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THE CAUTIONARY INSTRUCTION ON INCOME TAXES IN NEGLIGENCE ACTIONS

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Although the potential for such cases has been in existence for decades, there has been little, if any, activity in the courts until the last decade with reference to giving an instruction upon the inapplicability of income taxes to verdicts rendered by juries in negligence cases. Now we have an epidemic of cases that have approached the question from several different avenues and it appears inevitable that this epidemic will continue unabated until it has affected the dockets of every appellate jurisdiction in America. Because of the manner in which some decisions have been reached, the epidemic will no doubt continue until the law on this subject becomes harmonized among most of the states.

The statute giving life to this controversy is section 104(a)(2) of the Internal Revenue Code of 1954, which excludes from gross income "the amount of any damages received (whether by suit or agreement) or on account of personal injury or sickness." The exemption was originally passed by Congress in 1918 and has continued in much its same form to the present day.[1] In view of the long standing of this statute on the books, it is surprising that the recent flurry of cases did not occur some decades ago.[2]

THE SCOPE OF THIS ARTICLE

This discussion includes the question of whether or not the income tax instruction should be given in negligence cases but it does not

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[1]Morris & Nordstrom, infra note 46, at 274. See Int. Rev. Code of 1939, § 22(b)(5).

[2]An analogous situation has existed in England. See British Transp. Comm'n v. Gourley, [1956] A.C. 185, 198 (1955).

include the question of whether damages are to be based on gross earnings or net earnings.

Unfortunately, the courts have often failed to perceive the distinction between two related but distinct problems: one, whether jurors should be instructed that income taxes are not to enter into their deliberation on damages; and two, whether the correct measure of damages when the plaintiff has suffered a loss of earning power should be based upon plaintiff's gross earnings or upon his net earnings.[3]

The question of whether to give the income tax instruction in negligence cases is a relatively simple matter; the question of whether, in cases where there has been any curtailment or a termination of earning capacity, the measure of damages should be based upon

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[3]The Supreme Court of Missouri made the distinction in Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952), but the distinction was soon lost in other decisions.

Although the two questions have been confused by many courts, perhaps the most flagrant example is the case of Highshew v. Kushto, 235 Ind. 505, 134 N.E.2d 555 (1956). In that case the Supreme Court of Indiana in a somewhat peculiar appellate maneuver affirmed the opinion and decision of the Indiana Court of Appeals, 126 Ind. App. 584, 131 N.E.2d 652 (1956), but wrote its own opinion solely because the Court of Appeals had stated that the giving of the cautionary instruction on income taxes was discretionary with the trial judge. Therefore, although the Court of Appeals found no reason for the trial court's disapproval of the instruction offered by the defendant, it would not reverse the decision on that basis. The Supreme Court of Indiana confused the two questions and specifically set aside that portion of the intermediate court's opinion with this comment: "Inquiries at a trial into the incidents of taxation in damage suits of the character we have here, would open up broad and new matters not pertinent to the issues involved. Such subject matter would involve intricate instructions on tax and non-tax liabilities with all the regulations pertinent thereto. No court could, with any certainty, properly instruct a jury without a tax expert at its side." 134 N.E.2d 555, 556.

It is obvious that the cautionary instruction does not create new problems but instead eliminates a very probable misconception and does so with remarkable efficiency. On the other hand, the question of whether damages are to be based on gross or net earnings has several serious attendant problems, such as those mistakenly envisioned by the Supreme Court of Indiana. Another case which shows confusion of the two questions is Combs v. Chicago, St. P., M. & O. Ry., 135 F. Supp. 750 (N.D. Iowa 1955). See also, Bracy v. Great No. Ry., 343 P.2d 848 (Mont. 1955), cert. denied, 361 U.S. 449 (1960).

The majority opinion in Maus v. New York, C. & St. L. R.R., 165 Ohio St. 281, 135 N.E.2d 253 (1956), appears to confuse the two questions; however, the concurring opinion (3 judges) indicates that a well-drawn cautionary instruction would be acceptable in Ohio. In Cross v. Robert E. Lamb, Inc., 60 N.J. Super. 53, 158 A.2d 359 (1960), the defendant-appellant raised the question of the cautionary instruction for the first time on appeal and therefore the court declined to review it. However, from the cases cited in the opinion, it is apparent that the court was confusing the two questions. Id. at 374.

The basic distinction between the two questions was made in a Comment, 11 Wash. & Lee L. Rev. 66 (1954); See also, 4 U.C.L.A.L. Rev. 636 (1957).

gross earnings or upon net earnings is a highly complex one and beclouded by many factors.[4]

The distinguished Court of Appeals for the Second Circuit has recently handed down an opinion which dealt at length, and solely, with both questions in *McWeeney v. New York, New Haven & Hartford R.R.*[5] The suit was a personal injury suit under F.E.L.A. and the jury returned a verdict for the plaintiff. The defendant appealed claiming that the trial court erred in denying ten different instructions requested by the defendant. Argument was held before three judges and they unanimously agreed that there was no error in the trial court's denial of eight of the ten charges. Of the two remaining instructions, one was an instruction to the jury that it should not add any money to the amount of the verdict for income taxes since the verdict is not taxable income to the plaintiff and the second was to the effect that the jurors must calculate any past or future loss of earnings on the basis of the plaintiff's net income after the deduction of income taxes. Because of the importance of these two instructions the case was referred to the court *in banc*.

The majority opinion first dealt with the question of whether damages for loss of earnings are to be computed on the basis of gross earnings or net earnings. On this particular question the court discussed some of the problems encountered in attempting to instruct the jury how to arrive at a net, after-taxes, income. It concluded, four judges to one, that in most cases instructing the jury on gross earnings rather than net earnings is proper—primarily because it is more practical. The court concluded further that there are some cases when the potential verdict is quite large and a gross earnings instruction would produce an improper result, but suggested that the trial

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[4]McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir. 1960). See also Jennings v. United States, 178 F. Supp. 516 (D. Md. 1959); Armentrout v. Virginian Ry., 72 F. Supp. 997 (S.D. W. Va. 1947), reversed on other grounds, 166 F.2d 400 (4th Cir. 1948), for an indication of the computation possibly required by jurors.

To instruct on gross earnings presents an easier figure for the parties and the court to use during the course of a trial and it eliminates the possibilities of tedious instructions to the jury and expert testimony with reference to the effects of tax upon the individual plaintiff's gross earnings. On the other hand, expert witnesses have been successfully employed by courts in nearly every field of trial and the use of a tax expert in this instance would not be any greater burden to jurors than is the use of many of the expert witnesses utilized at the present time. Unfortunately, the gross earnings figure gives a projection of damages inflated beyond the amount necessary to compensate the plaintiff for his injury.

Some courts have approved the net earnings approach. O'Connor v. United States, 269 F.2d 578 (2d Cir. 1959) (applying Oklahoma law); Floyd v. Fruit Industries, 144 Conn. 659, 136 A.2d 918 (1957).

[5]282 F.2d 34 (2d Cir. 1960).

judge can handle those cases by a net earnings instruction or by granting a new trial.

Then the court considered the question, which is before us in this article, of whether the trial court should instruct the jury that it should not add anything to the verdict on account of income taxes because the recovery is not taxable income to the plaintiff. The court decided, three judges to two, that it was not error for the trial court to refuse to give this instruction, but even the majority had this to say about the instruction:

> "Unlike Request No. 18 [on gross earnings], *it* [the cautionary instruction] *imposes no new burdens on the jury and there is nothing speculative about it.* Hence *there would have been no error in the court's giving the instruction.* The question before us is not that but whether the failure to give it was error, and error so serious as to require a new trial."[6]

Chief Judge Lombard, who was joined by Judge Moore in his dissent on this point, would have reversed the judgment because the trial judge did not charge the jury that any sum awarded was not subject to tax.

As far as this writer knows, Chief Judge Lombard's dissenting opinion is the first opinion which would hold that a failure to instruct on this subject would be grounds for reversal. On the other hand, there is only one reported case where the giving of the instruction has been held to be reversible error.[7] All the other cases have simply held that if the trial judge gave the instruction, that was proper;[8] or if he did not give the instruction, that was properly within his discretion;[9] or, that it would have been proper for him to have given the instruction, but it was not reversible error if he chose not to do so.[10]

How the Problem of Whether To Give the Income Tax Instruction Arises

In most of the cases which have been presented to the appellate courts for determination the trial court has refused to give the instruction that has been offered by the defendant. In many of the cases

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[6]Id. at 39 (Emphasis added.)

[7]Wagner v. Iillinois Cent. R.R., 7 Ill. App. 2d 445, 129 N.E.2d 771 (1955).

[8]Anderson v. United Airlines, 183 F. Supp. 97 (S.D. Cal. 1960); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952).

[9]See cases discussed in Anderson v. United States Airlines, 183 F. Supp. 97 (S.D. Cal. 1960).

[10]McWeeney v. New York, N.H. & H. R.R., 282 F.2d 34 (2d Cir. 1960); Atherley v. McDonald, Young & Nelson, Inc., 142 Cal. App. 2d 575, 298 P.2d 700 (1956).

the instruction has been poorly drafted and the appellate court's affirmance of the trial court's refusal to give the instruction has been based upon the fact that the particular instruction offered was improper rather than because an instruction on the subject is improper.[11] In instances where the trial court has given the requested instruction to the jury, appeals have been rare.[12]

WHY THE PROBLEM ARISES

It seems more than obvious that the counsel for defendants in negligence cases want to have an instruction given on income taxes because of the fear that jurors erroneously believe that negligence awards are subject to Federal income taxation. It is equally obvious that plaintiff's attorneys oppose the instruction because of a feeling that jurors would not render as high a verdict as they would without the instruction.[13] The legal principle which should be the underlying one in these cases and which seems to be overlooked by many courts in the heat generated by the intensive legal contest over this question is simply: in the event the defendant is liable, the plaintiff's damages should be such that the plaintiff is made whole.[14] The purpose is compensation! The development of the common law has been towards achieving compensation, where due, by as efficient a manner as possible. Therefore, the courts are vigilant in negligence cases against attempts by either party to becloud the issue by interjecting bias, prejudice, passion, sympathy, or any other emotion or misconception which should not be present in the mind of a juror when he deliberates. If jurors have a misconception about income taxes which may very well affect their deliberations on the question of damages, it is consistent with the development of our jurisprudence that such a misconception should be erased by a simple instruction

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[11]Maus v. New York, C & St. L. R.R., 165 Ohio St. 281, 135 N.E.2d 253 (1956); Behringer v. State Farm Mut. Auto Ins. Co., 6 Wis. 2d 595, 95 N.W.2d 249 (1959).

[12]An instruction had been given in the case of Texas & Pac. Ry. v. Buckles, 232 F.2d 257 (5th Cir.), cert. denied, 351 U.S. 984 (1956), but the defendant was appealing and plaintiff did not cross-appeal on this particular question. Therefore, the appellate court did not have the question of the propriety of giving the income tax instruction before it. Also, see Kozitko v. City of Cleveland, as discussed in note 57 infra. But cf. Wagner v. Illinois Cent. R.R., note 48 infra and accompanying text, which is the only reported appeal assigning the giving of the instruction as error.

[13]This candid conclusion was expressed by Judge Tolin in Anderson v. United Airlines, 183 F. Supp. 97, 98 (S.D. Cal. 1960).

[14]Restatement, Torts § 901 (1939). As stated by the House of Lords in British Transp. Comm'n v. Gourley, [1956] A.C. 185 (1955); "Damages which have to be paid for personal injuries are not punitive, still less are they a reward. They are simply compensation...." Id. at 208.

and thereby bring the courts closer to achieving compensation in a more accurate manner for a party entitled to receive it.

At this stage in the development of income tax law when the general practitioner can no longer cope with the series of constant changes, distinctions, and developments which cascade forth from the Treasury Department, Internal Revenue Service and the courts in matters of income tax, only the most naive individuals could believe that the average juror—nay, that any juror—knows that personal injury or negligence awards are not subject to Federal income taxation. Perhaps the only avenue other than naiveté whereby one can arrive at the conclusion that the average juror knows of section 104 of the Internal Revenue Code is to follow dogmatically the fiction that every man is presumed to know the law. This fiction is so clearly inapplicable in this question of whether juries should receive a cautionary instruction on this subject that it merits no further comment.

One of the judges of the Supreme Court of Ohio remarked during oral argument of a case that during his tenure as a Common Pleas judge five jury foremen asked this specific question about taxability of verdicts.[15] In a recent Kansas case,[16] the jury during its deliberations specifically inquired of the trial court whether or not the verdict was taxable.

To consider the matter from a purely practical point of view, it is obvious that, since the institution of withholding taxes according to the late Mr. Ruml's plan, nearly every American is quite conscious that the Federal Government exacts its due from each and every dime that anyone receives in the form of wages and on most other transactions. The impact of income taxes and how it has pervaded almost all corners of our life is apparent to the average citizen. For example, if he turns to the world of television, he no doubt remembers that the once popular $64,000 Question program produced a number of contestants who were reluctant to risk the hazard of obtaining an additional $32,000 because the "tax bite" made the hazard too great—and this discussion was carried on at some length in the newspapers during the initial excitement of this program.[17] John Doe,

[15]See the comments of counsel at such oral argument in: Knachel, Jury Instructions on Tax Exemption in Personal Injury Cases, 6 Clev.-Mar. L. Rev. 71 (1957). See also, Morris, Should Juries in Personal Injury Cases be Instructed that Plaintiffs Recoveries are not Income Within the Meaning of Federal Tax Law?, 3 Defense L.J. 3 (1958).

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

[17]A similar observation was made by Chief Judge Lombard in his dissenting opinion in McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34, 41 (1960).

sports fan, is also aware of the fact that heavyweight prize fighters usually have only one fight per year at the championship level because any additional fights would be virtually for the benefit of Uncle Sam. He also notices comparisons between the total salaries of some of today's baseball stars and those of yesteryear with the usual sports-page comment that, although today's salaries may be larger, the net take-home pay is smaller than that earned by previous baseball greats.

The number of tax-paying Americans has increased steadily and most adults either file income tax returns or are taxpayers through the medium of joint returns.[18] There is every reason, therefore, to expect that the average citizen, when he is impaneled as a juror in a negligence case, is acutely aware of the impact of income taxes but has not the foggiest notion that negligence awards are not taxable as income to the recipient. He is likely to have a foggy notion, however, that the "tax bite" gets progressively larger as the amount increases and that it reaches rather dramatic proportions at higher levels. He might well realize—albeit in rough and hazy figures in his mind—that in order for the average married American to get a net after-taxes sum of $20,000, he needs a total amount of about $29,000; and to obtain $40,000, the total amount must be $78,000 and to obtain the sum of $65,000, the total amount has increased to $200,000.

Therefore, the defendant in a negligence case has a legitimate concern, especially where the amount of damages sought is quite large, that the jury—through no fault of its own and because its normal misconception has not been properly removed through a cautionary instruction—may impose upon him a verdict far in excess of what the jury, if it had known the true state of the law, would have determined to be compensation for the plaintiff's injury.

Is the Problem One of Form or Content?

The appellate courts to which this question has been directed have reached widely divergent views. Several courts have approved the giving of the income tax instruction.[19] In the usual instance where the trial court refuses to give the instruction offered by defendant the courts have often affirmed the trial court's refusal to give the instruction with very little explanation other than they felt it was

[18]For example, nearly 60 million tax returns were filed in 1957. 1960 World Almanac, p. 755.

[19]Anderson v. United Airlines, 183 F. Supp. 97 (S.D. Cal. 1960); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952).

within the discretion of the trial court,[20] or the giving of an instruction on this subject in any form has been rejected.[21] The Supreme Courts of Ohio and Wisconsin have indicated that a properly drafted instruction could be given but that the trial court was correct in refusing the instruction offered to it at the trial.[22] In California it has been held that the instruction offered by the defendant was proper but that the trial court was acting within its discretion in refusing to give it although that court would have been equally correct to have given the instruction.[23]

A review of the cases which have elaborated on the problem has led this writer to believe that the problem is basically one of form rather than content because the content of the instruction is a proper one to present to the jury when it is properly drafted as a cautionary instruction.

WHY THE INSTRUCTION SHOULD BE GIVEN

The leading early case in America which approached the problem from a practical standpoint was that of *Dempsey v. Thompson*[24] in which the Supreme Court of Missouri reversed its previous position on this question and, while affirming the judgment for the plaintiff with a remittitur, set forth an instruction properly to be charged by the trial court.[25] The conclusion of the Supreme Court of Missouri was preceded by a lucid and realistic approach to this problem of the probable misconception on the part of the juror about the tax effects of personal injury or wrongful death awards:

> "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."[26]

A careful analysis and well-reasoned decision appeared recently in

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[20]See conclusion and discussion in Anderson v. United Airlines, 183 F. Supp. 97 (S.D. Cal. 1960).

[21]Wagner v. Illinois Cent. R.R., 7 Ill. App. 2d 445, 129 N.E.2d 771 (1955).

[22]Maus v. New York, C. & St. L.R.R., 165 Ohio St. 281, 135 N.E.2d 253 (1956); Behringer v. State Farm Mut. Auto Ins. Co., 6 Wis. 2d 595, 95 N.W.2d 249 (1959).

[23]Atherley v. MacDonald, Young & Nelson, Inc., 142 Cal. App. 2d 575, 298 P.2d 700 (Dist. Ct. App. 1956).

[24]363 Mo. 336, 251 S.W.2d 42 (1952).

[25]See note 53 infra and accompanying text.

[26]251 S.W.2d at 45.

Anderson v. United Airlines.[27] This suit resulted from the collision between an airplane of United Airlines and one of Trans-World Airlines over the Grand Canyon several years ago. Regardless of the newsworthy aspects of the case, the reasoning of the judge is so lucid that it is commended as the best analysis of this particular problem of whether to give the income tax instruction which has appeared in any decision to date. The trial court wrote the opinion in *Anderson* solely to give its reasons for ruling that the instruction offered by the defendant would be given to the jury. He concludes that the weight of authority indicates it is a matter of discretion of the trial court and that no good reason for not giving it has been suggested. He also points out that there is only one reported appellate decision which directly holds that giving of such instruction is error. The one decision referred to was an Illinois case[28] spawned of the rather sweeping obiter dictum contained in the previous Illinois case of *Hall v. Chicago & Northwestern Ry.*[29]

Several of the early cases which affirmed the trial court's refusal to give an instruction on the exemption of personal injury verdicts from income tax rely on a statement in the case of *Stokes v. United States.*[30] However, the *Stokes* case was not concerned with the giving or refusing of the cautionary income tax instruction but was instead dealing with the second problem of whether gross earnings or net earnings were to be considered in making an award for damages. As we have seen from the *McWeeney* case,[31] even that question was rather lightly argued in the *Stokes* case and just as lightly treated by the court.[32]

The instruction, when properly drafted, should be given because it correctly states an important item of substantive law that jurors are unlikely to be aware of and because, as a cautionary instruction

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[27]183 F. Supp. 97 (S.D. Cal. 1960).

[28]Wagner v. Illinois Cent. R.R., 7 Ill. App. 2d 445, 129 N.E. 2d 771 (1955).

[29]5 Ill. 2d 135, 125 N.E.2d 77 (1955).

[30]144 F.2d 82 (2d Cir. 1944).

[31]282 F.2d 34 (2d Cir. 1960).

[32]It is pointed out that the question received only casual treatment in the briefs and was disposed of in one brief sentence in the Stokes case. 282 F.2d 34, 42 (2d Cir. 1960). Although the language in McWeeney indicated that the Stokes decision on gross earning was still adhered to in cases where Federal law was applicable or where the State law was silent, the Second Circuit had applied Oklahoma law in the case of O'Connor v. United States, 269 F.2d 578 (2d Cir. 1959), and decided that net earnings were the proper measure of damages. The court rejected the contention of the plaintiff that federal income taxes might be discontinued or reduced in the future. Id. at 584. Meehan v. Central R.R., 181 F. Supp. 594 (S.D.N.Y. 1960) expressly follows the rule of O'Connor with this terse comment: "realities must prevail." Id. at 614.

which directs that they *not* consider the question of income taxes in arriving at their verdict, it diminishes rather than adds to the number of subjects they are to consider.

Some critics of the instruction have claimed the instruction assumes the jury will not follow the other instruction given on the matter of damages;[33] to the contrary, it does not indulge in such an assumption but is given merely as further assistance to the jury. Many instructions fall into this category of directing jurors not to consider certain matters in arriving at their verdict. As an example, a specific instruction cautioning jurors not to allow sympathy to enter into the consideration of the verdict should be given in Florida courts and it is reversible error for the trial court to refuse it.[34] In view of the large number of cautionary instructions found in compilations of approved jury instruction, it seems that the Florida instruction cautioning jurors not to be influenced by sympathy is not atypical of instructions of a similar vein given in other jurisdictions.[35] Every trial court is familiar with cautionary instructions such as ones instructing the jury not to add to the verdict in order to penalize the defendant, and cautioning them not to arrive at their verdict or determine liability by the use of hindsight.

The British Courts Have Reversed Their Position and Now Lend Support to the Giving of the Income Tax Instruction

Of course the vast difference between the British method of handling litigation in negligence matters and that employed in American courts makes the British decisions helpful largely for the approach involved. It is significant that the British courts have now come to grips with the realities of income taxes in personal injury awards and do not permit a plaintiff to recover more than is necessary for just compensation.

In the case of *Billingham v. Hughes*,[36] the court reviewed several British lower court decisions on the subject and rejected defendant's claim that taxes should be taken into consideration in assessing damages.[37] The *Billingham* case was cited in some American

[33]Hall v. Chicago & Northwestern Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955).
[34]Loftin v. Skelton, 152 Fla. 437, 12 So. 2d 175 (1943).
[35]See note 46 infra.
[36][1949] 1 K.B. 643, 1 All E.R. 684.
[37]The question was not raised in British Courts until 1933 when Fairholme v. Firth & Browne, Ltd. [1933] 149 L.T. 332 (K.B.), held that taxes were not to enter into the consideration of the amount of damages. The basis of the decision seems to have

cases in the early 1950's[38] which declined to give the instruction offered by the defendant.

In the personal injury case of *British Transport Comm'n v. Gourley*,[39] Britain's highest court, the House of Lords, reviewed *Billingham* and the prior British cases and held that the trial judge was wrong in following *Billingham v. Hughes*. The court concluded that "to ignore the tax element at the present day would be to act in a manner which is out of touch with reality."[40]

Perhaps the action of the House of Lords in Britain in looking to the principle of compensation will foretell a similar trend in American courts.

The Rule Against Giving the Instruction Is Erroneous

The leading case for the proposition that jurors should not be informed in any way on the applicability of income taxes to personal injury awards is that of *Hall v. Chicago & Northwestern Ry.*[41] The language contained in the *Hall* case is sweeping and the error of its content is all the more apparent when one realizes that it is obiter dictum.[42] Examination of the *Hall* case shows only that the Illinois

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been the principle of res inter alios acta. Two Courts of Session in Scotland reached opposite results: McDaid v. Trustees of the Clyde Navigation, [1946] Sess. Cas. 462, held that damages should take taxes into consideration; Blackwood v. Andre, [1947] Sess. Cas. 333, reached the opposite conclusion and supported the gross earnings view.

[38]For example, Combs v. Chicago, St. P., M. & O. Ry., 135 F. Supp. 750 (N.D. Iowa 1955).

[39][1956] A.C. 185 (1955).

[40]Id. at 203. Although this bears on the question of whether the measure of damages is gross earnings or net earnings, the usual theory advanced by the gross earnings proponents that taxes are difficult to evaluate was rejected in the inimitable British manner by the court as follows: "It is impossible to assess with mathematical accuracy that reduction should be made by reason of the tax position, just as it is impossible to assess with mathematical accuracy the amount of damages which should be awarded for the injury itself and for the pain and suffering endured." Id. at 203-04. The only dissenting judge in the Gourley case had written the opinion in Blackwood v. Andre, note 37 supra, and refused to reverse his previous position.

[41]5 Ill. 2d. 135, 125 N.E.2d. 77 (1955), reversing 349 Ill. App. 175, 110 N.E.2d 654 (1953). Among the decisions which have apparently agreed with Hall v. R.R., see Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034 (1956) (dictum); Louisville & N.R.R. v. Mattingly, 318 S.W.2d 844 (Ky. 1958) (dictum; the court incredibly rejected defendant's contention as "a novel assertion" but reversed on other grounds); Missouri-K.-T. R.R. v. McFerrin, 156 Tex 69, 291 S.W.2d 931 (1956).

[42]Anderson v. United Airlines, 183 F. Supp. 97, 98 (S.D. Cal. 1960).

The court in Hall v. R.R. completely lost sight of the principle that the purpose is compensation to the plaintiff for his injury when it reached its conclusion by discussing whether a jury should know that the railroad's profits are affected by a judgment and this, in turn, affects fares, etc. 125 N.E.2d 77, 86: *Quaere*: (1) What

court was affirming the right of the trial court to grant a new trial under the particular circumstances. The sweeping and erroneous remarks contained in the opinion of the *Hall* case were neither necessary to the decision of the case nor well founded on law and experience.[43]

A number of reasons have been introduced by various courts and in the arguments of various counsel in an effort to support the refusal to give such an instruction. It is not the purpose of this article to compile a listing of the arguments used in opposition to the giving of this instruction but some of the ones more commonly employed can be discussed briefly:

1. The instruction introduces new elements into the case. Quite to the contrary, the instruction does not introduce a new element to the jurors that has not been there but rather it dispels a possible and, from what we have seen and surely know, actual element which does exist with jurors.

2. The instruction assumes that the jurors will not follow the other instruction on damages given by the judge. This instruction does not run at counter purposes with the assumption that jurors do follow the court's charge on damages. Rather, it tends to supplement the court's charge by giving the jurors additional information and guideposts which are necessary to arrive at the damages correctly in a personal injury or wrongful death case.

Obviously, it is not error for a trial court to give the jury an instruction that it is not to be influenced by sympathy or an unfair motive. Such instructions are not given because the court indulges the assumption that the jury will not follow its other instructions and its charge on damages but merely to aid the jury in discharging its duty.

3. If the instruction is given, the court should also charge the jury that the plaintiff will have to pay attorney fees out of any verdict rendered.

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bearing does this have on the question of what amount properly compensates the plaintiff? and (2) How does such reasoning apply to an average individual defendant?

[43]The court in the Hall case came up with the following curious conclusion: "It may be conceded that the possibility of harm exists if the jury is left uninformed on this matter; on the other hand, it is conceivable that the plaintiff could be prejudiced if they were told of this law." 125 N.E.2d 77, 85.

For a sharp criticism of the Hall opinion in a step-by-step analysis, see Comment, 26 Fordham L. Rev. 98 (1957). See also, Comment, 59 Va. L. Rev. 355 (1957). It is interesting to note that the Supreme Court of Illinois' opinion in Hall v. R.R. was not received enthusiastically in Illinois periodicals. Comments, 33 Chi.-Kent L. Rev. 377 (1955); 43 Ill. B.J. 810 (1955). The Court of Appeals decision was the subject of a Comment, 33 U. Chi. L. Rev. 156 (1953).

It seems incredible that this argument could be made in an American court but it has been proposed and it was apparently accepted by the Illinois court in the *Hall* case.[44] This contention is so groundless that it may be disposed of without further comment.[45]

4. The instruction is "cautionary" in nature.

Far from being a valid criticism of a well-drafted income tax instruction, the fact that it is cautionary is the reason it should be given to the jury. We have noted previously that cautionary instructions are given in nearly every jury trial.[46]

As was pointed out by the trial court in *Anderson v. United Airlines*,[47] the only case in America which has held that it was reversible error to give an instruction on income taxes is the case of *Wagner v. Illinois Central R.R.*[48] The case history of *Wagner v. Illinois Central* reveals the inherent error in refusing to instruct properly with regard to the nonapplicability of income taxes to negligence awards. In *Wagner* the plaintiff was a railroad conductor who sued for damages under F.E.L.A. and the first trial resulted in a verdict and judgment for $130,000. The trial judge granted a new trial on the grounds of error in the instructions. The second trial resulted in a verdict and judgment for only $80,000 and in this second trial the court gave an instruction which informed the jury of the tax-exempt nature of any award. Before the appeal of the second *Wagner* trial, the Supreme Court of Illinois decided the *Hall* case, embodying the dictum that a cautionary instruction is improper. As a result, the Illinois Court of Appeals reversed the $80,000 judgment in *Wagner* and remanded it for a new trial "on this basis alone."[49]

The *Wagner* case presents this unusual spectacle: a plaintiff has received a judgment for $80,000 but on the assumption that if he could have a new trial without an income tax instruction which gave the jury the true status of the Federal income tax law, he could get

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[44]125 N.E.2d 77, 86. In Bracy v. Great No. Ry., 343 P.2d 848 (Mont. 1959), the trial court quite properly refused such an instruction when the defendant requested the trial court to instruct both that the plaintiff would not have to pay taxes on any verdict and further that the jury was not permitted to include any court costs or attorney's fees in the verdict.

[45]Oelrichs v. Spain, 82 U.S. 211 (1872).

[46]For a statistical discussion of this subject, see Morris & Nordstrom, Personal Injury Recovery and the Federal Income Tax Law, 46 A.B.A.J. 274, 275 (1960), where it is pointed out that, in relation to the total number of instructions, the percentage of instructions of a cautionary nature were 62% in the compilations of instructions for California and 39% in a compilation made by Randall.

[47]183 F. Supp. at 98.

[48]7 Ill. App. 2d 445, 129 N.E.2d 771 (1955).

[49]129 N.E.2d at 772.

a larger judgment—probably $130,000—even though it must be conceded the plaintiff is not entitled to more than the $80,000 awarded under that instruction.[50]

If the cautionary instruction is not employed, even the severest critics of giving the instruction acknowledge that injustice may well occur to the defendant.[51] Further, the giving of a properly drafted cautionary instruction does not violate any principle of trial procedure but instead it effectuates the purpose of our courts to give redress to aggrieved parties in a fair and impartial manner. The plaintiff's purpose in seeking damages in negligence cases is to be made "whole"; therefore, since the plaintiff is not entitled to any additional amount because of the jury's misconception about income taxation and personal injury verdicts, the plaintiff cannot be harmed by the giving of the cautionary instruction. In effect, the giving of the instruction insures that the plaintiff will receive what he has been seeking: a more adequate award.

The Form To Be Employed in Instructing the Jury

Two different instructions have been specifically approved in reported decisions[52] and it is significant that in each instance the instruction carefully explains the inapplicability of income taxation to negligence awards *and directs the jury not to consider it in arriving at its verdict.*

The instruction proposed by the Supreme Court of Missouri in *Dempsey v. Thompson* is as follows:

> "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."[53]

Missouri requires strict compliance with this form and has approved the trial court's refusal to give a variation of this form which failed to instruct the jury *not to consider taxes in its determination.*[54] The other instruction was given by the trial court in *Anderson v. United Airlines*:

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[50]According to correspondence with counsel in the case, the third trial resulted in a verdict for the plaintiff in the amount of $107,625.

[51]See note 43 supra.

[52]Anderson v. United Airlines, 183 F. Supp. 97 (S.D. Cal. 1960); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952).

[53]251 S.W.2d at 45.

[54]Bowyer v. Te-co, Inc., 310 S.W.2d 892 (Mo. 1958).

> "You are instructed as a matter of law, that any award made to the plaintiff in this case is not income to the plaintiff within the meaning of the Federal Income Tax Law. Plaintiff is entitled to an award of damages. You are to follow the instructions already given by this court in measuring those damages and in no event should you either add to or substract from that award on account of Federal income taxes.[55]

The exact form of another instruction is available to us through a periodical and it is interesting to note that the instruction was given in Ohio, subsequent to the *Maus* case;[56] unfortunately, there was no appeal from the judgment in the lower court.[57]

When we examine the two instructions which courts have approved, it becomes obvious why several courts have affirmed the trial court's refusal to give the particular instruction offered in that case although the same court has stated that a well-drafted instruction could be properly given. Consider for example the following instructions:

> "You are further instructed that in determining the amount of damages for personal injuries you are not to add to or include in the award of damages anything to compensate the plaintiff for Federal or state income taxes, since any damages recovered as an award for personal injuries are not subject to and therefore are free of either Federal or state income taxes."[58]

And:

> "I charge you as a matter of law that by virtue of the Internal Revenue Act of 1954, any amount received by the plaintiff as compensation for personal injuries is exempt from Federal income taxation, and you must take this fact in consideration in arriving at the amount of your verdict in this case."[59]

In each of these instructions we do not see the trial court explaining the inapplicability of income taxes as to the verdict and then cautioning the jury *not to consider* them in arriving at their determination.

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[55]183 F. Supp. 97. (Liability had been determined at an earlier trial). This form was suggested in Morris & Nordstrom, supra note 46, at 276.

[56]Maus v. New York, C. & St. L.R.R., 165 Ohio St. 281, 135 N.E.2d 253 (1956). For the form of the instruction see Morris, supra note 15, at 3.

[57]The instruction was given by Judge Artl of the Court of Common Pleas of Cuyahoga County in the case of Kozitko v. City of Cleveland, case 658,519. The jury trial resulted in a judgment for the plaintiff in the amount of $20,000 and no appeal was taken, according to information obtained by this writer.

[58]Behringer v. State Farm Mut. Auto Ins. Co., 6 Wis. 2d 595, 95 N.W.2d 249, 254 (1959).

[59]Maus v. New York, C. & St. L.R.R., 165 Ohio St. 281, 135 N.E.2d 253, 254 (1956). The trial court's refusal to give a better but still inadequate instruction was affirmed in New York Cent. R.R. v. Delich, 252 F.2d 522 (6th Cir. 1958).

Of course, a properly drafted cautionary instruction will be refused by the trial court when it improperly adds a provision that the jury is not to add anything to its verdict for court costs or attorneys fees.[60]

It seems that either of the two approved instructions sufficiently eliminates any possible misconception the jury might have and yet grants protection to both the plaintiff and the defendant in a negligence action. There seems little to indicate a choice between the two although the instruction given in the *Anderson* case would seem to comply with the prescribed limits set forth by the Supreme Court of Wisconsin[61] and may possibly be preferable because of its insistence that this instruction shall not affect the computation of damages under the other instructions given in the charge.

It must be admitted that the Second Circuit Court of Appeals did not object to the form of the instruction offered by the defendant in the *McWeeney* case, even though the instruction offered did not direct the jury not to consider the question of income taxes.[62] As has been previously noted,[63] the court agreed that the instruction would have been proper as given but only disagreed on whether or not it was reversible error to refuse to give the instruction. Perhaps this is an indication that, as American courts make the distinction between the two questions and thereby appreciate the value and efficiency of giving the cautionary instruction, the matter of form will become less important.

In any event, the confusion which marked the earlier decisions in this field seems to be diminishing. As courts recognize that there are two distinct problems, and further recognize that the problems hinging upon the question of whether to compute damages on gross or net earnings simply do not plague courts in the mere giving of a cautionary instruction, the confusion should be dispelled. Giving the cautionary instruction—in form similar to two discussed in this article[64]—presents no problems to the court but gives the juries better tools with which to arrive at their verdict; at the same time it protects the defendant from possible misconceptions as well as assuring plaintiff that an award he receives is based upon proper compensation. It is rare that a simple and effective device such as this cautionary instruction presents itself and the courts should readily employ it in negligence trials.

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[60]Bracy v. Great No. Ry., 343 P.2d 848, 853 (Mont. 1959).
[61]95 N.W.2d at 254.
[62]282 F.2d at 39.
[63]See note 6 supra and accompanying text.
[64]See notes 53 and 55 supra and accompanying text.