AN UPDATE ON THE LIMITATION ACT 1969 (NSW)

Limitation period for personal injury actions –
for injuries after 6 December 2002:

***State of New South Wales v Gillett* [2012] NSWCA 83**

The Facts

- The respondent submitted a Hurt on Duty claim to his employer, the New South Wales Police Service, in October 2003 citing agitated depression arising from the internal affairs enquiry into his conduct.

- Also in October 2003 the respondent was charged with a number of offences including corruption under the *Police Act* 1900. During the hearing, the Crown Prosecutor learnt of the existence of certain documents which had not been provided to it by the Police Service. This led the DPP to offer no further evidence and to invite his Honour to direct the jury to acquit the respondent on all counts during the trial in June 2004.

- The plaintiff was diagnosed with an adjustment disorder with depressed and anxious mood in November 2004 and was medically discharged from the Police Service on 8 April 2005.

- The respondent had first sought legal advice in April 2005 and a barrister was briefed who advised there were no reasonable prospects of success for a claim for either assault or malicious prosecution.

- In March 2008, the respondent had a conversation with his solicitor-neighbour who referred him to another barrister. The barrister advised him that he had a reasonably arguable claim against the Police Service framed in negligence and breach of statutory duty.

- Statement of Claim was filed on 24 October 2008 against the State of New South Wales claiming damages for psychiatric injury - framed in negligence for failing to disclose the documents to the DPP which preceded his being charged with a number of criminal offences and alleging breach of statutory duty in failing to comply with provisions of the *Director of Public Prosecutions Act* 1986 and the *Police Act.*

The Legislation

- **50C Limitation period for personal injury actions**

(1) An action on a cause of action to which this Division applies is not maintainable if brought after the expiration of a limitation period of whichever of the following periods is the first to expire:

a) the "3 year post discoverability limitation period", which is the period of 3 years running from and including the date on which the cause of action is discoverable by the plaintiff…

b) the "12 year long-stop limitation period", which is the period of 12 years running from the time of the act or omission alleged to have resulted in the injury or death with which the claim is concerned.

- **50D Date cause of action is discoverable**

(1) For the purposes of this Division, a cause of action is "discoverable" by a person on the first date that the person knows or ought to know of each of the following facts:

a) the fact that the injury or death concerned has occurred,

b) the fact that the injury or death was caused by the fault of the defendant,

c) in the case of injury, the fact that the injury was sufficiently serious to justify the bringing of an action on the cause of action.

(2) A person "ought to know" of a fact at a particular time if the fact would have been ascertained by the person had the person taken all reasonable steps before that time to ascertain the fact.

(3) In determining what a person knows or ought to have known, a court may have regard to the conduct and statements, oral and in writing, or the person.

(4) To remove doubt, a compensation to relatives action is not discoverable before the date of death of the deceased.

The Appeal

- The State gave notice that it challenged the correctness of the Court of Appeal decision in *Baker-Morrison v State of New South Wales* [2009] NSWCA 35 and therefore a court of five judges was empanelled to hear the matter.

- The Court of Appeal dismissed the appeal and held that the cause of action was not discoverable unless and until the plaintiff received legal advice that the State was **legally liable** for his injuries.

- *"For a person to be in a situation where he or she knows or ought to know that an injury was sufficiently serious to justify the bringing of an action on the cause of action, they would have to know (or be in a position where they ought to know) that they have sufficient prospects of recovering enough damages for it to be worthwhile litigating.*

- *"That would require knowledge… that the injury in question is one for which the law would hold the defendant liable in damages, and that the damages that could be recovered are large enough to be worth the time and trouble of suing. Thus knowledge of actionability is necessary before s50D(1)(b) is satisfied. And, because it is involved in there being "fault", actionability is likewise one of the "key factors necessary to establish liability" that must be known before s 50D(1)(b) is satisfied."*

Conclusion:

- In some cases the date of discoverability will be a much later than the date of the accident. The limitation period will not commence until the claimant knows or ought to have known that there is fault which is actionable.

- The Court of Appeal decision in *Gillett* reinforces the Court's decision in *Baker-Morrison v State of New South Wales* [2009] NSWCA 35 which was a victory for all plaintiffs and effectively extends the limitation period in many matters.

- The Court also noted once again the undesirability of having the limitation issue determined as a separate question.

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