Riskwatch is prepared by Law Claims to assist practitioners in identifying risky areas in practice and to highlight risk prevention strategies to allow for safer, more enjoyable practice. Riskwatch appears as a monthly column in the Law Society Bulletin as well as being distributed on a monthly basis to members of the Law Society’s Professional Indemnity Scheme who do not receive the Law Society Bulletin.

Limitation of Actions – Application for extension of time in personal injury matters
By John Doyle, Senior Solicitor, Law Claims

A recent decision of the Full Court of the Supreme Court of South Australia has considered the meaning of “material fact” in an application for extension of time in personal injury matters.

Section 36 of the Limitation of Actions Act 1936 (SA) (“the Act”) provides:

“(1) All actions in which the damages claimed consist of or include damages in respect of personal injuries to any person, shall be commenced within three years next after the cause of action accrued but not after.

(1a) However, in the case of a personal injury that remains latent for some time after its cause, the period of 3 years mentioned in subsection (1) begins to run when the injury first comes to the person’s knowledge.

(2) In this section-
‘personal injuries’ include any disease and any impairment of a person’s physical or mental condition.”

The prescribed period may be extended. Section 48(1) allows a court to extend the time for instituting an action “to such an extent, and upon such terms (if any) as the justice of the case may require”. The power is, subject to a number of restrictions and conditions, including those laid down by section 48. Of particular relevance is s 48(3) which, provides:

“(3) This section does not-
(b) empower a court to extend a limitation of time prescribed by this Act unless it is satisfied that facts material to the plaintiff’s case were not ascertained by him until some point of time occurring within twelve months before the expiration of the period of limitation or occurring after the expiration of that period and that the action was instituted within twelve months after the ascertainment of those facts by the plaintiff... and that in all the circumstances of the case it is just to grant the extension of time.”

Section 48(3a) defines “material facts” for the purpose of s 48(3)(b)(i) as follows:

“a fact is not to be regarded as material to the plaintiff case for the purposes of subsection (3)(b)(i) unless:

(a) It forms an essential element of the plaintiff’s cause of action; or
(b) It would have major significance on an assessment of the plaintiff’s loss.
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Example-
In a case involving personal injury, a fact might qualify as a fact material to the plaintiff’s case if it establishes-

(a) a substantial reduction of the plaintiff’s capacity to work; or
(b) that the plaintiff will require substantially more medical care than previously expected; or
(c) a significant loss of expectation of life.”

Section 48(3b) provides that when determining whether it is, in all the circumstances of the case, just to grant an extension of time under s 48(3)(b), the court should have regard to:

(a) the period of extension sought and, in particular, whether the passage of time has prejudiced a fair trial; and
(b) the desirability of bringing litigation to an end within a reasonable period and thus promoting a more certain basis for the calculation of insurance premiums; and
(c) the nature and extend of the plaintiff’s loss and the conduct of the parties generally; and
(d) any other relevant factor.”

On the 28 May 2014 the Full Court of the Supreme Court of South Australia in Ireland v Wightman handed down a judgment concerning the meaning and effect of s 48(3a) of the Act. Parker J (with whom Vanstone and David JJ agreed) stated:

“The clear effect of s 48(3a) (b) is to require a comparison between the assessment of the plaintiff’s loss without the newly discovered facts being known and the assessment after those facts were ascertained. The statutory test will be satisfied if there would be a major (i.e. very important) difference between the two assessments.”

The effect of the judgment is that in an application for extension of time in a personal injury matter, a newly discovered fact may be regarded as having major significance on the assessment of the plaintiff’s loss if it would be “very important” in the assessment of loss. The determination of that question requires an overall judgment to be made in light of the evidence then available but does not require a precise mathematical or numerical exercise.

As the onus is on the Plaintiff to establish the essential precondition that a new material fact discovered within the 12 month period would have changed the assessment of loss to the plaintiff, the plaintiff will need to have evidence available to that position before bringing an application to extend the limitation period.

For any queries about this or other Risk Management Services offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano, on 8410 7677.

1 Ireland v Wightman [2014] SASCFC 52