Tax Issues of Personal Injury and Wrongful Death Awards

Randall G. Vaughan

Follow this and additional works at: http://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Available at: http://digitalcommons.law.utulsa.edu/tlr/vol19/iss4/4

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact daniel-bell@utulsa.edu.
TAX ISSUES OF PERSONAL INJURY AND WRONGFUL DEATH AWARDS

I. INTRODUCTION

The laws of tort and taxation converge when an injured person seeks to recover damages from a tortfeasor. Compensable injuries may include pain and suffering, disfigurement, medical expenses, loss of future earning capacity, loss of consortium, and lost wages. Damage awards for personal injury and wrongful death are excluded from gross income under the Internal Revenue Code and most state tax laws. Additionally, the majority rule permits computation of lost wages using gross rather than net income as the measure of damages.

1. The tax consequences of the award must be weighed in anticipation of either settlement or trial. This Comment deals with tax issues presented in the trial setting. For practical tax considerations in drafting a settlement or judgment, see Moe, The Tax Effects of Tort Damages, 26 PRAC. LAW. 37 (Jan. 15, 1980); Phillips, Federal Income Taxation of Damages Paid or Received in Litigation, 65 A.B.A. J. 1238 (1979). Tax consequences should always be explained to clients in order to effectuate informed decisionmaking during the course of the lawsuit. 3 M. MINZER, J. NATES, C. KIMBALL, D. AXELROD, & R. GOLDSTEIN, DAMAGES IN TORT ACTIONS § 17:13, at 17-46 (1983) [hereinafter cited as MINZER].


3. (a) IN GENERAL

Except in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness; . . . .


The exemption does not cover payments for breach of employment contracts and claims for unpaid rent, salaries, dividends, or lost profits. Moe, supra note 1, at 41.

4. MINZER, supra note 1, at 17-46. Oklahoma tax laws do not provide for exclusions because Oklahoma taxable income is based upon adjusted gross income calculated under the United States Internal Revenue Code. OKLA. STAT. tit. 68, § 2353(13) (1981). Because the federal income tax must be calculated before the Oklahoma income tax can be determined, personal injury awards are also excluded from Oklahoma state income tax. [1 Okla.] ST. TAX. REP. (CCH) ¶ 10-701 (Nov. 1983).

The plaintiff, in effect, is relieved of federal and state tax liabilities on past and future lost income.6

Although Congress enacted the personal injury exclusion in 1918,7 defense lawyers did not begin to argue the impact of taxation upon damage awards until 1944.8 As the tax consequences of the award became a disputed issue, defendants asserted two basic arguments: (1) evidence of the plaintiff’s income tax burden should be admitted because the award for lost income is nontaxable;9 (2) jurors should be apprised of the tax exemptions to prevent overcompensation.10 Notwithstanding acceptance of these arguments by commentators during the following two decades,11 the courts generally excluded evidence of plaintiffs’ tax

---

6. The plaintiff is not relieved of all future tax liabilities, however, because interest earned on any part of the invested award is taxable. See infra note 159. The government does not lose tax revenue by exempting personal injury awards from taxable income since the tortfeasor is not allowed to deduct the damage award from his taxable income unless authorized by the Internal Revenue Service (IRS). See supra note 1, at 43. The lost-revenue problem created by the exemption has been the subject of several tax articles. See Harris, Compensation for Loss of Income and its Taxation: Comment, 34 Nat’l Tax J. 135 (1981); Kahane & Voran, Compensation for Loss of Income and Its Taxation: A Policy Analysis, 32 Nat’l Tax J. 118 (1979); Yorio, The Taxation of Damages: Tax and Non-Tax Policy Considerations, 62 Cornell L. Rev. 701, 721 & nn.138-39 (1977).


8. The first published appellate opinions were Stokes v. United States, 144 F.2d 82 (2d Cir. 1944), and Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N.W.2d 627 (1944).


See infra note 159.
liabilities\textsuperscript{12} and refused requests for instructions that informed juries of the nontaxable status of awards.\textsuperscript{13} English courts had rejected net tax


\textit{Vaughn: Tax Issues of Personal Injury and Wrongful Death Awards

\textit{TULSA LAW JOURNAL [Vol. 19:702

Published by TU Law Digital Commons, 1983

3
evidence during the 1940's, and American courts often cited the English decisions. Interestingly, American courts did not reverse their positions when the English courts subsequently chose to consider income tax consequences.

The Second Circuit developed a flexible approach to net income tax evidence in *McWeeney v. New York, New Haven & Hartford Railroad*, stating that the plaintiff's tax burden could be considered if the income was above "the lower or middle reach of the income scale." The flexible approach is indicative of a more favorable reception of both arguments by federal courts in the 1970's when federal law controlled or state law was unclear, dated, or silent. However, federal

---


courts were obligated to follow state law when it provided the substantive rule of law.\textsuperscript{21} While the resurrected arguments in support of the net income rule and the nontaxability instruction received continued support from commentators\textsuperscript{22} and were more favorably accepted by a few state courts,\textsuperscript{23} most states continued their adherence to the majority

\begin{itemize}
rule.24

The United States Supreme Court breathed new life into the controversy with its decision in *Norfolk & Western Railway v. Liepelt*,25 a case brought under the Federal Employers’ Liability Act (FELA).26 The Court held that a defendant in a FELA case must be allowed to introduce evidence of the plaintiff’s tax liability,27 and that the jury should be instructed that the damage award is not taxable.28 The *Liepelt* decision and its progeny29 compel federal and state courts to reexamine the rationale of prior decisions that deny admission of net

---


26. 45 U.S.C. §§ 51-60 (1976). Plaintiffs cause of action is created by a federal statute; however, the lawsuit may also be filed in a state court. *Id.* § 56.

27. 444 U.S. at 494.

28. *Id.* at 497-98.

29. *See infra* notes 65-70 and accompanying text.
income evidence and refuse jury instructions regarding taxability in actions created by other federal statutes or state law.

This Comment summarizes the two tax issues presented in tort actions involving personal injury or death, discusses the rationale given by courts to preclude juror consideration of tax information, and reevaluates this rationale in light of the Liepell decision. Finally, Oklahoma case law on the tax consequences of damage awards is analyzed, and an approach is suggested for Oklahoma courts to follow in the future.

II. ANALYSIS OF THE TAX ISSUES

After the jury has determined that the defendant is liable for a personal injury or death, it must then calculate the damages to be awarded.30 The goal of compensatory damage awards is to make the plaintiff whole—to place the injured person in the same monetary position he would have enjoyed if the wrong had not occurred.31 Although that goal can be simply and succinctly stated, its achievement in the courtroom is quite difficult.32

Two tax issues contribute to the difficulty courts encounter in compensating plaintiffs. The first issue is evidentiary in nature and arises before 33 or during the trial 34 if lost wages are claimed as damages.35 Lost wages may be sought by a plaintiff who is temporarily or permanently disabled or by the decedent's estate under a wrongful death statute.36 The tax question raised by the lost wages claim is whether a

30. See C. McCormick, supra note 2, at § 6.
32. The goal of exactness in the award amount competes with the necessity of keeping the computation simple and practical.
33. Either party may file a motion in limine to determine whether net income evidence will be admissible; however, the motion is usually a plaintiff's tool to preclude defendant's introduction of the evidence. See, e.g., Seely v. McEvers, 115 Ariz. 171, __, 564 P.2d 394, 396 (Ariz. Ct. App. 1977).
34. Most appeals concerning the admissibility of net income evidence are taken from rulings that occur during the trial. Plaintiff's counsel objects when counsel for defendant attempts to cross-examine plaintiff's economic expert regarding income taxes, introduce the evidence directly through an expert, or argue tax liabilities during closing argument. For cases exemplifying these objections, see supra notes 12, 24.
35. Lost wages may include both past earnings from the date of the injury to the time of trial and future earnings. Three factors are considered in the calculation of future earnings: base earnings, average work-life expectancy, and trends in earnings. Franz, Should Income Taxes Be Included When Calculating Lost Earnings?, 18 Trial, Oct. 1982, at 23, 34.
defendant should be required to pay an amount equal to the plaintiff's gross or net earnings in order to fully compensate the plaintiff.\footnote{37} Plaintiffs introduce gross earnings evidence as the basis for calculation of damages while defendants attempt to prove that the actual "take home" salary would have been much less because of tax liabilities.\footnote{38} Defendants contend that an award based on gross income gives the plaintiff an unjustified windfall because taxes will never be paid on those earnings.\footnote{39} Defendants thus far have not advocated that other payroll deductions also should be used to reduce the award;\footnote{40} however, the Liepelt court indicated that small payroll deductions could also be excluded.\footnote{41} The second tax problem encompasses all types of damage awards but arises only when the case is tried before a jury. Defendants request an instruction informing the jury of the nontaxability of the award in fear that the "tax-conscious" jury,\footnote{42} unaware of the statutory exclusion,\footnote{43} will erroneously assume the award is taxable and must be inflated in order to make the plaintiff whole.\footnote{44} The well-established principle of law that a jury will not be permitted to impeach its verdict\footnote{45} precludes post-trial inquiry into the method by which the jury calculated the award amount. While empirical evidence is unavailable,\footnote{46} verdicts that substantially exceed the award amount expected by

\footnote{37} See supra note 5 and accompanying text.  
\footnote{39} See, e.g., Burlington N., Inc. v. Boxberger, 529 F.2d 284, 288 (9th Cir. 1975); harper \& James, supra note 31, at \$ 25.12. Although the goal of a damage award is to make the plaintiff whole, see supra note 31 and accompanying text, courts have argued that even an award based on gross income does not place the plaintiff in a "better" position because all losses are not recoverable. Huddell v. Levin, 395 F. Supp. 64, 89 (D.N.J. 1975), vacated, 537 F.2d 726 (3d Cir. 1976); Louissant v. Hudson Waterways Corp., 111 Misc. 2d 122, 130, 443 N.Y. S.2d 678, 682-83 (1981).  
\footnote{40} For the rationale regarding why other deductions should not be included, see Fitzpatrick, supra note 5, at 107-08. But see Marynik v. Burlington N., Inc., 317 N.W.2d 347, 351 n.2 (Minn. 1982).  
\footnote{41} 444 U.S. at 494-95 n.7.  
\footnote{42} See infra notes 179-85 and accompanying text.  
\footnote{43} See supra notes 3-4 and accompanying text.  
\footnote{45} See Fed. R. Evid. 606(b); Mccormick's Handbook of the Law of Evidence \$ 68, at 148 (2d ed. 1972); 3 J. Weinstein \& M. Berger, Weinstein's Evidence \$ 606[03] at 606-22; 8 Wigmore, Evidence \$ 2349, at 681 (McNaughton rev. 1961).  
\footnote{46} See Kalven, The Jury, the Law, and the Personal Injury Damage Award, 19 Ohio St. L.J. 158 (1958). But see Blake v. Delaware & H. R., 484 F.2d 204, 208 (2d Cir. 1973) (Lumbard, J., dissenting) (experience as trial judge indicates that jurors do consider taxes); Wagner v. Illinois Cent. R.R., 7 Ill. App. 2d 445, __, 129 N.E.2d 771, 772 (1955) (new trial in which jury instruction
the parties and questions concerning the tax consequences of the award submitted to the court by the juror during deliberation support the claim that juries improperly inflate awards.

Although both issues relate to the manner in which juries determine damage awards, each focuses on a different aspect of the problem and should be analyzed independently. Unfortunately, courts have often confused the two issues, utilizing arguments applicable to the evidence issue as the basis for refusing the nontaxability instruction. Courts must recognize this fundamental difference at the outset was given resulted in reduction of award from $130,000 to $80,000). Wagner is discussed in Morris & Nordstrom, supra note 11, at 276.

47. See, e.g., Liepelt, 444 U.S. at 497 (jury award of $775,000 when plaintiff's expert testified to loss of only $302,000). Some courts seem to require proof that the jury actually considered income taxes in calculating the award. See, e.g., Croce v. Bromley Corp., 623 F.2d 1084, 1097 (5th Cir. 1980). This burden is difficult to meet given the wide range of damages that can be awarded for nonpecuniary losses.


49. See infra notes 183-85 and accompanying text.


52. The most frequent erroneous objection to the jury instruction is the argument concerning the conjectural nature of taxes, an allegation that is unrelated to the nontaxability instruction. See, e.g., Bracy v. Great N. Ry., 136 Mont. 65, 343 P.2d 848 (1959).
and weigh each issue on its own merits. A decision to exclude net income tax evidence does not warrant automatic refusal of the jury instruction. The court refuses to permit the admission of tax evidence and also refuses to give the nontaxability instruction, the risk of overcompensation by defendant is doubled: not only will the jury fail to deduct tax liability from lost wages but it also may increase the total award to compensate for taxes it may assume the plaintiff will owe on the award itself. Thus defendant could pay twice for taxes the plaintiff will never owe.

The Supreme Court in Liepelt examined the tax issues independently and found the arguments against both to be unpersuasive. All state and federal FELA decisions to the contrary were clearly overruled. The decision by most courts to apply Liepelt retroactively and require a new trial if the trial court had failed to give the instruction was approved by the Supreme Court in Gulf Offshore v. Mobil Oil Corp. Notwithstanding the Gulf Offshore decision, some courts have refused to reverse and remand on the damages issue unless the defendant was harmed by the error.

53. This "compromise" position has been accepted by some courts. See, e.g., Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1250-51 (3d Cir.), cert. denied, 404 U.S. 883 (1971).
56. Id. at 494, 498.
59. 453 U.S. 473, 486 n.16 (1981). Gulf Offshore was a case arising under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1131-1360 (1982). Because Congress indicated that the law of the state governed when not inconsistent with federal common law, the Court remanded to the Texas Court of Appeals for that determination. 453 U.S. at 488. On remand, the Texas state court held that Louisiana law did not require the instruction and that federal common law did not displace state law under OCSLA. Gulf Offshore Co. v. Mobil Oil Corp., 628 S.W.2d 171, 173-75 (Tex. Civ. App. 1982).
nontaxability instruction and the admissibility of gross income evidence in FELA cases continue to arise in both state and federal courts.

Because *Liepelt* was not decided on a constitutional basis, courts are not obligated to apply it in non-FELA cases. The Court in *Gulf Offshore* amplified the *Liepelt* holding by stating that it "articulated a federal common law rule . . . [and] furthers strong federal policies of fairness and efficiency in litigation of federal claims." Federal courts have subsequently extended *Liepelt* to actions arising under the Longshoremen's and Harbor Workers' Compensation Act, admiralty jurisdiction, the Jones Act, and securities law. The Second Circuit has chosen to stretch *Liepelt* to its maximum limits, holding that it applies "to all federal claims for future lost wages." It appears that *Liepelt* will continue to influence the development of federal law in non-FELA cases and will eventually be binding in all federal cases.

Opportunity for conflict and division looms on the horizon, however, for two types of cases tried in federal courts: Federal Tort Claims Act (FTCA) cases and diversity cases. Although the two tax-damage issues were litigated in these types of cases prior to *Liepelt*, resolution was accomplished by ascertaining and applying the law of the state which inevitably excluded both net tax evidence and the instruc-

---

63. 444 U.S. at 492-93.
64. 455 U.S. at 486-87.
65. 453 U.S. at 486-87.
67. See Paquette v. Atlantska-Plovidba, 701 F.2d 746, 748 (8th Cir. 1983); O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1201 (7th Cir. 1982).
73. See supra notes 12-13, 19-21 and accompanying text.
Circuit courts in FTCA cases sometimes circumvented state law that precluded the use of net income as the measure of damages by holding that damage awards for lost wages in excess of net income were, in reality, punitive damages and could not be assessed against the federal government. The Third Circuit and several district courts have not adopted this interpretation since Liepelt, while the Fifth Circuit has chosen to do so.

The controversy in diversity cases is more recent. Decisions prior to Liepelt usually cited Erie Railroad v. Tompkins as requiring federal courts to apply the substantive law of the state in actions based upon diversity. Most decisions rendered since Liepelt have followed this same pattern, an approach which assumes that the tax issues are clearly substantive matters. In view of Supreme Court decisions which have modified Erie, this assumption is no longer valid. The Second Circuit has specifically left open the question as to whether a Liepelt charge must be given in a diversity action; however, the Eighth Circuit has suggested that due process may require the application of Liepelt in diversity cases. The need for a uniform approach to the tax issues in diversity cases is now being examined by both state and fed-

---

76. See Harden v. United States, 688 F.2d 1025, 1029 (5th Cir. 1982).
77. 304 U.S. 64 (1938).
78. See supra note 21 and accompanying text.
81. For thorough discussions of diversity law, see In re Air Crash Disaster Near Chicago, Ill., 526 F. Supp. 226, 233 (N.D. Ill. 1981) (Illinois law should be applied), rev'd, 701 F.2d 1189, 1200 (7th Cir. 1983) (federal law governs).
82. See Fanetti v. Hellenic Lines Ltd., 678 F.2d 424, 431 n.6 (2d Cir. 1982).
83. Grant v. City of Duluth, 672 F.2d 677, 683 (8th Cir. 1982) (reversing and remanding for failure to give the tax instruction in spite of a 1978 Minnesota decision to the contrary).
The response to *Liepelt* by state courts in actions governed by state law was predictable in light of the position taken by most courts during the past thirty years. An overwhelming majority of states have adhered to prior law by summarily distinguishing *Liepelt* as a case involving only federal procedural law in FELA cases, by rejecting its rationale, or by ignoring it entirely. Some states have even embraced the majority rule for the first time without discussing *Liepelt*. Even though commentator support is still strong, few state courts have found *Liepelt* persuasive. Unfortunately, most states have failed to consider the rationale of *Liepelt* in their haste to reject it as only a statement of federal law. This approach is regrettable since the argu-


85. See supra notes 11-12, 23 and accompanying text.


ments against the admissibility of net income evidence or the use of the jury instruction are even more tenuous in the tax-conscious 1980's.

III. INTRODUCTION OF TAX EVIDENCE

Compensation for past and future lost wages is awarded in a lump sum following the single recovery rule.\(^{92}\) This practice allows the court to avoid continual supervision of periodic awards and permits final disposition of the case.\(^{93}\) It appears doubtful that courts will abandon this practice even though a change to periodic payments could promote accuracy in the awarding of compensation for future lost wages.\(^{94}\) Under the present practice, the calculation of adequate compensation for wages that would have been earned at some future time is a difficult task.

The necessary choice between the use of net or gross income in this calculation is further complicated by wrongful death statutes that only allow recovery for "pecuniary losses."\(^{95}\) Some state wrongful death statutes specifically exclude taxes from the recovery\(^{96}\) while others are silent regarding taxes.\(^{97}\) In the latter instance, courts can construe the statute to include or exclude the amount of taxes that would have been paid on lost wages.\(^{98}\) Decisions that include the tax liability create an anomaly in that the survivors are allowed to recover an amount that the victim would never have realized.\(^{99}\)

An inconsistency in the calculation of lost wages is created by decisions that use net income for wrongful death actions and gross income for personal injury actions.\(^{100}\) Arguably, the different methods of calculating damages can be justified on the basis of the action's nature.


\(^{93}\) Id.

\(^{94}\) Id.

\(^{95}\) E.g., Okla. Stat. tit. 12, § 1053(B) (1981). "The damages recoverable in actions for wrongful death . . . shall include the following: . . . The pecuniary loss to the survivors based upon properly admissible evidence . . . ." Id.


\(^{100}\) See Erickson v. United States, 504 F. Supp. 646, 652 (D.S.D. 1980); Gorham v. Farming-
Since wrongful death actions are statutory, the decision to limit the amount recoverable is legislative and unrelated to damages available under common law negligence. Absent specific statutory wording, however, no distinction should be made between personal injury and wrongful death actions.

Courts have relied upon a variety of reasons to prohibit defendants from introducing evidence of the plaintiff's tax liability in cases involving compensation for lost wages. The following sections analyze the most frequently used arguments.

A. Future Taxes Are Too Speculative

Courts that reject net income evidence are primarily concerned about the uncertainty of the plaintiff's future taxes since many factors affect income tax liability. During any time period for which tax rates and income levels are known factors, however, the tax liability can be calculated with reasonable certainty. Tax liability on lost wages for the period of time prior to the jury's calculation of the award also falls within this category. Such tax amounts are potentially substantial given the average time between the filing of the lawsuit and the actual trial.

In calculating the compensation for future lost wages, however, the uncertainty as to future tax rates does create concern. The potential for undercompensation is created when the award is reduced to present value. Additionally, when a plaintiff is to be compensated for future net earnings, the tax to be deducted must be calculated using present tax rates. If the tax rates subsequently change in favor of the plaintiff, undercompensation has occurred because the defendant actually compensated the plaintiff for less than the plaintiff would have eventually

---

101. See supra note 96 and accompanying text.
102. See Elligett, supra note 22, at 646.
104. The Liepelt Court acknowledged this problem when it stated, "Admittedly there are many variables that may affect the amount of a wage earner's future income-tax liability. The law may change, his family may increase in size, his spouse's earnings may affect his tax bracket, and extra income or unforeseen deductions may become available." 444 U.S. at 494.
107. See infra notes 157-60 and accompanying text.
TAX ISSUES

netted. Courts reason that the only way to prevent such undercompensation is to exclude net income evidence entirely.\textsuperscript{108} However, the fear of undercompensation caused by changes in the tax rates is unfounded. Empirical evidence demonstrates that a plaintiff's future tax liability will worsen given the massive federal deficits.\textsuperscript{109} Even though room for disagreement exists as to the precise rates of future taxes, "the old saw about the certainty of taxes is still good."\textsuperscript{110}

The Supreme Court in \textit{Liepelt} recognized the weakness of the speculation argument when it stated, "[F]uture employment itself, future health, future personal expenditures, future interest rates, and future inflation are also matters of estimate and prediction."\textsuperscript{111} Other "uncertain" factors that are relevant to future lost income include promotions,\textsuperscript{112} earning capacity,\textsuperscript{113} and stability of familial relationships.\textsuperscript{114} In rejecting these factors as being sufficient to justify the exclusion of tax evidence, the \textit{Liepelt} Court stated:

Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. We therefore reject the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative . . . for a jury.\textsuperscript{115}

The holding by the Ninth Circuit in \textit{United States v. Furumizo}\textsuperscript{116}

\begin{enumerate}
\item\textsuperscript{110} \textit{United States v. Furumizo}, 381 F.2d 965, 971 (9th Cir. 1967).
\item\textsuperscript{111} \textit{444 U.S. at 494.}
\item\textsuperscript{112} See, e.g., O'Connor v. United States, 269 F.2d 578, 582 (2d Cir. 1959); Sabine Towing Co. v. Brennan, 85 F.2d 478, 481 (5th Cir. 1936).
\item\textsuperscript{114} Earning capacity for children, especially infants, is the ultimate in prognostication as no past earning record exists. To aid the jury in calculating future lost wages, hypothetical careers are used. \textit{E.g.}, Hooks v. Washington Sheraton Corp., 578 F.2d 313 (D.C. Cir. 1977).
\item\textsuperscript{115} \textit{See} Burlington N., Inc. v. Boxberger, 529 F.2d 284, 293 (9th Cir. 1975).
\item\textsuperscript{116} United States v. Furumizo, 381 F.2d 965 (9th Cir. 1967).
\end{enumerate}
allowed the award to be based on present net income.\textsuperscript{117} This is clearly the more "modern and reasonable" rule.\textsuperscript{118} The possible changes in tax laws that would favor the plaintiff are offset by potential adverse developments. It is unjust to allow only the plaintiff an opportunity to prove matters that are speculative.\textsuperscript{119} Certainty of awards is clearly a goal that should be fostered, but fairness to defendants cannot be sacrificed in pursuit of this ideal.\textsuperscript{120}

B. \textit{The Net Income Rule Would Overburden the Courts}

The litigation explosion is a genuine concern of courts across the nation. As the number of cases being filed continues to increase,\textsuperscript{121} courts search for additional ways to streamline the judicial process.\textsuperscript{122} It is argued that the net income rule increases the quantity and complexity of the evidence in a trial, resulting in a burden on the administration of justice.\textsuperscript{123} The Supreme Court of New Jersey in \textit{Tenore v. Nu Car Carriers, Inc.}\textsuperscript{124} acknowledged this potential problem but did not believe that the problem would be "insurmountable for the trial courts or juries."\textsuperscript{125}

The Supreme Court in \textit{Liejelt} recognized that the use of the net income rule would require the admission of additional evidence relating to the award investment, but stated, "[T]he fact that such an . . . estimate . . . would also be admissible does not persuade us that it is wrong to use after-tax figures instead of gross earnings in projecting what the decedent's financial contributions to his survivors would have been . . . ."\textsuperscript{126}

The Court then attempted to reduce the added burden of the net income rule when it stated that evidence of the plaintiff's tax liability can be disallowed when the effect is \textit{de minimis}.\textsuperscript{127} This approach is akin to the flexible rule utilized by the Second Circuit before the
Liepelt decision; however, it expands the use of net income evidence substantially. Some state courts have followed the *de minimus* concept by admitting net income evidence only when the tax burden is severe.  

As a practical matter, income tax is only one of the many factors to which expert witnesses must testify. It is unlikely that counsel for either party will unduly prolong tax testimony because of its possible anesthetizing effect upon the jury. In reality the actual time necessary to present net income evidence is insubstantial in comparison to the time spent on earnings evidence that already must be introduced by the plaintiff to substantiate the lost wages claim.

C. Reduction of the Award for Taxes Violates the Collateral Source Rule and Congressional Intent

The collateral source rule is a rule of evidence that prohibits the introduction of evidence regarding benefits received by the plaintiff from external sources. Third-party relationships such as insurance contracts, employment agreements, or gratuities from friends and relatives serve to reduce the plaintiff’s actual losses. Courts reason that defendants should not be allowed to benefit by a reduction in the amount of damages owed simply because the plaintiff received outside assistance. Some courts have analogized the reduction of damages by the amount of tax liability to a reduction for benefits received from a collateral source; accordingly, consideration of tax evidence violates the collateral source rule.

Use of the collateral source rule to exclude net tax evidence is improper because the concepts differ inherently. The collateral source rule excludes evidence of benefits received by the plaintiff in instances when the plaintiff was fortunate in receiving donated services or fortuitous enough to prepare contractually for future emergencies. The col-

---

128. See supra notes 17-18 and accompanying text.
132. See, e.g., Majestic v. Louisville & N.R.R., 147 F.2d 621, 627 (6th Cir. 1945).
lateral source rule is an exception to the general goal of damages\textsuperscript{134} because it allows the plaintiff to be overcompensated.\textsuperscript{135} The rule fosters advanced planning and the rendering of assistance in time of need, both of which are matters of personal choice between the plaintiff and others. Taxes, on the other hand, are liabilities imposed upon the plaintiff as a matter of law. Admission of this evidence in an action for damages would not interfere with the plaintiff's private relationships. It is also argued that a societal purpose of aiding innocent tort victims is furthered by allowing the victim to receive the prospective tax, while no such purpose would be served by allowing the defendant to benefit.\textsuperscript{136}

Another argument against admission of tax evidence based on a third-party relationship is the claim that reduction of an award to account for taxes frustrates congressional intent. It has been suggested by courts that Congress intended to give the injured plaintiff a tax break by excluding the award from taxable gross income and that any attempt to reduce that award because of taxation would nullify congressional intent.\textsuperscript{137} The \textit{Liepelt} Court scrutinized the Congressional Record and found no such intent.\textsuperscript{138} Additionally, the Court stated that "netting out the taxes that the decedent would have paid does not confer a benefit on the tortfeasor any more that netting out the decedent's personal expenditures."\textsuperscript{139} A tortfeasor is not "benefitted" when the damage award is based on actual pecuniary losses.\textsuperscript{140}

Rulings that permit net income evidence to be admitted contradict neither the collateral source rule nor congressional intent. If the goal of compensatory damage awards is truly to put the plaintiff in the position

\begin{itemize}
  \item \textsuperscript{134} See supra note 31 and accompanying text.
  \item \textsuperscript{135} Note, \textit{Ramifications}, supra note 50, at 296 n.58.
  \item \textsuperscript{136} Huddell v. Levin, 395 F. Supp. 64, 87 (D.N.J. 1975), \textit{vacated on other grounds}, 537 F.2d 726 (3d Cir. 1976).
  \item \textsuperscript{137} The first published opinion to so hold was \textit{Hall} v. Chicago & N.W. Ry., 5 Ill. 2d 135, 151-52, 125 N.E.2d 77, 86 (1955); \textit{accord} \textit{Kalavity} v. United States, 584 F.2d 809, 812 (6th Cir. 1978); \textit{Lumber Terminals, Inc.}, v. \textit{Nowakowski}, 36 Md. App. 82, \textit{vacated on other grounds}, 373 A.2d 282, 292 (1977); \textit{Louissant} v. \textit{Hudson Waterways Corp.}, 111 Misc. 2d 122, 129, 443 N.Y.S.2d 678, 682 (1981); \textit{Ericksen v. Boyer}, 225 N.W.2d 66, 74 (N.D. 1974); \textit{see also Yorio}, \textit{The Taxation of Damages: Tax and Non-Tax Policy Considerations}, 62 CORNELL L. REV. 701, 734 (1977) (discussing the emotional and practical factors behind the exception).
  \item \textsuperscript{138} 444 U.S. at 496 n.10. Justices Blackman and Marshall argued in \textit{Liepelt} that congressional intent to give a tax break can be found in Congress' failure to repeal the exemption. 444 U.S. at 502.
  \item \textsuperscript{139} \textit{Id.}
  \item \textsuperscript{140} \textit{Id.} Petitioner argued that Congress did not believe that damages were income within the meaning of the Sixteenth Amendment. Brief for Petitioner at n.23, \textit{Liepelt}. Although this argument is consistent with the majority opinion, the Court did not address the constitutional issue.
\end{itemize}
he would have enjoyed had the injury not occurred, then decisions concerning calculation of an award should not revolve around a "benefit" to either party. Although a reduced award is "beneficial" to the defendant in a purely economic sense, it is not actually a true "benefit" in a legal sense if the law does not define it as such.

D. Plaintiff's Tax Liabilities Are of No Concern to the Tortfeasor

In the first reported English case discussing the taxation of damages, the court declared that matters of taxation are between the Crown and the taxpayer and are of no concern to the wrongdoer. American courts have adopted this argument and continue to justify a gross income award on the grounds that the tax liability of the plaintiff is a matter between the government and the plaintiff.

This argument is weak in that it fails to distinguish the fundamental difference between compensatory and punitive damages. Compensatory damages are designed to restore the plaintiff to a former position, while punitive damages serve to punish the tortfeasor and to deter similar behavior in others. Although awards for lost wages are one type of compensatory damages, a defendant effectively is being punished when forced to pay a lost-wages award in excess of the amount the plaintiff actually would have accumulated. Additionally, while it is accepted that a victim should be allowed to dispose of the damage award in his own way once it is received from the tortfeasor, a deduction of taxes from the amount awarded does not interfere with this right because the reduction to reflect tax liability occurs before the award is made. Any decision influencing the measurement of damages is a proper one for the court.

E. Jurors Are Unable To Understand Complex Tax Information

The subject of taxation, like other types of admissible technical
information, is voluminous and complex. Some courts have paternalistically stated that tax information is too complex for the jury to understand and properly apply during deliberation. Other courts fear that the tax issue will overshadow the issue of liability and other damage calculation factors.

The Ninth Circuit reasoned to the opposite conclusion in Burlington Northern, Inc. v. Boxberger: "Today's sophisticated jurors surely have had some personal experience in determining their own tax liability, and in today's tax-conscious society we are confident that our juries and judges, with the aid of such competent expert testimony as may be received, are equal to the task and the responsibility." The Liepelt Court also rejected the complexity argument, stating that the trial bar and bench have "developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life." Empirical evidence also suggests that most tax testimony regarding individual income taxes would not be overly complex. The argument is even more tenuous when one considers other types of evidence admitted during trials. Jurors routinely consider complex, technical evidence in medical malpractice and product liability cases and assess damages for nonpecuniary losses such as pain and suffering. Additionally, the complexity argument is of less merit for cases tried without a jury. Although the exclusion of net income evidence arguably may promote judicial simplicity, it does not effectuate justice.

151. 529 F.2d 284 (9th Cir. 1975).
152. Id. at 293.
153. 444 U.S. at 494; see also Hooks v. Washington Sheraton Corp., 578 F.2d 313, 317 (D.C. Cir. 1977) (maintaining that trial judge can eliminate confusing testimony under Fed. R. Evid. 403).
156. See Brooks, 273 F. Supp. at 630.
F. Reduction to Present Worth Results in Undercompensation

The plaintiff who receives a lump sum award is being compensated in advance of the injury. To correct this anomaly, courts reduce the damage award to a sum that, if invested, would provide an amount equal to that lost.\(^{157}\) This process is commonly known as reduction to present worth.\(^{158}\) Although the actual damage award for personal injury is excluded from gross income, the interest earned on the award following investment is taxable.\(^{159}\) It is claimed that the reduction of an award to present worth actually undercompensates the plaintiff because the interest earned on the invested award is taxable.\(^{160}\) Additionally, the exclusion of evidence regarding plaintiff's attorney's fees compounds the problem of undercompensation. Investment award interest is calculated on the total damage amount; however, plaintiff has substantially less money to invest after the attorney's fees are paid.\(^{161}\)

Courts deal with reduction to present worth in a variety of ways. Some ignore the problem by allowing the discount rate to be offset by inflation.\(^{162}\) Those courts that consider the tax impact on the invested award either reduce the tax rate to reflect this future liability before discounting the award,\(^{163}\) or they determine tax liability, reduce to present value, and then "add back" the taxes that must be paid on the investment.\(^{164}\)

Although courts have often noted that damage awards can never be made with mathematical certainty,\(^{165}\) commentators are statistically

\(^{158}\) "[W]here future payments are to be anticipated and capitalized in a verdict the plaintiff is entitled to no more than their present worth . . . ." Chesapeake & O. Ry. v. Proffitt, 241 U.S. 462, 493 (1916).
\(^{159}\) Rev. Rul. 65-29, 1965-1 C.B. 59; Rev. Rul. 76-133, 1976-1 C.B. 34. Taxation of award interest is premised on the assumption that it will be invested in plans which are taxable. Defendants have recently begun to argue the availability of tax shelters to negate the allowance for investment taxes. See, e.g., DeLucca v. United States, 670 F.2d 843, 846 (9th Cir. 1982); Rodriguez v. McDonnell Douglas Corp., 87 Cal. App. 3d 626, 667, 151 Cal. Rptr. 399, 422 (1979).
\(^{160}\) See Sours v. Alaska Barge, 600 F.2d 238, 247 (9th Cir. 1979); Flannery v. United States, 297 S.E.2d 433, 441 (W. Va. 1982); cf. First Nat'l Bank v. Material Serv. Corp., 597 F.2d 1110, 1120 (7th Cir. 1979) (expert testimony that tax liability deductions were offset by investment taxes).
\(^{162}\) See, e.g., Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 461 (3d Cir. 1982). The "total offset method" is simple, yet is criticized as being imprecise. See Elligett, supra note 22, at 651.
\(^{164}\) See DeLucca v. United States, 670 F.2d 843, 844 (9th Cir. 1982); McWeeney, 282 F.2d at 37.
\(^{165}\) E.g., Cox v. Northwest Airlines, Inc., 379 F.2d 893, 896 (7th Cir. 1967).
exploring the different approaches to awarding damages. No comprehensive model has yet been developed. It is clear, however, that problems of reduction to present worth must also be solved when gross earnings are used as the measure of damages and thus should not serve as an obstacle to the introduction of net tax evidence.

IV. JURY INSTRUCTION

It is the duty of the judge to instruct the jury before it retires to render its decision. Instructions inform the jury of the law to be applied and help to reduce erroneous conclusions. Each juror brings his own knowledge and experience into the deliberation room. Because this reality cannot be overlooked, jurors are allowed to utilize their "own general experience and knowledge" in arriving at a decision.

A presumption exists that jurors do not engage in misconduct during deliberation by failing to follow instructions of the court. The jury is typically instructed to limit its deliberation to the evidence admitted at trial. In applying common knowledge to this evidence, jurors may unintentionally miscalculate the award. Defendants contend that a general instruction as to the method of damage calculation actually contributes to an inaccurate award if unaccompanied by a nontaxability instruction. Unless this instruction is given, the potential for an improper calculation is present each time the jury retires to deliberate. Courts attempt to refute this claim with the following arguments.

166. See Bell, Bodenhorn, & Taub, Taxes and Compensation for Lost Earnings, 12 J. LEGAL STUD. 181 (1983); Brady, Brookshire, & Cobb, Calculating the Effects of Income Taxes on Lost Earnings, 18 TRIAL, Sept., 1982, at 65; Elliget, supra note 22, at 653-54 & n.68.

167. Elliget, supra note 22, at 652.

168. Each party is given the opportunity to propose instructions, or the judge may choose to give instructions he has prepared himself. Most states utilize pattern jury instructions. See, e.g., OKLA. UNIF. JURY INSTRUCTIONS—CIVIL. For a comprehensive discussion of pattern jury instructions and damage awards, see Graham, Pattern Jury Instructions: The Prospect of Over or Under Compensation In Damage Awards for Personal Injuries, 27 DE PAUL L. REV. 33 (1978).

169. See supra note 10 and accompanying text. The nontaxability instruction presumes that the total award is actually nontaxable. If the plaintiff previously deducted from taxable income medical expenses paid prior to trial, then the instruction would not be a correct statement of the law.
A. Jurors Do Not Overcompensate

The nontaxability instruction is often refused on the grounds that experience and empirical evidence do not support the overcompensation contention\(^\text{174}\) or that tax matters were not raised during the trial.\(^\text{175}\) Courts instead prefer to assume that jurors correctly assess damages,\(^\text{176}\) an assumption that is questionable.\(^\text{177}\)

Disagreement among the courts as to the possibility for overcompensation began in Missouri in *Dempsey v. Thompson*.\(^\text{178}\) The *Dempsey* court stated that jurors “are acutely sensitive to the impact of taxes,”\(^\text{179}\) but the court also realized that most Americans are not aware of the exclusion of damage awards from gross income.\(^\text{180}\) Unable to divine a reason for refusing a nontaxability instruction, the court overruled a state decision to the contrary.\(^\text{181}\) In *McWeeney v. New York, New Haven & Hartford Railroad*,\(^\text{182}\) the Second Circuit refused to reverse a New York district court for failing to give the instruction, but a strong dissenting opinion argued that constant media reports of the taxes due on large sums of money won in quiz programs, lotteries, and sweepstakes could create an assumption that awards are also taxable.\(^\text{183}\) This line of reasoning was subsequently adopted by the Third\(^\text{184}\) and Ninth\(^\text{185}\) Circuits. Judge Ely, writing for the *Boxberger* court, compared the advantages and disadvantages of giving the instruction:

> The benefits of informing the jury of the true tax consequences are so clear, and the burden in terms of time and the possibility of confusion so minimal, that we believe the balance is overwhelmingly in favor of giving such an instruction.

To put the matter simply, giving the instruction can do no

---

\(^{174}\) See supra note 46 and accompanying text.


\(^{177}\) See supra notes 47-48 and accompanying text.

\(^{178}\) 363 Mo. 339, 251 S.W.2d 42 (1952).

\(^{179}\) Id. at __, 251 S.W.2d at 45.

\(^{180}\) Id.

\(^{181}\) Id.

\(^{182}\) 282 F.2d 34, 39 (2d Cir. 1960).

\(^{183}\) Id. at 41 (Lumbard, C.J., dissenting). The Second Circuit recently adopted Judge Lumbard’s dissent in Fanetti v. Hellenic Lines Ltd., 678 F.2d 424, 431 (2d Cir. 1982).


\(^{185}\) See Burlington N., Inc. v. Boxberger, 529 F.2d 284 (9th Cir. 1975).
harm, and it can certainly help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable.\textsuperscript{186}

The Supreme Court in \textit{Liepelt} similarly concluded that the benefits justified the giving of the instruction.\textsuperscript{187} Even if the subject of taxation is not formally argued, the routine use of the previous year’s tax return as evidence of the plaintiff’s lost income calls the subject of taxes to the attention of the jury.\textsuperscript{188} Although jurors may not intentionally increase the award in the jury room, the impact of taxation could influence each juror unconsciously.

\section*{B. Cautionary Instructions Are Unnecessary}

The purpose of a cautionary instruction is to dispel misconception about the law;\textsuperscript{189} however, the fact that a proposed instruction is a correct statement of the law does not warrant its submission to the jury if inapplicable to the facts.\textsuperscript{190} For example, the plaintiff is not permitted to tell the jury that attorney’s fees must be paid from the damage award.\textsuperscript{191} Courts use this same reasoning in refusing the nontaxability instruction.\textsuperscript{192} The prohibition against the attorney’s fees instruction has also been used to justify exclusion of gross income.\textsuperscript{193} It is ironic that the jury is not permitted to consider attorney’s fees and taxes, those aspects of the calculation of damages that are the most certain.

A fundamental difference exists, however, between attorney’s fees and the income tax exclusion. Jurors know that the attorney for the plaintiff represents his client for financial remuneration. The jury may not know the details of a “contingency fee” arrangement, but the

\begin{flushleft}
\textsuperscript{186} \textit{Id.} at 297.
\textsuperscript{187} 444 U.S. at 499.
\textsuperscript{188} \textit{See Minzer, supra note 1, at 17-41.}
\textsuperscript{189} \textit{Harper \\& James, supra note 31, at 1327-28.}
\textsuperscript{190} \textit{C. Wright \\& A. Miller, 9 Federal Practice and Procedure \$ 2522 (1971).}
\textsuperscript{191} The “American rule” does not allow the successful party to recover attorney’s fees. \textit{See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 247-71 (1975).} It has been suggested that damages for pain and suffering are a substitute for attorney’s fees. This approach has been characterized as using one error to correct another. \textit{Fitzpatrick, supra note 5, at 110.} Arguably, the goal of making the plaintiff “whole” can never be met as long as the “American rule” is followed.
\textsuperscript{192} \textit{See, e.g., Hall v. Chicago \\& N.W. Ry., 5 Ill. 2d 115, ..., 125 N.E.2d 77, 86 (1955); Barnette v. Doyle, 622 P.2d 1349, 1367 (Wyo. 1981).}
\textsuperscript{193} \textit{See, e.g., Rodriguez v. McDonnell Douglas Corp., 87 Cal. App. 3d 626, 668, 151 Cal. Rptr. 399, 422-23 (1979). But see Liepelt, 444 U.S. at 495-96. “[I]t surely is not proper for the Judiciary to ignore the demonstrably relevant factor of income tax in measuring damages in order to offset what may be perceived as an undesirable or unfair rule regarding attorney’s fees.” Id.}
\end{flushleft}
Supreme Court's decision to permit lawyer advertising\(^{194}\) increases the probability that future jurors will have some idea of the attorney's fees that plaintiff will pay. If the jurors choose to inflate the award to pay the plaintiff's attorney, it would not be repugnant to the notion of justice, given the goal of compensatory damage awards. However, this rationale does not justify an inflated award to compensate for nonexistent taxes. If it is unjust to force the plaintiff to pay his attorney from the award, the rule against awarding attorney's fees should be changed. Substantive justice is not served by circumventing the rule with false assumptions about income taxes in the jury room.

C. A Nontaxability Instruction Would Prejudice the Plaintiff

The first two arguments in support of the refusal to grant the tax instruction are defensive in nature. Some courts have taken an offensive position, stating that the instruction would prejudice the plaintiff,\(^{195}\) presumably because the jury would intentionally lower the award out of jealousy\(^{196}\) or would disregard the gross income rule and calculate the award using an estimated net income amount.\(^{197}\) This opposition is the result of instructions that are improperly worded, especially in jurisdictions using the gross income rule.\(^{198}\) Properly worded instructions will eliminate this source of concern.

In jurisdictions that use gross income as the measure of damages or allow the introduction of both net and gross income evidence, the court should first instruct the jury as to the method of calculating the damages. The court would then give the following tax instruction:

\[
\text{I charge you as a matter of law, that any award to the plaintiff in this case, if any is made, is not income of the plaintiff within the meaning of the federal [state] income tax. Should you find the plaintiff is entitled to an award of damages, then you are to follow the instructions already given to you by this court in measuring damages, and in no event should you either add or subtract from that award on account of income taxes.}^{199}
\]


\(^{195}\) See Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 151, 125 N.E.2d 77, 86 (1955).

\(^{196}\) See Nordstrom, supra note 11, at 234.


\(^{198}\) Some courts have instructed the jury only that it should not consider taxes. See, e.g., Dempsey v. Thompson, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952).

\(^{199}\) G. DOUTHWAITE, JURY INSTRUCTIONS IN DAMAGES IN TORT ACTIONS 1-26 (1981).
In a net income jurisdiction, the court should first instruct the jury that it is to calculate any past or future loss of earnings on the basis of net income, adding back any amount the plaintiff would pay in taxes on the interest. The court would then give the nontaxability instruction.

The nontaxability instruction can be given in cases not involving lost earnings because it applies to all types of damages. Separate and precisely worded instructions that distinguish the tax consequences of each issue reduce the chance that the jury will intentionally disregard the gross income rule or, in net income jurisdictions, further reduce the award after making a calculation using net income.

V. Status of Oklahoma Law

Oklahoma courts have not addressed either taxation issue in a non-FELA context. Oklahoma adhered to the majority view by refusing the nontaxability instruction in *Chicago, Rock Island & Pacific Railroad v. Kinsey.*200 The Supreme Court of Oklahoma also followed the gross income rule in *Missouri-Kansas-Texas Railroad v. Miller,*201 stating that “income tax consequences should not be considered, because of being too conjectural.”202

The court did not cite either case in its most recent FELA decision, *Faulkenberry v. Kansas City Southern Railway.*203 The *Faulkenberry* trial court had refused to give the nontaxability instruction. One week after the conclusion of the trial, the United States Supreme Court rendered its decision in *Liepelt.* On appeal, the Oklahoma Supreme Court refused to apply *Liepelt* retroactively.204 The court apparently based its decision not to reverse the trial court on the absence of any indication in the record that the evidence admitted did not support the amount of the award.205 The question remains open as to Oklahoma’s willingness to apply the *Liepelt* rationale in non-FELA actions.

Oklahoma appellate decisions that discuss damage awards for both personal injury and wrongful death cases do not discuss taxes.206

201. 486 P.2d 630 (Okla. 1971).
202. *Id.* at 636.
204. *Id.* at 513.
205. *Id.*
Conversations with several district court judges, trial attorneys, and economists in Tulsa County, however, indicate that defendants are permitted to introduce net income evidence at trial.\textsuperscript{207} Thus the current practice in Oklahoma regarding the admissibility of net income evidence appears to be consistent with \textit{Liepelt}. While permitting the introduction of net income evidence in actions for lost wages is a partial step toward resolving taxation issues in injury awards, complete resolution requires that awards be calculated using net income.

The Oklahoma Uniform Jury Instructions state that the nontaxability instruction should not be given.\textsuperscript{208} The only cited authority for the refusal is \textit{Miller},\textsuperscript{209} which conflicts with \textit{Liepelt}. Thus the status of the instruction is uncertain in Oklahoma. The Oklahoma Supreme Court should alleviate this uncertainty by revising the Oklahoma Uniform Jury Instructions to require the nontaxability instruction in all cases.

The recent Oklahoma decision in \textit{Vanderpool v. State}\textsuperscript{210} provides an additional argument for requiring that awards be calculated on net income and for instructing juries regarding the nontaxability of the award. The \textit{Vanderpool} decision abrogated the doctrine of sovereign immunity in Oklahoma and exposed Oklahoma taxpayers to liability for torts committed by state employees.\textsuperscript{211} Thus Oklahoma taxpayers have a vital interest in insuring that personal injury and wrongful death awards do not overcompensate the plaintiff. The \textit{Vanderpool} court utilized the underlying purposes of the Federal Tort Claims Act in reaching its decision.\textsuperscript{212} Consequently, it would seem that the same rationale used by the federal courts to justify calculation of damages using net income should apply with equal force in Oklahoma.\textsuperscript{213}

\textbf{VI. Conclusion}

The rationale for extending \textit{Liepelt} to non-FELA cases is convinc-
ing. At a minimum, courts should require the nontaxability instruction because the benefits of the instruction clearly outweigh the slight inconvenience that would be incurred. In addition, this Comment maintains that courts should adopt the net income rule, an approach that permits the plaintiff to recover only an amount that reflects the true extent of his injury. Problems associated with net income evidence can be solved through the use of expert testimony and effective argument by counsel.

Randall G. Vaughan