

Tax on verdict interest

Whitaker v Commissioner of Taxation
Simon McGregor, APLA Policy Manager

Maree Whitaker made legal history in Australia when she sued her surgeon over her loss of eye sight. The injury was a known side effect of the operative procedure, but Whitaker was not informed of the risk. The verdict in her favour set a new standard for informed consent in Australia, leaving the UK standard of "doctor knows best" behind.

Whitaker was awarded \$808,564 in damages at trial, including \$65,514 in pre-judgment interest. Her case was appealed twice, ending with a High Court ruling in her favour several years later. During that time she became entitled to \$287,617 in

post-judgment interest. Her legal costs totaled \$348,240, and after recovering party/party costs from her defendants she was still out of pocket \$214,240.

The Australian Taxation Office then assessed her interest as taxable income, and launched this action to recover the same.

The Full Court of the Federal Court of Australia ruled on 26 March 1998, that pre-judgement interest was a capital asset and not taxable, but that post-judgement interest was a "delay in payment of a previously ascertained liability" (see Black CJ) and therefore assessable income. In con-

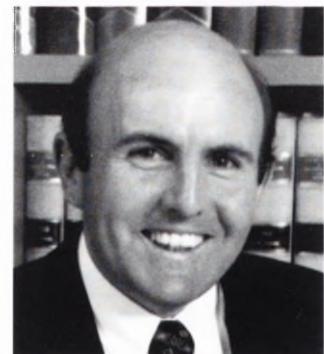
trast, the principal verdict and interest accrued before judgment were a capital asset that was not taxable.

The ruling that post-judgment interest was taxable income in turn raised the issue of the deductibility of the plaintiff's legal costs. The Court ruled that the legal costs were deductible in "the same proportion as the post judgment interest bears to the total amount of the judgment and interest." (*Ibid.*)

The full judgment is available on the internet at http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/262.html ■

Recent changes to the Workers Compensation Act in the ACT

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For those employed privately in the ACT there have been recent changes to the Workers Compensation Act.

The definition of injury in the Act has been amended to incorporate an exception which effectively excludes liability for mental injury or stress, wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of an employer with respect to the transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of a worker or the provision of an employment benefit to a worker.

There are similar provisions in the NSW legislation and also a more limited exception in the Safety Rehabilitation and Compensation Act (as it applies to Public Servants in the ACT). The amendment

will have an effect of limiting the benefits payable to those suffering from stress as a result of action by management. Further, the failure to obtain a benefit associated with employment cannot give rise to a compensable situation.

I suggest that this change will involve the need for a careful consideration of the circumstances giving rise to stress or mental injury. If there are still significant other employment factors giving rise to the said condition, the injury may be compensable even if it does arise from one of the nominated causes.

The amendments to the Act also insert a definition of deemed total incapacity. In summary the effect of the amendment is that a worker will be deemed to be totally incapacitated even if they are only partial-

ly incapacitated if the employer cannot provide appropriate alternative employment and there is no other alternative employment available to the worker.

Therefore, it seems that even if a worker is fit for some duties of work, if the employer is unable to provide those suitable duties, the worker is deemed to be totally incapacitated and will receive benefits accordingly. I suggest that this change will encourage employers to participate in the rehabilitation of workers and hopefully assist workers in a graduated return to work carrying out suitable duties. ■

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