

NY CLS CPLR § 4546

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Article 45 Evidence (§§ 4501 — 4551)

§ 4546. Loss of earnings and impairment of earning ability in actions for medical, dental or podiatric malpractice.

1. In any action for medical, dental or podiatric malpractice where the plaintiff seeks to recover damages for loss of earnings or impairment of earning ability, evidence shall be admissible for consideration by the court, outside of the presence of the jury, to establish the federal, state and local personal income taxes which the plaintiff would have been obligated by law to pay.
2. In any such action, the court shall instruct the jury not to deduct federal, state and local personal income taxes in determining the award, if any, for loss of earnings and impairment of earning ability. The court shall further instruct the jury that any reduction for such taxes from any award shall, if warranted, be made by the court.
3. In any such action, the court shall, if warranted by the evidence, reduce any award for loss of earnings or impairment of earning ability by the amount of federal, state and local personal income taxes which the court finds, with reasonable certainty, that the plaintiff would have been obligated by law to pay.

History

Add, L 1986, ch 266, § 4; amd, L 1987, ch 507, § 3, eff July 30, 1987.

Annotations

Notes

Editor's Notes

Laws 1986, ch 266, § 1, provides as follows:

Section 1. Legislative findings and declaration. The legislature hereby finds and declares that reforms have been enacted to restrain increases in medical and dental malpractice premiums and related costs and to prevent medical and dental malpractice. These reforms include those enacted by chapter two hundred ninety-four of the laws of nineteen hundred eighty-five and further reforms enacted by chapters of the laws of nineteen hundred eighty-six applicable to all actions for personal injury. The legislature finds, for example, that the former standard for appellate adjustment of damages in personal injury actions—i.e., whether the award is so excessive or inadequate as to shock the conscience of the court—provided for insufficient review of awards and that the new standard, enacted by a chapter of the laws of nineteen hundred eighty-six, will invite more careful appellate scrutiny.

The complete effect of some of these reforms cannot be fully measured for some time, however, due to the considerable delay currently between the malpractice event and its final determination.

In the meantime, the legislature finds and declares that upward pressures on already high malpractice premiums continue to threaten the public health by discouraging physicians and dentists from initiating or continuing their practice in New York and by contributing to the rising cost of health care as premium costs are passed along to health care consumers.

The legislature finds and declares, therefore, that additional steps must be taken in the public interest to reduce the cost of malpractice insurance, such as providing the superintendent of insurance with the authority to establish rates for medical malpractice insurance and gradually requiring the issuance of only claims-made policies which will significantly reduce physician and

health care system costs in the short-run and substantially enhance the reliability and predictability of malpractice insurance rate regulation in the future.

The legislature further finds that reducing lost earnings awards to reflect the effect of income taxation will reduce the costs of the dental and medical malpractice system.

The legislature further finds that the arbitration of malpractice claims should expedite the resolution of malpractice claims and reduce costs associated with their adjudication. Accordingly, the legislature finds that statutorily authorizing health maintenance organizations to offer the alternative of arbitration to their subscribers and requiring health care professionals and entities to participate in such arbitrations will provide a significant opportunity to assess the efficacy of arbitration in the malpractice context.

The legislature further finds that establishing a mechanism for the arbitration of damages when liability is not contested and streamlining the medical malpractice panels will result in the more timely resolution of claims.

The legislature further finds that requiring certificates of merit in medical and dental malpractice actions, together with similar reforms enacted previously, will improve the quality of medical malpractice adjudications and deter the commencement of frivolous cases.

Further, the legislature finds and declares that physicians responsible for acts of professional misconduct should be subject to effective discipline and that improvements in the disciplinary process will contribute to the protection of the public health and the reduction of the incidence of malpractice.

Laws 1987, ch 507, § 4, provides as follows:

§ 4. This act shall take effect immediately and shall apply to any acts, omissions or failures occurring on or after such date.

Notes to Decisions

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Court should have reduced award for future lost earnings by deducting personal income taxes at 23.75 percent rate where unrefuted affidavit from defendant's economic expert stated that infant plaintiff would have been obligated to pay federal, state, and local personal income taxes at such rate. *Cabrera v New York City Health & Hosps. Corp.*, 272 A.D.2d 495, 708 N.Y.S.2d 429, 2000 N.Y. App. Div. LEXIS 5785 (N.Y. App. Div. 2d Dep't 2000).

In personal injury action, defendants were entitled to 25.6 percent reduction of award for loss of earnings for income taxes, pursuant to CLS CPLR § 4546. *Giventer v Rementeria*, 184 Misc. 2d 744, 705 N.Y.S.2d 863, 2000 N.Y. Misc. LEXIS 64 (N.Y. Sup. Ct. 2000).

Since an administratrix's action for wrongful death medical malpractice action sought damages of a pecuniary nature, the administratrix waived any claim of privacy or privilege with respect to the financial affairs of the decedent and thus defendants were entitled to discovery of all matters pertaining to economic loss, including the decedent's income tax returns. *Friedman v Frank*, 835 N.Y.S.2d 872, 16 Misc. 3d 321, 237 N.Y.L.J. 104, 2007 N.Y. Misc. LEXIS 3310 (N.Y. Sup. Ct. 2007).

Patient's loss of wages/earnings award did not have to be reduced to account for the Federal Insurance Contributions Acts (FICA) tax as: (1) FICA was a social security tax and not a personal income tax; (2) this section had to be strictly construed and did not mention FICA; and (3) to reduce the patient's loss of wages award by another 7 percent would be unjust as when an employee paid the required FICA tax, he or she was earning credits or quarters to establish his or her eligibility for Social Security and Medicare benefits, but the patient would not earn any such credits for the reduction of his award. *Boyer v Kamthan*, 978 N.Y.S.2d 633, 42 Misc. 3d 786, 2013 N.Y. Misc. LEXIS 6116 (N.Y. Sup. Ct. 2013).

Strictly construing this section, as it must, the court concludes that this section only allows an award for loss of wages/earnings to be reduced by personal income tax and that the Federal Insurance Contributions Acts (FICA) tax is not strictly such a tax as the payment of the FICA tax is directed toward a benefit program, from which the employee may, at some point, draw based

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upon the amount of credit or quarters he or she has accumulated, as opposed to a personal income tax that is helping to raise revenue for the federal, state or local government. *Boyer v Kamthan*, 978 N.Y.S.2d 633, 42 Misc. 3d 786, 2013 N.Y. Misc. LEXIS 6116 (N.Y. Sup. Ct. 2013).

Research References & Practice Aids

Jurisprudences:

76 NY Jur 2d Malpractice § 354. .

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4546, Loss of Earnings and Impairment of Earning Ability in Actions for Medical, Dental or Podiatric Malpractice.

3 Rohan, New York Civil Practice: EPTL P 5-4.2, 5-4.3.

5 Cox, Arenson, Medina, New York Civil Practice: SCPA P 2203.03, 2204.07.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 24.01-a. Collateral source payments in personal injury, property damage and wrongful death actions.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 9.18. Meeting Additional Requirements for Jury Verdicts in Certain Actions.

LexisNexis AnswerGuide New York Negligence § 7.33. Examining Defendant's Disclosure Demands.

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Matthew Bender's New York Evidence:

1 Bender's New York Evidence § 107.04, Preservation.

Matthew Bender's New York Checklists:

Checklist for Introducing Documents and Information into Evidence LexisNexis AnswerGuide
New York Civil Litigation § 10.05.

Texts:

NY Pattern Jury Instructions 3d, PJI 2:151C.

Hierarchy Notes:

NY CLS CPLR, Art. 45

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