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SOCIAL CONTRACT IN *O’DONNABHAIN v. COMMISSIONER*

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“RHIANNON O’DONNABHAIN IS A TAXPAYER”: TAX AND THE
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*Ann Mumford**

The case of *O’Donnabhain v. Commissioner*, decided by the U.S. Tax Court in 2010, considered the IRS’s position that a taxpayer who had been diagnosed with gender identity disorder (GID) could not deduct the medical expenses associated with sex reassignment surgery (now referred to as gender confirmation surgery) under § 213.¹ The IRS contended that the expenses were cosmetic and not medically necessary.² The court ruled that the taxpayer, Rhiannon O’Donnabhain, should be allowed to deduct the costs of her treatment for GID, including sex-reassignment surgery and hormone treatments.³ In its decision, the court found that the IRS position was, “at best a superficial characterization of the circumstances that is thoroughly rebutted by the medical evidence.”⁴

The IRS’s original decision was received with alarm by the medical community.⁵ Doctors had diagnosed O’Donnabhain and prescribed treatment for her disorder. The decision of the IRS to deny the deductions led to accusations that the IRS apparently felt comfortable challenging medical

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¹ Nancy J. Knauer, *Commentary on O’Donnabhain v. Commissioner*, in *FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS* 267–68 (Bridget J. Crawford & Anthony C. Infanti eds., 2017). “Gender identity disorder” has since been removed from the *Diagnostic and Statistical Manual of Mental Disorders*. Dani Heffernan, *The APA Removes “Gender Identity Disorder” from Updated Mental Health Guild*, GLAAD (Dec. 3, 2012), <https://www.glaad.org/blog/apa-removes-gender-identity-disorder-updated-mental-health-guide>.

² Knauer, *supra* note 1, at 267–68.

³ *Id.*

⁴ *O’Donnabhain v. Comm’r*, 134 T.C. 34, 77 (2010).

⁵ Anthony Faiola, *Woman Suing IRS over Sex-Change Tax Claims*, WASH. POST, Oct. 1, 2007, at A3.

diagnoses.⁶ The Tax Court’s rejection of the IRS’s position was welcomed, but questions lingered as to the rationale used by the court in reaching this decision.⁷ The subtlety of the rewritten judgment is that it both protects the right of the taxpayer to deduct medical expenses, but also, as this review will explain, seeks to protect the taxpayer from the propagation of any stigma in relation to “illness” or “disorder” (not, as the rewritten judgment is careful to explain, that the view that illness should be associated with stigmatization is shared by the rewritten judgment’s author).

It is difficult to escape the power of the first line of the rewritten judgment: “Rhiannon O’Donnabhain is a taxpayer.”⁸ Not only does this place Rhiannon O’Donnabhain, herself, “front and center,”⁹ as the commentary accompanying this rewritten judgment describes, it also places Rhiannon O’Donnabhain front and center as a party to the social contract at the heart of which sits tax. The agreement between citizen and state covers not simply some payments, in the form of tax, owed by the taxpayer to the government but also the scope of that agreement and the content of the rights and obligations protected within, all are covered by the rewritten opinion. One does not need to be able to afford to pay taxes in order to be able to access those rights (it is far more than *juste retour*, or a quid pro quo exchange of tax for benefits), but as a taxpayer, one has standing in the construction of that contract.

The social contract keeps an eye on the importance of the individual in fullness; and it does not reduce the individual simply to an amalgamation of needs. And yet, although the original decision of *O’Donnabhain* was heralded as an important victory for individuals undertaking gender confirmation surgery, closer reading of the decision (as this insightful chapter enables) reveals lingering attention to the details of the surgery, and assumptions as to the (potentially stigmatizing) “illness” that would lead a

⁶ *Id.*

⁷ See Lauren Herman, Note, *A Non-Medicalized Medical Deduction?: O’Donnabhain v. Commissioner & the I.R.S.’s Understanding of Transgender Medical Care*, 35 HARV. J.L. & GENDER 487, 511–13 (2012).

⁸ David B. Cruz, *O’Donnabhain v. Commissioner of Internal Revenue*, in FEMINIST JUDGMENTS, *supra* note 1, at 274.

⁹ *Id.*

person to require this form of medical care.¹⁰ This is important in two respects. By introducing O'Donnabhain as a “taxpayer” and not (as occurred in the judgment) someone who “was born a genetic male with unambiguous male genitalia,”¹¹ Cruz presents a party to the social contract who is entitled to participate within its terms; and not, as the majority’s introduction strongly implies, simply a medical problem. Rather, Cruz’s opening statement draws the reader’s attention elegantly to the point that O’Donnabhain as a taxpayer, since 1942, has been able to deduct medical expenses.¹²

The second respect in which Cruz’s approach is significant lies in the way it differs in outcome. Although the majority of the expenses were allowed in the original decision, the costs relating to breast augmentation were disallowed on the grounds that they were purely cosmetic.¹³ Cruz’s rewritten judgment concludes that breast augmentation is just one point on a list of treatments which O’Donnabhain’s doctor prescribed for her medical “care.”¹⁴ Justice Gale’s decision to disallow the treatment for breast augmentation was specific to the facts of the case, and did not intend to create a principle that the costs of breast augmentation should always be disallowed after reassignment surgery.¹⁵ Following the “structure or function of the body” prong of § 213(d)(1)(A), however, Cruz pointedly explains how the expenses related to breast augmentation clearly are permitted by the legislation.¹⁶ In the rewritten judgment, Cruz explains that the difference between using the term “care,” as opposed to “treatment,” is important.¹⁷ The correct test, which the IRS failed to acknowledge, is whether the medical care is “for the purpose of affecting any structure or function of the body.”¹⁸

¹⁰ Knauer, *supra* note 1, at 266–96.

¹¹ *Id.* at 272.

¹² Cruz, *supra* note 8, at 275.

¹³ Knauer, *supra* note 1, at 268–69.

¹⁴ Cruz, *supra* note 8, at 296.

¹⁵ Knauer, *supra* note 1, at 269.

¹⁶ Cruz, *supra* note 8, at 281.

¹⁷ *Id.*

¹⁸ *Id.* at 279.

Beyond O'Donnabhain's status as a taxpayer, Cruz is meticulous in his efforts to make no other assumptions about her.¹⁹ First of all, as the opinion subtly emphasizes, assumptions as to O'Donnabhain's wellness or illness, requirement for care or not, are the preserve of her doctors, and not the IRS. Secondly, assumptions are inappropriate because most courts simply are incapable of understanding her experience. As Cruz eloquently writes, "[t]hat the author of this opinion is a gay man and identifies as a member of various LGBT communities is no guarantee against misrecognition or mistake; it could even lead to overconfidence about this court's level of understanding."²⁰ If, as a judge, Cruz were to make assumptions about persons identified as transgender, this would constitute a first step towards pressuring her to accept that she is "'defective,' 'ill,' or 'diseased,' in the statutory and regulatory terminology, to obtain a deduction for expenses that are patently medical in nature."²¹ Cruz clarifies that this is not to endorse a lesser category for persons with "illness, whether physical or mental," but to acknowledge that "many in U.S. society do not agree."²² This, then, is one aspect of "stigmatization" that might be sidestepped.

The underlying risk, Cruz acknowledges, is that the IRS agrees that O'Donnabhain does not have an illness.²³ This is the justification for denying her a deduction for her medical care.²⁴ Indeed, the practical benefits of a "diagnosis" are emphasized by Cruz as simply an approach that has made treatment possible for persons who could not otherwise afford it.²⁵ The original decision held that O'Donnabhain should be able to recover the expenses of treating her GID, and this is a delicate line of which Cruz is not unaware.²⁶

¹⁹ See *id.* at 274–96.

²⁰ *Id.* at 282.

²¹ *Id.*

²² *Id.* at 284.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Knauer, *supra* note 1, at 268–69.

It is noteworthy that the rewritten judgment does not focus to a large extent on the amount of the deduction. A not insignificant amount of money is at stake; and thus, the availability of the deduction would appear to be important to the ability of many individuals to be able to afford this medical treatment. As this would not have been an issue for other illnesses or disorders, under the terms of the statute, then, it is not at issue here.

Knauer notes the subtlety of the rewritten opinion, as it sidesteps the “portal of disease and disorder.”²⁷ This stands in contrast to Justice Gale’s observation that, if Rhiannon were a “normal male,” then she would not wish to have her genitals removed.²⁸ The different experiences of different persons are all, under the Fourteenth Amendment, entitled to equality of consideration by a court.²⁹ By opening with the details of, and then proceeding to linger upon, O’Donnabhain’s “disorder,” the judgment implies that one experience (that of nontransgender persons) is the norm against which that of transgender persons must be judged. In this sort of ranking, courts have an inglorious history, as Cruz’s brief review of the “treatment” of homosexuality and women substantiates.³⁰

Cruz’s rewritten judgment presents a masterful exploration of both history and law. It reminds us that O’Donnabhain’s reception by the IRS, and that agency’s presumption as to how she should be treated, is but part of an ongoing history relating to the mistreatment of marginalized groups. It also displays agility and technique, simply, with the requirements of § 213. This review struggles to do justice to how well the rewritten judgment explains the details of § 213. It is difficult to finish reading the rewritten judgment and reach any other conclusion than that the IRS had misapplied the legislation. This was not an ambiguous area of law. The IRS denied the deduction simply because it felt it had permission to do so with a transgender taxpayer. Cruz addresses this directly, and, in so doing, leaves the reader with a rich sense of what might have been possible had the original decision elected to do this as well.

²⁷ *Id.* at 272.

²⁸ *Id.* at 270.

²⁹ See Cruz, *supra* note 8, at 282.

³⁰ *Id.*

The rewritten opinion does not linger on the details of the procedure any more than is necessary to itemize them for deduction. Simply, and forthrightly, the rewritten decision uses the pronouns with which O'Donnabhain identifies. In this and other ways, it is the decision one wishes had been written.