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apparent major problems.[234] Similarly, the French civil law system holds landowners to a high degree of responsibility, and yet has not experienced "incessant verdicts in favor of the plaintiff."[235] If, in fact, insurance rates do rise, the increase might be absorbed by industrial and commercial concerns.[236] This would be indicative of *Basso* and *Scurti's* most important result — the partial shifting of risk by expanding the duty of care on the parties who will, in many cases, be able to prevent, insure against, and absorb the financial loss of property-related injuries. Commercial entities can treat such losses or insurance premiums as a cost of doing business. The homeowner or apartment dweller of limited means, on the other hand, may be protected by flexibility in the general standard of reasonableness,[237] as well as by joint landlord liability. Hopefully, the increase in potential liability will yield a decrease in future injuries by placing landowners on notice that they will be held to reasonable standards of care in the maintenance of their premises.[238] The holding of the Court of Appeals in *Basso* is a welcome step toward conforming the law to modern socio-economic conditions and demands. Application of a single duty of reasonable care will simplify litigation in the area of property-related injuries while shifting liability to those who should properly bear its burden.

Jury need not be instructed as to the tax-exempt status of personal injury awards.

Damages awarded in personal injury actions are exempt from both federal[239] and New York State income taxation.[240] Whether a jury should be informed of this fact has presented considerable difficulty for the courts. Recently, in *Coleman v. New York City Transit Authority*,[241] the Court of Appeals, following the view of a majority of jurisdictions,[242] held that a trial judge is not required to

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[234] *Cf., e.g.*, Minoletti v. Sabini, 27 Cal. App. 3d 321, 103 Cal. Rptr. 528 (1972); Cappaa v. Oscar C. Holmes, Inc., 25 Cal. App. 3d 978, 102 Cal. Rptr. 207 (1972); Fitch v. LeBeau, 1 Cal. App. 3d 320, 81 Cal. Rptr. 722 (1969).

[235] Hughes, *supra* note 224, at 684.

[236] 25 VAND. L. REV. 623, 637 (1972). *See also* 44 N.Y.U.L. REV. 426, 432 (1969).

[237] Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 106 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973).

[238] Hughes, *supra* note 224, at 691.

[239] INT. REV. CODE OF 1954, § 104(a).

[240] N.Y. TAX LAW § 359(2)(e) (McKinney 1975).

[241] 37 N.Y.2d 137, 332 N.E.2d 850, 371 N.Y.S.2d 663 (1975).

[242] The majority of state and federal jurisdictions clearly prohibit any instruction to the jury on the tax-exempt status of personal injury awards. *See, e.g.*, Prudential Ins. Co. of America v. Wilkerson, 327 F.2d 997 (5th Cir. 1964) (per curiam); Gerham v. Farmington Motor Inn, Inc., 159 Conn. 576, 271 A.2d 94 (1970); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955). Some jurisdictions, however, have adopted the contrary position,

charge the jury on the tax-exempt nature of such an award.[243]

The plaintiff in *Coleman* suffered amputation of both legs below the knees when he was struck by defendant's subway train. At a trial on the issue of liability, a verdict was returned in plaintiff's favor.[244] The defendant contended that reversible error was committed in a subsequent trial to determine damages when the court refused to answer a jury query as to the taxability of the award.[245] Instead, the trial judge instructed the jury not to consider potential tax consequences in determining the award. The Court summarily rejected defendant's contention,[246] although Judge Jasen, in dissent, urged closer examination of the underlying policy considerations.[247]

It should be noted that the *Coleman* Court did not rule that it would be error to inform the jury of the tax-exempt nature of the award; rather, the Court held only that the trial judge is not required to give such an instruction.[248] *Coleman* may well be com-

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and require instructions on this point when requested by counsel. *See, e.g.,* Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245 (3d Cir.), *cert. denied,* 404 U.S. 883 (1971); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952). The Court of Appeals for the Second Circuit stands somewhere between the two extremes, holding that while such an instruction is proper, refusal to inform the jury of the nontaxable nature of personal injury awards is not prejudicial error in the absence of a showing that recovery was increased as a result of the failure to so instruct. McWeeney v. New York, N.H. & Hart. R.R., 282 F.2d 34, 39 (2d Cir.) (en banc), *cert. denied,* 364 U.S. 870 (1960). *See* notes 249-51 and accompanying text *infra.* A similar position was adopted in Anderson v. United Air Lines, Inc., 183 F. Supp. 97 (S.D. Cal. 1960). *See generally* Nordstrom, *Income Taxes and Personal Injury Awards,* 19 OHIO ST. L.J. 212 (1958) [hereinafter cited as Nordstrom]; Comment, *Personal Injury Awards and The Nonexistent Income Tax—What is a Proper Jury Charge?,* 26 FORDHAM L. REV. 98 (1957); Note, *Income Taxes and the Computation of Lost Future Earnings in Wrongful Death and Personal Injury Cases,* 29 MD. L. REV. 177 (1969); 56 MINN. L. REV. 503 (1972).

[243] 37 N.Y.2d at 145, 332 N.E.2d at 855, 371 N.Y.S.2d at 670.

[244] *Id.* at 139-40, 332 N.E.2d at 851, 371 N.Y.S.2d at 665.

[245] In response to the jury's request for information on the taxability of the award, the trial judge answered: "'Don't concern yourselves with that. It forms no part of your deliberations. It is not an element to be concerned by you. Do not consider that at all.'" *Id.* at 145, 332 N.E.2d at 855, 371 N.Y.S.2d at 670. This response is similar to that suggested by the Appellate Division, First Department, in Towli v. Ford Motor Co., 30 App. Div. 2d 319, 292 N.Y.S.2d 8 (1st Dep't 1968) (per curiam). *Towli* involved the same jury question as did *Coleman.* After the jury had begun deliberations, they asked the trial judge: "Does the plaintiff have to pay taxes on the award? If so, how are they computed?" The court responded: "I instruct you, members of the jury, that the law does not permit me to instruct the jury with regard to income taxes. I therefore *cannot answer* your questions as to taxes or the payment of same." *Id.* at 320, 292 N.Y.S.2d at 9 (emphasis added). The appellate division reversed the damage award and held that the trial judge should have instructed the jury that they may not consider taxes in arriving at an award, rather than indicating that he could not respond to their inquiry. *Accord,* Osborne v. Miller, 38 App. Div. 2d 298, 301, 328 N.Y.S.2d 769, 777 (1st Dep't 1972); *cf.* Kramer v. Chatham Green, Inc., 38 App. Div. 2d 931, 330 N.Y.S.2d 144 (1st Dep't 1972) (mem.). The *Towli* court, however, expressly declined to indicate the appropriate response if counsel requests an instruction on the issue of taxes. 30 App. Div. 2d at 320, 292 N.Y.S.2d at 9.

[246] 37 N.Y.2d at 145, 332 N.E.2d at 855, 371 N.Y.S.2d at 670.

[247] *Id.* at 149-50, 332 N.E.2d at 857-58, 371 N.Y.S.2d at 673-75 (Jasen, J., dissenting).

[248] *Id.* at 145, 332 N.E.2d at 855, 371 N.Y.S.2d at 670.

pared to the decision by the Court of Appeals for the Second Circuit in *McWeeney v. New York, New Haven & Hartford Railroad.*[249] The *McWeeney* court indicated that jury instructions regarding the tax-exempt status of awards were proper,[250] but refused to rule that the failure to give such instructions constitutes prejudicial error.[251]

Supporters of the majority position argue that instructions regarding tax consequences inject a collateral issue into the proceedings in that the plaintiff's tax liability is a private affair between himself and the government and has no legitimate bearing on the litigation.[252] Any instructions in this area, it is contended, would confuse and mislead the jury and obscure the substantive issues at trial.[253] In addition, it has been suggested that since the intent of the government in exempting the award from taxation is to confer a benefit upon the injured party, it would be improper to allow the jury to decrease the award because of its tax-exempt nature.[254] These arguments are based upon a presumption that the jury, in arriving at an award, will confine its deliberations to those elements it is instructed to consider.[255] The absence of any refer-

[249] 282 F.2d 34 (2d Cir.) (en banc), *cert. denied*, 364 U.S. 870 (1960).

[250] 282 F.2d at 39.

[251] *Id.* The *McWeeney* court reasoned that the failure to charge the jury concerning taxation did not merit a new trial absent some indication that the jury had considered the defendant's possible tax liability in computing damages. *Id.* at 39-40. The *McWeeney* rationale was reaffirmed in Blake v. Delaware & Hudson Ry., 484 F.2d 204 (2d Cir. 1973). Judge Lumbard dissented in both cases, declaring that an instruction concerning the tax-exempt status of the award should be required. *Id.* at 208 (Lumbard, J., dissenting); 282 F.2d at 40 (Lumbard, C.J., dissenting). In *Blake,* he reasoned that "[t]his is one way in which our courts can properly do something to curb escalating verdicts without subtracting one iota from a fair and just recovery of damages suffered." 484 F.2d at 208 (Lumbard, J., dissenting).

[252] *See* Kawamoto v. Yasutake, 49 Hawaii 42, 51, 410 P.2d 976, 981 (1966), *citing* Missouri-Kansas-Texas R.R. v. McFerrin, 156 Tex. 69, 90, 291 S.W.2d 931, 945 (1956).

[253] *See* Gorham v. Farmington Motor Inn, Inc., 159 Conn. 576, 581, 271 A.2d 94, 97 (1970); Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 152, 125 N.E.2d 77, 86 (1955) (instructions would inject an extraneous issue into the damage award). *But see* Feldman, *Personal Injury Awards: Should Tax-Exempt Status Be Ignored?*, 7 ARIZ. L. REV. 272, 280 (1966), wherein it is argued that since such a cautionary instruction does not require introduction of any new evidence and may dispel a misconception of the jury, it will have a simplifying rather than a complicating effect on their deliberations.

[254] Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 152, 125 N.E.2d 77, 86 (1955). This interpretation of legislative intent is questionable. It appears that the Revenue Act of 1918, ch. 18, § 213(b)(6), 40 Stat. 1066 (now INT. REV. CODE OF 1954, § 104(a)), was enacted primarily because of then existing doubts about the constitutionality of taxing personal injury awards. H.R. REP. No. 767, 65th Cong., 2d Sess. 9-10 (1918).

[255] *See* Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 149-51, 125 N.E.2d 77, 84-85 (1955). *See also* Gorham v. Farmington Motor Inn, Inc., 159 Conn. 576, 581, 271 A.2d 94, 97 (1970) (the limiting instruction is based on an unjustified assumption that the jury will not confine their deliberations to the court's charge); Prudential Ins. Co. of America v. Wilkerson, 327 F.2d 997 (5th Cir. 1964) (per curiam); Burns, *A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell The Jury?*, 14 DE PAUL L. REV. 320 (1965); Feldman, *Personal Injury Awards: Should Tax-Exempt Status Be Ignored?*, 7 ARIZ. L. REV. 272 (1966).

ence to taxation supposedly precludes the possibility of unfair prejudice to any party.[256]

Whatever the merits of these arguments, it is submitted that adherence to the majority position creates a very real possibility of prejudice to the defendant. While the average wage earner is highly conscious of taxation in general,[257] the public is largely unaware of the tax exemption accorded personal injury awards.[258] A serious danger exists that an uninstructed jury will arbitrarily increase a personal injury award in order to compensate the plaintiff for taxes which the jurors mistakenly believe he will have to pay.[259] Jury awards which do more than make the plaintiff whole do violence to our notions of the compensatory nature of damages.[260] A cautionary instruction informing the jury of the nontaxability of the award and instructing them not to consider taxes in their determination of damages[261] would dispel any misconceptions the jurors may have as well as provide greater assurance that the award will be purely compensatory in nature. Rather than complicating deliberations, as the majority view fears, such an instruction would simplify the jury's task by removing any possible confu-

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[256] *See, e.g.,* Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 151, 125 N.E.2d 77, 86 (1955). The Illinois court assumed that the jury's reaction to such a charge would be to subtract a projected tax liability from an award fairly arrived at through affirmative consideration of the relevant damage factors. *See also* Nordstrom, *supra* note 242, at 234. *But see* McWeeney v. New York, N.H. & Hart. R.R., 282 F.2d 34, 40 (2d Cir.), *cert. denied,* 364 U.S. 870 (1960) (Lumbard, C.J., dissenting) (without the instruction many jurors believe the award taxable and weigh this factor against defendant).

[257] The Court of Appeals for the Third Circuit found the tax consciousness of the American public to be so notorious as to justify the court in taking judicial notice thereof. Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1251 (3d Cir. 1971). *See also* McWeeney v. New York, N.H. & Hart. R.R., 282 F.2d 34, 41 (2d Cir.), *cert. denied,* 364 U.S. 870 (1960) (Lumbard, C.J., dissenting); Dempsey v. Thompson, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952).

[258] *See* Coleman v. New York City Transit Authority, 37 N.Y.2d 137, 150, 332 N.E.2d 850, 858, 371 N.Y.S.2d 663, 674 (1975) (Jasen, J., dissenting); Dempsey v. Thompson, 363 Mo. 339, 346, 251 S.W.2d 42, 45 (1952); Nordstrom, *supra* note 242, at 233.

[259] Coleman v. New York City Transit Authority, 37 N.Y.2d 137, 150, 332 N.E.2d 850, 858, 371 N.Y.S.2d 663, 674 (1975) (Jasen, J., dissenting); Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1251 (3d Cir. 1971). *See also* McWeeney v. New York, N.H. & Hart. R.R., 282 F.2d 34, 41 (2d Cir.), *cert. denied,* 364 U.S. 870 (1960) (Lumbard, C.J., dissenting).

[260] *See* Coleman v. New York City Transit Authority, 37 N.Y.2d 137, 150, 332 N.E.2d 850, 858, 371 N.Y.S.2d 663, 674 (1975) (Jasen, J., dissenting); McWeeney v. New York, N.H. & Hart. R.R., 282 F.2d 34, 40 (2d Cir.), *cert. denied,* 364 U.S. 870 (1960) (Lumbard, C.J., dissenting). *See also* Morris & Nordstrom, *Personal Injury Recoveries and the Federal Income Tax Law,* 46 A.B.A.J. 274 (1960).

[261] The instruction typically requested is similar to that given by the trial court in Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952), where the court charged:

> 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.

Id. at 346, 251 S.W.2d at 45.

sion.[262] In the final analysis, an instruction on taxation would be a readily understood statement of the law,[263] taking nothing from plaintiffs while protecting the rights of defendants to be free from unduly inflated verdicts.

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[262] *See* Feldman, *Personal Injury Awards: Should Tax-Exempt Status Be Ignored?*, 7 ARIZ. L. REV. 272, 280 (1966).

[263] 37 N.Y.2d at 145, 332 N.E.2d at 855, 371 N.Y.S.2d at 670 (1975). Apparently, there has been a tendency among courts to confuse the evidentiary issue of proving lower damages by showing a loss of net earnings rather than gross income, with the issue of instructing the jury on the nontaxability of the final award. *See* Domeracki v. Humble Oil & Ref. Co., 443 F.2d 1245, 1250 (3d Cir. 1971). In Highshew v. Kushto, 235 Ind. 505, 134 N.E.2d 555, (1956), for example, the court, in denying a request for jury instructions concerning the tax-exempt nature of the award, stated that "[s]uch subject matter would involve intricate instructions on tax and non-tax liabilities . . . ." *Id.* at 507, 134 N.E.2d at 556. This reasoning may support exclusion of proof of net earnings; it is not applicable to the instruction issue. *See* Burns, *A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell the Jury?*, 14 DE PAUL L. REV. 320, 330 (1965); Morris & Nordstrom, *Personal Injury Recoveries and the Federal Income Tax Law*, 46 A.B.A.J. 274, 275 (1960). Evidence of plaintiff's tax liability on lost earnings has been appropriately criticized as being highly speculative and for increasing the trial's complexity with a "parade of tax experts." *See In re* Marina Mercante Nicaraguense, S.A., 364 F.2d 118, 126 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967); Stokes v. United States, 144 F.2d 82, 87 (2d Cir. 1944); D'Amico v. Resnik, 22 Misc. 2d 545, 548, 197 N.Y.S.2d 826, 828-29 (Sup. Ct. Queens County 1960); Nordstrom, *supra* note 242, at 231. Jury instructions as to the tax-exempt nature of personal injury awards, however, are not subject to these infirmities and impose no new burdens on the finders of fact. *See* McWeeney v. New York, N.H. & Hart. R.R., 282 F.2d 34, 39 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960). Such instructions would merely caution the jury not to consider taxation in determining the amount of damages. *See* note 261 and accompanying text *supra*.