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Case Comments

Contracts: Promissory Estoppel Applied to Bind Subcontractor to His Subbid

Defendant subcontractor submitted a bid to plaintiff general contractor who used it to compute his prime bid to the awarding authorities. Several days after the opening of the prime bids but more than a month before plaintiff received the award, defendant attempted to withdraw the subbid because of substantial errors he had discovered in it. More than a week later plaintiff mailed to defendant a formal acceptance of the original subbid. Defendant refused to perform at the original subbid price. Plaintiff therefore employed two other firms to do the work at a cost higher than the original subbid. Plaintiff brought suit for damages caused by the defendant's refusal to perform. On the basis of both local bidding practices and the customary bidding conduct of the general contractor, the trial court found that the subcontractor could expect the general contractor to rely on the subbid and entered judgment for plaintiff on the ground of promissory estoppel. On appeal the Minnesota Supreme Court affirmed, holding that the subcontractor is bound by his subbid if he can reasonably expect that the contractor will rely on it and the contractor reasonably does so to his detriment without attempting to renegotiate the subcontract. Constructors Supply Co. v. Bostrum Sheet Metal Works, Inc., 190 N.W.2d 71 (Minn. 1971).

The principle that an offer is revocable before acceptance unless supported by consideration is fundamental to the law of contracts. But to cover situations where the application of this rule would cause injustice, modern contract theory has developed the doctrine of promissory estoppel which makes certain promises legally enforceable even though the element of bargained for con-

1. See text accompanying note 19 infra.
2. See RESTATEMENT OF CONTRACTS §§ 35, 75 (1932).
3. RESTATEMENT OF CONTRACTS § 90 (1932) states the doctrine as follows:
A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
sideration is lacking. The doctrine is a logical extension of equitable estoppel, which estops certain defenses when one has made a misrepresentation as to past or present fact. Promissory estoppel estops the denial of consideration by one who has made a promise on the ground that he has misrepresented as to the future. The principle has for the most part been applied to gratuitous or donative promises such as the charitable donation, the promise to convey land, the gratuitous bailment and the waiver of an existing right. In some jurisdictions promissory estoppel is deemed inappropriate for promises made in commercial bargaining, an area where conventional offer-acceptance principles have historically reigned. Other jurisdictions, however, have freely invoked it, for example, in negotiation for the financing of construction and in franchising.

There is a split of authority as to whether the concept is applicable to construction subbidding, each line of authority re-

5. See generally Henderson, supra note 4, at 376-77.
7. See, e.g., Greiner v. Greiner, 131 Kan. 760, 293 P. 759 (1930); Seavey v. Drake, 62 N.H. 393 (1882). See also Pound, Consideration in Equity, 13 Ill. L. Rev. 667, 672 (1919).
9. In the Minnesota case of Albachten v. Bradley, 212 Minn. 359, 3 N.W.2d 783 (1942), the court applied promissory estoppel to the statute of limitations defense, estopping the debtor when he promised to settle the claim and induced the creditor to forbear suit.
10. See Henderson, supra note 4, at 353.
lying on either of two opposing major cases. Drennan v. Star Paving Co.,\textsuperscript{14} in applying promissory estoppel to construction subbidding, directly opposes the holding of the earlier case of James Baird Co. v. Gimbel Brothers, Inc.\textsuperscript{15} In Baird, Judge Learned Hand reasoned that the parties to the bilateral negotiation did not bargain for the general contractor's use of the subbid in making his prime bid. Thus, because there was no consideration, there could be no binding contract at the time of use and the subcontractor could withdraw his offer before the contractor explicitly accepted.\textsuperscript{16} Judge Hand rejected promissory estoppel as a solution because, in his view, the subcontractor expected an acceptance of his subbid by the general contractor after the award of the prime contract.\textsuperscript{17} Judge Traynor, in Drennan, agreed that neither party envisioned use of the subbid as acceptance and that there could thus be no binding contract. But the subcontractor could nevertheless expect that the contractor would be forced to use the low subbid in computing his own bid. The court found that this expectation justified the implication of a promise by the subcontractor, subsidiary to his subbid offer, not to revoke the offer until the general contractor had been allowed a reasonable time in which to accept. As a first step the court had to marshall support for the finding of this implied subsidiary promise not to revoke the offer. Since subbidding negotiations are bilateral, the Restatement of Contracts' Section 45 is not directly pertinent because it evidences the law only with respect to protection of the unilateral offeree who has relied by partially performing.\textsuperscript{18} The protection is there obtained by implying a promise by the unilateral offeror which is subsidiary to the offer. The Drennan court, however, reasoned that the bilateral offeree could be protected using the same implied promise concept. Since the support for the implied promise in the unilateral context is the consideration found in part performance by the offeree, the second step for the court was to find something in lieu of such consideration to support the implied promise in the bilateral context. The court based its reasoning that bargained for consideration is not necessary for enforcement in the bilateral context on language in comment b to Restatement of Contracts, Section 45. The comment states that

\textsuperscript{14} 51 Cal. 2d 409, 333 P.2d 757 (1958).
\textsuperscript{15} 64 F.2d 344 (2d Cir. 1933).
\textsuperscript{16} Id. at 346.
\textsuperscript{17} Id.
\textsuperscript{18} See generally 1 A. CORBIN, supra note 6, at § 63.
merely “justifiable reliance” by the offeree may serve as a reason for binding the offeror to the subsidiary promise not to revoke. Thus detrimental reliance, though not bargained for, replaces conventional consideration as a justification for enforcement in the bilateral context.

The Drennan court held that the general contractor must act reasonably; he cannot delay acceptance in the hope of getting a better offer, nor can he reopen bargaining with the low subbidder. It is probable that in making this limitation the court was conscious of the practices of “bid shopping” and “bid chopping.” In bid shopping the general contractor contacts other subcontractors before or after he submits the prime bid and encourages them to undercut the low subbid. In bid chopping subcontractors take the initiative in trying to undercut the low subbid.

In the instant case the Minnesota Supreme Court followed Drennan in applying promissory estoppel to the bargain context of construction subbidding. The court held that the general contractor’s refusal to accept the low subbid before award of the contract but after the prime bidding did not impair his rights in invoking the estoppel. However, the court expressly limited the holding to situations with no shopping or chopping conduct. But the court did not make clear, with respect to chopping, the

19. Comment b states that “merely acting in justifiable reliance on an offer may in some cases serve as a sufficient reason for making a promise binding (see § 90).” RESTATEMENT OF CONTRACTS § 45, comment b, at 54 (1932).

20. The opinion states that “[i]t bears noting that a general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer.” 51 Cal. 2d at 415, 333 P.2d at 760.

21. Promissory estoppel has been accepted in Minnesota as a logical extension of equitable estoppel. See Albachten v. Bradley, 212 Minn. 359, 3 N.W.2d 783 (1942) (promisor estopped from pleading the statute of limitations). It is well recognized in charitable donation cases. See Horan v. Keane, 164 Minn. 57, 214 N.W. 546 (1925); Albert Lea College v. Brown’s Estate, 88 Minn. 524, 93 N.W. 672 (1903). Cf. Rochester Civic Theater, Inc. v. Ramsay, 368 F.2d 749 (8th Cir. 1966). Prior to the instant case, however, no Minnesota decision had upheld the doctrine of promissory estoppel as applied to the commercial bargaining of construction subbidding. But the Eighth Circuit Court of Appeals, interpreting Minnesota law, had applied it to a franchise promise in Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 395 F.2d 388 (8th Cir. 1968).


23. Id. at 77.
extent of participation by the general contractor in such further negotiation which would prevent invocation of the estoppel.

The application of the promissory estoppel rule in construction subbidding is justified by the need to protect the contractor's reliance on the low subbid. To establish the amount of his prime bid, he must rely on a compilation of such subbids which are usually submitted shortly before he submits the prime bid. After the prime bids are submitted and opened the contractor cannot change his bid. As in the instant case, the general contractor's reliance is most acute when he must submit a bid bond with the prime bid which will be forfeited if he is awarded the contract and does not perform. If the subcontractor has made a mistake and refuses to perform, or if he attempts to substitute a higher subbid quotation later, the general contractor must take the loss to avoid forfeiture of the bid bond, a possible damage suit by the awarding authority or a reputation for submitting unreliable bids. Enforcement of the subbid is therefore justified by the principle that the subcontractor, having made a mistake, should bear the loss, or even not having made a mistake, should not be able to force the relying contractor to a higher subcontract price. Indeed, the Minnesota court, in referring to local practices, found that subcontractors themselves expect the general contractor to rely and that they expect to be bound to their subbids.


25. 190 N.W.2d at 75-76. Although the Minnesota Supreme Court stressed the bid bond as a component of reliance, the requirements for application of the estoppel are generally satisfied if the contractor merely incorporates the subbid in his prime bid, even if there is no required bid bond. See Note, supra note 24, at 1722-23.

26. However if the mistake is so large as to be noticeable to the contractor, he cannot invoke the estoppel since any reliance on the subbid is unreasonable. See Union Tank Car Co. v. Wheat Bros., 15 Utah 2d 101, 387 P.2d 1000 (1964).

27. 190 N.W.2d at 73. The trial court stated that the subcontractors in the area agree to be bound to their subbids, and the supreme court apparently based its finding on this assertion. Brief for Appellant at Appendix 11. The trial judge did not make the assertion as a finding of fact, and the only evidence in the record which appears to support this assertion is testimony by the plaintiff contractor. Record at 46, 177-78. See generally Schultz, The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry, 19 U. Chi. L. Rev. 237, 267-68 (1952); Note, supra note 24, at 1734.

Although subcontractors generally expect contractors to rely, few make "firm offers" which expressly keep the offer open. Because of the
Some limitation in the application of the promissory estoppel rule is required to afford the low subbidder needed protection.\(^8\)

If the general contractor gets the prime contract, he is not required to subcontract with the subbidders on whom he has relied in the absence of a statutory basis for such an obligation.\(^9\)

Thus unless he is somehow restrained, the general contractor is free to actively pursue a better subcontract price and yet bind the low subbidder if the quest is to no avail. It is even possible in such a situation for the subcontractor to force the low subbidder to go lower by threatening to subcontract with another subcontractor for a lower price he has found while shopping.

Subcontractors lacking legal protection have made attempts to prevent such conduct. Some low subbidders try to demand acceptance conditional on award at the time of subbid submission, generally without success, due to lack of sufficient bargaining power.\(^30\)

The primary reason for general contractors’ refusal of such a demand appears to be their superior bargaining position, especially after prime bidding.\(^31\) Other reasons, however, also exist for such refusal. A general contractor will not submit to such a demand because he does not have the time to check subbids just before he submits the prime bid and is fearful of being bound to a subcontractor’s mistaken specification or error in price computation.\(^32\)

Subcontractors made his subbid irrevocable, in a signed writing, and if it could be resolved that he is a “merchant to buy or sell goods,” \textit{Uniform Commercial Code} § 2-205 would apply to bind him. It states:

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated, for a reasonable time, but in no event may such a period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.


28. There is a great deal of evidence in the record of the instant case that local contractors shop and entertain shops. Record at 116, 144–48, 158, 200–01.

29. \textit{See} \textit{Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng'r Corp.}, 305 F.2d 659 (9th Cir. 1962); \textit{Milone & Tucci, Inc. v. Bona Fide Builders, Inc.}, 49 Wash. 363, 301 P.2d 759 (1956). Some states do have such a statutory basis. \textit{See}, e.g., discussion of California statute, \textit{infra} note 41.

30. \textit{See} Note, \textit{supra} note 24, at 1745–47.

31. \textit{See} text accompanying notes 28 & 29 \textit{supra}.

32. \textit{See} Note, \textit{supra} note 24, at 1745–47.
tractor with whom the general contractor is unfamiliar, he may reluctantly rely on it, but will want to reserve a decision to accept until after he has had time to verify the subcontractor's reliability. Subcontractors have also tried to restrict contractors by forming bid depositories. Where a bid depository has been set up, all subbids are made public, and the general contractors make known the accepted subbids before submitting the prime bid. There are various penalties for attempting to withdraw or change a subbid after submission, and other sanctions force members to continually use the depository and boycott contractors who do not use it. Unfortunately, such sanctions have caused some courts to hold the depository to be a restraint of competition in violation of the Sherman Act. An additional problem with the depository is that it cannot control the conduct of local contractors and subcontractors who are not members. If these problems can be minimized, the public disclosure which makes the depository effective, particularly in the knowledge it brings to others in the industry concerning conduct of a contractor, seems to be the most promising type of protection the subcontractor can obtain.

Regardless of whether or not effective extra-legal protection is available to the local subcontractor, courts recognize his plight and deny relief to the contractor who seeks to invoke the estoppel after actively renegotiating for a better contract. But such a limitation is insufficient protection for the subcontractor when it is simply stated that no shopping or chopping will be allowed. Since the court looks to the contractor's conduct to determine whether promissory estoppel should be invoked, the contractor can avoid the limitation simply by delaying after the opening of prime bids. Without shopping or actively participating in chopping during the delay, he can passively entertain the chops of other subcontractors a short time after he knows he is the low bidder or likely to get the contract. This behavior is no less harmful to the low subbidder than if the contractor actively renegotiates. It is almost impossible for a subcontractor to estab-

33. Id.
lish in court that such conduct has occurred, or even to convince a court that such conduct should prevent estoppel invocation. The Minnesota court ignored such passive conduct in the instant case, where the contractor admitted that he entertained lower subbids as a general practice, and where there was evidence, albeit disputed, of bid chopping on other subprojects of the job. The effectiveness of the limitation is further impaired when a court accepts the argument that since there is no guarantee that the low prime bidder will get the award the contractor should not have to accept until after the award when the award is not made immediately after prime bidding. This argument is without merit in most situations since the contractor can make an acceptance conditioned on his receiving the award. In some situations this argument is justified since the contractor must often consolidate overlapping subbids and decide on alternative specifications or prices suggested in the subbids. However, the contractor must do all the consolidation in order to accept the subbids before prime bidding, so the burden should not be considered onerous where no depository constrains the contractor. Furthermore, many of the subprojects have no such complications in the first place. But in spite of the weakness in the uncertainty argument, the Minnesota court was unfortunately persuaded by it and allowed the delay of more than one week. Thus the

36. There was testimony by the general contractor in the instant case that he entertained lower subbids. For example, he stated: “We do not negotiate. We cannot speak for other people. If, as an example XYZ Company, for some reason or other, wants to reduce their price, we are going to entertain it.” Record at 112-14.

37. Id. at 210-13. Also, one of the subcontractors who testified described his own subbid reduction as a bid chop. Id. at 148-49.

38. Subcontractors give an alternative to the contractor in several ways. For instance, a subcontractor might specify in his subbid that he can do the work only with #1 pipe instead of the #2 pipe designated in the contractor's specifications. Also, on a part of the subproject for which the contractor has not made detailed specifications, a subcontractor might specify that he will do the job either with #1 pipe for one price or with #2 pipe for another. Such suggested variations probably occur more often and with greater complexity on large projects, increasing the time and effort that must be expended in choosing subbids and refining the prime bid.

39. See text accompanying note 34 supra.

40. 190 N.W.2d at 76. For another court which accepted the argu-
court's allowance of the delay, and thus the possibility of entertaining chops all but destroys any protection the limitation might give to the subcontractor.

In the absence of statutory protection or other means of ameliorating the subcontractor's position, a refinement of the limitation is needed to prevent abuse by the contractor. Yet the refinement must not destroy the protection of the contractor's reliance or curtail the extra time he needs after the opening of prime bids to check the reliability of subbids. The needed extra time could not be provided if use of the subbid constituted acceptance, a rule suggested by some authorities but rejected by both the Drennan and Baird opinions. The objectives can be met instead by requiring the contractor who seeks to invoke the rule to conditionally accept the low subbid offer a short but reasonable time after prime bid opening. Such a requirement denies the contractor the extra time to passively entertain chops. The reasonable time given the contractor to check a subbid would depend on the size and complexity of the job, the number of subcontractors on whose subbids he relied, and his familiarity with their past work and reputation. In situations where the particular subproject is so complex that the contractor could

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41. California has a statute that requires the contractor to reveal the subcontractors whose subbids he used in compiling the prime bid. It reads, in part:

The Legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements... deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils. No prime contractor whose bid is accepted shall: (a) Substitute any person as subcontractor in place of the subcontractor listed in the original bid... .

CAL. GOV'T CODE §§ 4101, 4107 (West 1966).

In Southern California Acoustics Co., Inc. v. C.U. Holder, Inc., 71 Cal. 2d. 719, 456 P.2d 975, 79 Cal. Rptr 319 (1969), it was held that such bid listing obligates the contractor to subcontract with the listed subbidders. The court found that the statutory purpose was to protect both the public and subcontractors from unfair shopping and chopping.

42. One suggested solution has been that subcontractors contract separately with the awarding authority. This is unrealistic since the large number of subprojects would be an unwieldy burden for the prime contract architect, and it could lead to padded subbids by unscrupulous subcontractors that would be difficult to detect. See Note, supra note 34, at 828.

43. Id. at 829-34.

44. See text accompanying notes 16 & 18 supra.
not fully consolidate and choose alternative specifications and prices before prime bidding, and it is burdensome for him to undertake the task after prime bidding when he is uncertain of award, such time might extend beyond the time of award. But such complication should not excuse the contractor from conditionally accepting the subbids on simpler portions of the project, nor should he be excused if, because of extensive consolidation work prior to prime bidding, only minimal work would be required to completely consolidate prior to award. If he does not respond within a reasonable time, either he should not be able to invoke the estoppel, or at least there should be a presumption of shopping or entertaining chops which would shift the burden of proof on the issue to the contractor.
Jury Instructions: Upon Request Court Must Instruct that Compensatory Damages Are Not Subject to Federal Tax

Plaintiff, a longshoreman, was injured while loading defendant's ship. Alleging the cause of the injury to be the vessel's unseaworthy condition, plaintiff brought an action before a jury in the federal district court for the Eastern District of Pennsylvania.\(^1\) Defendant argued unsuccessfully that the jury be instructed that any damages awarded plaintiff would not be subject to federal income tax and that the jury therefore should not add or subtract from the award on account of federal taxes.\(^2\) The jury returned a verdict for the plaintiff and defendant appealed, alleging that failure to grant the requested instruction constituted reversible error. The Third Circuit Court of Appeals affirmed but ruled that in the future, federal district courts of that circuit must instruct the jury upon request that compensatory damages awarded in personal injury actions are not subject to federal tax.\(^3\) *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245 (3d Cir. 1971).

Traditionally, "The primary aim in measuring damages [has been] compensation, and this contemplates that the damages for a tort should place the injured person as nearly as possible in the condition he would have occupied if the wrong had not oc-

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2. The following is the text of the requested charge:
   I charge you, as a matter of law, that any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of the federal income tax law. Should you find that plaintiff is entitled to an award of damages, then you are to follow the instructions already given to you by this court in measuring those damages, and in no event should you either add or subtract from that award on account of federal income taxes.
   443 F.2d 1245, 1248-49.
3. The defendant also contended on appeal that slips of paper containing information regarding the jury's methods in computing the $270,982 award to the plaintiff to which the trial judge accidently became privy, were grounds for finding that the jury had failed to adhere to the trial court's instructions. Defendant also argued that plaintiff's assertion that defendant would have recourse against a third party, which the jury was told to disregard, constituted prejudicial error. In addition, remarks of counsel during summation and in closing argument, as well as the size of the award, were assigned as error by the plaintiff. The court, however, found no prejudicial error and found the award not excessive.
curred . . . .” Adherence to this theory of tort damages requires an award equal to past and future loss of net after-tax earnings since personal injury awards generally are not subject to taxation. Nevertheless, United States courts traditionally have held that personal injury awards should approximate the plaintiff's present and future gross income. Until recently, this departure from the compensation theory of damages was not challenged by defense lawyers in either state or federal courts.

Since 1944, however, numerous defendants have undertaken to show that net earnings should be the true measure of damages and have attempted to introduce evidence of the amount that plaintiff's gross earnings would have been taxed had he been able to work. The courts have based their consistent refusal to admit such evidence on one or more of the following grounds: (1) determination of future tax liability would be too conjectural; (2) personal injury litigation would become “trials by tax experts” and thereby confuse the jury if the net income theory were employed; (3) the congressional intent of the tax law is to give plaintiffs a tax benefit; (4) the tax consequences are matters between the plaintiff and the taxing authority and

6. The two earliest cases in which the question arose are Stokes v. United States, 144 F.2d 82 (2d Cir. 1944), and Crecelius v. Gamble-Skogmo, 144 Neb. 394, 13 N.W.2d 627 (1944). The question was addressed directly in Stokes, while in Crecelius, a juror, during the course of deliberation, asked whether or not any award received by plaintiff would be subject to income tax. In neither instance was the jury instructed on the non-taxability of damage awards. See Annot., 63 A.L.R. 2d 1396 (1959).
7. The English rule, however, is to the contrary. In British Trans. Comm. v. Gourley, 3 All E.R. 796, 802 (1955) it was stated that “to ignore the tax element at the present day would be to act in a manner which is out of touch with reality.”
10. Burns, A Compensation Award for Personal Injury or Wrongful Death is Tax Exempt; Should We Tell the Jury?, 14 DePaul L. Rev. 320, 323 (1965).
12. Id.
should not enter into the plaintiff-defendant relationship.

As a result of the general disapproval of the net earnings rule by the courts, it soon became apparent to defense attorneys that attempts to introduce tax evidence at trial were predes- tined to failure. Therefore they resorted to jury instructions as the means to inform jurists that compensatory damages for past and future lost earnings were not subject to federal income taxes. The requested instructions were cautionary in nature, their purpose being merely to inform the jury of the fact of non-taxation and to caution it not to consider taxes at all in determining the plaintiff's award. Initially, such efforts went unrewarded.\(^{13}\)

Then, in \textit{Dempsey v. Thompson},\(^{14}\) an FELA case, the Missouri Supreme Court ruled that in future actions a cautionary instruction must be given to the effect that damages awarded for lost earnings are not subject to state or federal taxation. The court reasoned that "[p]resent economic conditions are such that most citizens, most jurors, are not only conscious of, but acutely sensitive to, the impact of income taxes."\(^{15}\) Until \textit{Domeracki}, however, no Federal Circuit Court of Appeals had approved such an instruction.\(^{16}\)

The \textit{Domeracki} court, in requiring a cautionary instruction upon request in future cases, primarily relied on the "absence of complications that an instruction would engender."\(^{17}\) The instruction approved by the court simply cautioned the jury to neither add nor subtract from the award on account of federal income taxes. Such an instruction does simplify the jury's task by removing taxes from consideration in arriving at damages.\(^{18}\) Nevertheless, the decision is only a weak and inadequate improvement on pre-\textit{Domeracki} law since (1) the cautionary instruction does not result in an award based on the traditional notions of compensation; and (2) the prospective application of the decision to the exclusion of the instant plaintiff results in a deprivation of the defendant's efforts without any sound countervailing reasons.

The use of a cautionary instruction to meet the problems raised by the non-taxability of compensatory damages has been

\(^{13}\) See note 6 supra.

\(^{14}\) 363 Mo. 339, 251 S.W.2d 42 (1952).

\(^{15}\) Id. at 346, 251 S.W.2d at 45.

\(^{16}\) \textit{Domeracki v. Humble Oil and Refining Co.}, 443 F.2d 1245, 1252 (1971).

\(^{17}\) Id. at 1251.

regarded as a "compromise" between the alternatives of introducing evidence of plaintiff's tax liability and complete disregard of the matter. The argument is that with a cautionary instruction the objections to the former alternative are met in that the jury would not be confused by the introduction of tax evidence and yet the instruction avoids the defects of the latter possibility in preventing mistaken considerations of tax liability in determining the damage award. The view that such a procedure combines "the best of both worlds," however, is fallacious. While a cautionary instruction does serve to prevent a "double windfall" to the plaintiff, the basis used by the jury to determine past and future lost income is still the plaintiff's gross income. That is, the plaintiff is given the amount he would have been paid by his employer before taxes since the jury is told to disregard any taxes that may have been deducted from the gross earnings. Such a situation seems preferable to the pre-Domeracki approach which ran the risk of a "double windfall" in giving the plaintiff his taxes twice by awarding the gross earnings and then tacking on the amount of tax the jury mistakenly believed would be deducted by the Internal Revenue Service. Still, the uncomfortable fact remains that the plaintiff under Domeracki is getting more than his due from the defendant.

To prevent overcompensation of accident victims, compromises must be discarded. Instead juries must be required to

21. The "double windfall" possibility may be hypothetically illustrated as follows: if plaintiff's lost earnings were $10,000 (assuming the entire amount to be taxable income) his tax liability under the Internal Revenue Code of 1954 would be $2,100 if he filed a separate return. Therefore, his net earnings would be only $7,900. If the jury started with gross income, already a "single windfall" over the actual net damages, and then tacked on the amount of the tax—erroneously believing the award to be taxable—the total award would be $12,100. Therefore, the plaintiff would, in effect, be getting his tax windfall twice. The cautionary instruction, if heeded by the jury, removes the possibility that the additional $2,100 would be added to the award. Still, it does not prohibit the plaintiff from receiving more than $2,000 in excess of what he would have been entitled to had the accident not occurred because the jury's compensation equals gross, rather than net earnings.
22. In fact, the defendant may be harmed by the Domeracki instruction since it forecloses the possibility of a jury independently arriving at an approximation of the net income figure.
grant awards equal only to lost past and future net income. To arrive at that figure, evidence must be admitted respecting the plaintiff's past and anticipated future tax liability. Although the introduction of such tax information has been attacked on several grounds, thoughtful examination of these arguments reveals that the admission of such evidence would create no insurmountable problems.

Numerous judges and commentators have contended that any determination of plaintiff's future tax liability would be simply too conjectural. Contingencies such as plaintiff's marital status, size of family and the fact that any interest earned on the amount awarded is taxable all have been mentioned as factors complicating the computation. Yet such a determination is certainly no more conjectural than estimation of future earnings or the evaluation of pain and suffering—tasks with which the jury copes regularly in personal injury litigation. More bluntly expressed:

As long as our system stays wedded to the single lump sum recovery, our courts simply have to speculate about the uncertainties of the future. With anything as sure as "death and taxes," the courts are avoiding their responsibilities when they decline to make the best guess they can, once all the reasonably available evidence has been brought before them.

The fear also has been expressed that personal injury litigation would become a "trial by tax experts" which would serve only to confuse the jury. This argument overlooks the fact that expert witnesses are used constructively in several areas of litigation. Medical doctors, psychiatrists, expert tradesmen and others are called upon to testify in pertinent situations, and there seems to be no reason to believe that the tax expert would "confuse" the jury to any greater degree. Indeed, if the American public is as "tax conscious" as the Domeracki court believes,

23. See, e.g., Briggs v. Chicago & Great Western Ry., 248 Minn. 418, 80 N.W.2d 625 (1957).
27. Burns, supra note 9.
28. Expert testimony has been defined as "evidence of persons who are skilled in some art, science, profession or business, which skill or knowledge is not common to their fellow-man, and which has come to such experts by reason of special study and experience in such art, science, profession or business." Black Starr Coal Co. v. Reeder, 278 Ky. 532, 534, 128 S.W.2d 905, 906 (1939).
the jury should have little trouble comprehending expert testimony on the subject.

In refusing to admit tax evidence, the courts also have argued that allowing juries to consider the plaintiff's tax status would constitute an abandonment of a Congressional intent to give the injured plaintiff a tax saving. This contention is incorrect. The provision exempting compensatory damages did not appear until the Revenue Act of 1918. It was included not to benefit injured parties but rather because it was considered doubtful that tort damages were income within the meaning of the Sixteenth Amendment.

Finally, it has been alleged that fixing tax liability is a matter between the plaintiff and the taxing authority and of no concern to the defendant. This rationale is founded on the idea that Congress' decision not to tax these awards should affect only the plaintiff and not inure to the benefit of the defendant wrongdoer. However, this justification begs the question in assuming the inevitability of a gross income award windfall and is in no way responsive to the issue at hand—the proper measure of compensation.

The Domeracki opinion therefore offers only a limited improvement upon prior law, stopping short of the optimal ruling. The court's reluctance to depart from precedent was revealed further in its decision to apply the holding prospectively to the exclusion of the defendant. That decision was based upon two considerations. First, the court felt that its decision would not reasonably have been foreseen by the trial court. Ever if true, it is difficult to ascribe a great deal of importance to this factor, especially when it is weighed against the fact that the plaintiff

32. It has been suggested that, analytically, the fact that personal injury awards are not subject to federal income taxation is the converse of the collateral source rule in that the benefit received from the third party is in the form of a withheld expense rather than an actual contribution of money or services. See generally Morris, supra note 18. The collateral source rule has been defined as follows: "The judicial refusal to credit to the benefit of the wrongdoer money or services received in reparation of the injury caused which emanate from sources other than the wrongdoer." Maxwell, The Collateral Source Rule in the American Law of Damages, 46 MINN. L. REV. 669, 670 (1962).
33. Nordstrom, supra note 20, at 223.
34. 443 F.2d 1245, 1252 (3d Cir. 1971).
may have been overcompensated to the defendant's detriment as a result of the decision. This latter factor should be the overriding consideration and yet was totally ignored by the Circuit Court. Second, the court found no evidence that the amount of the award had been affected by any mistaken notions regarding taxes. But there is no way of obtaining such evidence because of the secrecy of jury deliberations. Especially under the facts of this case, the Court should have used a Molitor approach in ruling prospectively rather than risk the injustice of permitting the plaintiff to receive an undue amount at defendant's expense.

The Domeracki case is noteworthy because it is an attempt to come closer to what has been an elusive goal—properly compensating an individual for losses actually suffered due to another's breach of the duty of due care. But in the final analysis, this plaintiff, like those before him, may have received a double windfall. All future plaintiffs in the Third Circuit will continue to receive awards based on gross income, an amount greater than that which would have been received were it not for the accident. As long as that situation continues to inure, the "cardinal principle" of compensatory damages will be subverted.

35. Id.
36. See note 4 supra.
37. See Molitor v. Kaneland Comm. Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), in which the court's decision is applied to the parties to the actual case before it, but the decision has otherwise a purely prospective application.
38. See 2 F. HARPER & F. JAMES, LAW OF TORTS 1299 (1956).