Id.* at 504 (Blackmun, J., dissenting). The dissent conceded, however, that Illinois procedural law was not controlling if the state law interfered with federal policies. *Id.* Federal policy limits the measure of damages in FELA wrongful death actions to the survivor's lost pecuniary benefits. *Id.* at 493. Since a refusal to give the nontaxability instruction can result in an award exceeding lost pecuniary benefits, the Illinois procedural rule allowing such a refusal interferes with federal policy. Therefore, federal law, rather than state law, controlled the jury instruction issue in *Liepelt*.

[67] *See* Kalven, *The Jury, the Law and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 163 (1958); Klevorick & Rothschild, *A Model of the Jury Decision Process*, 8 J. LEGAL STUD. 141, 142 (1979).

[68] *See, e.g.*, Kennett v. Delta Air Lines, Inc., 560 F.2d 456, 461-62 (1st Cir. 1977) (jury inquired during deliberations about tax ramifications of award); Towli v. Ford Motor Co., 30 A.D.2d 319, 319, 292 N.Y.S.2d 8, 9 (1968) (jury inquired during deliberations whether plaintiff had to pay taxes on award). *See also* cases cited in Roettger, *supra* note 13, at 6.

[69] A danger exists that today's tax-conscious jurors will believe mistakenly that an award is taxable and therefore increase the award to compensate the plaintiff fully after the imaginary tax is taken out. 444 U.S. at 497; II F. HARPER & F. JAMES, THE LAW OF TORTS § 25.12, at 1327-28 (1956).

[70] *See* note 40 *supra*. The *Liepelt* dissent argued that the nontaxability instruction is purely cautionary and therefore unnecessary. 444 U.S. at 502-03 (Blackmun, J., dissenting). The dissent suggested that once courts begin to restrict jury actions, courts will not be able to define a logical ending point. *See id.* The dissent's argument ignores the common use of cautionary instructions to clarify affirmative charges. *See* Morris, *supra* note 13, at 275. Courts normally require certain cautionary instructions to prevent prejudice to litigants. For example, a court must instruct the jury to ignore prejudicial comments made by the trial judge. *See* Pager v. Pennsylvania R.R., 165 F.2d 56, 57 (2d Cir. 1947).

[71] Prior to *Liepelt*, most federal courts did not require the nontaxability instruction. *See, e.g.*, Taenzler v. Burlington N., 608 F.2d 796, 802 (8th Cir. 1979); Kennett v. Delta Air Lines, Inc., 560 F.2d 456, 461 (1st Cir. 1977); Nicholas v. Marshall, 486 F.2d 791, 794 (10th Cir. 1973); Greco v. Seaboard Coast Line R.R., 464 F.2d 496, 497 (5th Cir. 1972), *cert. denied*, 410 U.S. 990 (1973). *But see* note 37 *supra*. Similarly, most state courts have not required the instruction. *See, e.g.*, Mitchell v. Emblade, 80 Ariz. 398, ____, 298 P.2d 1034, 1038, *mod.*, 301 P.2d 1032 (1956); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 152, 125 N.E.2d 77, 86 (1955). *But see* Dempsey v. Thompson, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952).

[72] *See* Morris, *supra* note 13, at 276. The instruction that N&W requested in *Liepelt* did not prohibit the jury from subtracting from the award on account of taxes. *See* note 20 *supra*; text accompanying notes 73-74 *infra*.

because of taxes.[73] In actions where evidence of the effect of taxes on lost earnings is admissible, the court should give the jury two tax-related instructions. The first instruction should direct the jury to reduce the award to an amount which represents the plaintiff's lost after-tax income. The second instruction should inform the jurors that once they have calculated the award based on after-tax income, they should not add to the award on account of taxes.[74]

Liepelt will have varying effects on actions other than FELA wrongful death claims. The Supreme Court did not decide *Liepelt* on a constitutional basis.[75] Therefore, while *Liepelt* is binding precedent in FELA actions brought in state courts,[76] the decision is not binding on state court actions involving common law or state statutes.[77] The *Liepelt* decision also is not binding precedent in diversity actions brought in federal courts.[78] *Liepelt*, therefore, can have only a persuasive effect on state and federal courts applying state law. Similarly, *Liepelt* has no direct effect on actions under the Federal Torts Claims Act (FTCA).[79]

---

[73] *See* note 41 *supra.*

[74] A jury instruction not to subtract from the award on account of taxes might confuse jurors when the court also instructs the jurors to reduce the tort victim's award to an amount representing after-tax income.

[75] In *Liepelt*, the Supreme Court based its opinion exclusively on the FELA. *See* 444 U.S. at 492-93. If *Liepelt* had involved constitutional matters, the decision would be binding on the states as the supreme law of the land. *See* Pennekamp v. Florida, 328 U.S. 331, 335 (1946); Owsley v. Peyton, 352 F.2d 804, 805 (4th Cir. 1965).

[76] Pursuant to the supremacy clause of the United States Constitution, art. VI, § 9, decisions of the United States Supreme Court on questions of federal law are binding on all state courts. United States v. Gilbert Assocs., 345 U.S. 361, 363 (1952); United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971). The Illinois Court of Appeals has recognized that *Liepelt* is controlling in FELA actions brought in the Illinois Courts. *See* Oltersdorf v. Chesapeake & O. Ry., 83 Ill. App. 3d 457, ____, 404 N.E.2d 320, 324-25 (1980).

[77] In our bifurcated judicial system, the states' highest courts, rather than the United States Supreme Court, are the final arbiters of questions of state law. Union Pac. R.R. v. Board of County Comm'rs, 247 U.S. 282, 287 (1918). The Supreme Court's interpretation of a federal statute, therefore, does not control a state court's interpretation of state law. Miller v. School Dist. No. 167, 500 F.2d 711, 711 (7th Cir. 1974). In South v. National R.R. Passenger Corp., 290 N.W.2d 819 (N.D. 1980), a wrongful death action under North Dakota law, the North Dakota Supreme Court upheld a trial court's refusal to give a nontaxability instruction. *Id.* at 827. The *South* court indicated that *Liepelt* was not controlling in state actions. *Id.*

[78] *See, e.g.*, Croce v. Bromley Corp., No. 78-2627, slip op. at 8414-15 (5th Cir., August 14, 1980) (*Liepelt* inapplicable in wrongful death action predicated upon state statute); Spinosa v. International Harvester Co., 621 F.2d 1154, 1158 (1st Cir. 1980) (*Liepelt* does not mandate nontaxability instruction in action controlled by New Hampshire law); Vasina v. Grumman Corp., 492 F. Supp. 943, 944 (E.D.N.Y. 1980) (*Liepelt* inapplicable in diversity actions).

[79] 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1976 & Supp. II 1978).

The FTCA allows tort actions to be brought against the United States.[80] State law however, governs the measure of damages in FTCA actions,[81] unless such damages are punitive.[82] Since *Liepelt* is not binding on state damages law, *Liepelt* is not controlling in FTCA actions.[83] Even if *Liepelt* were controlling, the holding on the jury instruction question would be inapplicable because FTCA actions are tried without juries.[84]

For actions under the Jones Act,[85] however, *Liepelt* will have a direct effect on the calculation of damages.[86] The statutory language of the FELA governs wrongful death actions and personal injury actions[87] under the Jones Act.[88] Similarly, the measure of damages under the Death on the High Seas Act[89] (DOHSA) is the same as the measure of

---

[80] *Id.* §§ 1346(b), 2674. The FTCA waives a portion of the federal government's sovereign immunity by enabling plaintiffs to recover compensatory damages against the federal government. *Id.* § 2674.

[81] In FTCA actions, courts must apply the law of the state where the tort occurred. *Id.* § 1346(b); Richards v. United States, 369 U.S. 1, 9 (1962); *see* Rayonier, Inc. v. United States, 352 U.S. 315, 321 (1957). Therefore, state law determines the measure of damages in an FTCA action. Ferrero v. United States, 603 F.2d 510, 512 (5th Cir. 1979).

[82] 28 U.S.C. § 2674 (1976) (punitive damages not allowed under FTCA).

[83] The Fifth and Ninth Circuits have allowed income tax evidence in FTCA actions, despite contrary state law, under the theory that failure to do so would result in punitive damages. *See* Felder v. United States, 543 F.2d 657, 668-70 (9th Cir. 1976); Hartz v. United States, 415 F.2d 259, 264 (5th Cir. 1969). The Ninth Circuit in *Felder* reasoned that use of the tort victim's lost gross income, rather than lost net income, results in a punitive award since the award exceeds the amount necessary to compensate the plaintiff. 543 F.2d at 668-70. The Fifth Circuit in *Hartz* reasoned that to the extent that the applicable Georgia wrongful death statute allowed a recovery of more than lost net income, the statute was punitive. 415 F.2d at 264.

[84] 28 U.S.C. § 2402 (1976).

[85] 46 U.S.C. § 688 (1976). The Jones Act provides seamen with a modified common law remedy for negligent personal injuries. De Zon v. American Presidential Lines, Ltd., 129 F.2d 404, 407 (9th Cir. 1942), *aff'd*, 318 U.S. 660 (1943). An injured seaman has the option to bring an action under the Jones Act or to seek a remedy under traditional maritime law. Panama R.R. v. Johnson, 264 U.S. 375, 388 (1924). The Jones Act also provides for a wrongful death action by the personal representative of a seaman who dies in the course of his employment. 46 U.S.C. § 688 (1976); *see* note 88 *infra*.

[86] *See* Nesmith v. Texaco, Inc., 491 F. Supp. 561, 563-64 (W.D. La. 1980) (*Liepelt* applicable to action under Jones Act).

[87] Although *Liepelt* specifically involved a wrongful death action, the decision is equally applicable to personal injury actions under the FELA and the Jones Act. The distinction between wrongful death actions and other personal injury actions does not justify a refusal to allow tax evidence or a refusal to give an offered nontaxability instruction. Hooks v. Washington Sheraton Corp., 578 F.2d 313, 317 (D.C. Cir. 1977). Several courts already have applied *Liepelt* to personal injury actions. *See* Cazad v. Chesapeake & O. Ry., 622 F.2d 72, 76 (4th Cir. 1980); Nesmith v. Texaco, Inc., 491 F. Supp. 561, 563-64 (W.D. La. 1980); Oltersdorf v. Chesapeake & O. Ry., 83 Ill. App. 3d 457, ____, 404 N.E.2d 320, 325 (1980).

[88] *See* O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 38 (1943). The Jones Act provides that all federal statutes conferring or regulating actions for death or injury to railroad employees, including the FELA, are applicable. 46 U.S.C. § 688 (1976).

[89] 46 U.S.C. §§ 761-768 (1976). DOHSA provides for a wrongful death action in admiralty on behalf of persons who are killed on the high seas. *Id.* § 761. Personal representatives of a deceased seaman may recover under the Jones Act or under the DOHSA. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 396 n.12 (1970).

damages for wrongful death under the FELA.[90] Therefore, *Liepelt* also will be controlling in actions under the DOHSA.

Additionally, *Liepelt* will have an impact on civil rights actions brought under Title 42, U.S.C. § 1983. Section 1983 grants a cause of action to any person who is deprived of his civil rights by action under color of state law.[91] Although courts measure section 1983 damages by referring to common law damage rules,[92] federal law governs section 1983 actions.[93] To the extent that a section 1983 award is nontaxable,[94] therefore, courts in section 1983 actions must give a requested nontaxability instruction and admit income tax evidence.

The *Liepelt* court's decision to allow income tax evidence to reduce awards representing lost earnings is incorrect. The allowance of tax evidence burdens juries with compounded, complex tax calculations that will require expert assistance and protracted trials.[95] The use of tax evidence to reduce awards also violates the collateral source rule by appropriating for the tort-feasor a benefit that Congress has bestowed on the tort victim.[96] A better solution to the problem of overcompensation of plaintiffs would be the repeal of the exclusion of lost income awarded in personal injury actions.[97] The *Liepelt* Court's decision to require the nontaxability instructions, however, is correct. A nontaxability instruction that is worded to prevent prejudice to either party[98] will eliminate the substantial risk that juries will miscalculate awards.[99]

KENNETH B. TILLOU

---

[90] Solomon v. Warren, 540 F.2d 777, 788 n.12 (5th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1978); National Airlines, Inc. v. Stiles, 268 F.2d 400, 403-04, 404 n.4 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959).

[91] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

[92] *See* Carey v. Piphus, 435 U.S. 247, 257-58 (1978) (common law of torts is starting point for § 1983 damage inquiries); Zarcone v. Perry, 572 F.2d 52, 55 (2d Cir. 1978) (general principles of damages should apply to civil rights actions).

[93] 42 U.S.C. § 1988 (1976); *see* Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015, 1023 (1967).

[94] A civil rights award that represents back pay is taxable if personal injuries are not the basis for the award. *See* Watkins v. United States, No. 319-79 T (Ct. Cl. April 11, 1980); Willie B. Hodge, 64 T.C. 616, 620-21 (1975); Rev. Rul. 341, 1972-1 C.B. 32. Neither the courts nor the Service, however, has addressed the question of whether a civil rights award that does not represent backpay is taxable. Arguably, an award representing lost constitutional rights is closer to a nontaxable recovery of capital.

[95] *See* text accompanying notes 45-52 *supra*.

[96] *See* text accompanying notes 58-65 *supra*.

[97] *See* text accompanying notes 64-65 *supra*.

[98] *See* text accompanying notes 72-73 *supra*.

[99] *See* text accompanying notes 67-69 *supra*.