

Capital Gains Tax on Injury Awards

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Members should note that the final Ruling was handed down by the Australian Taxation Office on 6 December, 1995 (Reference: TR95/35)

The general rule is that damages for personal injury received by an individual Plaintiff will be exempt from Capital Gains Tax (CGT).

However, in cases where economic loss is recovered by an associated entity (company/trust) employing the Plaintiff, under a "per quod" action, lawyers must now give consideration to the CGT implications which were considered in the August/September edition of *Update*.

In short, that proportion of compensation received as a result of a personal injury claim that is attributed to an associated entity's loss will now attract CGT liability.

Where employers are co-plaintiffs, lawyers should ensure that any lump sum award/settlement specifies the amount of compensation that pertains to the employer's loss as opposed to the Plaintiff's loss, or that the components of the lump sum be capable of being determined or reasonably estimated. If not, the whole damages award will attract CGT liability and the exemption which would otherwise be available to the Plaintiff will not apply.

Potential CGT liability should therefore be taken into account when assessing quantum in these cases, and the pertinent portion of the damages "grossed up".

Whilst the ATO has indicated that the exemption from CGT will probably be extended to claims for loss of consortium, it would be prudent to incorporate in any terms of settlement or court order an indemnity in relation to CGT liability that may be imposed, until the position becomes clear.

Members should also bear in mind Ronald Gorrick's consideration of the ruling insofar as it relates to damages received by the estate of an injured victim which was published in the June/July *Update*.

APLA Membership

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Hidden Hazards Of Defective Products: Now And In The Future

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Introduction

Many American consumers today assume that commercial products on the market provide a high level of safety based on extensive pre-marketing testing by industry and/or government regulators. Those who handle products liability cases know that this consumer confidence is more often than not an illusion. Hidden hazards exist in the use of currently marketed products. A "hidden hazard" as used herein refers to defects that cannot be seen or suspected to exist by a reasonable consumer.

Toys

Toys have long been a hotbed of consumer products safety litigation. Children are certainly the most innocent of consumers, incapable of appreciating hidden or even apparent dangers of toys. Parents and purchasers of toys are sometimes distracted or misled by attractive packaging and aggressive marketing.

Certainly, strides have been made in this field based largely on the unrelenting efforts of consumer advocates. Age-appropriate guidelines imprinted on the outside packaging of a toy product constitute noteworthy progress toward insuring safety among toy users. However, the massive crayon recalls instituted in 1994 demonstrate that hidden dangers still exist on a massive scale in the toy field. Over the course of 1994, nearly one million boxes of crayons sold by multiple "off brand" manufacturers were recalled because they may contain harmful levels of lead, that could pose a poisoning hazard to children using the crayons. The manufacturers and quantities involved in this recall alone are astounding:

- 3 Bomb Imports of New York City (80,400 boxes recalled)
- Toys "R" Us Crayons sold in 1990-1991 and 1993 (102,000 packages recalled)
- A.J. Cohen Distributors' Crayons (226,008 units recalled)

- Overseas United of New York City (16,949 boxes recalled)
- Bargain Wholesale of Los Angeles (101,184 boxes recalled)
- Universal International of Minneapolis (295,000 boxes recalled)
- Kip Brothers Crayons (19,006 boxes recalled)
- Kaleidoscope Art sets manufactured by Sure Products Inc., Chicago and sold by Toys "R" Us from January through August of 1994 (14,000 sets recalled)

That an innocuous toy product such as crayons could be placed on the market for sale in a form that constitutes such a hidden danger to child users is a surprising example of testing and regulatory lapses in the toy industry. There is no way a consumer could possibly discern the lead content of a crayon, short of taking it to a lab for analysis.

Motor Vehicles

The extensive publicity involving the General Motors Chevrolet and GMAC pick-up trucks with the controversial "side saddle" fuel tanks has overshadowed the discovery of other latent defects in vehicles placed in the stream of commerce.

For example, 356,097 GM Geo Metro passenger cars, 1989-1993 model years, were recalled in 1994 due to a hood latch problem. An improperly positioned spot weld in these subcompact passenger cars can cause the hood to fly open while the vehicle is being driven. This event often occurs without any prior warning.

The American public assumes that vehicles sold in the marketplace have been strictly analysed and inspected. However, defects such as these "flying hoods" demonstrate that such is not always the case.

Consumer Household Products

Household products utilising thermostats continue to present a hidden risk to unsuspecting consumers. Numerous cases of exploding hair dryers and coffee makers have been reported which, upon investigation, have been linked to defectively designed or malfunctioning thermostats.

For example, in June 1994, Black & Decker/General Electric recalled a large number of under-the-cabinet coffee makers manufactured from 1984 to 1988. The thermostats in these units were discovered to be defective and presented a fire hazard. Numerous incidents involving fires caused by these products have been reported.

There is virtually no way for a consumer to independently test a thermostatic unit housed in a household product. The problem is magnified because these defective thermostats can malfunction after the product has been used for a period of time, without any warning signs to the user. Simple mechanical defects of a product's interior workings can also lead to disaster. In March 1994, Casablanca Ceiling Fans recalled over 3.2 million ceiling fans on the market, due to a discovery that while in use they may separate from the canopy on which they are mounted to the ceiling and fall to the ground, typically while the blades are engaged and rotating. This mechanical defect cannot be observed by any consumer, even upon close inspection.

Child Care Equipment

There have been regular reports of defects and dangers posed by child care equipment. For example, over the past several years it was discovered that widely marketed mini beanbag chairs or platforms, that had been marketed for use with infants, posed a risk of suffocation to the infant. The marketing of such products has been largely discontinued.

Even products designed for child safety and comfort can pose hidden risks. For example, two-rod toddler beds and guardrails manufactured by Cosco, Inc., in 1991 and 1992, were recalled in June 1994 due to the realisation that they are an entrapment hazard that could result in asphyxiation. The design of the guard rails can allow a space to be created between the lowest rod, the bed mattress frame, and the mattress, in which a child can become entrapped while sleeping or attempting to back down off the bed through the guardrails. Cosco received at least 67 reports of children becoming entrapped in these toddler bed guardrails.

The average consumer purchasing a new product to enhance child safety would rarely suspect that the product itself may constitute a serious hazard.

Pharmaceutical Products

Many people assume that a drug product approved for use by the F.D.A. is safe, when used as directed. Insiders to the F.D.A. approval process have long known that this is not always the case and that the F.D.A. has approved many products that were later recalled or banned due to proof that they were unsafe. For example, the drug Imitrex, manufactured by Cerenex/Glaxo, has been widely marketed and promoted in 1994 and 1995 as a prescription migraine medication. This is notwithstanding knowledge that Imitrex can cause serious injury or death due to effects the drug has

on the heart. The drug can cause coronary arteries to contract or go into spasm, leading to heart attack or death. The drug has been linked to numerous deaths world-wide, yet Glaxo continues to market and promote the drug.

Food Service Products

In recent years, there have been a number of widely publicised incidents involving food sold through restaurants. Most noteworthy is the "McDonald's Coffee Case." McDonald's requires all franchisees to serve coffee at 180 to 190 degrees, which is 40 to 65 degrees hotter than home-brewed coffee or coffee brewed at most other restaurants. Coffee of this temperature, which is sold both inside the restaurants and at drive-thrus, causes third-degree burns if it comes in contact with human skin.

In August 1994, a 2.9 million-dollar jury verdict was returned for a woman who suffered severe third-degree burns and required extensive medical treatment and skin grafting as a result of spilled McDonald's coffee. There were some 700 prior complaints of incidents before this case, and the jurors in the case commented that their verdict had been based in part on McDonald's "indifferent" attitude regarding this problem. The verdict was substantially reduced by the trial court, and the case was subsequently settled. McDonald's continues to sell its coffee at this temperature.

Although this case has been misconstrued in the media to the advantage of tort reform proponents, the facts of the case and prior incidents demonstrate the reasonableness of the jury's verdict. An unwary consumer has no way of knowing that McDonald's serves its coffee at a higher temperature than anyone else in the industry, or that it will cause third-degree burns on contact with human skin. A reasonable consumer might assume that a coffee spill would result in no more than extreme discomfort and embarrassment.

The Jack-In-The-Box cases involving tainted hamburger meat demonstrate another incidence of consumers exposing themselves and their children to unknown danger. The sole protection to a consumer in such circumstances is cooking hamburger meat until it is well done. Reasonable food service providers should take that precaution.

Conclusion

As the above examples demonstrate, many of the defective products and consumer items sold in the marketplace today have defects that are hidden and

impossible to detect by the reasonable consumer. While the ethical product manufacturer will seek to recall or retro-fit the product when a hidden defect is discovered, such recalls or retro-fits are not always undertaken. Even when recalls or retro-fits are undertaken, the publicity generated by the manufacturer relative to the recall or retro-fit rarely, if ever, matches the level of promotion in promoting the product.

With increasingly sophisticated products, hidden product hazards can grow only more common. For their own safety, the consciousness of American consumers must be raised to rid them of a false sense of security that products that make it to the marketplace somehow provide a guarantee of safety. This is particularly true based on current movements to further limit the government's role in inspecting and regulating consumer products. If the role of agencies such as the F.D.A. and the Department of Agriculture are cut back from the current levels, will products manufacturers and sellers step up their self-regulatory efforts? The lessons of history tell us that the answer is clearly "No."

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