



# NewsFlash

cbp

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## When is late "too late"?

A case involving a two year old girl and her severed fingers has defined the law governing the commencement of causes of action for personal injury damages.

The *Civil Liability Amendment (Personal Responsibility) Act* (NSW) 2002 came into effect on 6 December 2002 and introduced a multiplicity of amendments to the legislation affecting personal injury claims accruing after that date.

The primary amendment states that an action for personal injuries is not maintainable if brought after the expiration of three years from the "date of discoverability", being the date on which the cause of action giving rise to the injury or death in question was first "discoverable" by the Plaintiff (s50C). This amendment replaced the former statutory time limits which required proceedings to be commenced within 3 years of the date of accident.

The definition of the date of discoverability is contained within s50D(1) and essentially states that a cause of action is "discoverable" by a person on the first date that the person knows or ought to know the fact that the injury or death was caused by the fault of the defendant and the injury was sufficiently serious to justify the bringing of an action.

The obvious potential difficulty, from the defendant's perspective, is to determine whether the claim is within time or not.

This issue was precisely the conundrum faced by the State of New South Wales itself when served with a statement of claim on behalf of Ms Shakyra Baker-Morrison in June 2007.<sup>1</sup>

On 26 May 2004, the plaintiff sustained injury when the fingers of her right hand were caught in automatic sliding doors at the Gosford Police Station. The plaintiff was subsequently taken to hospital where part of her right ring and middle fingers were amputated and reconstruction surgery was undertaken of her ring and middle fingers requiring the insertion of pins.

On 21 June 2007 (3 years and 26 days after the injury was sustained) a statement of claim was filed out of the District Court and served on the State.

On 27 November 2007, the State filed a notice of motion seeking to strike out the claim on the basis that the proceedings were statute barred in accordance with section 50C of the *Limitation Act*.

The notice of motion was heard at first instance by Johnstone DCJ who struck out the proceedings as they had been filed out of time.

<sup>1</sup> *Baker-Morrison v State of New South Wales* [2009] NSWCA 35 (4 March 2009).

The plaintiff sought leave to appeal.

The primary issue on appeal was whether the cause of action was “discoverable” within the 26 day period after the accident and in particular whether during that period, the plaintiff’s mother was aware that the injury sustained by her daughter had been “caused by the fault of the defendant” (section 50D(1)(b)) and that the injury to the plaintiff was “sufficiently serious to justify bringing of an action on the cause of action” (section 50D(1)(c)).

In a unanimous decision handed down by the Court of Appeal on 4 March 2009 their Honours Ipp JA, Basten JA and MacFarlan JA granted leave to the plaintiff to appeal, set aside the orders of the District Court, dismissed the State’s motion and ordered the State to pay the plaintiff’s costs of the District Court motion and the appeal.

The substantive judgment was delivered by His Honour Justice Basten.

His Honour noted that one of the key aspects for determination on appeal was the concept of “fault” in accordance with section 50D(1)(b). The plaintiff submitted that “fault” requires a degree of “appreciation of the potential legal liability of the putative defendant”. Conversely, the State submitted that it was sufficient for the plaintiff to appreciate a connection between some blameworthy act/ omission of the defendant and the injury.

In support of its position, the State relied on a letter dated 15 June 2004 sent by a solicitor consulted by the plaintiff’s mother, which recommended the letter be forwarded to the State’s public liability insurer concerning a claim for damages and requesting a view of the door for that purpose.

Basten JA found that the State had failed, in this case, to discharge its burden in showing that the plaintiff’s mother had the requisite knowledge.

His Honour noted the primary particular of negligence in the statement of claim was a failure to provide:

*A protective guard or covering along the area of the operation of the ... sliding glass doors. Until the plaintiff’s mother was aware (or ought to have been aware) of the availability and reasonable practicality of installation of such a device, she could not be said to be aware that her daughter’s injury was caused by a failure on the part of the State to take reasonable care for her safety. These are the terms in which the relevant test under section 50D(1)(b) should be formulated.*

His Honour further noted that, given the variety of statutory thresholds in place governing the recovery of damages for personal injury, a determination of whether an injury is “sufficiently serious” would invariably involve the plaintiff obtaining medical and legal advice of the material facts.

In turning to an analysis of the phrase “ought to know” in terms of the date of discoverability, His Honour found this to be an objective test satisfied, in most circumstances, by instructing a solicitor.

### The moral of this story

It is sufficiently apparent that the legislative intent of the amendments to the *Limitation Act* arising from the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) have introduced a degree of flexibility (and uncertainty) to the date of commencement of the limitation period for personal injury claims.

From a practical perspective, in circumstances where a defendant is served with a statement of claim which is filed more than three years after an accident, the defendant is in a unique position of having to assess whether the proceedings are statute barred or not.

As a precautionary measure, it may be prudent to raise a limitation issue in a defence and/or proceed by way of motion to strike out the proceedings. The latter course should however be undertaken after preliminary particulars are sought as to when a plaintiff first sought legal advice and the nature of the advice sought, as there are adverse costs ramifications which may flow from an unsuccessful motion to strike out.

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