

LEGAL BITES

25.11.06

WORKERS' COMP IS TAX ASSESSABLE

The Administrative Appeals Tribunal has found that workers' compensation lump sums for weekly earnings count as income tax and are assessable upon receipt. In this case, the worker received two aggregated sums for weekly earnings payable under s40 of the *Workers Compensation Act 1987*.

Applicant v Commissioner of Taxation [2006] AATA 614 can be found at:
<http://www.austlii.edu.au/au/cases/cth/aat/2006/614.html>

MEDICAL INDEMNITY CLAIMS DROP

The Medical Indemnity Industry Association of Australia (MIIAA) has released a report on premium and indemnity claim trends from 1995 to 2005. It shows that insurance premiums have fallen by about 11% between 2003 and 2005. It also indicates a dramatic drop in claims against neurosurgeons, orthopaedic surgeons and anaesthetists, though GPs have had more claims made against them.

The report can be found at: <http://www.miaa.com.au/media/files/462.pdf>.

NO DUTY OF CARE FOR SOCIAL HOSTS

The Supreme Court of Canada has unanimously held that social hosts of parties do not owe a duty of care to members of the public who may be injured by the conduct of their intoxicated guest.

In this case, Mr Desormeaux was leaving a party in a private home when he drove his car onto oncoming traffic and collided head-on with another vehicle. He had a BAC of 0.225, well over the legal limit of 0.08. As a result of the accident, one of the passengers in the other vehicle was killed and three others seriously injured. One of the injured, Ms. Childs, brought an action against the hosts of the party for the injuries she had suffered.

Both the trial judge and the Court of Appeal concluded that social hosts do not owe a duty of care to members of the public, and Ms Childs appealed to the Supreme Court. The Supreme Court unanimously dismissed the appeal, noting that, firstly, the injury to the third parties was not reasonably foreseeable because there was no finding that the hosts knew, or ought to have known, that Mr Desormeaux was impaired, and that although the hosts knew that he had a history of alcohol consumption and impaired driving, this did not make impaired driving, and the consequent risk to other motorists, reasonably foreseeable. The court further held that even if foreseeability had been established, no duty would arise because a social host at a party, where alcohol is served, is not under a duty of care to members of the public who may be injured by a guest's actions, unless the host's conduct implicates him or her in the creation or exacerbation of the risk. As there was no evidence of such conduct, a *prima facie* duty of care could not be established and the appeal was accordingly dismissed.

Childs v Desormeaux, 2006 SCC 18 (May 5, 2006) can be found at:
<http://scc.lexum.umontreal.ca/en/2006/2006scc18/2006scc18.pdf>

LIFETIME CARE AND SUPPORT

The eligibility for the NSW Lifetime Care and Support scheme has been restricted to children that were under the age of 16 at the time of the motor vehicle accident. This provision will come into effect on 1 October 2006, along with the previously reported *Motor Accident Compensation Act* amendments relating to no-fault recovery by children.

The *Motor Accidents (Lifetime Care and Support) Regulation 2006* can be found at:
<http://www.legislation.nsw.gov.au/>

SMALL CLAIMS LIMIT DOUBLED

The NSW government has doubled the maximum amount the Industrial Relations Commission or an industrial magistrate can order an employer to pay for unpaid remuneration. The increase of the \$10,000 limit to \$20,000 limit was intended to allow employees who are exploited by the implementation of the WorkChoices legislation to reclaim.

The *Industrial Relations (General) Amendment (Small Claims) Regulation 2006* can be found at: <http://www.legislation.nsw.gov.au/maintop/scanact/sessional/NONE/0>

SLIP AND PAY

The NSW Supreme Court has ordered the owners of an apartment to pay compensation to a man who injured his back when he slipped on wet tiles outside his unit. Brereton J found that the owners had been negligent in failing to provide slip-proof mats to cover tiles known to be slippery and exposed to rain at the top of a flight of stairs. His Honour stated that a failure to implement non-mandatory safety standards published after construction would not shield the owners from liability unless the changes were part of the 'fabric' of the building. The man was awarded \$210,000 in costs after reductions for his contributory negligence in slipping.

Morgan v Owners of Strata Plan 13937 [2006] NSWSC 1019 can be found at: <http://www.lawlink.nsw.gov.au/scjudgments/2006nswsc.nsf/6ccf7431c546464bca2570e6001a45d2/d1118e9767039af1ca2571f70014ab2b?OpenDocument>

CARS ASSESSMENT OF QUANTUM NOT BINDING

The NSW Supreme Court of Appeal has recently found that an insurer was not bound by a CARS assessment as to quantum. The issue in that case arose from the wording of s95(2) of the *Motor Accidents Compensation Act 1999* (NSW), which provides that a claims assessor's assessment of the amount of damages for liability under a claim is binding on the insurer, provided that the insurer accepts that liability and the claimant accepts the quantum of damages within 21 days of the certificate being issued. The issue that arose concerned whether insurers are bound by the claims assessor's assessment of the quantum of damages where they allege contributory negligence and dispute the assessor's finding of percentage contributory negligence.

The NSWCA unanimously agreed that, in such cases, the insurer is not bound by the CARS assessor's finding as to quantum. In the leading judgment, Giles JA, said "section 95(2) provides a mechanism by which the non-binding assessment of the issue of liability for a claim and the assessment of the amount of damages for that liability become binding as a package... [however] each of the claimant and the insurer may decline to accept and thereby make the other go to court."

Lee v Yang [2006] NSWCA 214 (2 August 2006) is available at: <http://www.austlii.edu.au/au/cases/nsw/NWCA/2006/214.html>

WORKPLACE RELATIONS - OPERATIONAL REASONS DEFENCE

The Australian Industrial Relations Commission has recently held that using an operational reasons defence to justify a dismissal must be accompanied by proof that genuine operational reasons existed for dismissing the employee; a statement or mere assertion as to the alleged operational reasons is insufficient. In this case, Ms Kieselbach was employed as a nurse by Amity, an aged-care service-provider. Amity claimed that it needed to reduce the hours of unendorsed Division 2 nurses like Ms Kieselbach because its staffing costs were exceeding the funding it received from government. Amity gave Ms Kieselbach the option of alternative employment at reduced hours, or redundancy. Ms Kieselbach refused alternative employment and was made redundant. She alleged that this termination was harsh, unjust or unreasonable under s643(8) of the *Workplace Relations Act 1996*. In response, Amity claimed the operational reasons defence, and submitted internal documents discussing the unsustainable staffing costs in support of this claim. However, the documents did not contain evidence as to the nature of the alleged operational reasons or how they led to the dismissal.

Deputy President Hamilton of the Commission said that under the Act, a mere assertion is

insufficient to prove the genuine operational reasons. As a result, the matter was allocated for conciliation.

Kieselbach v Amity Group Pty Ltd (9th October 2006) can be found at:
<http://www.airc.gov.au/decisionssigned/html/PR973864.htm>

WORKERS' COMPENSATION AMENDMENTS

The Workers' Compensation Amendment (Miscellaneous Provisions) Regulation 2006 makes ancillary changes to regulations as a result of amendments to workers' compensation legislation. This includes:

prescribing a period of 14 days for wage details to be provided to injured workers for computing average weekly earnings;

modifying details that insurers must provide when discontinuing or reducing weekly payments; and

removing the rights to appeal interlocutory matters to the workers' compensation commission president.

The Regulation can be found at:

<http://www.legislation.nsw.gov.au/sessionalview/sessional/SRTITLE/W>

CONSENT TO TREAT A NEWBORN

The NSW Supreme Court has declared that the director-general of the Department of Community Services has the authority to give consent to doctors treating a baby against the mother's will. If the pregnant woman has HIV, but refuses any treatment for HIV in the belief that she is no longer sick, the director-general may then give consent.

Brereton J declared that the director-general had authority to consent to treating the child, provided the treatment excluded surgical treatment of the mother or child. Consent from either the mother or director-general was sufficient for treatment, so the mother's refusal of treatment would become irrelevant in this case.

Re Elm [2006] NSWSC 117 can be found at:

<http://www.lawlink.nsw.gov.au/scjudgments/2006nswsc.nsf/6ccf7431c546464bca2570e6001a45d2/f789fa794ec7257fca257214002c2e02?OpenDocument>

EXPERT EVIDENCE REFORM 'INEVITABLE'

NSW Supreme Court Justice Peter McClellan has spoken out about the problems of expert evidence. His Honour cited personal experiences of partisan experts as a barrister and judge, as well as an empirical study of the opinions of 244 Australian judges. He then gave examples of changes that the NSW Land and Environment Court and Supreme Court had undergone to address these problems. Changes such as court-appointed experts and concurrent evidence had more than halved court time in some cases. Expert evidence, he concluded, was an area where change is 'not only desirable, but inevitable'.

Justice McClellan's speech can be found at:

http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_mcclellan201006