ORIGINAL

In the

Supreme Court of the United States

NORFOLK AND WESTERN RAILWAY COMPANY,

PETITIONER,

V.

KANDYTHE J. LIEPELT, ADMINISTRATRIX OF THE ESTATE OF DELROY LIEPELT, DECEASED,

RESPONDENT.

No. 78-1323

Washington, D. C.
November 5, 1979

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Petitioner,

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KANDYTHE J. LIEPELT, ADMINISTRATRIX OF THE ESTATE OF DELROY LIEPELT, Deceased,

Respondent.

Washington, D. C.

Monday, November 5, 1979

The above-entitled matter came on for argument at 11:57 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

HOWARD J. TRIENENS, ESQ., Sidley & Austin, One First National Plaza, Chicago, Illinois 60603; on behalf of the Petitioner.

RICHARD S. FLEISHER, ESQ., Karlin & Fleisher, 111 West Washington Street, Chiago, Illinois 60602; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1323, Norfolk and Western Railway against Liepelt.

Mr. Trienens, we will let you get started.

ORAL ARGUMENT OF HOWARD TRIENENS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. TRIENENS: Mr. Chief Justice, and may it please the Court:

There are two questions here. In both respects, the Illinois Courts have a rigid, unwaivering rule which forbids a jury being informed of two Federal tax consequences, income tax consequences, that profoundly affect the amount of awards in FELA cases. One of them is whether the amount of the tax that a decedent would have paid on his income may be considered in deciding how much the beneficiary -- how much contribution the beneficiary has lost.

And the second is to inform this jury of the tax-free character of the award, however measured.

Now, the point of FELA is not to punish rareties. It is to be sure that beneficiaries get damages measured by their financial loss, and for that only.

The FELA cases can be tried in state or federal courts, but the proper measure of damages, to quote from an early decision in Chesapeake & Ohio v. Kelly, "proper measure of damages is inseparably connected to the right of action, and therefore must be

settled according to uniform standards under the FELA."

QUESTION: If the instruction you requested had been given, would you be here -- and the same verdict had come in?

MR. TRIENENS: As to that issue on the instruction, the answer is we would not be here for failure to give the instruction. It might well have been that the state court would have granted a remititure in this case, but no, we wouldn't have been here if the instruction had been given on that aspect. The other aspect is income tax effect on the amount of contribution. That's a separate question.

QUESTION: I mean a combination of the tax instruction, in other words. If that had been given, you indicate you would not be here.

MR. TRIENENS: We wouldn't be here on that issue, but we would still be here on the issue we briefed first, which is the question of whether in measuring the damages actually incurred by the beneficiaries they should have reflected the fact that the amount the decedent paid in taxes would never have been available to the beneficiary. And that's a quite different question.

QUESTION: I didn't make my question clear. I meant the whole tax aspect. If you had gotten the instruction you wanted on both aspects of the tax problem, and had the same verdict, then all you would have left was a claim of an excessive verdict, wouldn't you?

MR. TRIENENS: Yes, sir, but perhaps the reason I fell off the sled was this. It is more than the instruction on this question of the taxation of the decedent and how much would have been available for contribution, because that was a question of no evidence, no cross-examination, a lot of other things.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 o'clock, noon, the Court recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Counsel, you may resume.

ORAL ARGUMENT OF HOWARD TRIENENS, ESQ.,

ON BEHALF OF THE PETITIONER (Resumed)

MR. TRIENENS: If cross-examination had been permitted in this case on the matter of Federal income tax effects, if the offer of proof had been received in evidence, and the jury had been properly instructed, we think the award would have been very, very different. The errors here were clearly prejudicial. The lower court never found -- They weren't prejudicial, they just found that they weren't errors.

QUESTION: Mr. Trienens, does it make much sense to fine tune the lost earnings part of the award this way, when the jury is virtually permitted to throw darts at the wall on pain and suffering?

MR. TRIENENS: In the first place, in a death case, like this, it is clear that the losses are limited to financial losses incurred by the beneficiaries by reason of the death. That's not involved here, but it certainly is not true that a factor such as Federal income tax, which is after all money that could never have gotten to these beneficiaries if the man had lived -- but that's not something to be considered. It is no more trivial than the other things that go on. In fact, it is far more important than the other things that go on in the trials of these cases.

For example, the expert witness gets on, for the Plaintiff. He goes through what you would regard as just a rigamaroll, but in fact he very precisely says, "Here are the gross wages, $13,000 when he died, $17,000 by the time of trial, so many percent a year to reflect inflation" --

QUESTION: Did you cross-examine him about what the figures would be if he took income taxes out -- I say you, your --

MR. TRIENENS: We tried to and were blocked from doing it. In fact, Plaintiff Counsel came and said, "Judge, these people may ask him questions like that. We want you to instruct these lawyers before the witness ever gets on he can't talk about that."

We had an argument before the witness went on, we had an argument afterward, about our right to cross-examine on this question.

As far as adding to the complexity here, if this expert witness who, as I say, came on with the wages projected, then he discounted those wages -- Excuse me, not discounted -- he deducted from those wages the personal expenditures of the decedent, clothing, food, entertainment, 10% this year, 25% later, 50% later, 31%, calculates all that. He says, "Oh, and what would he have contributed in terms of household chores, 9%?" Calculates that. One more sentence of that testimony -- He could have said, "Of course, he would have to pay income taxes,

about 14%." One more sentence, that's the complexity this would have added to that calculation.

They say the jury can run rampant. I don't think they can. I don't think that the problem here is -- All the courts who dealt with this have said it is a question of balance. Certainly we ought to be permitted to deal with matters that are clearly relevant under the standards of the Act. Why have any standards under the Act, if that's the approach?

QUESTION: Mr. Trienens, you've made the point that an FELA case can be brought in either Federal or State court, but that Federal law controls. Is it your basic submission here -- and the further point that Illinois forbids the introduction of any evidence in either aspect of your Federal income tax. First, that his wages would have been subject to Federal income tax, and secondly that the award is not subject to any tax. Is it your submission that Federal law requires that this be submitted to the jury or simply permits it?

MR. TRIENENS: It is our position --

QUESTION: Illinois law prohibits it.

MR. TRIENENS: Illinois law prohibits it. It is our position that in cases where it is substantial, at least, the state should not prohibit us from asking the Plaintiff's witness did he consider taxes.

QUESTION: Federal law should permit it or because Federal law requires it?

MR. TRIENENS: Federal law should require that subject matter be relevant to these cases, because Federal law is that the measure is the financial loss to the beneficiaries.

QUESTION: Would you settle for the Boxberger rule in the Ninth Circuit?

MR. TRIENENS: I don't have any quarrel with the Boxberger rule. I think Judge Ely's opinion is one of the best on the books on this subject.

QUESTION: But he didn't say Federal law requires it in every case, did he?

MR. TRIENENS: He said in every case where it is substantial, and it is a matter for the discretion of the trial court.

QUESTION: Exactly. If it is for the discretion of the trial court, it is not required, is it?

MR. TRIENENS: Well, the Illinois rule absolutely prohibits it,

QUESTION: I know that.

MR. TRIENENS: And that's what we are here talking. But as to the question -- And this gets complicated by the question of prejudicial error. I am not here saying that the result reached by the Second Circuit in McWeeney, for example, was wrong. After all, the trial had happened, they knew what the judgment was, they knew what the evidence was, and it clearly was within the range of the evidence, and that this was a fairly

de minimis factor, at a man earning $4800 a year at that time. The Second Circuit later, using the McWeeney approach, came along in a case about subpoena, where the man had $16 to $20,000, whatever it was, $16 to $40 -- $25,000 in that case, that was substantial, and they should have considered it.

I am not here saying that every case in which a trial judge doesn't receive the evidence, and in which Appellate Court says, "That's all right, but it wasn't prejudicial in that case." I am not saying that you have to knock out every case. I am just saying that the rule should be that it is relevant. The rule should be that if we want to cross-examine on a relevant matter, just like personal expenditures, household chores, you ought to ask about this. And if it doesn't --

QUESTION: Putting it just a little differently, do I correctly understand that what you are saying is that as a matter of Federal law it is relevant and a state rule that says it is irrelevant is preempted by the Federal rule?

MR. TRIENENS: Precisely. And the whole point of the FELA, both as to defenses and as to damages was to supplant state law. "It was in order to create uniformity throughout the Union" -- I am reading from the legislative history of the FELA. And, of course, it supplants state law. When there is a relevant matter that is relevant under FELA, it supplants state law, and state law is knocked down when it says that this matter cannot be considered by the jury. It's wrong.

QUESTION: After the Akron case and all the cases, Ohio can't apply its rule as to releases, Texas can't apply a procedural rule, we are pretty far down the Federal law track on that.

MR. TRIENENS: Oh, sure. Now take this complexity argument and forget about taxes. Talk about how far you are down the track and go back to Chesepeake and Ohio v. Kelly. The State Court of Kentucky says, "Here is an FELA case. It is too complicated for juries to discount the future earnings to a present cash value. That's too complicated for juries. We in Kentucky aren't going to require that."

This Court said it may be complicated but the Federal standard is it is the contribution they lost and you are over-compensating them if you don't discount the future to present value.

QUESTION: Would you say it is more or less complicated or speculative than measuring the value of his services fixing the screen windows and painting the trim on the house, and what not?

MR. TRIENENS: I would say either of those. Either the discounting process or fixing the screen door are far more speculative and far more complex than the question of: Does a fellow who at this wage level pays 14% of his wages in income taxes.

QUESTION: Did your clients have an offer of proof showing what these figures would be?

MR. TRIENENS: Yes, sir.

QUESTION: So we can look at it and see its significance here now, can't we?

MR. TRIENENS: Sure.

For example, in addition to asking to cross on this and being denied we offered to prove through an expert that over the lifetime $57,000 of decedent's gross income would have gone to taxes, and therefore would never have been available to his beneficiaries. It's at page 75 of the Appendix.

QUESTION: Of course, that could, at best, be an estimate. Nobody knows what the future tax laws are going to be.

MR. TRIENENS: The world is full of estimates, but as estimates go and as you read this case that's one of the least of the problems of estimating, one of the least of the problems.

QUESTION: In discounting the present value -- To get the present value of future earnings you use more or less an arbitrary interest rate, don't you?

MR. TRIENENS: It is far more complicated than that. If you really want to prolong one of these trials and really get complicated, you go into that. Now in the first place, does that represent today's interest rate or the interest rate you are projecting over each of the twenty years of his life? Does it reflect a taxable return on equity or corporate bonds? Is it influenced by municipal bonds, as Kelly suggested it

should be?

If the latter, there is none of this tax on tax problem.

QUESTION: Back in the early 1950s we used to use 4% assumed interest rate, and how wrong we would have been -- we were.

MR. TRIENENS: Yes, but you are also projecting the rate of inflation. Plaintiff put on a witness to tell what the rate of inflation would be over the next --

QUESTION: He's doing that when you estimate wages too.

MR. TRIENENS: That's exactly my point. In estimating his future wages, they estimate not only the future inflation rate but the future rate of rate of increase in real wages which Railroad employees had incurred. In other words, beyond the inflation. And that's all relevant, and talks about practicalities. The trial, as I say, would have lasted anohter five minutes longer if they had simply had an income tax effect.

QUESTION: It is rather strange to hear you talk -- why it is that your suggested rule is in such a decided minority around the country?

MR. TRIENENS: I don't know that it is such a decided minority. I must say that the law, as laid out in these cases, is in amazing disarray.

QUESTION: You are trying to get it out of that rut?

MR. TRIENENS: I think it is the responsibility of this Court, under FELA, to have a uniform standard for the Union to decide what is right, what's the relevant standard, and that will be it.

QUESTION: Illinois has been -- a lot of the states have -- This is an old issue in negligence cases, isn't it?

MR. TRIENENS: A very old issue and the courts are here and there, throughout the country, on various sides, but Illinois, I must say, is at the extreme end of the spectrum on both aspects of this case.

QUESTION: How many state courts of last resort agree with you on both issues?

MR. TRIENENS: Let's see, New Jersey, Iowa --

QUESTION: Three or four? Two or three?

MR. TRIENENS: Three or four or five, yes. Some of them on one issue and not the other.

QUESTION: How many disagree with you?

MR. TRIENENS: Flatly? Maybe twenty, something like that.

Of course, the reason for this is that there has been an evolution here. What are we doing in the 1980s, almost, worrying about something like this, when it should have been settled back in 1908? Well, of course, there wasn't any Federal tax when the FELA --

QUESTION: You mean it should have been settled your way, you say? It was settled one way or the other, for heaven's sake.

MR. TRIENENS: Your Honor, what I am saying is that if Federal taxes had been a significant item at the time of the Vreeland case, the Kelly case, all the cases that decided the standards of the FELA -- If that had been a substantial item, or even thought about, there is no doubt on the logic it would have come out the same.

QUESTION: Nothing you are saying would require any rule that forbad Illinois in a non-FELA case from using whatever jury instruction or consideration of taxation it wanted to as a matter of state policy.

MR. TRIENENS: No. We are talking only about FELA cases which have a Federal standard.

QUESTION: The nontaxability of the award. Wouldn't that have general significance throughout Federal law? For example, the Antitrust Laws and every place else where you have Federal judgments. Is it your position that in all those cases the tax consequence of the award should be explained to the jury?

MR. TRIENENS: No, I don't get that far because there is an inherent, internal inconsistency in the instructions that are given under the Illinois pattern, and generally, in FELA cases. The inconsistency is this. You are, in the first place, telling the jury to make these beneficiaries whole, make them

whole as if the man hadn't died, so his contributions would have continued. Fine. But that to a juror who isn't told about the tax laws and who is living in a tax-conscious society where, as one of the courts said, Irish lottery winnings are taxed, everything is taxed -- When they get that they say, "Well, if I am going to make him whole and evidence shows financial loss of $300,000, I had better see that they get $600,000."

QUESTION: How about the Plaintiff's contingent fee arrangement with his lawyer? And they tell the jury that whatever you award, the Plaintiff, himself, is only going to get a maximum of two-thirds of it.

MR. TRIENENS: That's different, quite different. It is different because in Alyeska and elsewhere the American system, and under FELA cases, is that the defendant does not pay the attorney fees. Congress could change that, but they didn't. And to give an instruction like that would just "back-door" the attorney fees question.

QUESTION: Well, the Defendant doesn't pay his taxes either. It is the Plaintiff who pays them.

MR. TRIENENS: The Plaintiff doesn't have to pay taxes. We are not talking about the separate question of the award, however measured. Whatever that measurement is, they don't pay any taxes on that. It is just a question of telling the jury the facts of life.

QUESTION: The facts of life include that contingent

fee, too.

MR. TRIENENS: But the fact of life also is that Congress has not provided that the Railroad should pay their lawyers' fees and --

QUESTION: And I suppose if you could instruct that you can't consider the attorneys' fees or you can, then you could also get to expert witness fees and that sort of thing.

MR. TRIENENS: I think they are of quite different character than this.

QUESTION: Why do you want the instruction on the award,to keep the jury from thinking that it is subject to taxation and doubling it?

MR. TRIENENS: Yes, exactly, and doing just what we think they did here.

QUESTION: Which do you regard as the strongest of your two points?

MR. TRIENENS: I think they are so separate,and as to the inherent logic of FELA damages, no doubt the first point which we brief is the one that fits right in with that. As to this instruction point, I think it is important, and just to paraphrase Judge Ely, he says, "The benefits of informing the jury of the true tax consequences are so clear, and the burden so minimal, that the balance is overwhelmingly in favor of giving instruction."

QUESTION: How could the jury really do you in in the

death case?

MR. TRIENENS: How could they do us in?

QUESTION: How could this fear really become real? Wouldn't it be perfectly obvious to an Appellate Court that the jury exceeded the damages, or not? It may not be in a pain and suffering case, but that isn't so here. You just told us that this depends on financial loss.

MR. TRIENENS: That's right, and as a matter of state law we urge that there ought to be a reminiter here. We thought it was clear what happened, but the Illinois court said, "Well, we are not going to mess around with these damages, with these income tax instructions."

QUESTION: Wasn't the total damages awarded within the evidence?

MR. TRIENENS: No, sir. The evidence of the economic witness who put on the calculation of financial loss was $302,000. There was also some talk about the loss of guidance to the children. This is loss of what you would have to pay somebody to give them guidance, as to which the economic man couldn't put any dollar figure.

So they come in not with $300,000, to remotely resemble this guidance, they come up with $775,000. More than double. Plenty of room for all the guidance talk and then doubled it.

You see, that's the difference between this and McWeeney. If we had come in here and said, "All right, as a

matter of logic and theory and just good practice"--

QUESTION: With his income that much couldn't have been a tax mistake. You said 14% is what you wanted; is that right?

MR. TRIENENS: It would have been something in that range, yes, sir.

No, no, I am talking about the quite separate question now of the failure to give the instruction that the award, however measured -- You see, the 14% goes into -- However measured, you don't have to pay --

QUESTION: Do you think the jury thought the award would be taxable? And it will be taxable at more than 50%

MR. TRIENENS: Well, when you throw in something for guidance and double it, I think that's the best explanation you can of the award of this level. And, as I say, it is unlike McWeeney where they said, "Well, Judge Weinfeld didn't give the instruction." But, after all, the clear damages evidence showed about $120,000. The jury gave $85,000. So how can we say prejudice? Here we've got the case where the prejudice is clear from the absence of the instruction.

QUESTION: What was the amount of the award?

MR. TRIENENS: $775,000.

QUESTION: What was the amount requested in the complaint?

MR. TRIENENS: $500,000. And I think before the

jury, Mr. Fleisher said he would like $1 million.

QUESTION: Well, if the jury is going to think about taxes in connection with the award, why wouldn't they think about taxes in connection with measuring damages, without an instruction?

MR. TRIENENS: Of course, they couldn't. There wasn't any record, because we were blocked from that, too.

QUESTION: Well, they knew what his wages were supposed to be. I guess each one of them is paying some taxes. They might talk about how much he was really going to take home, how much was really going to be available.

MR. TRIENENS: Why not tell them?

QUESTION: That isn't what I asked you. I would think you would -- If the jury is going to think about taxes in one context, it would the other.

MR. TRIENENS: Why have records?

QUESTION: Did the expert witness testify as to take-home pay or as to gross?

MR. TRIENENS: He testified as to take-home pay in the sense that he deducted the personal expenditures of the decedent.

QUESTION: But before taxes?

MR. TRIENENS: But before taxes, so it is something you can't logically defend,doing both those things.

The last point I would like to make is that all cases -- talking about these FELA cases -- of all cases in which the

Railroad is saying, "You ought to let the jury have these facts and do the right thing," and the Plaintiffs are saying, "You ought to keep these things from the jury," you would think in FELA cases where the faith in juries is supposed to be the greatest, this would be one of the ironies of all time.

QUESTION: I suppose it would be difficult to imagine an FELA coverage of someone with a salary of the President of General Motors, but you had someone up in the $500,000 a year bracket this would become an enormous element. Of course, we are getting out of the range of this case. Say, just an ordinary common law death case, statutory death case. You couldn't show that more than half of $500,000 taxes are going to come out of this man's income. You would have greater distortion than you have here, wouldn't you?

MR. TRIENENS: Oh, my, yes. As to the point about how much of his income would have gone to the Government instead of his beneficiaries, it would have been much greater. But, of course, we are in an area where it is clearly substantial under all the cases. And also as to the amount of the award, $775,000, or what they thought they had to double, that's pretty big money itself.

QUESTION: I take it, you are not making any point of the distinction between the amount requested and the amount of the verdict, under Illinois practice? I find nothing in the Appendix which indicates an amendment to the pleading.

MR. TRIENENS: I am not making that point here because the sole point I am making is the effect of income taxes on the FELA standards.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Fleisher.

ORAL ARGUMENT OF RICHARD S. FLEISHER, ESQ.

ON BEHALF OF THE RESPONDENT

MR. FLEISHER: Mr. Chief Justice, and may it please the Court:

Counsel for the Railroad today has asked this Court to consider two issues. The first is to impose a net wage standard as the measure of damages in all FELA claims. This proposition has never been followed by any state or Federal appellate court decision in this country.

The second issue asks this Court to today reverse a jury award in this case, as a cautionary instruction telling the jury that this award was tax-free was not given by the trial judge

Again, no state or Federal appellate court has ever reversed a verdict for the failure to give such a cautionary instruction.

QUESTION: If the jury during its deliberations had come back and said they wanted to ask the judge a question, and the question was, "Should we take into consideration the fact that the wages projected should be take-home pay, after you deduct Federal taxes, in computing the present value of the award,"

do you think the judge should have answered it, could have answered it?

MR. FLEISHER: Mr. Justice Rehnquist, I feel the judge could not have answered that question, as there was no evidence before this jury as to the effects of taxes on the man's gross earnings.

QUESTION: But it had been offered and refused, as I understand it.

MR. FLEISHER: The instruction that was offered was not the instruction that Your Honor has just presented to me.

QUESTION: I thought that there had been an effort to cross-examine the expert.

MR. FLEISHER: There was an effort, Mr. Justice Rehnquist, to admit a cautionary instruction, stating that the award was not subject to taxes. That, in itself, was the only cautionary instruction that was tendered before the trial judge, and that was properly refused.

QUESTION: Wasn't there an effort to cross-examine your expert as to the effect of withholding on the man's future income?

MR. FLEISHER: Yes, Your Honor, and that was done outside the presence of the jury by an offer of proof in chambers, so that there was no evidence presented to this jury where they would possibly raise that question.

QUESTION: You are saying, in effect, that the jury

couldn't get the answer to that question, regardless of whether the judge's inliminary ruling was right or wrong.

MR. FLEISHER: That's correct, on the basis of the evidence in that case; since there was no evidence before the jury as to the effect of gross versus net, there could be no instruction. As we all are aware, instructions are based on evidence that is presented before the jury in open court.

QUESTION: It follows from that, I take it, that you would submit that you would be entitled to an instruction to the jury, "Don't consider the matter of taxation in computing the award"?

MR. FLEISHER: No, Justice White.

QUESTION: Why wouldn't you? I take it you -- If no evidence, the jury might think about taxes. You don't want them to think about taxes. Wouldn't you say that --

What if the judge had instructed the jury here on his own, would that have been error? On his own,"Do not take taxes into consideration," would that have been --

MR. FLEISHER: Yes, Your Honor, I believe that would have been an improper cautionary instruction. Also, there are only four decisions -- If I may explain, Justice White. The Petitioner Railroad cites four cases in the United States, State and appellate, discussing the possibility of a proper cautionary tax-free award instruction.

Tenore is a state decision out of New Jersey. In

Tenore the cautionary instruction was given, therefore it is not applicable. New Jersey is a minority state.

The second case they cite is Dempsey. In Dempsey, the cautionary instruction was given, was tendered. It was refused, under Missouri state law. On appeal, the Missouri Supreme Court held that it was not reversible error to not give the cautionary, but possibly it should be given.

QUESTION: This is now Point Two in the --

MR. FLEISHER: Yes, this is Point Two, but -- You have jumped me to Point Two and I am going to Point Two.

QUESTION: I am sorry, but I was asking about in computing the award would you be entitled to instruction, "Do not consider taxes"?

MR. FLEISHER: In computing the award, if there is no evidence --

QUESTION: Your opponent says he is entitled to an instruction to the jury to consider the impact of taxes, and reduce the award, just consider take-home pay. And I want to know whether you think you would be entitled to an instruction to the jury, "Do not consider taxes at all when computing the award"?

MR. FLEISHER: No. I do not feel that that is a proper instruction, just as I do not feel the other is, depending on the evidence that is presented to the jury at the time of the trial.

QUESTION: Well, when the evidence is first presented, supposing the Railroad offers evidence that the man's take-home pay was such and such, although your expert has testified only as to gross pay, ought that evidence to be admitted?

MR. FLEISHER: In this instant case, no, Your Honor, because the evidence that was submitted by the improper offer of proof by the Railroad counsel was that the taxes were so negligible that under the McWeeney minority rule they would not have any substantial or significant impact on the man's gross earnings. The taxes were based on from the years 1973 to the year 2000, or a total of 27 years, the taxes would be $54,000, approximately only $2,000 a year in taxes.

QUESTION: But 10% of which you pay for in your complaint.

MR. FLEISHER: My complaint, Your Honor, was based on the law in Illinois, the instruction that is set out in our brief as to the evidence of damages for wrongful debt in Illinois. Contrary to what Mr. Trienens stated, you are not limited merely to your wages, under Illinois law, for a wrongful death action under the FELA, or in any jurisdiction.

QUESTION: You can recover pain and suffering?

MR. FLEISHER: You cannot recover pain and suffering. However, in the case of minor children, of which decedent had four, the youngest being approximately four months of age, the Illinois instruction allows you to recover damages for the loss

of care,attention, instruction, training, advice and guidance to each of those children.

QUESTION: Is that a case from this Court that provides for that?

MR. FLEISHER: That is the law in Illinois. That is the Illinois pattern instruction.

QUESTION: Illinois law is totally superseded by Federal law in FELA cases.

MR. FLEISHER: If I may address myself to that matter, under Federal law, for damages in the FELA, you are entitled to the same basic elements that I just stated to Your Honor. That is undisputed.

QUESTION: I thought you said there had been no case from this Court, saying you are entitled to recover for loss of guidance to minor children.

MR. FLEISHER: No, I don't believe I said that.

QUESTION: I am sorry. What case is it?

MR. FLEISHER: If you are asking for a specific case --

QUESTION: Yes, I am.

MR. FLEISHER: -- from this Court, I can only refer back to the history of the FELA from this Court, as to the liberal recovery, as to the full and proper intent for complete damages --

QUESTION: Let's face it, this Court was pro-Railroad

from 1908 to 1939, and pro-Plaintiff from 1939 until some -- perhaps still is. It has not been an unwaivering line. So to act as if the construction of the FELA has been kind of a straight line thing since 1908, just isn't accurate in the light of the decisions. They have bent one way sometimes and bent the other way other times.

MR. FLEISHER: I do not dispute, Mr. Justice Rehnquist, what you say. I can only assert to the Court that the proper element of damages under an FELA is not strictly limited to wage laws. It never has been in any Federal court decision. It never has been by any Federal District Court, by any Court of Appeals, or by this Court.

In the Petition, the Railroad has asserted that there is a conflict between Federal and State courts, as to the method of computing future loss of earnings in an FELA claim. It implies, as Mr. Treinens said today, that this is conflict of gross versus net. That is simply not correct.

QUESTION: How do you say the instruction would be in Federal court?

MR. FLEISHER: The instruction, Your Honor, is a cautionary instruction. It is procedural. It is procedural. It is discretionary with a trial court.

QUESTION: Does it permit the introduction of the evidence which was excluded here?

MR. FLEISHER: No, Your Honor. There is no

instruction that has ever been tendered that has been reversed by way of a cautionary instruction.

The Boxberger case, which Mr. Justice Rehnquist is familiar with, coming out of the Ninth Circuit, allowed a cautionary instruction to be given, which stated complete language. The language in Boxberger was that the jury was told that the award was not taxable, and that therefore the jury should neither add to nor subtract from the award, because of this consequence.

That instruction is totally different from the instruction tendered in the Lepelt case. The Liepelt instruction as tendered by the railroad merely asked to tell the jury that the award was not subject to taxes.

QUESTION: Do you think Boxberger is a correct statement of FELA law?

MR. FLEISHER: In regard to cautionary, Your Honor, or in regard to modified gross wages?

QUESTION: In both?

MR. FLEISHER: I think that there should be no cauationary instruction mandated by this Court, in regard to instructing a jury on the taxability of an award. I think it is procedural. I think it is discretionary. I think it should be left up to the individual trial judges, as all cautionary instructions are.

QUESTION: So far as procedural is concerned, the

burden of proof as to relief in the Akron and Canton Railroad Company was a procedural Ohio rule. And this Court said, "You can't have it. It is a Federal rule and we are going to impose a different burden of proof."

MR. FLEISHER: If this Court feels that a cautionary instruction, under the FELA, should be given, then the Boxberger instruction would be a proper instruction, as was the Domeracki instruction stating the same thing. But it must be a complete, whole instruction. It must not be a part instruction.

QUESTION: On your theory, each individual judge in the country is to make his own way on what he thinks is the best way to do it?

MR. FLEISHER: As to a cautionary instruction, and that has been the law --

QUESTION: As to the admissibility of evidence on net take-home pay?

MR. FLEISHER: No, Your Honor, that is an entirely different issue.

QUESTION: I wondered whether you are bracketing them both.

MR. FLEISHER: No, I am saying that the cautionary instruction, as has always been -- and there is no Federal appellate court decision changing that -- has always left cautionary instructions to the discretion of the trial court, for good reason. If, in fact, this Court feels that a cautionary

instruction should be given, then it should be a complete cautionary instruction, as that given in Boxberger or Domeracki, advising both sides of the coin to the jury, that the award should neither be increased nor decreased because of taxes. That was not the instruction given in Liepelt.

QUESTION: Well, the trial judge in Liepelt felt bound by Illinois Law that you simply couldn't say anything, in the exercise of your discretion or otherwise.

MR. FLEISHER: True. And if, in fact, this Court feels there should be a cautionary, it should be prospective only, because no case has ever been reversed, State or Federal, where that type of cautionary instruction was not tendered. It should have prospective effect only.

QUESTION: What sort of doctrine is that?

MR. FLEISHER: The doctrine in law as to cautionary instructions, Justice Rehnquist, have always been interpreted as being discretionary with the trial court. It is a caution to a jury what to do or not to do.

QUESTION: But if you find that it was -- that the judge was hampered by an erroneous view of the law in deciding whether to give a cautionary instruction, you reverse and remand for a new trial, if you find there was prejudice, don't you?

MR. FLEISHER: Yes, sir, Your Honor. But there is no evidence here that the judge was hampered, or did not properly present the law, since there are no Federal or Appellat

courts that have ever reversed the failure to give this type of cautionary instruction.

QUESTION: What if we reverse it?

MR. FLEISHER: Is the question: If you reverse it, is that proper? Are you asking me?

QUESTION: Unless you take it to the world court.

MR. FLEISHER: I am merely saying that cautionary instructions regarding the question of taxation have never in this country, ever been reversed for the failure to give. They have been made prospective, Your Honor. And I would say that if the Court feels that this is an improper cautionary instruction that it should be made prospective and follow the language in Boxberger or in Domeracki. That, of course, is the Court's discretion. However, that should have prospective application. There was no evidence in the case that the court or the jury assumed that the award was or was not taxable. We are giving a cautionary instruction, going into the state of mind of jurors.

QUESTION: I don't know if he is right or not, but if Mr. Trienens is right in suggesting that the jury gave $700,000 on evidence and only would support $350,000, whatever the figures are, isn't this a perfect case for applying the rule in this very case? If it was done because of the failure to give instruction.

MR. FLEISHER: In two respects. The Appendix and our

brief show that there were co-Plaintiffs in this matter, that the Plaintiff Lepelt received the verdict of $775,000. Liepelt was the fireman on this operating crew. A co-Plaintiff whose name is in the record received a verdict -- by the name of Maynard -- of $16,500. He was the brakeman. That man, in the evidence of the case, was permanently injured and unable to ever return to railroad work for the rest of his life.

And so, for Counsel to come here today and assert to the Court what he feels the jury did in a runaway verdict, certainly would have no application. Because here is a co-Plaintiff, represented by different counsel than myself, who received a substantially lower verdict than was asked for by the jury.

In addition to that, Mr. Justice Stevens, --

QUESTION: I really -- I must confess I fail to see the relevance. I don't know anything about the evidence pertaining to that person, how his recovery was, or how good his lawyer was. But, obviously, he may have made a mistake in the very beginning of the trial.

I still don't understand how that responds to the point that if there was error in giving the instruction, and if the award was for that reason or arguably for that reason twice as large as it might have been otherwise, isn't this a proper case for -- as to this particular litigant?

MR. FLEISHER: Your Honor, I can merely reiterate that

lost wages is only one element of damages under the construction --

QUESTION: Are you suggesting that the other $300,000 represents this loss of guidance?

MR. FLEISHER: Clearly, Your Honor. Clearly. Four minor children, ranging in ages from four months to age 16, leaving a wife and these four children. I presented days of testimony of superior employers of this man from the railroad. I presented testimony of co-employees, of neighbors and friends, as to this man's characteristics, this man's ability, this man's worth to his family, under the applicable instruction that was given to the jury. Ahd there is no doubt in my mind as trial counsel that that verdict was substantiated by the evidence of these witnesses.

This case was tried primarily on damages, Your Honor, not on liability. Liability wasn't the major issue in this case.

There are five Federal circuits that follow a gross wage rule. There are not twenty States, Your Honors, there are thirty-five states that follow a straight gross wage rule. Those States are listed in the Amicus brief that was filed by those thirty-five State Bar Associations.

QUESTION: Are those all FELA cases? That the thirty-five states represent?

MR. FLEISHER: Mr. Justice Rehnquist, I can't tell you the exact number. If we are talking about gross wages, the question becomes whether or not in all types of litigation gross should be used, modified gross should be used, or net should be used.

QUESTION: Under Kelly, perhaps, a different standard may be required under FELA cases than might be required in the ordinary tort action, under State law.

MR. FLEISHER: Your Honor, Kelly was a case decided by this Court in 1916. And what Kelly merely stated was that all lump sum awards, under the FELA, were to be discounted to a present cash value.

Our gross wages were, in fact, discounted to a present cash value.

QUESTION: But that isn't a discount for the issue we are talking about.

MR. FLEISHER: No, Your Honor, that's why I feel that Kelly is certainly not appropriate in this matter.

QUESTION: When you have been talking about all these other States and what they have done, sometimes cases get here because a rule which has been extant for quite a while is in need of reexamination and the rule gets changed; is that not so?

MR. FLEISHER: That is so, Your Honor.

QUESTION: What logic supports the exclusion of evidence about taxes, logic now, not precedent?

MR. FLEISHER: Logic, Your Honor, revolves around the fact that, as we know the law today in the vast majority of Federal and State jurisdictions, gross wages is the proper and fair measure --

QUESTION: I excluded precedent. I said never mind what the states are doing or what other Federal courts do, what is the logic that supports the exclusion of this very relevant evidence in ordinary matters of common sense?

MR. FLEISHER: Several, Your Honor. The first and most prominent would be that of the double tax being imposed upon the injured or deceased party. The award, if it is to be reduced, as Your Honor suggests, by estimated future taxes, brings it down then to a net award. That net award will be subject to taxes on the interest on the award that the injured party will receive. So, in effect, we are twice taxing the injured party. It is double taxation.

In addition to that --

QUESTION: Well, couldn't the instruction be tailored to eliminate that?

MR. FLEISHER: Well, then in effect the Court is suggesting that you include the speculative nature, the conjecture of taxes, the prolonging of trial by taxes, come down to a net award, then refuse to tell the jury that the interest on the award is taxable, taxable as unearned income, as opposed to earned income, can be taxable as high as a 70% tax bracket,

depending on the interest on the award for the individual.

QUESTION: This assumes you would invest -- that the award would be invested and bring interest.

MR. FLEISHER: Mr. Justice Rehnquist, the evidence that is presented at a trial is in order to get a proper award you must in fact reduce that to a present cash value, then you must invest that money at a reasonable return, so at the end of the work expectancy of the decedent there is nothing left. Otherwise, it is an unjust enrichment to the injured party. It must be invested and at the end of the investment period, in this case twenty-seven years, the testimony of the economist is there is zero left. That's why it is not an excessive award.

QUESTION: It really is not correct to talk about double taxation, is it? The evidence they want in would tend to reduce the award. If you include the tax, it would say the net earnings were less than the gross earnings. On the other hand, if you put in the fact that the interest on the award would be subject to taxes, that would tend to increase the award, because they tend to cancel one and other out.

MR. FLEISHER: Mr. Justice Stevens, that is exactly the issue, and that has been cited by cases repeatedly, that the candle is not worth the light, the effort. They do cancel each other out. That's why gross wages has been the standard of damages in the great majority of Federal --

QUESTION: They tend to cancel each other out, but they

do not necessarily meet exactly, but they are offsetting factors. What you are saying is you come out about the same if you let both sides in. That would be somewhat more accurate.

MR. FLEISHER: With the exception if we follow the minority gross wages rule, as enunciated in McWeeney, and the Fourth Circuit said follow McWeeney. Because we then come into a situation where our wages are -- or taxes on the wages -- are so insignificant we have done nothing but prolong the jury trial, we have increased cost to each side, we have gone into conflicts and complicated calculations to, as Your Honor says, merely end up approximately the same. The current law, as we have it now from the Federal courts, is yes there is division, five circuits. The First, Third, Fourth, Fifth and Eighth follow gross wages only. The remaining five follow McWeeney. There is no circuit that has ever followed a net wage loss. There is no case reported in the country that has ever said that net wages are the measure of damages in all FELA cases.

QUESTION: In those McWeeney circuits, when does the tax impact on the future earnings become important? When it passes the middle?

MR. FLEISHER: Not even the middle, Your Honor. To cite McWeeney verbatim, "Income tax matters should not be taken into consideration unless and until a decedent's earnings are beyond the lower or middle range of the income scale."

Obviously, in a --

QUESTION: When it gets there, what happens, in a McWeeney jurisdiction?

MR. FLEISHER: When it gets there, then the jury has the right to hear the type of impact, or the dollar amount that these taxes --

QULSTION: So, when it reaches that level, then they are entitled to calculate what the net -- the take-home pay after taxes?

MR. FLEISHER: Exactly, Mr. Justice White.

QUESTION: Because there are some jurisdictions that on certain facts calculate net earnings.

MR. FLEISHER: Certainly, when they exceed the McWeeney threshhold level. The reason being that if you are in the lower or middle range the taxes will be insignificant. Here the taxes on this man for twenty-seven years were --

QUESTION: This doesn't sound like very supportive of your position.

MR. FLEISHER: It does to this extent, Your Honor.

QUESTION: These five circuits say that whenever it is worth talking about, "Why, of course, we calculate net earnings." Is that right?

MR. FLEISHER: Yes, Your Honor. But we are contending that the earnings and the taxes -- Here is the railroad laborer who would always be at the lower end of a wage scale. At the time he was killed in '73, he was earning right under $12,000 a

year. In the year 2000, he would earn only approximately $40,000.

QUESTION: But that is a practicality argument more than a principle. On principle, these five circuits, following the McWeeney rule, if it were worth the candle, as you say, they would calculate net wages in every case.

MR. FLEISHER: Yes. And the cases that have followed McWeeney are all cases in which income has been far more substantial, from years back. The Leroy case, where they talked about $16,000, was a decade ago. We are talking about a wage earner who earned in '73, twelve years later, substantially less. So that it has no effect. It has no bearing. McWeeney, in fact, would allow -- Even if McWeeney was followed, it would allow Federal courts throughout the country to set out what is substantial by way of wages, and what is significant by way of taxes. It would lead to a total hodgepodge for individual judges around the country, to say that, for instance, $20,000 in a city like Washington could be considered not substantial because of the cost of living here.

QUESTION: How much more of a hodgepodge is it than $300,000 bucks for guidance?

MR. FLEISHER: Your Honor, I can only reiterate that the $300,000 is more than guidance. It is care, attention, instruction, training --

QUESTION: Totally subjective in value.

MR. FLEISHER: Your Honor, there is no question before this Court regarding the excessiveness of the verdict.

QUESTION: No, you are talking about income taxes is going to make the jury worry about things that are difficult and hard to figure out.

MR. FLEISHER: Just like court costs, witness expenses, attorneys' fees, are extraneous issues and matters that are not considered --

QUESTION: But the question here is whether or not these are extraneous.

MR. FLEISHER: Taxes?

QUESTION: Well, in reducing the award to present value.

MR. FLEISHER: Your Honor, I submit to the Court that taxes, where they are not significant, do not have any emphasis or bearing on an award in regard to loss of wages. The other elements of damages have not been raised in this case, as to whether or not they were excessive. It is almost an impossible situation for me, in a limited period of time, to express to the Court the witnesses who testified as to the type of care, training, guidance, advice, instruction, that this man gave to four children in raising them. And to sit here now as a reviewing court and ask whether or not that is a hodgepodge, or that is excessive, without --

QUESTION: You used the word "hodgepodge."

MR. FLEISHER: I used it merely to say that in the case of modified wages, under McWeeney, that if we abolish the five circuits who followed the gross wages, and have only modified, we will have different decisions throughout as to what is reasonable or what is substantial by way of taxes.

QUESTION: Certainly you get widely differing results as to what the value of guidance is, too, don't you?

MR. FLEISHER: Yes, and that also invades the province of a jury, Your Honor. They can only listen to the evidence that is presented on that issue, then deliberate as to that amount. That amount should not be in question. The question is whether or not the wages should be gross wages, modified gross wages, or net wages. We claim that gross and modified gross -- We fall under either category because they were not significant and the taxes were not substantial.

In conclusion, it is the Respondent's position that her husband, the decedent, at a time of his tragic death, was a railroad laborer at the low end of the wage and tax scale in the United States in 1973. Therefore, the effects of future taxes on future wages would have been nominal under, again, majority gross wages or minority modified gross wages. Also, there has never been a cautionary instruction that has ever reversed on this issue. And, therefore, the failure to give such a cautionary instruction would not constitute reversible

error.

QUESTION: I don't understand why you -- Have you said all you want to say about the refusal -- about the cautionary instruction on the award?

MR. FLEISHER: If I may answer a question --

QUESTION: In a nutshell, why is that so damaging to Plaintiff's case, to have the jury told that your award -- the award is not taxable?

MR. FLEISHER: That is a half measure, Your Honor. The award is not taxable. Finish the instruction, Mr. Justice White, "therefore, neither add nor subtract to your verdict."

That was not the cautionary that was given in this case.

QUESTION: Would you object --

MR. FLEISHER: No, Your Honor, we would not object to a full cautionary instruction. The award should neither be added to nor subtracted from on account of taxes. An instruction must be a fair and proper instruction to both sides. This was a half instruction in Lepelt. No instruction that was given on that basis has ever been sustained by any Federal court in this country.

QUESTION: Let's assume, though, that we agreed with you -- Suppose we thought that the Federal law required that sort of an instruction, a complete instruction. What would we do in this case?

MR. FLEISHER: In this case, that would become prospective law. The cautionary instruction should not, and never has been, grounds for reversible error.

QUESTION: How about the Boxberger case? That judgment was reversed.

MR. FLEISHER: That judgment was reversed, Your Honor, because in Boxberger they followed gross wages, and Boxberger followed McWeeney and reversed to go to modified gross wages.

QUESTION: With respect to the question my brother White has just asked you, it was reversed also on that issue. And Judge Ely for the Ninth Circuit, in the final footnote, specified the precise instruction that he --

MR. FLEISHER: In future cases, the footnote --

QUESTION: In that case. Well, in future cases, that footnote said, but that judgment was reversed.

MR. FLEISHER: Again, Your Honor, the Boxberger opinion is some twenty pages long.

QUESTION: And it reversed the judgment.

MR. FLEISHER: It reversed the judgment specifically, because gross wages were not used as a measure of damages and they followed McWeeney. It was a secondary issue which was ruled prospectively, that from that time on --

QUESTION: Dont' you think in that very case the jury -- the District Court was instructed to tell the jury in assessing damages in that very case it was to use that

instruction?

MR. FLEISHER: Yes, Your Honor.

QUESTION: Not in future cases, in that very case.

MR. FLEISHER: Certainly.

QUESTION: And that judgment was reversed, so you are a little bit misleading when you say no judgment has ever been reversed.

MR. FLEISHER: Well, again, my reading of Boxberger is that it was reversed for the failure to allow gross wages, that in regard to the cautionary instruction neither add nor subtract, that was given and affirmed and given prospective application to that case forward or any others in the Ninth Circuit.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Trienens.

REBUTTAL ORAL ARGUMENT OF HOWARD J. TRIENENS, ESQ.

ON BEHALF OF THE PETITIONER

MR. TRIENENS: Just one item, Catch 22.

Of course, you can't seek an instruction on a matter as to which there is no evidence. I am talking now about the matter of the take-home pay of the decedent, where we weren't allowed to show what his tax burden was. And we weren't allowed to show it not because -- I don't know what all this chatter was about discretion and trial judge -- The reason this trial

judge didn't do it is the Illinois courts won't let you talk about taxes at all, balanced, half way, part way, all the way, at all. And that's wrong. It is contrary to the standards of FELA.

Now, we asked about the cautionary instructions. We asked to talk to this witness about the taxes the man would have paid. We asked to put in evidence. The judge says -- and I cite A74 and 75, and again back to A62, the judge says the Illinois courts won't let us talk about that. And it was decided on that basis.

QUESTION: How would you come out under McWeeney?

MR. TRIENENS: On McWeeney and Boxberger, which I think accepts it, we would say that whatever the situation was with a man who earned $4800 a year, and after a trial it was regarded as really de miniis and not worth it -- in Boxberger the man, a fireman in the 70s earning from $18,000 to $40,000 projected, our man $17,000 at time of trial to $50,000 projected, exactly the same.

And in the Second Circuit, which follows McWeeney, after all, in the Sabena case, it was $15,000 to $25,000 projected.

So we say the McWeeney rule fits this like a glove in this case. It would require that this kind of evidence be received, and if it isn't received require that the judgment be reversed, which is what we ask.

QUESTION: What would you do if someone had made an assignment of 25% of his wages in advance to some creditor? And the employer had been notified and he just sent him a check every month, that employer did. Would you be claiming that the damage -- Certainly his survivors couldn't benefit from that 25%

MR. TRIENENS: That's right, and that's the way these folks tried the case, exactly on that method.

QUESTION: What's your answer to it?

MR. TRIENENS: My answer is that if the wife and the children weren't getting any of the money, if they lost no contribution, or they lost contribution that was measured by a smaller than you might expect proportion of his wages, that's the contribution they lost.

QUESTION: I would suppose the assignee then would be one of the plaintiffs.

MR. TRIENENS: But for the fact that Congress in putting in the FELA Act for people --

QUESTION: Maybe United States ought to join in this suit if you win. They are losing their tax.

MR. TRIENENS: Oh, no, they are not, because one of the ideas of a windfall to railroads has that concept which is wrong, because the railroad still has to run the trains. It still has to hire a fireman, and the fireman is paying taxes. In addition to that, we than have to pay this award, which all

we say ought to be properly measured, to do just what Congress said, which is to compensate these people for the loss.

Now, the one other item which complicates this, or the parties try to complicate it, is this double tax, tax on the tax, tax on interest idea. That is a totally, totally separate concept, and would arise if the decedent had had no taxable income, no income subject to tax. And that's because it relates to the use of the award. It goes to the whole concept of single sum damages. It goes to the question of whether if it goes to children and their tax bracket is such they don't pay it. And it goes, as I mentioned earlier, to on what basis do these folks calculate the discount rate? What they love to do is use a low rate because that produces a high award. They use a low rate and they mix in some municipal bond interest, which if you actually invest it that way wouldn't be taxable. But now they want it both ways. They can't have it both ways.

But the point I am making is that this tax on tax,and what you do with the award after you get it and what you want to assume about it, has nothing in the world to do with the question we brought before this Court. It would arise in any case. It is a totally separate issue, as Judge Friendly recognized in McWeeney, because he never said it was a totally offset. Otherwise, he said, if a fellow earns enough you ought to consider his taxes. That's all we are saying.

In this day and age, people earn enough, it is

substantial, and you ought to consider it, under traditional rules of the FELA damages.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Gentlemen.

The case is submitted.

(Whereupon, at 1:57 o'clock, p.m., the case was submitted.)