June 1957

Damage Awards, Instructions, and the Jury's Common Knowledge

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A recent decision by the British House of Lords, *British Transport Comm'n v. Gourley*,\(^1\) reversing a line of English decisions, required that a personal injury award be reduced by taking into account the amount the plaintiff would have had to pay in income taxes had he earned the amount of the award.\(^2\)

The relationship which *British Transport Comm'n v. Gourley* is considered to have to the question of an instruction to a jury as to the lack of income taxation in the United States upon any award made for personal injuries,\(^3\) suggests the value of an attempt to trace the line of English decision before discussing American decisions on the issue of a proposed instruction concerning the incidence of taxation upon the damage award.

The earliest English decision on the tax issue is *Fairholme v. Firth and Brown Ltd.*,\(^4\) in which the court refused to permit consideration of the income tax question.

This case set the theme for decisions on the question of assessment of income tax liability on damage awards for Great Britain. There was, however, no dearth of attempts to overrule the decision. The advent of World War II, with its adjuncts of increased taxation and pay as you earn schemes for the collection of taxes in certain situations, made the issue particularly acute.\(^5\)

Lord Sorn in *M'Daid v. Clyde Navigation Trustees* held it proper to take the plaintiff's income tax liability into account when determining the amount of the award.\(^6\) With regard to the request that the jury be barred from taking the tax aspect into consideration, the court stated: "With income tax at 10s. in the £, to say nothing of surtax) such a direction would seem to a jury just like telling them to give . . . twice the amount of loss, and it is difficult to suppose that such a direction, apparently ignoring realities, could be received or given with any sense of satisfaction. It seems to me that, when you set a liability to which all earnings are subject and

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\(^1\) (1955) 3 All E.R. 796.

\(^2\) The decision also had reference to wrongful dismissal.

\(^3\) Int. Rev. Code of 1954 § 104.

\(^4\) (1933) 49 T.L.R. 470 Digest Supp., 149 L.T. 392. This was a suit for damages for breach of a contract of employment.

\(^5\) The court stated that the rate and existence of the tax depended upon the will of Parliament and that the liability to the Crown for the tax was extraneous as far as the action for damages was concerned.

which depends not upon any circumstances peculiar to the individual but upon a general law of the land universal in its application, it would be wrong to ignore the existence of that liability. It becomes, so to speak, a public fact and the jury, or the judge in its place, should take notice of it, if its effect is going to be material in the particular case.\(^7\)

The court refused to assume that it could order production of the plaintiff’s tax returns for the purpose of the determination of the amount of income tax paid by the plaintiff, assuming that there was income not taxed by the P.A.Y.E. system. It was suggested that the element of income tax be given effect upon the award “simply on broad lines.” The court believed that it was not beyond the power of a jury to deal in such broad manner with the income tax problem.\(^8\)

Less than one year later the British courts were again faced with the problem of income tax and its relation to the assessment of damages in a personal injury action. Lord Keith in Blackwood v. Andre refused to agree with the reasoning of M’Daid v. Clyde Navigation Trustees, and held that no deduction based upon income tax could be made.\(^9\) Holding that the argument for inclusion of income tax data in the calculation of an award must be rejected, the court overruled M’Daid v. Clyde Navigation Trustees, stating that the decision in that case rested upon a consideration of facts that are really res inter alios acta.\(^10\)

The question as to the tax deduction in the assessment of damages again arose in Billingham v. Hughes,\(^11\) wherein the court

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\(^7\) Ibid.

\(^8\) It is apparent from the opinion that the attention of the court had not been called to Fairholme v. Firth and Brown Ltd., note 4 supra.


\(^10\) Prior to the decision in Blackwood v. Andre the King’s Bench Division (Atkinson, J.) had reached the same conclusion in Jordan v. Limmer & Trinidad Lake Asphalt Co., Ltd., (1946) 1 All E.R. 527, 115 L.J.K.B. 379, 175 L.J. 89 2d Digest Supp., which was a personal injury action. The court relied heavily upon Fairholme v. Firth and Brown Ltd., note 4, supra.

\(^11\) (1949) 1 All E.R. 684, (1949) 1 K.B. 643. The plaintiff was a medical doctor with an extensive practice both as a general practitioner and a radiologist. He was injured due to the negligence of the defendant. The court reduced his recovery because of his probable increase in fees from his radiology practice which would not be impaired by the injury. Tucker, L. J. stated: "... apart from authority and apart from the practice which has prevailed for so many years, that restitutio in integrum requires the plaintiff to be put in the position in which he would have been vis-a-vis his patients, that is, to receive his fees in full, and that questions of his ultimate liability to the revenue authorities are matters which do not concern the defendants. (1 All E.R. 684, 686).
approved the decisions of *Fairholme v. Firth and Brown Ltd.*, and *Jordan v. Limmer & Trinidad Lake Asphalt Co. Ltd.*

Six years elapsed during which *Billingham v. Hughes* was the law of England. The issue again was litigated and came to decision in the House of Lords in *British Transport Comm'n v. Gourley*. The House of Lords disapproved *Billingham v. Hughes*, refused to follow *Blackwood v. Andre*, and gave approval to an award which was computed by taking into account the taxes the plaintiff would have had to pay. The rationale of the decision appears to be the reality and calculated continuation of the income taxation laws. The House of Lords also dismissed the principle of *restitutio in integrum* as a factual impossibility and relied upon compensation as the goal of the litigation.

Lord Goddard, by way of a summary of the position taken by the House of Lords, suggested the following instruction: "You know what the plaintiff was earning before the accident and what he had left to support himself and his family after tax was paid. You know his age. It is for you to consider for how long he would be likely to earn at the present rate. If he is a member of a partnership take into consideration his position in the firm at the time of the accident. If a junior partner, you may well think that his earnings would have increased as time goes on, while if a senior partner, they might well decrease as he ceases to give the same amount of time to the business of the firm. Remember that whatever he earned would be subject to tax, and that you will already have in mind when assessing his pre-accident income. No one can foresee whether tax will go up or down, and I advise you not to speculate on the subject but to deal with it as matters are at present. You cannot tell what his health would have been had he not been injured, nor what fortune good or bad he might have met with. You know he had, when he was injured, a spendable income of so much (adding if the plaintiff was in partnership, you have heard the provisions of his

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12 Note 1 supra.
13 Note 11 supra.
14 Note 9 supra.
15 Earl Jowitt stated: "The obligation to pay tax—save for those in possession of exiguous incomes—is almost universal in its application. That obligation is ever present in the minds of those who are called on to pay taxes, and no sensible person any longer regards the net earnings from his trade of profession as the equivalent of his available income. Indeed, save for the fact that in many cases—though by no means in all cases—the tax only becomes payable after the money has been received, there is, I think, no element of remoteness or uncertainty about its incidence."
partnership deed providing for an alteration in the shares, and you may consider whether his injury may affect the earnings of the partnership.) Taking all these matters into consideration, you will consider what it is fair that a man of this age should receive in respect of the amount of disability which you find this accident has imposed on him, remembering also that what you give is given once and for all.”

It is submitted that his instruction is the best summary possible of the decision of the House of Lords. Implicity it can rest on but one proposition: Income tax is a reality, affecting all but a minute segment of the citizens directly and must be recognized in the calculation of any compensatory damages. The forthright manner by which the House of Lords faced the issue is a refreshing method for treatment of such problems. One should bear in mind that although the relation between the English issue of tax deduction in arriving at the amount of the award and the American issue of exclusion of tax information in arriving at the award is tenuous at best, both can and should be met with common sense and a practical approach.

Very few American cases hinge on the use of tax liability to calculate the damages awarded. Rather the issue which has been discussed by the American courts is that of the allowance of an instruction which would bar any use of income tax information by a jury in reaching its decision upon an award.

The American courts are divided. The only appellate court that has allowed the debated instruction and constructively presented the arguments for such instruction is the Missouri court in its decision of Dempsey v. Thompson. The basic contention on appeal was that in making the award nothing should be included in the jury verdict for “Federal, State or City taxation.” This is clearly an attempt to prevent the jury from adding to the amount of the award a sum to equal, as nearly as possible, the amount the jury may think that the successful plaintiff will have to pay as income tax upon the award.

The attempt brings to light what is really a remarkable facet of the general rule that a jury may use its common knowledge in

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16 (1955) 3 All E.R. 796, 806.
17 363 Mo. 339, 251 S.W.2d 42 (1952). This was an action for personal injuries sustained by plaintiff who was a fireman on the defendant’s steam locomotive when the locomotive was derailed due to the admitted negligence of the defendant.
arriving at a decision. In essence the court is requested to bar the use of what the jury considers common knowledge, basing such bar on the ground that the knowledge is erroneous. In permitting such an instruction, the court recognized the fact that income taxation is known to nearly all of the citizens of the nation. It would be well to recognize at this point that no longer are there any particularly isolated sections of the country wherein radio, newspaper, and television have not penetrated, thus no person can be completely ignorant of the effect of income taxation upon large sums of money, due in part to the prevailing trend of entertaining by questioning, that is, the "quiz show," and the publicity relative to taxation engendered by such presentations.

The court refused to award a new trial on the basis that such instruction was cautionary only, "the giving or refusal of which is generally held to be within the discretion of the trial court." The ruling of the court was held to be prospective only.

The basis of the question of the instruction as to tax liability in the United States according to the court is the avoidance of the possibility of juries being led astray due to their likely ignorance of the fact that such awards are not subject to income tax.

The evil intended to be prevented is that of excessive awards due to misapplication of the limited knowledge of lay jurors. Appropriate instructions are apt to prevent such error. This is to be contrasted with the present English view that the award should be modified by taking into account income taxation.

The court refused to permit an instruction that any income realized from the award would be taxable. In stating that such instruction would require the jury to enter a speculative field, the court indirectly condemned the British decision in British Transport Comm'n v. Gourley.

The desire of the defendant's attorney that the jury not be under the impression the award would be subject to income tax was exhibited in Hall v. Chicago & N.W. Ry. The appellate court

18 9 Wigmore, Evidence § 2570 (1940).
19 The instruction suggested by the court: "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." Note 17 supra at 846, 251 S.W.2d 42, 45.
20 Note 1 supra.
21 349 Ill. App. 175, 110 N.E.2d 654 (1953).
reversed a direction for a new trial by the trial court based upon an alleged prejudicial statement to the jury by the defendant's attorney relative to income taxation.\textsuperscript{22} Upon appeal to the Supreme Court of Illinois the appellate court's decision was reversed. "The incident of taxation is not a proper factor for a jury's consideration, imparted either by oral argument or written instruction. It introduces an extraneous subject, giving rise to conjecture and speculation."\textsuperscript{23}

In the \textit{Hall} case the Illinois court fell into a typical American error. Careful reading of the opinion in \textit{Dempsey v. Thompson} will demonstrate that the court did not approve of an instruction that would include the issue of income taxation in arriving at an award, rather the suggested instruction clearly bars any consideration of income taxation by the jury.

In \textit{Margevich v. Chicago & N.W. Ry.}, the instruction given was: "You are instructed that under the present provisions of the Internal Revenue Code of the United States any amount paid plaintiff by defendant under a verdict of this jury is exempt from the payment of federal income taxes for the year of receipt of the said amount, although the amount of any dividends, interest, gain, profits, or income derived from any such amount paid plaintiff by defendant under a verdict of this jury would not be exempt from the payment of federal income taxes."\textsuperscript{24} The instruction was held bad on appeal.\textsuperscript{25}

In \textit{Maus v. New York, Chicago & St. L.R.R.}, there was a request to charge the jury orally that there is no income tax applicable to an award for personal injury.\textsuperscript{26} The court refused to permit the

\textsuperscript{22} "I say again if you believe that the plaintiff here has proved by a preponderance of evidence that the defendant is guilty of negligence, which caused these injuries, then you are going to have to award him a verdict, and whatever amount he received by way of verdict in this case is not subject to Federal Income Tax." \textit{Id.} at 180, 110 N.E.2d 654, 656.

\textsuperscript{23} \textit{Hall v. Chicago & N.W. Ry.}, 51 Ill. 2d 185, 125 N.E.2d 77 (1955).

\textsuperscript{24} 1 Ill. App. 2d 162, 116 N.E.2d 914 (1953), \textit{cert. denied}, 348 U.S. 881 (1954). The court distinguished this instruction from that suggested in \textit{Dempsey v. Thompson}, note 15 \textit{supra}, on the basis of the words following "although."

\textsuperscript{25} The court cited with approval \textit{Hilton v. Thompson}, 360 Mo. 177, 227 S.W.2d 675 (1950), wherein the court held tax matters to be extraneous and improperly injected into the issue.

\textsuperscript{26} 128 N.E.2d 166 (C.A. Ohio 1955). "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 into consideration in arriving at the amount of your verdict in this case."
instruction and based the decision on the erroneous belief that such instruction would require inquiry into the tax status of the plaintiff.²⁷

The Court of Civil Appeals of Texas in *Texas & N.O. Ry. v. Pool* appears to be one of the few courts which has been able to distinguish the decision of the Missouri court coupled with the proposed instruction therein,²⁸ from those decisions which bar the use of income tax information in the calculation of awards by juries.²⁹

A later Texas case, *Missouri, K., T. Ry. v. McFerrin* refused to approve *Dempsey v. Thompson*.³⁰ The court stated its reasons for such refusal: "The Missouri practice in instructing juries seems to us to be quite different from our own. However this may be we are not in accord with its reasoning. . . . It assumes that the jury will not confine itself to the evidence nor the court's charge but will consider and take into account matters not mentioned therein, this is to assume that there will be misconduct on the part of the jury, an assumption in which we cannot indulge."³¹

The decision in this case presents the prime if not the sole objection to an instruction of the Missouri type. True, the traditional place of the jury system in the American court bars the assumption that the jury will do something that is improper. True, the jury system itself may present a valid means of achieving substantial justice in spite of the obstacles to such result placed in the path by the law. It would seem however, that the prejudicial qualities of such instruction are based upon one of the most esoteric theorems of the law and as such lawsuits would reach their intended end in a more rational and reasonable manner if the instruction were permitted. Perhaps it is worthy of note that a use of this type of instruction might have prevented the decision in the *Gourley* case, which should certainly give pause to the more vocal of the opponents of the proposed instruction.

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²⁷ "The result of several such inquiries would so complicate the trial of a personal injury action into an intricate discussion of tax and non-tax liabilities, and so confuse the ordinary jury with technical tax questions as to defeat the purpose of the trial." *Id.* at 167.

²⁸ 263 S.W.2d 589 (C.C.A. Texas 1953).

²⁹ See Southern Pacific Co. v. Guthrie, 186 F.2d 926 (9th Cir. 1952); Stokes v. United States, 144 F.2d 82 (2d Cir. 1944); Cole v. Chicago, St. Paul & Ohio Ry., 59 F. Supp. 443 (1945); Majestic v. Louisville & N.R.R., 47 F.2d 621 (6th Cir. 1945).

³⁰ 279 S.W.2d 410 (1955), rev'd, 291 S.W.2d 931 (1956).

³¹ *Id.* at 419.