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Trial -- Prejudicial Effect of Argument that Jurors Should Award Damages They Would Want for Similar Injuries

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CASES NOTED

TRIAL—PREJUDICIAL EFFECT OF ARGUMENT THAT JURORS SHOULD AWARD DAMAGES THEY WOULD WANT FOR SIMILAR INJURIES

The plaintiff's counsel in his summation to the jury in a negligence action asked the jurors to consider the damages in the context of what they would request if the plaintiff's injury had been inflicted upon them.[1] The defendant's objections to these remarks were overruled. *Held*, reversed: it is improper to suggest that the jurors award to a plaintiff the damages they would wish to receive for similar injuries. *Bullock v. Branch*, 130 So.2d 74 (Fla. App. 1961).

In analagous cases, counsel for both plaintiffs and defendants have utilized arguments which suggested that the jury adopt the viewpoint of one of the parties in deciding the question of damages, or the entire case.[2] This general suggestion has been presented by various arguments to the effect that the jurors should: (1) put themselves in the position of the arguing attorney's client;[3] or (2) give the plaintiff the recovery which the

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1. In counsel's more picturesque language: "What would I have to pay to inflict a half inch cut into your skull, to render you unconscious, to put you home in bed for a week, to force you to use a cane or crutches for months after that, and to leave you for the balance of your life with your walk affected, with your speech affected, with a tremor, with your memory affected, with your handwriting affected?" Bullock v. Branch, 130 So.2d 74, 75 (Fla. App. 1961).

2. The great majority of the arguments to be discussed have been presented by the plaintiff's counsel; however, in the cases that follow, the controversial argument was that of the counsel for defendant. Fisher v. Williams, 327 S.W.2d 256 (Mo. 1959); Stewart v. Boring, 312 S.W.2d 131 (Mo. 1958); Fambrough v. Wagley, 140 Tex. 577, 169 S.W.2d 478 (1943); Kahn v. Green, 234 S.W.2d 131 (Tex. Civ. App. 1950); Sorsby v. Thom, 168 S.W.2d 873 (Tex. Civ. App. 1943); Bookhout v. McGeorge, 65 S.W.2d 512 (Tex. Civ. App. 1933). On this type of argument generally, see Annot., 70 A.L.R.2d 935 (1960); 53 AM. JUR. *Trial* § 496 (1945); 88 C.J.S. *Trial* § 191 (1955).

3. Chicago & N.W. Ry. v. Kelly, 84 F.2d 569 (8th Cir. 1936); McCullough v. Langer, 23 Cal. App. 2d 510, 73 P.2d 649 (1937); Hollis v. Bourne, 292 Ky. 578, 167 S.W.2d 50 (1942); Stewart v. Boring, 312 S.W.2d 131 (Mo. 1958); Sparks v. Auslander, 353 Mo. 177, 182 S.W.2d 167 (1944); Kelsey v. Kelsey, 329 S.W.2d 272 (Mo. App. 1959); O'Connell v. Kansas City, 208 Mo. App. 174, 231 S.W. 1040 (1921); Botta v. Brunner, 42 N.J. Super. 95, 126 A.2d 32 (1956), *modified*, 26 N.J. 82, 138 A.2d 713 (1958); Fambrough v. Wagley, 140 Tex. 577, 169 S.W.2d 478 (1943); Ochoa v. Winerich Motor Sales Co., 127 Tex. 542, 94 S.W.2d 416 (Comm'n App. 1936); Wichita Coca Cola Bottling Co. v. Tyler, 288 S.W.2d 903 (Tex. Civ. App. 1956); Minyard v. Kennedy, 241 S.W.2d 767 (Tex. Civ. App. 1951); East Texas Motor Freight Lines

jury members would want if they had suffered the injuries;[4] or (3) consider how they would feel or want to be treated if they or a family member were in the client's situation;[5] or (4) apply the "golden rule" and do unto one or both of the parties as the jurors would wish to have done unto themselves.[6] Another variation, the one used in the instant case, has been

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v. Sterrett, 232 S.W.2d 253 (Tex. Civ. App. 1950), *rev'd*, 236 S.W.2d 776 (1951); Sorsby v. Thom, 168 S.W.2d 873 (Tex. Civ. App. 1943); Texas Coca Cola Bottling Co. v. Lovejoy, 112 S.W.2d 203 (Tex. Civ. App. 1937); Tennessee Dairies, Inc. v. Seibenhausen, 99 S.W.2d 323 (Tex. Civ. App. 1936); Texas & N.O. Ry. v. New, 95 S.W.2d 170 (Tex. Civ. App. 1936); Brown Cracker & Candy Co. v. Castle, 26 S.W.2d 435 (Tex. Civ. App. 1930); Bookhout v. McGeorge, 65 S.W.2d 512 (Tex. Civ. App. 1933); Commercial Standard Ins. Co. v. De Hart, 47 S.W.2d 898 (Tex. Civ. App. 1932); Eagle Star & British Dominion Ins. Co. v. Head, 47 S.W.2d 625 (Tex. Civ. App. 1932); Marcus v. Huguley, 37 S.W.2d 1100 (Tex. Civ. App. 1931); Duchaine v. Ray, 110 Vt. 313, 6 A.2d 28 (1939); Keathley v. Chesapeake & O. Ry., 85 W.Va. 173, 102 S.E. 244 (1919).

4. West Chicago St. R.R. v. Dedloff, 92 Ill. App. 547 (1900); Murphy v. Cordle, 303 Ky. 229, 197 S.W.2d 242 (1946); Gungrich v. Anderson, 189 Mich. 144, 155 N.W. 379 (1915); Wells v. Ann Arbor R.R., 184 Mich. 1, 150 N.W. 340 (1915); Texas & N.O. Ry. v. New, 95 S.W.2d 170 (Tex. Civ. App. 1936); Allen v. Denk, 87 S.W.2d 303 (Tex. Civ. App. 1935); Leonard Bros. v. Newton, 71 S.W.2d 613 (Tex. Civ. App. 1934); City of Dallas v. Johnson, 54 S.W.2d 1024 (Tex. Civ. App. 1932); Dallas Ry. & Terminal Co. v. Curtis, 53 S.W.2d 85 (Tex. Civ. App. 1932); Southwestern Tel. & Tel. Co. v. Andrews, 169 S.W. 218 (Tex. Civ. App. 1914); see also Church v. Larned, 206 Mich. 77, 172 N.W. 551 (1919); Merrill v. Tinkler, 160 Mich 575, 125 N.W. 717 (1910); Gulf Cas. Co. v. Archer, 118 S.W.2d 976 (Tex. Civ. App. 1938); Southwestern Gas & Elec. v. Hutchins, 68 S.W.2d 1085 (Tex. Civ. App. 1934). Counsel have also argued that the plaintiff should recover in order to discourage harm of a similar nature to the jury members. Smith v. Reed, 252 Ala. 107, 39 So.2d 653 (1949); Stafford v. Steward, 295 S.W.2d 665 (Tex. Civ. App. 1956); Humble Oil & Ref. Co. v. Butler, 46 S.W.2d 1043 (Tex. Civ. App. 1932); Houston Oil Co. v. Brown, 202 S.W. 102 (Tex. Civ. App. 1917), *cert. denied*, 250 U.S. 659 (1919).

5. British General Ins. Co. v. Simpson Sales Co., 265 Ala. 683, 93 So.2d 763 (1957); Hale v. San Bernardino Valley Traction Co., 156 Cal. 713, 106 Pac. 83 (1909); Stone v. City of Pleasanton, 115 Kan. 378, 223 Pac. 312 (1924); J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S.W.2d 359 (1935); Mortensen v. Bradshaw, 188 Mich. 436, 154 N.W. 46 (1915); Fisher v. Williams, 327 S.W.2d 256 (Mo. 1959); Stotler v. Blanton-Sims Co., 273 S.W. 137 (Mo. App. 1925); Williams v. Fleming, 218 Mo. App. 563, 267 S.W. 6 (1924); El Paso City Lines v. Prieto, 191 S.W.2d 59 (Tex. Civ. App. 1945); Community Natural Gas Co. v. Lane, 133 S.W.2d 200 (Tex. Civ. App. 1939); Independent Life Ins. Co. v. Hogue, 70 S.W.2d 629 (Tex. Civ. App. 1934); Dallas Ry. & Terminal Co. v. Moore, 52 S.W.2d 104 (Tex. Civ. App. 1932); Southern Pac. Co. v. Huggins, 9 S.W.2d 382 (Tex. Civ. App. 1928).

6. Klotz v. Sears, Roebuck & Co., 267 F.2d 53 (7th Cir. 1959); H. P. Selman & Co. v. Goldstein, 278 S.W.2d 713 (Ky. 1955); Merrill v. Tinkler, 160 Mich. 575, 125 N.W. 717 (1910); Warning v. Thompson, 249 S.W.2d 335 (Mo. 1952); Rio Grande, E.P. & S.F.R.R. v. Dupree, 55 S.W.2d 522 (Tex. Comm'n App. 1932); Texas Employers' Ins. Ass'n v. Thames, 252 S.W.2d 228 (Tex. Civ. App. 1952); H. L. Butler & Son v. Walpole, 239 S.W.2d 653 (Tex. Civ. App. 1951); Kahn v. Green, 234 S.W.2d 131 (Tex. Civ. App. 1950); Airline Motor Coaches v. Green, 217 S.W.2d 70 (Tex. Civ. App. 1949); Liberty Mutual Ins. Co. v. Nelson, 174 S.W.2d 103 (Tex. Civ. App. 1943), *aff'd*, 178 S.W.2d 514 (1944); Texas Creosoting Co. v. Sims, 113 S.W.2d 227 (Tex. Civ. App. 1937); Metropolitan Life Ins. Co. v. Moss, 109 S.W.2d 1035 (Tex. Civ. App. 1937); Levy v. Rogers, 75 S.W.2d 304 (Tex. Civ. App. 1934); Texas & P. Ry. v. Short, 62 S.W.2d 995 (Tex. Civ. App. 1933); International & G.N.R.R. v. Morin, 53 Tex. Civ. App. 531, 116 S.W. 656 (1909); Semour v. Richardson, 194 Va. 709, 75 S.E.2d 77 (1953).

to ask the jury members how much they would wish to receive for the injuries of the plaintiff[7] or, similarly, to tell the jurors that they would not take a particular sum in exchange for the same damage.[8]

Many appellate courts confronted by one of the above arguments have declared its use to be reversible error *per se*;[9] others have reversed when the case presented an additional error,[10] or when the argument was one of a series of errors.[11] The courts have described these arguments and

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7. F.W. Woolworth Co. v. Wilson, 74 F.2d 439 (5th Cir. 1934); St. Louis, I.M. & S. Ry. v. Boback, 71 Ark. 427, 75 S.W. 473 (1903); Adams Express Co. v. Aldridge, 20 Colo. App. 74, 77 Pac. 6 (1904); Russell v. Chicago, R.I. & Pac. R.R., 249 Iowa 664, 86 N.W.2d 843 (1957); Goldman v. Detroit United Ry., 200 Mich. 543, 166 N.W. 1007 (1918); Morrison v. Carpenter, 179 Mich. 207, 146 N.W. 106 (1914); Bates v. Kitchel, 166 Mich. 665, 132 N.W. 459 (1911); Sinclair v. Columbia Tel. Co., 195 S.W. 558 (Mo. App. 1917); Haake v. G. H. Dulle Milling Co., 168 Mo. App. 177, 153 S.W. 74 (1912); Budden v. Goldstein, 43 N.J. Super. 340, 128 A.2d 730 (1957); Jackson v. Southwestern Pub. Serv. Co., 66 N.M. 458, 349 P.2d 1029 (1960); Al McCullough Trans. Co. v. Pizzulo, 53 Ohio App. 470, 5 N.E.2d 796 (1936); Donnelly v. Buffalo & Lake Erie Traction Co., 40 Pa. Super. 110 (1909); Red Top Cab Co. v. Capps, 270 S.W.2d 273 (Tex. Civ. App. 1954); Henwood v. Richardson, 163 S.W.2d 256 (Tex. Civ. App. 1942); Younger Bros. v. Moore, 135 S.W.2d 780 (Tex. Civ. App. 1939); Macfadden's Publications, Inc. v. Hardy, 95 S.W.2d 1023 (Tex. Civ. App. 1936); Gulf C. & S.F. Ry. v. Carson, 63 S.W.2d 1096 (Tex. Civ. App. 1933); Dallas Ry. & Terminal Co. v. Curtis, 53 S.W.2d 85 (Tex. Civ. App. 1932); Dallas Ry. & Terminal Co. v. Smith, 42 S.W.2d 794 (Tex. Civ App. 1931); Marcus v. Huguley, 37 S.W.2d 1100 (Tex. Civ. App. 1931); Crosswhite v. Barnes, 139 Va. 471, 124 S.E. 242 (1924); P. Lorillard & Co. v. Clay, 127 Va. 734, 104 S.E. 384 (1920).

8. De Young v. Haywood, 139 Cal. App. 2d 16, 292 P.2d 917 (1956); Hughes v. City of Detroit, 161 Mich. 283, 126 N.W. 214 (1910); Faught v. Washam, 329 S.W.2d 588 (Mo. 1959); Crockett v. Kansas City Rys., 243 S.W. 902 (Mo. 1922); Texas & N.O.R.R. v. Sturgeon, 142 Tex. 222, 177 S.W.2d 264 (1944); Brooks v. Enriquez, 172 S.W.2d 794 (Tex. Civ. App. 1943); Foster v. Langston, 170 S.W.2d 250 (Tex. Civ. App. 1943); Dallas Ry. & Terminal Co. v. Smith, 42 S.W.2d 794 (Tex. Civ. App. 1931); Larson v. Hanson, 207 Wis. 485, 242 N.W. 184 (1932).

9. Klotz v. Sears, Roebuck & Co., 267 F.2d 53 (7th Cir. 1959); Russell v. Chicago, R.I. & Pac. R.R., 249 Iowa 664, 86 N.W.2d 843 (1957) (affirming grant of new trial by the trial court); Mortensen v. Bradshaw, 188 Mich. 436, 154 N.W. 46 (1915); Texas & N.O.R.R. v. Sturgeon, 142 Tex. 222, 177 S.W. 2d 264 (1944); Fambrough v. Wagley, 140 Tex. 577, 169 S.W.2d 478 (1943) (affirming grant of new trial by the trial court); Stafford v. Steward, 295 S.W.2d 665 (Tex. Civ. App. 1956); Brooks v. Enriquez, 172 S.W.2d 794 (Tex. Civ. App. 1943); Foster v. Langston, 170 S.W.2d 250 (Tex. Civ. App. 1943); Texas Coca Cola Bottling Co. v. Lovejoy, 112 S.W.2d 203 (Tex. Civ. App. 1937); Metropolitan Life Ins. Co. v. Moss, 109 S.W.2d 1035 (Tex. Civ. App. 1937); Dallas Ry. & Terminal Co. v. Curtis, 53 S.W.2d 85 (Tex. Civ. App. 1932); Humble Oil & Ref. Co. v. Butler, 46 S.W.2d 1043 (Tex. Civ. App. 1932); Dallas Ry. & Terminal Co. v. Smith, 42 S.W.2d 794 (Tex. Civ. App. 1931).

10. Morrison v. Carpenter, 179 Mich. 207, 146 N.W. 106 (1914); Hughes v. City of Detroit, 161 Mich. 283, 126 N.W. 214 (1910); Kelsey v. Kelsey, 329 S.W.2d 272 (Mo. App. 1959); Haake v. G. H. Dulle Milling Co., 168 Mo. App. 177, 153 S.W. 74 (1912); Dallas Ry. & Terminal Co. v. Moore, 52 S.W.2d 104 (Tex. Civ. App. 1932).

11. Chicago & N.W. Ry. v. Kelly, 84 F.2d 569 (8th Cir. 1936); F. W. Woolworth Co. v. Wilson, 74 F.2d 439 (5th Cir. 1934); Murphy v. Cordle, 303 Ky. 229, 197 S.W.2d 242 (1946); Faught v. Washam, 329 S.W.2d 588 (Mo. 1959); Gulf Cas. Co. v. Archer, 118 S.W.2d 976 (Tex. Civ. App. 1938): Allen v. Denk, 87 S.W.2d 303 (Tex. Civ. App. 1935); Gulf, C. & S.F. Ry. v. Carson, 63 S.W.2d 1096 (Tex. Civ. App. 1933); City of Dallas v. Johnson, 54 S.W.2d 1024 (Tex. Civ. App. 1932); Eagle Star & British Dominion Ins. Co. v. Head, 47 S.W.2d 625 (Tex. Civ. App. 1932); Brown Cracker & Candy Co. v. Castle, 26 S.W.2d 435 (Tex. Civ. App. 1930); Southwestern Tel. & Tel. v. Andrews, 169 S.W. 218 (Tex. Civ. App. 1914).

requests to the jury as improper,[12] inflammatory,[13] prejudicial,[14] as presenting to the jury an improper standard by which to measure damages,[15] and as destroying the necessary impartiality of the jury.[16] It has been stated that "the appeal to the jury to put themselves in plaintiff's place was improper. One doing that would be no fairer judge of the case than would [the] plaintiff . . . ."[17] A similar argument was thought to be "calculated to persuade the jury to forget their sworn duty, and not to reach a verdict from a preponderance of the evidence, but from the view point of a litigant or interested party."[18]

Many jurisdictions have affirmed judgments for the party who has urged that the jury adopt his viewpoint. The courts have reached this result by reasoning that the particular argument was not sufficiently pre-

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12. F. W. Woolworth Co. v. Wilson, 74 F.2d 439 (5th Cir. 1934); Russell v. Chicago, R.I. & Pac. R.R., 249 Iowa 664, 86 N.W.2d 843 (1957); Murphy v. Cordle, 303 Ky. 229, 197 S.W.2d 242 (1946); Morrison v. Carpenter, 179 Mich. 207, 146 N.W. 106 (1914); Faught v. Washam, 329 S.W.2d 588 (Mo. 1959); Haake v. G. H. Dulle Milling Co., 168 Mo. App. 177, 153 S.W. 74 (1912); Texas & N.O.R.R. v. Sturgeon, 142 Tex. 222, 177 S.W.2d 264 (1944); Fambrough v. Wagley, 140 Tex. 577, 169 S.W.2d 478 (1943); Foster v. Langston, 170 S.W.2d 250 (Tex. Civ. App. 1943); Community Natural Gas Co. v. Lane, 133 S.W.2d 200 (Tex. Civ. App. 1939); Texas Coca Cola Bottling Co. v. Lovejoy, 112 S.W.2d 203 (Tex. Civ. App. 1937); Macfadden's Publications, Inc. v. Hardy, 95 S.W.2d 1023 (Tex. Civ. App. 1936); Allen v. Denk, 87 S.W.2d 303 (Tex. Civ. App. 1935); Gulf, C. & S.F. Ry. v. Carson, 63 S.W.2d 1096 (Tex. Civ. App. 1933); Dallas Ry. & Terminal Co. v. Curtis, 53 S.W.2d 85 (Tex. Civ. App. 1932); Dallas Ry. & Terminal Co. v. Moore, 52 S.W.2d 104 (Tex. Civ. App. 1932); Humble Oil & Ref. Co. v. Butler, 46 S.W.2d 1043 (Tex. Civ. App. 1932); Southwestern Tel. & Tel. Co. v. Andrews, 169 S.W. 218 (Tex. Civ. App. 1914); Larson v. Hanson, 207 Wis. 485, 242 N.W. 184 (1932).

13. Hughes v. City of Detroit, 161 Mich. 283, 126 N.W. 214 (1910); Stafford v. Steward, 295 S.W.2d 665 (Tex. Civ. App. 1956); Foster v. Langston, 170 S.W.2d 250 (Tex. Civ. App. 1943).

14. Klotz v. Sears, Roebuck & Co., 267 F.2d 53 (7th Cir. 1959); Hughes v. City of Detroit, 161 Mich. 283, 126 N.W. 214 (1910); Stafford v. Steward, 295 S.W.2d 665 (Tex. Civ. App. 1956); Foster v. Langston, 170 S.W.2d 250 (Tex. Civ. App. 1943); Metropolitan Life Ins. Co. v. Moss, 109 S.W.2d 1035 (Tex. Civ. App. 1937); Allen v. Denk, 87 S.W.2d 303 (Tex. Civ. App. 1935); Brown Cracker & Candy Co. v. Castle, 26 S.W.2d 435 (Tex. Civ. App. 1930); Larson v. Hanson, 207 Wis. 485, 242 N.W. 184 (1932).

15. Texas & N.O.R.R. v. Sturgeon, 142 Tex. 222, 177 S.W.2d 264 (1944); Dallas Ry. & Terminal Co. v. Smith, 42 S.W.2d 794 (Tex. Civ. App. 1931).

16. Chicago & N.W. Ry. v. Kelly, 84 F.2d 569 (8th Cir. 1936); F. W. Woolworth Co. v. Wilson, 74 F.2d 439 (5th Cir. 1934). Faught v. Washam, 329 S.W.2d 588 (Mo. 1959); Brooks v. Enriquez, 172 S.W.2d 794 (Tex. Civ. App. 1943); Texas Coca Cola Bottling Co. v. Lovejoy, 112 S.W.2d 203 (Tex. Civ. App. 1937); Metropolitan Life Ins. Co. v. Moss, 109 S.W.2d 1035 (Tex. Civ. App. 1937); Dallas Ry. & Terminal Co. v. Smith, 42 S.W.2d 794 (Tex. Civ. App. 1931); Brown Cracker & Candy Co. v. Castle, 26 S.W.2d 435 (Tex. Civ. App. 1930).

17. F. W. Woolworth Co. v. Wilson, 74 F.2d 439, 442 (5th Cir. 1934).

18. Metropolitan Life Ins. Co. v. Moss, 109 S.W.2d 1035, 1038 (Tex. Civ App. 1937).

judical to require a reversal,[19] that the argument was not erroneous[20] or that the small verdict indicated an absence of error.[21] Courts also have found that any error was cured by an instruction to disregard the offending language,[22] sometimes accompanied by the sustaining of an objection thereto,[23] or by withdrawal of the argument by the party making it.[24] Some appellate courts have refused to consider these arguments as a basis for reversal on the ground that the appellant did not object at the time the argument was made, and thus did not give the appellee or the trial judge an opportunity to correct any error.[25] A few tribunals have considered the possible harmful effect of an argument of this nature to have been corrected by a remittitur required of the appellee as an alternative to reversal.[26] A series of Texas cases has distinguished "golden rule" argu-

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19. Hale v. San Bernardino Valley Traction Co., 156 Cal. 713, 106 Pac. 83 (1909); West Chicago St. R.R. v. Dedloff, 92 Ill. App. 547 (1900); Stone v. City of Pleasanton, 115 Kan. 378, 223 Pac. 312 (1924); J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S.W.2d 359 (1935); Bates v. Kitchel, 166 Mich. 665, 132 N.W. 459 (1911); Stewart v. Boring, 312 S.W.2d 131 (Mo. 1958); Stotler v. Blanton-Sims Co., 273 S.W. 137 (Mo. 1925); Budden v. Goldstein, 43 N.J. Super. 340, 128 A.2d 730 (1957); Donnelly v. Buffalo & Lake Erie Traction Co., 40 Pa. Super. 110 (1909); Houston Oil Co. v. Brown, 202 S.W. 102 (Tex. Civ. App. 1917), *cert. denied*, 250 U.S. 659 (1919); Duchaine v. Ray, 110 Vt. 313, 6 A.2d 28 (1939).

20. British Gen. Ins. Co. v. Simpson Sales Co., 265 Ala. 683, 93 So.2d 763 (1957); Smith v. Reed, 252 Ala. 107, 39 So.2d 653 (1949); De Young v. Haywood, 139 Cal. App. 2d 16, 292 P.2d 917 (1956); McCullough v. Langer, 23 Cal. App. 2d 510, 73 P.2d 649 (1937); Adams Express Co. v. Aldridge, 20 Colo. App. 74, 77 Pac. 6 (1904) (dictum); Fisher v. Williams, 327 S.W.2d 256 (Mo. 1959); Ochoa v. Winerich Motor Sales Co., 94 S.W.2d 416 (Tex. Comm'n App. 1936); Southwestern Gas & Elec. Co. v. Hutchins, 68 S.W.2d 1085 (Tex. Civ. App. 1934); Commercial Standard Ins. Co. v. De Hart, 47 S.W.2d 898 (Tex. Civ. App. 1932).

21. Missouri Pac. R.R. v. Maxwell, 194 Ark. 938, 109 S.W.2d 1254 (1937); St. Louis, I.M. & S. Ry. v. Boback, 71 Ark. 427, 75 S.W. 473 (1903); Levy v. Rogers, 75 S.W.2d 304 (Tex. Civ. App. 1934); Leonard Bros. v. Newton, 71 S.W.2d 613 (Tex. Civ. App. 1934); Crosswhite v. Barnes, 139 Va. 471, 124 S.E. 242 (1924).

22. Affleck v. Chicago & N.W. Ry., 253 F.2d 249 (7th Cir. 1958); Hollis v. Bourne, 292 Ky. 578, 167 S.W.2d 50 (1942); Goldman v. Detroit United Ry., 200 Mich. 543, 166 N.W. 1007 (1918); Warning v. Thompson, 249 S.W.2d 335 (Mo. 1952); Williams v. Fleming, 218 Mo. App. 563, 267 S.W. 6 (1924); Red Top Cab Co. v. Capps, 270 S.W.2d 273 (Tex. Civ. App. 1954); Minyard v. Kennedy, 241 S.W.2d 767 (Tex. Civ. App. 1951); El Paso City Lines, Inc. v. Prieto, 191 S.W.2d 59 (Tex. Civ. App. 1945); Henwood v. Richardson, 163 S.W.2d 256 (Tex. Civ. App. 1942); Younger Bros. v. Moore, 135 S.W.2d 780 (Tex. Civ. App. 1939); Tennessee Dairies, Inc. v. Seibenhausen, 99 S.W.2d 323 (Tex. Civ. App. 1936); Leonard Bros. v. Newton, 71 S.W.2d 613 (Tex. Civ. App. 1934); Independent Life Ins. Co. v. Hogue, 70 S.W.2d 629 (Tex. Civ. App. 1934); Duchaine v. Ray, 110 Vt. 313, 6 A.2d 28 (1939).

23. Affleck v. Chicago & N.W. Ry., 253 F.2d 249 (7th Cir. 1958); Hollis v. Bourne, 292 Ky. 578, 167 S.W.2d 50 (1942); Younger Bros. v. Moore, 135 S.W.2d 780 (Tex. Civ. App. 1939); Leonard Bros. v. Newton, 71 S.W.2d 613 (Tex. Civ. App. 1934).

24. Williams v. Fleming, 218 Mo. App. 563, 267 S.W. 6 (1924); Duchaine v. Ray, 110 Vt. 313, 6 A.2d 28 (1939).

25. Adams Express Co. v. Aldridge, 20 Colo. App. 74, 77 Pac. 6 (1904); Gungrich v. Anderson, 189 Mich. 144, 155 N.W. 379 (1915); Community Natural Gas Co. v. Lane, 133 S.W.2d 200 (Tex. Civ. App. 1939); Texas & N.O. Ry. v. New, 95 S.W.2d 170 (Tex. Civ. App. 1936); P. Lorrilard & Co. v. Clay, 127 Va. 734, 104 S.E. 384 (1920); Keathley v. Chesapeake & O. Ry., 85 W.Va. 173, 102 S.E. 244 (1919).

26. Johnson v. Stotts, 344 Ill. App. 614, 101 N.E.2d 880 (1951); Jackson v. Southwestern Pub. Serv. Co., 66 N.M. 458, 349 P.2d 1029 (1960); Al McCullough Transfer Co. v. Pizzulo, 53 Ohio App. 470, 5 N.E.2d 796 (1936).

ments from the others mentioned previously, and found no error presented by this appeal to the jury.[27]

Bullock v. Branch is a case of first impression in Florida. The First District Court of Appeal emphatically expressed its belief that "every party is entitled to nothing less than the cold neutrality of an impartial jury when such body determines the questions of fact involved in his case."[28] The court considered this neutrality to be disturbed by the identification of the jurors with the plaintiff's injuries. It held that the trial court erred in not counteracting this effort by the plaintiff to persuade the jurors to depart from their impartial position. The argument of the plaintiff's counsel, referred to in the opinion as "the so-called 'golden rule' argument,"[29] was considered by the court to be "so palpably prejudicial and inflammatory"[30] that the trial court on its own motion should have instructed the jury to disregard it.[31] The decision adheres to the mandate of the Florida Supreme Court that a jury's verdict must be "uninfluenced by the appeals of counsel to passion or prejudice."[32]

While it often has been considered possible for a trial court to overcome the prejudicial effect of similar remarks,[33] no attempt to do so was made in the instant case. The jury received the impression from the court "that the argument correctly reflected the applicable law and that they could properly consider what they themselves would want in det-

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27. Rio Grande, E.P. & S.F.R.R. v. Dupree, 55 S.W.2d 522 (Tex. Comm'n App. 1932); Texas Employers' Ins. Ass'n v. Thames, 252 S.W.2d 228 (Tex. Civ. App. 1952); H. L. Butler & Son v. Walpole, 239 S.W.2d 653 (Tex. Civ. App. 1951); Airline Motor Coaches v. Green, 217 S.W.2d 70 (Tex. Civ. App. 1949); Liberty Mut. Ins. Co. v. Nelson, 174 S.W.2d 103 (Tex. Civ. App. 1943), *aff'd*, 178 S.W.2d 514 (1944); Texas Creosoting Co. v. Sims, 113 S.W.2d 227 (Tex. Civ. App. 1937); Levy v. Rogers, 75 S.W.2d 304 (Tex. Civ. App. 1934); Texas & P. Ry. v. Short, 62 S.W.2d 995 (Tex. Civ. App. 1933); International & G.N.R.R. v. Morin, 53 Tex. Civ. App. 531, 116 S.W. 656 (1909); *cf.* Texas & N.O.R.R. v. McGinnis, 130 Tex. 338, 109 S.W.2d 160 (Comm'n App. 1937); Southern Underwriters v. Yocham, 140 S.W.2d 341 (Tex. Civ. App. 1940).

The rationale for this distinction as stated by the Texas Commission of Appeals is that: "The application of the Golden Rule by this jury would require them to look with equal solicitude to the rights of the defendant and the plaintiffs, and would not call for the application of an improper measure of damages." Rio Grande, E.P. & S.F.R.R. v. Dupree, *supra* at 527. See also Fambrough v. Wagley, 140 Tex. 577, 169 S.W.2d 478 (1943).

28. Bullock v. Branch, 130 So.2d 74, 76 (Fla. App. 1961).

29. *Id.* at 77. The argument in the instant case does not appear to be what is normally referred to as the "golden rule argument." This term usually encompasses appeals to the jury to apply the golden rule and arguments couched in the phraseology of that rule. See cases cited note 5 *supra*. *But see*, Ravel v. Couravallos, 245 S.W.2d 731 (Tex. Civ. App. 1952).

30. Bullock v. Branch, 130 So.2d 74, 77 (Fla. App. 1961).

31. Despite the absence of evidence in the record that the argument in question had a prejudicial effect on the jury, the court said that this effect need not be demonstrated to show reversible error, but may be presumed from the use of the improper argument. *Ibid; accord,* Dallas Ry. & Terminal Co. v. Curtis, 53 S.W.2d 85 (Tex. Civ. App. 1932); Dallas Ry. & Terminal Co. v. Smith, 42 S.W.2d 794 (Tex. Civ. App. 1931); *but see,* Southern Pac. Co. v. Huggins, 9 S.W.2d 382 (Tex. Civ. App. 1928).

32. Seaboard Air Line R.R. v. Ford, 92 So.2d 160, 165 (Fla. 1956); Seaboard Air Line R.R. v. Strickland, 88 So.2d 519, 524 (Fla. 1956).

33. Cases cited note 22 *supra*.

ermining the award of damages."[34] The defendant was thus entitled to a new trial before an *impartial* jury, properly instructed as to the factors to be considered in awarding damages.

PAUL SIEGEL

TRIAL—JURY INSTRUCTION AS TO TAXABILITY OF PERSONAL INJURY AWARD

In a negligence action the trial judge, over the plaintiff's objection, charged the jury that any award made to the plaintiff as compensation for injuries would not be subject to federal or state income taxes, and these taxes should not be considered by them in making an award. The jury returned a verdict for the plaintiff for less than she had asked, and she appealed from the court's refusal to grant a new trial. *Held*, affirmed: it is proper for the court to instruct the jury in a personal injury suit that any recovery for damages is free from federal or state income taxes. *Poirer v. Shireman*, 129 So.2d 439 (Fla. App. 1961).

The question of whether a jury should be charged with regard to the tax consequences of any award made in a personal injury action is of recent origin.[1] It is settled that any award as compensation for personal injury is not income[2] and, therefore, not subject to taxation under the Internal Revenue Code.[3] Defendants have sought to make juries aware of this, and to have them instructed not to increase the plaintiff's recovery for nonexistent taxes.

The majority of American courts have refused to permit any mention of this tax boon to the jury. Various reasons have been given to support this view. It has been stated that it is wrong to charge a jury with a cautionary instruction on the premise that it will act outside of and contrary to other instructions.[4] Another point is that the tax liability of any given group of people is primarily of legislative concern, and the courts should not interfere.[5] Further, the tax liability of a party is a personal matter, and the defendant should not be allowed to mitigate his potential liability by seeking to prevent a benefit accruing to the plaintiff, especially

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34. Bullock v. Branch, 130 So.2d 74, 77 (Fla. App. 1961).

1. Stokes v. United States, 144 F.2d 82 (2d Cir. 1944); Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N.W.2d 627 (1944). See 11 MIAMI L. Q. 304 (1957).

2. INT. REV. CODE OF 1954, § 104(a) (2).

3. In Pfister v. City of Cleveland, 96 Ohio App. 185, 187, 113 N.E.2d 366, 367-68 (1953), the court said: "Under the Internal Revenue Code compensation for injuries received is tax exempt. . . . Technically, it would seem that compensation for loss of wages should be taxable, but where a verdict is general, there is no way of determining the amount apportionable to wages, so that the entire verdict in practice becomes tax free."

4. Missouri-Kan.-Tex. R.R. v. McFerrin, 279 S.W.2d 410 (Tex. Civ. App. 1955), *rev'd on other grounds*, 156 Tex. 69, 291 S.W.2d 931 (1956); Hardware Mut. Cas. Co. v. Harry Crow & Son, Inc., 6 Wis. 2d 396, 94 N.W.2d 577 (1959).

5. Hall v. Chicago & N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955); Hardware Mut. Cas. Co. v. Harry Crow & Son, Inc., 6 Wis. 2d 396, 94 N.W.2d 577 (1959).