

Is Post-Traumatic Stress Disorder Physical Injury for Tax Purposes?

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With the scope of section 104 often debated and litigated, a question exists as to the treatment of post-traumatic stress disorder (PTSD). Should a PTSD diagnosis make resulting damages tax free? With increased diagnoses of PTSD, these issues will arise more frequently.

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Argentinean writer José Narosky is said to have observed that in war, there are no unwounded soldiers. Even soldiers who return from war physically whole face struggles reintegrating with society.¹ Yet only after the Vietnam War was post-traumatic stress disorder (PTSD) added to our lexicon and legitimized. Some studies estimate that 30 percent of returning veterans have PTSD² and that women are twice as likely as men to suffer from it.³

Today, PTSD has moved from military to civilian life, with diagnoses in increasing numbers in the general population.⁴ It is now common following

traumatic events from workplace violence, discrimination, harassment, auto accidents, child abuse, sexual assault, and more. A 2004 study found that one in 10 victims of workplace bullying or trauma have PTSD, with 44 percent suffering like battered women or victims of child abuse.⁵

PTSD is generally characterized by paranoia, intense fear, and the inability to concentrate, crippling one's ability to function.⁶ Its implications are slowly being integrated into legal literature and case law, and the IRS and the Tax Court are being forced to address its tax implications. However, like all damages that are not physically observable, the standard for excludability remains unclear.

A basic tenet of tort law is that one takes a plaintiff as one finds him.⁷ All plaintiffs do not react the same to a particular stimulus.⁸ Like a broken leg, PTSD is a resulting injury. Medical and psychiatric professionals generally agree that PTSD is an illness, psychiatric in nature.⁹ The authorities debate its organic causes and the physical nature of the changes PTSD brings to the brain and to the rest of the sufferer's body.¹⁰ Yet all seem to agree that PTSD is not simply emotional distress — not even an extreme form of it.

PTSD as a Physical Injury

Under section 104(a)(2) before 1996, recoveries for personal harm, including emotional distress, were tax free. Perceived abuses led Congress to

Disorders in Children," *Catecholamine Function in Post Traumatic Stress Disorder: Emerging Concepts* 253 (1994).

⁵Noreen Tehrani, "Bullying: A Source of Chronic Post Traumatic Stress?" 32 *Brit. J. of Guidance & Counseling* 357 (2004).

⁶See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV*, section 309.81 (1994).

⁷*Vosburg v. Putney*, 80 Wis. 523 (1891).

⁸Consider the definition of intentional infliction of emotional distress: "If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause, (a) although the actor has no intention of inflicting such harm, and (b) irrespective of whether the act is directed against the other or a third person." See Restatement 2d of Torts, section 312 (1977).

⁹Gregory C. Gray et al., "Increased Postwar Symptoms and Psychological Morbidity Among U.S. Navy Gulf War Veterans," 60 *Am. J. of Tropical Med. and Hygiene* 758 (1999).

¹⁰See Monica Uddin et al., "Epigenetic and Immune Function Profiles Associated With Posttraumatic Stress Disorder," *Proc. of the Nat'l Acad. of Sci.* (2010).

¹See Carrie Farmer et al., "A Needs Assessment of New York State Veterans," RAND Corporation Report for New York State Health Foundation, Doc No. TR-920-NYSHF (2011).

²Charles W. Hoge et al., "Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care," 351 *New England J. of Med.* 13 (2004).

³Ronald C. Kessler et al., "Posttraumatic Stress Disorder in the National Comorbidity Survey," 52 *Archives of Gen. Psychiatry* 1048 (1995).

⁴Children may especially be at risk. Bruce D. Perry, "Neurobiological Sequelae of Childhood Trauma: Post Traumatic Stress

(Footnote continued in next column.)

amend section 104 to exclude only damages for personal *physical* injuries and *physical* sickness.¹¹ Over the last 15 years, the IRS has not defined the physical requirement in regulations, revenue rulings, or notices.¹² However, private letter rulings and the IRS position in litigated cases make clear that the IRS expects there to be “observable bodily harm” such as broken bones, cuts, or bruises.¹³ If one can see it, it must be physical.

The unfortunate corollary is that if one *cannot* see it, then it must *not* be physical. That intended bright-line may be more defensible as an administrative matter when it comes to physical injury, but it is hard to understand the putative bright line in the case of physical sickness. One ponders such questions as whether the modifier before the word “sickness” is meant to differentiate between sickness of the body (within the exclusion) and sickness of the mind (outside the exclusion).¹⁴

In the realm of taxation, these questions matter. If a defendant pays a plaintiff for causing PTSD, should the payment be taxed? As we shall see, I believe the answer should be no. Does it depend on what other injuries the plaintiff had? No again.

Does it depend on the nature of the defendant’s action that caused the PTSD? It shouldn’t. Or whether other similarly situated persons also would have exhibited similar evidence of PTSD, or whether the plaintiff is particularly sensitive or prone to acquiring it? Plainly, the answer here is no. Remember: You take your plaintiff as you find him.

At first glance, PTSD may appear to be purely psychological. The physical body may seem entirely unharmed. However, a strong case can be made that PTSD is a physical sickness and that any resulting recovery should be excludable.

Defining Physicality

Despite the central importance of the physical injury and physical sickness concept in the post-1996 version of section 104, there is no definition of “physical.” The IRS typically has focused on physical injuries, considering recoveries to be excludable only if there is observable bodily harm.¹⁵ Thus, the

IRS has construed damages allocable to unwanted physical contact *without* observable physical evidence as fully taxable.¹⁶

Conversely, the IRS has sought to tax recoveries from “merely” emotional anguish. Perhaps most infamously, in *Murphy v. IRS*,¹⁷ the taxpayer’s recovery was viewed as taxable. Although Murphy pointed out that she had experienced somatic injuries as a result of the defendant’s behavior, Chief Judge Ginsburg ultimately ruled that Murphy did not receive her damages *because of* her bruxism and other physical manifestations of stress.¹⁸ Murphy’s assertions of anxiety, humiliation, and embarrassment were not enough to constitute *physical* injury or sickness, even though they may have caused bruxism leading to permanent tooth damage.

Of course, it is clear from the 1996 legislative history that the “physical” modifier was intended to ensure that emotional distress recoveries (without explicit physical evidence) are taxable.¹⁹ Yet emotional and physical are often inextricably linked. Plainly, they are not mutually exclusive. Moreover, PTSD leaves observable physical footprints on the brain that can directly lead to other debilitating physical problems.²⁰

Subsections of Section 104

Section 104(a)(2) excludes damages for physical injuries or physical sickness. However, section 104(a) contains other subsections. Section 104(a)(1) excludes amounts received under worker’s compensation acts as compensation for personal injuries or sickness. Section 104(a)(4) excludes amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces. Neither of these subsections requires the injuries or sickness to be physical as in section 104(a)(2).

Section 1529 of the Taxpayer Relief Act of 1997²¹ created a presumption of personal injury for purposes of section 104(a)(1) in cases of heart disease and hypertension in former police officers and firefighters. Such heart disease and hypertension is not observably physical (at least not without special

¹¹Small Business Job Protection Act of 1996, section 1605.

¹²See Wood, “Post-1996 Act Section 104 Cases: Where Are We Eight Years Later?” *Tax Notes*, Oct. 4, 2004, p. 68, *Doc 2004-18582*, or 2004 *TNT* 189-27; Wood, “IRS Allows Damages Exclusion Without Proof of Physical Harm,” *Tax Notes*, Mar. 31, 2008, p. 1388, *Doc 2008-5734*, or 2008 *TNT* 63-31.

¹³See LTR 200041022, *Doc 2000-26382*, 2000 *TNT* 201-10.

¹⁴See Wood, “Tax-Free Physical Sickness Recoveries in 2010 and Beyond,” *Tax Notes*, Aug. 23, 2010, p. 883, *Doc 2010-16739*, or 2010 *TNT* 165-7.

¹⁵See LTR 200041022, *supra* note 13: “We believe that direct unwanted or uninvited physical contacts resulting in observable
(Footnote continued in next column.)

bodily harms such as bruises, cuts, swelling, and bleeding are personal physical injuries under section 104(a)(2).”

¹⁶*Id.*

¹⁷493 F.3d 170 (D.C. Cir. 2007), *Doc 2007-15777*, 2007 *TNT* 129-4.

¹⁸*Id.* at 176.

¹⁹See H.R. Conf. Rep. No. 104-737, at 301 (1996).

²⁰See Justin Berton, “PTSD Leaves Physical Footprints on the Brain,” *San Francisco Chronicle*, July 27, 2008, available at http://articles.sfgate.com/2008-07-27/news/17173727_1_ptsd-hippo-campus-traumatic.

²¹As amended by the Internal Revenue Service Restructuring and Reform Act of 1998, section 6015(c)(1).

medical equipment) under the standard now required by section 104(a)(2). Similarly, section 104(a)(4) appears to exclude payments made to veterans for PTSD.

In *Sullivan v. United States*,²² the taxpayer received payments from the Department of Veterans Affairs for disabilities resulting from his service in Vietnam, including PTSD. After his disability rating was adjusted upward, he attempted to amend previous tax returns to exclude more of his disability payments. The court balked based on the statute of limitations, but it did not dispute that disability payments for PTSD are excludable under section 104(a)(4).²³

For purposes of section 104(a)(2), the IRS seems to agree in at least some cases that what starts as physical leads to inevitable emotional and psychological aftermath. In 2008 the IRS issued a ruling involving a minor who recovered from sexual abuse.²⁴ The minor had been abused and many years later, long after reaching majority, received a settlement.

At the time of the ruling (and perhaps even during the time the abuse was occurring), the taxpayer had no outward manifestation of physical injuries.²⁵ On recovery years later, the taxpayer could no longer prove observable bodily harm. Nevertheless, the IRS ruled that it was reasonable to *presume* such harm in that case.²⁶ When it is no longer possible to show observable bodily harm, the IRS was willing to *assume* that the damages were physical in the first instance.

Symptoms and Signs

Causation has become terribly important. In tax disputes, it can involve a chicken-or-egg inquiry. The IRS and the Tax Court attempt to determine whether damages are received “on account of”²⁷ physical sickness or physical injury, or rather because of emotional distress (including its physical symptoms). The legislative history of the 1996 amendments to section 104(a)(2) makes clear that payments for emotional distress and the symptoms

that may result from emotional distress (insomnia, headaches, or stomach disorders) are not excludable from income.²⁸

For example, in *Sanford v. Commissioner*²⁹ the Tax Court ruled that physical symptoms including asthma, sleep deprivation, skin irritation, appetite loss, severe headaches, and depression were simply manifestations of emotional distress. That meant the damages were awarded for the emotional trauma, not for the physical symptoms and were therefore taxable.

However, the Tax Court appeared to distinguish *symptoms* of emotional distress from *signs* of emotional distress in *Parkinson v. Commissioner*.³⁰ The court defined a symptom as “subjective evidence of disease or a patient’s condition.” In contrast, a sign is evidence perceptible to the examining physician.

In *Parkinson* the taxpayer suffered a heart attack on the job, brought suit against co-workers for intentional infliction of emotional distress and invasion of privacy, and received a settlement. The IRS argued that the settlement was not excludable because Parkinson received it on account of his claims for emotional distress and invasion of privacy. Unconvinced, Tax Court Judge Thornton sensibly viewed a heart attack — presumably whether or not one can see it on the surface of the body — as a sign (not simply a symptom) of emotional distress.

The court alluded to the relationship between a sign and powers of observation and found the payment excludable. Plainly, a heart attack and its physical aftereffects constitute physical injury or sickness and can hardly be viewed as mere subjective sensations or symptoms of emotional distress, the court said.

Like a heart attack, the nature of PTSD reveals a striking picture of serious and entrenched physical (and mental) effects. Using the Tax Court’s *Parkinson* terminology, the effects of PTSD are plainly signs and not symptoms. They therefore should give rise to damages that are excludable under section 104.

Demonstrable Physical Changes

PTSD is considerably more than extreme anxiety over a traumatic event. In addition to its emotional symptoms, there are measurable changes in both

²²46 Fed. Cl. 480 (Fed. Cl. 2000), *Doc 2000-11837*, 2000 TNT 81-6.

²³See also *Kiourtsis v. Commissioner*, T.C. Memo. 1996-534, *Doc 96-31404*, 96 TNT 236-9, in which disability compensation for PTSD appears to be excludable.

²⁴See CCA 200809001, *Doc 2008-4372*, 2008 TNT 42-21.

²⁵*Id.*

²⁶See Wood, “IRS Allows Damages Exclusion Without Proof,” *supra* note 12.

²⁷See *Commissioner v. Schleier*, 515 U.S. 323 (1995), *Doc 95-5972*, 95 TNT 116-8; *O’Gilvie v. United States*, 519 U.S. 79 (1996), *Doc 96-31894*, 96 TNT 240-1.

²⁸See H.R. Conf. Rep. No. 104-737, *supra* note 19, at 301, n.56 (1996).

²⁹T.C. Memo. 2008-158, *Doc 2008-13911*, 2008 TNT 122-11.

³⁰T.C. Memo. 2010-142, *Doc 2010-14364*, 2010 TNT 124-12. See also Wood, “Tax-Free Physical Sickness Recoveries in 2010 and Beyond,” *Tax Notes*, Aug. 23, 2010, p. 883, *Doc 2010-16739*, or 2010 TNT 165-7; Wood, “Recent Tax Case Expands ‘Sickness’ Exclusion,” *Tax Law News* (May 2010), at 3.

the victim's neuroendocrinology and neuroanatomy. The former are changes to how the brain functions. The latter are changes to how the brain physically exists.

The overarching nature of these neurological changes suggests they are the cause of PTSD, not its symptoms. In other words, PTSD is not merely a frame of mind that can manifest itself in physical ways. Instead, the physical results of traumatic events are the cause. The PTSD itself is the effect.³¹

On a neuroendocrinological level, traumatic events that lead to PTSD can cause an overactive adrenaline response, resulting in the formation of deep neurological patterns in the brain.³² Studies demonstrate that a majority of PTSD sufferers show abnormally low levels of cortisol secretion in fight-or-flight situations. Cortisol is an important hormone in restoring homeostasis and normalcy after stressful incidents, and a dearth of cortisol represents a serious neuroendocrinological problem.³³

One need not explore the nuances of the science to conclude that many of the measurable effects of PTSD differentiate it from other psychiatric disorders such as major depression and bipolar disorder.³⁴ In fact, a study by Columbia University demonstrates that PTSD may actually catalyze objectively measurable changes to physical attributes, including some that are as fundamental as DNA structure.³⁵ Some researchers believe that:

trauma that [a PTSD sufferer] experiences results in molecular changes around the DNA that result in changes in what genes are expressed and not expressed . . . that people who experience traumatic events are more likely to have these molecular epigenetic changes, which may explain in part why particular genes then are expressed or not expressed, and result in symptoms of the psychological disorder.³⁶

Even more basic than the neuroendocrinological changes that affect those afflicted with it, PTSD also changes the physical structure of the brain itself. The physical structure of the brain is observable, much as one can observe a heart attack. In that

sense, PTSD can tie into the IRS's current nomenclature of observable bodily harm.

There have been recent developments in magnetoencephalography, a noninvasive measurement of magnetic fields in the brain. With this technology, researchers have been able to map the living human brain more thoroughly than previously possible with conventional brain scans (X-ray, CT scan, or MRI).³⁷ Studies have noted differences in the prefrontal cortex as well as in the hippocampus of PTSD sufferers.³⁸ For example, military veterans with PTSD showed a 20 percent reduction in hippocampus size compared with veterans free of the disorder.³⁹

Cause and Effect

The IRS would like to draw a bright line between the physical and the nonphysical. This is understandable, but may be unrealistic. The tax rules should be more nuanced than the playground basketball rule, "no blood, no foul." Increasingly, we can expect the putatively bright line drawn by the Service to become even more blurred.

The scope of section 104 is an increasingly important battleground. In her 2009 annual report to Congress, National Taxpayer Advocate Nina Olson addressed section 104 excludability and stated her position that PTSD and similar illnesses should be excludable.⁴⁰ I agree, and it should not be a stretch for the IRS to agree, too.

After all, the IRS has recognized that sickness can give rise to a section 104 exclusion. For example, LTR 200121031⁴¹ makes clear that a sickness may be physical despite not displaying observable bodily harm. In that ruling, the taxpayer was awarded damages from asbestos manufacturers owing to her husband's death from lung cancer, a sickness attributed to inhalation of asbestos fibers.

³⁷See Katie Drummond, "Neuroscientists Say Brain Scans Can Spot PTSD" (Jan. 22, 2010), available at <http://www.wired.com/dangerroom/2010/01/brain-biomarker-could-be-the-key-to-ptsd-diagnosis/>.

³⁸Neil R. Carlson, *Physiology of Behavior* (2007).

³⁹*Id.*

⁴⁰See Olson, "National Taxpayer Advocate 2009 Annual Report to Congress," *Doc 2010-174*, 2010 TNT 4-19, at 356:

Since the amendment of IRC section 104(a)(2) in 1996, the scientific and medical community has demonstrated that mental illnesses can have associated physical symptoms. Accordingly, conditions like depression or anxiety are a physical injury or sickness and damages and payments received on account of this sickness should be excluded from income. Including these damages in gross income ignores the physical manifestations of mental anguish, emotional distress, and pain and suffering.

⁴¹*Doc 2001-15011*, 2001 TNT 103-10.

³¹See Uddin, *supra* note 10.

³²J.W. Mason et al., "Elevation of Urinary Norepinephrine/Cortisol Ratio in Posttraumatic Stress Disorder," 176 (8) *J. Nerv. Ment. Dis.* 498 (1988).

³³*Id.*

³⁴See Rachel Yehuda et al., "Effects of Trauma Exposure on the Cortisol Response to Dexamethasone Administration in PTSD and Major Depressive Disorder," *Psychoneuroendocrinology* (2004). See also Berton, *supra* note 20.

³⁵See Uddin, *supra* note 10.

³⁶*Id.*

More recently, *Domeny v. Commissioner*⁴² provided an important clarification of the treatment of physical sickness. Domeny's multiple sclerosis (MS) was exacerbated by her working conditions to the point that she was unable to work (and was subsequently fired). Her symptoms of MS, including shooting pain, fatigue, burning eyes, spinning head, vertigo, and lightheadedness, "spiked" as a result of the conditions she faced on the job. The Tax Court concluded that the settlement payment Domeny received was for physical illness within the scope of section 104 and ruled it excludable.

Demonstrably Physical

Given the prevailing scientific research, there should be little doubt that PTSD is like the physical sickness in *Domeny*. No less than the MS suffered by Domeny, a plaintiff with PTSD is physically sick — and observably so. Unlike the payment for mere emotional trauma that was held to be taxable in *Sanford*, someone with PTSD *does* suffer observable bodily harm. Whether the physical effects of PTSD are as complex as neuroanatomic changes in the brain or as fundamental as in the sufferer's DNA may not matter. In *Sanford* the taxpayer had unquestionably physical complaints. They included asthma, sleep deprivation, skin irritation, appetite loss, severe headaches, and depression. Yet as physical as they were, the court dismissed them as mere symptoms of emotional distress.

What is important to the tax equation is that the scientific community has researched and verified that PTSD is real and is demonstrably physical in signs, symptoms, and effects. This should be sufficient for a PTSD diagnosis to be treated much like a medical report on a broken leg. A payment for either should be tax free. Yet there remains the nettlesome question whether PTSD is *caused* by the observable neurological changes or whether such observable neurological changes are themselves merely *symptoms* of PTSD. According to Dr. Sandro Galea, one of the authors of the Columbia study⁴³ on measurable physical changes to the brain of PTSD sufferers:

It's a challenge to tease apart whether these molecular changes are causing the disorder or are the result of the disorder. We have a number of analyses in the paper that show, for example, that the more traumatic events people experience, the more of these molecular changes they have. That, of course, sug-

gests that the molecular changes are a result of the traumatic events [and not the PTSD itself].⁴⁴

If these molecular changes are a result of the traumatic events that led to the onset of PTSD, then much like the lung cancer in LTR 200121031, they should be considered attributable to physical sickness. Yet even if these observable changes are considered effects of a *mental* affliction, that does not make them mere symptoms of emotional distress. They are clearly much more than that.

Unlike the ailments in a famous footnote to the conference committee report to the 1996 act,⁴⁵ these are not minor. The D.C. Court of Appeals in *Murphy* considered sleeplessness, stomachaches, and headaches minor and transitory.⁴⁶ Clearly, a physical change in the brain structure, a change in neural pathways, and significant shifts in hormonal and neurological reaction are all *major*. None of these alterations can be considered minor *or* transitory, much less minor *and* transitory.

An additional causal question may be whether a case of PTSD was caused by the conditions and/or termination of work, or whether the disorder could have other origins. Yet those causal questions arise in virtually any litigation. The *Domeny* case makes clear that the settlement monies were for the exacerbation of MS symptoms caused directly by the taxpayer's working conditions and subsequent firing. Judge Gerber, who decided *Domeny*, also decided *Prinster v. Commissioner*,⁴⁷ in which he held that a settlement for hypertension, hyperlipidemia, and other ailments was not excludable.

Taxpayers, tax advisers, the IRS, and the Tax Court must evaluate those payments. Factual distinctions such as that between *Domeny* and *Prinster* cannot be eliminated by IRS bright lines. Indeed, the court in *Prinster* simply noted that the taxpayer had not sufficiently shown that his ailments resulted from his work conditions or termination. That invokes the traditional relevance of the reason for a payment, a point often evaluated in assessing the tax consequences of a settlement payment.

A settlement agreement may (or unfortunately, may not) be explicit as to the precise intent of a settlement payment. It may parse the recovery into several categories to be even more discerning. The parties may bargain over the language and the

⁴⁴See "The Biological Effects of Traumatic Events," National Public Radio (May 8, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=126637629>.

⁴⁵H.R. Conf. Rep. No. 104-737, *supra* note 19, at 301.

⁴⁶See 493 F.3d 170 (2007).

⁴⁷T.C. Summ. Op. 2009-99, *Doc* 2009-14983, 2009 TNT 124-47.

⁴²T.C. Memo. 2010-9, *Doc* 2010-787, 2010 TNT 9-9.

⁴³See Uddin, *supra* note 10.

allocation of payments among categories of damages that were all sought in the complaint. The IRS and the courts may well respect it.⁴⁸

But whether or not a settlement agreement explicitly addresses it, a payment for PTSD should be viewed as one for physical injuries or physical sickness. If there must be a bright line between taxable and tax-free based on observable bodily harm, PTSD should qualify as both observable and relating to the body; it is certainly harm. Of course, treating PTSD as physical injuries or physical sickness will not remove the line drawing that has come to characterize section 104 analysis.

An attempted bright line leads to stark tax differences between similarly situated taxpayers. There still will be questions whether the defendant's conduct *caused* the plaintiff's PTSD and whether the defendant's payment was really made

⁴⁸See *Knuckles v. Commissioner*, 349 F.2d 610, 613 (10th Cir. 1965), *aff'd* T.C. Memo. 1964-33; *Robinson v. Commissioner*, 102 T.C. at 126.

on account of the PTSD. One plaintiff receiving a payment for some physical symptoms (à la *Parkinson, Domeny, or Murphy*) may not be taxed on his recovery. Other identically situated taxpayers may be taxed on theirs. However, shorn of the awkward nomenclature of signs, symptoms, and the thing itself, recoveries for PTSD should be well within the scope of the exclusion.

Conclusion

Based on the prevailing scientific data, PTSD should not be considered a purely emotional or mental disorder for tax purposes. The case is strong for treating PTSD as physical sickness or physical injury within the meaning of section 104. Taxpayer Advocate Nina Olson has argued that disorders such as PTSD are indeed physical and has spotlighted this area of dispute as a field that must be addressed soon.⁴⁹ As is so often true with her observations, she is correct on both counts.

⁴⁹See Olson, *supra* note 40.

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