

LIMITATION (AMENDMENT) ACT 1990 No. 36

NEW SOUTH WALES



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LIMITATION (AMENDMENT) ACT 1990 No. 36

NEW SOUTH WALES



Act No. 36, 1990

An Act to amend the Limitation Act 1969 in relation to the limitation of actions for personal injury; and for other purposes. [Assented to 22 June 1990]

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Limitation (Amendment) Act 1990.

Commencement

2. This Act commences on 1 September 1990.

Amendment of Limitation Act 1969 No. 31

3. The Limitation Act 1969 is amended as set out in Schedule 1.

SCHEDULE 1 - AMENDMENTS

(Sec. 3)

(1) Section 6 (**Transitional provisions**):

- (a) Omit "Subject to section 26 and to Division 3 of Part 3", insert instead "Subject to section 26, to Division 3 of Part 3 and to Schedule 5".
- (b) At the end of section 6, insert:
 - (2) Schedule 5 has effect.

(2) Section 11 (**Definitions**):

In section 11 (1), insert in alphabetical order:

"Beneficiary", when used in relation to an order under section 60D or 60H or an application for such an order, means a person for whose benefit an action might be, or might have been, brought under the Compensation to Relatives Act 1897.

"Breach of duty", when used in relation to a cause of action for damages for personal injury, extends to the breach of any duty (whether arising by statute, contract or otherwise) and includes trespass to the person.

"Personal injury" includes any disease and any impairment of the physical or mental condition of a person.

SCHEDULE 1 - AMENDMENTS - *continued*

(3) Section 18A:

After section 18, insert:

Personal injury

18A. (1) This section applies to a cause of action, founded on negligence, nuisance or breach of duty, for damages for personal injury, but does not apply to:

- (a) a cause of action arising under the Compensation to Relatives Act 1897; or
- (b) a cause of action that accrued before 1 September 1990.

(2) An action on a cause of action to which this section applies is not maintainable if brought after the expiration of a limitation period of 3 years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims.

(4) Section 19:

Omit the section, insert instead:

Compensation to relatives

19. An action on a cause of action arising under the Compensation to Relatives Act 1897, by virtue of a death, is not maintainable if brought after the expiration of a limitation period of:

- (a) 6 years running from the date of the death, where the cause of action accrued before 1 September 1990; or
- (b) 3 years running from the date of the death, where the cause of action accrues on or after 1 September 1990.

(5) Section 51 (**Ultimate bar**):

At the end of section 51, insert:

(2) This section does not apply to a cause of action in relation to which an order has been made under Subdivision 3 of Division 3 (Discretionary extension for latent injury etc.).

SCHEDULE 1-AMENDMENTS- *continued*

(6) Part 3, Division 3 (**Personal injury cases**):

After the heading to the Division, insert:

Subdivision 1 - Discovery

(7) Sections 57, 57A, 57B:

Renumber section 57 as section 57B, and insert the following sections:

Purpose of this Subdivision

57. The purpose of this Subdivision is to provide a procedure for the extension of limitation periods, based on the belated discovery of material facts. This procedure was established by this Division as originally enacted, but is retained only for causes of action that accrued before 1 September 1990.

This Subdivision applies only to old causes of action

57A. This Subdivision applies only to causes of action that accrued before 1 September 1990.

(8) Section 57B as renumbered (**Interpretation**):

(a) From section 57B (1), omit "Division", insert instead "Subdivision".

(b) Omit section 57B (1) (a) and (2).

(9) After section 60, insert:

Subdivision 2 - Secondary limitation period

Purpose of this Subdivision

60A. The purpose of this Subdivision is to provide a procedure for a 5 year (maximum) extension of the 3 year limitation period for personal injury cases. It applies to causes of action that accrue on or after 1 September 1990.

This Subdivision applies only to new causes of action

60B. This Subdivision applies only to causes of action that accrue on or after 1 September 1990.

SCHEDULE 1 - AMENDMENTS - *continued*

Ordinary action (including surviving action)

60C. (1) This section applies to a cause of action, founded on negligence, nuisance or breach of duty, for damages for personal injury, but does not apply to a cause of action arising under the Compensation to Relatives Act 1897.

(2) If an application is made to a court by a person claiming to have a cause of action to which this section applies, the court, after hearing such of the persons likely to be affected by the application as it sees fit, may, if it decides that it is just and reasonable to do so, order that the limitation period for the cause of action be extended for such period, not exceeding 5 years, as it determines.

Compensation to relatives

60D. (1) This section applies to:

- (a) a cause of action for damages arising under the Compensation to Relatives Act 1897 by virtue of the death of a person caused by a wrongful act, neglect or default; and
- (b) such a cause of action that would arise under the Compensation to Relatives Act 1897 but for the expiration as against the deceased of a limitation period.

(2) If an application is made to a court by a person claiming to have a cause of action to which this section applies, the court, after hearing such of the persons likely to be affected by the application as it sees fit, may, if it decides that it is just and reasonable to do so, order:

- (a) that a limitation period for the cause of action of the deceased for the wrongful act, neglect or default in relation to the cause of action that the applicant claims to have be extended for such period, not exceeding 5 years, as it determines; or

SCHEDULE 1 - AMENDMENTS - *continued*

(b) that a limitation period for the cause of action that the applicant claims to have been extended for such period, not exceeding 5 years, as it determines, or both.

(3) The court may, in an order under this section, exclude any beneficiary or class of beneficiaries from the operation of the order, if it decides that it is just and reasonable to do so.

Matters to be considered by court

60E. (1) In exercising the powers conferred on it by section 60C or 60D, a court is to have regard to all the circumstances of the case, and (without affecting the generality of the foregoing), the court is, to the extent that they are relevant to the circumstances of the case, to have regard to the following

- (a) the length of and reasons for the delay;
- (b) the extent to which, having regard to the delay, there is or may be prejudice to the defendant by reason that evidence that would have been available if the proceedings had been commenced within the limitation period is no longer available;
- (c) the time at which the injury became known to the plaintiff;
- (d) the time at which the nature and extent of the injury became known to the plaintiff;
- (e) the time at which the plaintiff became aware of a connection between the injury and the defendant's act or omission;
- (f) any conduct of the defendant which induced the plaintiff to delay bringing the action;
- (g) the steps (if any) taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice the plaintiff may have received;
- (h) the extent of the plaintiff's injury or loss.

(2) In the application of this section to an application for an order under section 60C in respect of a cause of action

SCHEDULE 1 - AMENDMENTS - *continued*

that has survived on the death of a person for the benefit of the person's estate under section 2 of the Law Reform (Miscellaneous Provisions) Act 1944, references in subsection (1) to the plaintiff include references to the deceased and the applicant, or any of them, as appropriate in the circumstances.

(3) In the application of this section to an application for an order under section 60D (2) (a):

- (a) references in subsection (1) to the plaintiff include references to the deceased, the personal representative of the deceased, and the beneficiaries, or any of them, as appropriate in the circumstances; and
- (b) regard may also be had to delay occurring after the death of the deceased,

whether or not a limitation period has expired in relation to the cause of action that the applicant claims to have, and whether or not the applicant is also making an application under section 60D (2) (b).

(4) In the application of this section to an application for an order under section 60D (2) (b), references in subsection (1) to the plaintiff include references to the personal representative of the deceased, and the beneficiaries, or any of them, as appropriate in the circumstances.

**Subdivision 3 - Discretionary extension
for latent injury etc.**

Purpose of this Subdivision

60F. The purpose of this Subdivision is to provide a procedure for a further discretionary extension of limitation periods where the plaintiff was unaware of the fact, nature, extent or cause of the injury, disease or impairment at the relevant time. This procedure is available for causes of action accruing on or after 1 September 1990, and also (by the operation of Schedule 5) for causes of action that accrued before that date.

SCHEDULE 1 - AMENDMENTS - *continued*

Ordinary action (including surviving action)

60G. (1) This section applies to a cause of action that accrues on or after 1 September 1990, founded on negligence, nuisance or breach of duty, for damages for personal injury, but does not apply to a cause of action arising under the Compensation to Relatives Act 1897.

(2) If an application for an order under this section is made to a court by a person claiming to have a cause of action to which this section applies, the court, after hearing such of the persons likely to be affected by the application as it sees fit, may, if it decides that it is just and reasonable to do so, order that the limitation period for the cause of action be extended for such period as it determines.

Compensation to relatives

60H. (1) This section applies to:

- (a) a cause of action for damages arising under the Compensation to Relatives Act 1897 by virtue of the death of a person caused by a wrongful act, neglect or default; and
- (b) such a cause of action that would arise under the Compensation to Relatives Act 1897 but for the expiration as against the deceased of a limitation period,

being a cause of action that accrues on or after 1 September 1990.

(2) If an application for an order under this section is made to a court by a person claiming to have a cause of action to which this section applies, the court, after hearing such of the persons likely to be affected by the application as it sees fit, may, if it decides that it is just and reasonable to do so, order:

- (a) that a limitation period for the cause of action of the deceased for the wrongful act, neglect or default in relation to the cause of action that the applicant claims to have be extended for such period as it determines; or

SCHEDULE 1 - AMENDMENTS - *continued*

- (b) that a limitation period for the cause of action that the applicant claims to have be extended for such period as it determines,

or both.

(3) The court may, in an order under this section, exclude any beneficiary or class of beneficiaries from the operation of the order, if it decides that it is just and reasonable to do so.

Matters to be considered by court

60I. (1) A court may not make an order under section 60G or 60H unless it is satisfied that:

(a) the plaintiff:

- (i) did not know that personal injury had been suffered; or
- (ii) was unaware of the nature or extent of personal injury suffered; or
- (iii) was unaware of the connection between the personal injury and the defendant's act or omission,

at the expiration of the relevant limitation period or at a time before that expiration when proceedings might reasonably have been instituted; and

- (b) the application is made within 3 years after the plaintiff became aware (or ought to have become aware) of all 3 matters listed in paragraph (a) (i)–(iii).

(2) Subsections (2), (3) and (4) of section 60E apply, with any necessary adaptations, in relation to applications for orders under this Subdivision.

Operation of this Subdivision

60J. An order may not be made under this Subdivision in relation to a limitation period unless the time has expired for the making of an order under Subdivision 2, but nothing in this Act prevents the making of orders under

SCHEDULE 1 - AMENDMENTS - *continued*

section 60D (2) (a) and section 60H (2) (b) in relation to the one matter.

Subdivision 4 - General

Effect of order

60K. (1) If a court orders the extension of a limitation period for a cause of action under Subdivision 2 or 3, the limitation period is accordingly extended for the purposes of:

- (a) an action brought by the applicant in that court on the cause of action that the applicant claims to have; and
- (b) section 26 (1) (b) in relation to any associated contribution action brought by the person against whom that cause of action lies.

(2) If a court excludes a beneficiary or class of beneficiaries from the operation of an order under section 60D or 60H, the beneficiary or beneficiaries are to be treated as not being entitled to damages in any compensation action brought as a consequence of the making of the order.

(3) In this section:

"compensation action" means an action on a cause of action arising under the Compensation to Relatives Act 1897;

"contribution action" means an action for contribution under section 5 (1) of the Law Reform (Miscellaneous Provisions) Act 1946.

Costs

60L. Without affecting any discretion that a court has in relation to costs, a court hearing an action brought as a result of an order under Subdivision 2 or 3 may reduce the costs otherwise payable to a successful plaintiff, on account of the expense to which the defendant has been put because the action was commenced outside the original limitation period.

SCHEDULE 1 - AMENDMENTS - *continued*

Prior expiry of limitation period or extinction of right

60M. (1) Applications and orders may be made under Subdivision 2 or 3 as if Division 1 of Part 4 had never been in force.

(2) An order for the extension of a limitation period, and an application for such an order, may be made under Subdivision 2 or 3 even though the limitation period has already expired.

(10) Section 77 (**Rules of court**):

Omit "sections 22, 58, 59, 60 and 73" wherever occurring, insert instead "this Act".

(11) Schedule 5:

After Schedule 4, insert:

**SCHEDULE 5 - FURTHER TRANSITIONAL
PROVISIONS
Limitation (Amendment) Act 1990**

(Sec. 6 (2))

Definitions

1. (1) In this Schedule:

"**legal professional negligence**" extends to the breach of any duty of professional care owed by a solicitor or barrister, whether arising in tort, contract or otherwise;

"**limitation period**" means a limitation period fixed by an enactment repealed or omitted by this Act or fixed by or under a provision of this Act (including a repealed or omitted provision of this Act).

(2) In this Schedule, a reference to a judgment given extends to a judgment entered, and also to an agreement entered into before and in connection with any such judgment.

SCHEDULE 1 - AMENDMENTS - *continued*

Ultimate bar

2. Section 51 (2) applies even if a relevant limitation period had expired before 1 September 1990.

Secondary limitation period

3. (1) This clause applies in relation to a cause of action for damages arising under the Compensation to Relatives Act 1897 by virtue of the death of a person caused by a wrongful act, neglect or default, where:

- (a) the deceased's cause of action accrued before 1 September 1990; and
- (b) the cause of action arising under that Act accrues on or after 1 September 1990.

(2) Subdivision 1 of Division 3 of Part 3 applies to the deceased's cause of action.

(3) Subdivision 2 of Division 3 of Part 3 applies to the cause of action arising under that Act.

Existing causes of action for personal injuries may be extended where latent injury etc.

4. (1) Section 60G also applies to a cause of action, founded on negligence, nuisance or breach of duty, being a cause of action that accrued or would have accrued before 1 September 1990, but does not apply to a cause of action arising under the Compensation to Relatives Act 1897.

(2) Section 60H also applies to:

- (a) a cause of action for damages arising under the Compensation to Relatives Act 1897 by virtue of the death of a person caused by a wrongful act, neglect or default; or
- (b) a cause of action that would arise under the Compensation to Relatives Act 1897 but for the expiration as against the deceased of a limitation period,

king a cause of action that accrued or would have accrued before 1 September 1990.

SCHEDULE 1 - AMENDMENTS - *continued*

- (3) Sections 60G and 60H so apply
- (a) whether or not a relevant limitation period has expired
- (i) before 1 September 1990; or
- (ii) before an application is made under either of those sections in respect of the cause of action; and
- (b) whether or not an action has been commenced on the cause of action before 1 September 1990; and
- (c) whether or not a judgment on the cause of action has, on the ground that a limitation period applying to the cause of action had expired before 1 September 1990, been given (whether before, on or after that date); and
- (d) whether or not a judgment in respect of legal professional negligence has, on the ground that a limitation period applying to the cause of action had expired before 1 September 1990, been given (whether before, on or after that date).
- (4) The court may make an order under section 60G or 60H, in relation to a cause of action referred to in this clause, within:
- (a) the period of 3 years referred to in section 601; or
- (b) the period of 3 years commencing on 1 September 1990.
- (5) For the purposes of this clause, a reference in Part 3 to a limitation period is to be read as including a reference to a limitation period as defined by this Schedule.

Pre-existing judgments and settlements

5. (1) In this clause:

"previously barred cause of action" means a cause of action that was not maintainable immediately before 1 September 1990, but to which clause 4 applies.

SCHEDULE 1 - AMENDMENTS - *continued*

(2) Without affecting the generality of Division 3 of Part 3, an action on a previously barred cause of action may be brought as a result of an order made under Subdivision 3 of that Division, even though

- (a) a judgment on the cause of action has, on the ground that a limitation period applying to the cause of action had expired before 1 September 1990, been given (whether before, on or after that date); or
- (b) a judgment in respect of legal professional negligence has, on the ground that a limitation period applying to the cause of action had expired before 1 September 1990, been given (whether before, on or after that date),

or both.

(3) Such an action may be brought as if the action in which such a judgment was given had not itself been commenced.

(4) If such an action is brought after 1 September 1990 on such a previously barred cause of action, the court hearing the action may, if it decides that it is just and reasonable to do so, do any or all of the following:

- (a) set aside any such judgment already given on or in relation to the cause of action;
- (b) take into account any amounts paid or payable by way of damages under any such judgment;
- (c) take into account any amounts paid or payable by way of costs in connection with any action in which any such judgment was given.

(5) The Supreme Court may, on application, exercise the power to set aside a judgment under subclause (4) (a) even though it is not hearing the action.

(6) A court (other than the Supreme Court) may not, under this clause, set aside a judgment of any other court.

*[Minister's second reading speech made in •
Legislative Assembly on 8 May 1990
Legislative Council on 4 June 1990]*