

**COURTS LEGISLATION (CIVIL PROCEDURE) AMENDMENT
ACT 1991 No. 12**

NEW SOUTH WALES



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**COURTS LEGISLATION (CIVIL PROCEDURE) AMENDMENT
ACT 1991 No. 12**

NEW SOUTH WALES



Act No. 12, 1991

An Act to amend various Acts to make further provision for the civil procedure of the Supreme Court and the District Court and to increase the jurisdictional limits of the District Court and Local Courts.
[Assented to 3 May 1991]

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Courts Legislation (Civil Procedure) Amendment Act 1991.

Commencement

2. This Act commences on a day or days to be appointed by proclamation, except as provided by this section.

Amendments

3. Each Act specified in Schedules 1-3 is amended as set out in those Schedules.

Explanatory notes

4. Matter appearing under the heading "Explanatory note" in Schedules 1-3 does not form part of this Act.

**SCHEDULE 1 - AMENDMENT OF SUPREME COURT
ACT 1970 No. 52**

(Sec. 3)

Amendment - consequential

(1) Part 5 (**Heading**):

Omit the heading, insert instead:

PART 5 - POWERS

Division 1 - Powers generally

Explanatory note - item (1)

Item (1) is consequential on the proposed amendment contained in item (3) concerning interim payments.

Amendment - liability of a solicitor for costs

(2) Section 76C:

After section 76B, insert:

SCHEDULE 1 - AMENDMENT OF SUPREME COURT ACT
1970 No. 52 - *continued*

Costs - liability of solicitor

76C. (1) The Court may, at any stage of any proceedings, make one or more of the following orders in respect of a solicitor whose serious neglect, serious incompetence or serious misconduct delays, or contributes to delaying, those proceedings:

- (a) disallow the whole or any part of the costs between the solicitor and his or her client;
- (b) direct the solicitor to repay to his or her client the whole or any part of the costs which the client has been ordered to pay to any other party;
- (c) direct the solicitor to indemnify any party other than his or her client against the whole or any part of the costs payable by the party indemnified.

(2) The Court may refer the matter to a taxing officer for inquiry and report before making such an order.

(3) The Court may order that notice of such an order against a solicitor is to be given to the solicitor's client in a specified manner.

(4) A solicitor is not entitled to demand, recover or accept from his or her client any part of the amount for which the solicitor is directed by the Court to indemnify a party pursuant to such an order.

(5) Nothing in this section limits the generality of section 76 or any other provision of this Act.

Explanatory note - item (2)

Item (2) will enable the Supreme Court to penalise a solicitor whose serious neglect, incompetence or misconduct delays proceedings. The Court may penalise the solicitor by making orders about the payment of costs. For example, the Court may make an order preventing the solicitor from collecting fees from his or her client.

Amendment - interim payments

- (3) Part 5, Division 2:
Before Part 6, insert:

SCHEDULE 1 - AMENDMENT OF SUPREME COURT ACT
1970 No. 52 - *continued*

Division 2 - Interim payments

Definitions

76D. In this Division:

"**interim payment**", in relation to proceedings for the recovery of damages, means a payment of any of those damages by a defendant before the completion of the proceedings:

- (a) in accordance with an order of the Court under section 76E; or
- (b) voluntarily;

"**public authority**" means a public or local authority constituted by or under an Act, a Government Department or a statutory body representing the Crown, and includes a person exercising functions on behalf of that authority, Department or body.

Court may order interim payments

76E. (1) In any proceedings for the recovery of damages, the Court may, in accordance with this section, order a defendant in the proceedings to make one or more payments to the plaintiff of part of the damages sought to be recovered in the proceedings.

(2) The Court may make such an order against a defendant on the application of the plaintiff at any stage of the proceedings.

(3) The Court may make such an order if:

- (a) the defendant has admitted liability; or
- (b) the plaintiff has obtained judgment against the defendant for damages to be assessed; or
- (c) the Court is satisfied that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the defendant.

(4) The Court may not make such an order if the defendant satisfies the Court that:

SCHEDULE 1 - AMENDMENT OF SUPREME COURT ACT
1970 No. 52 - *continued*

- (a) the defendant is not insured in respect of the risk giving rise to the plaintiff's claim for the recovery of damages; and
 - (b) the defendant is not a public authority; and
 - (c) the defendant would, having regard to the defendant's means and resources, suffer undue hardship if such a payment were to be made.
- (5) The Court may order a defendant to make one or more payments of such amounts as it thinks just but not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff.
- (6) In estimating those damages, the Court is to take into account any relevant contributory negligence or any cross-claims on which the defendant may be entitled to rely.

Interim payment not admission of liability

76F. (1) The fact that a defendant makes one or more interim payments is not of itself an admission of liability by the defendant.

(2) The making of, or refusal to make, an order under section 76E is not a finding as to liability in respect of the proceedings.

Adjustments on final judgment etc.

76G. (1) This section applies to proceedings in which a defendant makes one or more interim payments.

(2) The Court may make such orders with respect to the interim payments as may be just, and in particular may order one or more of the following:

- (a) the repayment by the plaintiff of all or part of any interim payment, with or without interest;
- (b) the variation or discontinuance of any such payments;

SCHEDULE 1 - AMENDMENT OF SUPREME COURT ACT
1970 No. 52 - *continued*

- (c) the payment by another party to the proceedings of all or part of any interim payment that the defendant is entitled to recover from that party.
- (3) The Court may make an order under this section:
 - (a) in making a final judgment or order; or
 - (b) in granting the plaintiff leave to discontinue the action or to withdraw the claim; or
 - (c) on the application of any party, at any other stage in the proceedings.

Exclusion of damages relating to motor accidents

76H. This Division does not apply to an award of damages to which Part 6 of the Motor Accidents Act 1988 applies.

(4) Section 124 (**Rule-making power**):

After section 124 (1) (o), insert:

- (p) for regulating or making other provision concerning interim payments referred to in Division 2 of Part 5;

Explanatory note - items (3) and (4)

Item (3) inserts a proposed new Division concerning interim payments. The new Division will enable the Supreme Court in certain cases to order the defendant to make one or more payments to the plaintiff during the course of proceedings for the recovery of damages (for example, where the defendant has admitted liability).

The defendant may not be ordered to make interim payments if the defendant satisfies the Court that the defendant is not insured in respect of the claim, is not a public authority and would suffer undue hardship if the payments were to be made.

The Court may subsequently vary the payments and, if the final award of damages is less than the interim payments, the plaintiff may be ordered to repay the difference.

The new Division does not apply to an award of damages under the Motor Accidents Act 1988.

Item (4) will enable rules to be made concerning interim payments.

SCHEDULE 1 - AMENDMENT OF SUPREME COURT ACT
1970 No. 52 - *continued*

Amendment - interest on damages

(5) Section 94 (**Interest up to judgment**):

After section 94 (2), insert:

(3) In any proceedings for the recovery of damages, the Court may not order the payment of interest under subsection (1) if:

- (a) the defendant has made an offer of settlement; and
- (b) the sum for which judgment is given (without the addition of interest) does not exceed by more than 10 per cent the highest sum offered in settlement by the defendant,

unless the special circumstances of the case warrant the making of such an order.

Explanatory note - item (5)

Item (5) concerns the payment of interest when an award of damages is made. Under section 94, as currently in force, the Court may order the payment of interest to the plaintiff. The proposed amendment provides that the plaintiff is not entitled to interest if the defendant has made an offer of settlement (which is not accepted by the plaintiff) and the offer matches or nearly matches the amount of damages ultimately awarded by the Court.

SCHEDULE 2 - AMENDMENT OF DISTRICT COURT
ACT 1973 No. 9

(Sec. 3)

Amendment - increase in limit of jurisdiction

(1) Section 44 (**Actions**):

(a) Omit section 44 (1), insert instead:

(1) Subject to this Act, the Court has jurisdiction to hear and dispose of the following actions:

- (a) any personal action at law in which the amount claimed does not exceed \$250,000, whether on a balance of account or after an admitted set-off or otherwise;

SCHEDULE 2 - AMENDMENT OF DISTRICT COURT ACT
1973 No. 9 - *continued*

- (b) any action to recover goods that have been detained, or to recover the assessed value of such goods, in which the value of the goods together with the amount of any consequential damages claimed for the detention of the goods does not exceed \$250,000;
- (c) any action brought to recover an amount not exceeding \$20,000, which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of the distributive share under an intestacy or of a legacy under a will.

(b) Section 44 (3):

Omit "or (aa)" wherever occurring, insert instead "or (b)".

(2) Sections 48, 49, 51, 134A:

From sections 48 (2) and (3), 49 (2), 51 (2) and 134A, omit "\$100,000" wherever occurring, insert instead "\$250,000".

Explanatory note - items (1) and (2)

Item (1) will increase to \$250,000 the limit on the District Court's jurisdiction in common law proceedings (current limit \$100,000). It will also increase to \$20,000 the limit on that Court's jurisdiction in proceedings to recover the unliquidated balance of a partnership account, or the amount of the distributive share under an intestacy or of a legacy under a will (current limit \$10,000).

Item (2) is consequential on the amendments contained in item (1).

Amendment - interim payments

(3) Part 3, Division 3, Subdivision 4:

After Subdivision 3, insert:

Subdivision 4 - Interim payments

Definitions

57. In this Subdivision:

"**interim payments**", in relation to proceedings for the recovery of damages, means a payment of any of those damages by a defendant before the completion of the proceedings:

SCHEDULE 2 - AMENDMENT OF DISTRICT COURT ACT
1973 No. 9 - *continued*

- (a) in accordance with an order of the Court under section 58; or
- (b) voluntarily;

"public authority" means a public or local authority constituted by or under an Act, a Government Department or a statutory body representing the Crown, and includes a person exercising functions on behalf of that authority, Department or body.

Court may order interim payments

58. (1) In any action for the recovery of damages, the Court may, in accordance with this section, order a defendant in the action to make one or more payments to the plaintiff of part of the damages sought to be recovered in the action.

(2) The Court may make such an order against a defendant on the application of the plaintiff at any stage of the action.

- (3) The Court may make such an order if:
 - (a) the defendant has admitted liability; or
 - (b) the plaintiff has obtained judgment against the defendant for damages to be assessed; or
 - (c) the Court is satisfied that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the defendant.

(4) The Court may not make such an order if the defendant satisfies the Court that:

- (a) the defendant is not insured in respect of the risk giving rise to the plaintiff's claim for the recovery of damages; and
- (b) the defendant is not a public authority; and
- (c) the defendant would, having regard to the defendant's means and resources, suffer undue hardship if such a payment were to be made.

SCHEDULE 2 - AMENDMENT OF DISTRICT COURT ACT
1973 No. 9 - *continued*

(5) The Court may order a defendant to make one or more payments of such amounts as it thinks just but not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff.

(6) In estimating those damages the Court is to take into account any relevant contributory negligence or any cross-claims on which the defendant may be entitled to rely.

Interim payment not admission of liability

59. (1) The fact that a defendant makes one or more interim payments is not of itself an admission of liability by the defendant.

(2) The making of, or refusal to make, an order under section 58 is not a finding as to liability in respect of the action.

Adjustments on final judgment etc.

60. (1) This section applies to an action in which a defendant makes one or more interim payments.

(2) The Court may make such orders with respect to the interim payments as may be just, and in particular may order one or more of the following:

- (a) the repayment by the plaintiff of all or part of any interim payment, with or without interest;
- (b) the variation or discontinuance of any such payments;
- (c) the payment by another party to the action of all or part of any interim payment that the defendant is entitled to recover from that party.

(3) The Court may make an order under this section:

- (a) in making a final judgment or order; or
- (b) in granting the plaintiff leave to discontinue the action or to withdraw the claim; or

SCHEDULE 2 - AMENDMENT OF DISTRICT COURT ACT
1973 No. 9 - *continued*

- (c) on the application of any party, at any other stage in the action.

Exclusion of damages relating to motor accidents

61. This Division does not apply to an award of damages to which Part 6 of the Motor Accidents Act 1988 applies.

(4) Section 161 (**Civil procedure rules**):

- (a) From section 161 (2) (ah), omit "and".
- (b) At the end of section 161 (2) (ai), insert:
 - ; and
 - (aj) interim payments.

Explanatory note - items (3) and (4)

Item (3) inserts a proposed new Subdivision into the District Court Act 1973 concerning interim payments. The proposed Subdivision will enable the District Court to order the defendant to make one or more payments to the plaintiff during the course of an action for the recovery of damages (in the same way as the Supreme Court may under the amendment contained in Schedule 1 (3)).

The new Subdivision does not apply to an award of damages under the Motor Accidents Act 1988.

Item (4) enables rules to be made for or with respect to interim payments.

Amendment - civil juries

(5) Section 80A:

Before Subdivision 9 of Division 3 of Part 3, insert:

References to determinations by a jury

80A. (1) For the purposes of any action that, under this Subdivision, is to be tried without a jury, a reference in a provision of an Act or statutory instrument (being a provision which is in force before the appointed day) to a determination by a jury in the action is taken to be a reference to a determination by the Court.

SCHEDULE 2 - AMENDMENT OF DISTRICT COURT ACT
1973 No. 9 - *continued*

(2) In this section, "**appointed day**" means the day on which Schedule 2 (5) to the Courts Legislation (Civil Procedure) Amendment Act 1991 commenced.

Explanatory note - item (5)

Item (5) concerns the role of juries in civil proceedings in the District Court.

Amendment - interest on damages

(6) Section 83A (**Interest up to judgment**):

After section 83A (2), insert:

(3) In any action for the recovery of damages, the Court may not order the payment of interest under subsection (1) if:

- (a) the defendant has made an offer of settlement; and
- (b) the amount for which judgment is given (without the addition of interest) does not exceed by more than 10 per cent the highest sum offered in settlement by the defendant,

unless the special circumstances of the case warrant the making of such an order.

Explanatory note - item (6)

Item (6) concerns the payment of interest when an award of damages is made by the District Court. Just as the amendment in Schedule 1 (5) will prevent a plaintiff in the Supreme Court from recovering interest if the defendant has not accepted an offer of settlement which matches or nearly matches the damages awarded, item (6) will prevent a plaintiff in the District Court from recovering interest in the same circumstances.

Amendment - liability of solicitor for costs

(7) Section 148A (**Definition of "costs"**):

- After "Division", insert ", (except section 148E)".

(8) Section 148E:

After section 148D, insert:

SCHEDULE 2 - AMENDMENT OF DISTRICT COURT ACT
1973 No. 9 - *continued*

Costs - liability of solicitor

148E. (1) The Court may, at any stage of an action, make one or more of the following orders in respect of a solicitor whose serious neglect, serious incompetence or serious misconduct delays, or contributes to delaying, the action:

- (a) disallow the whole or any part of the costs between the solicitor and his or her client;
- (b) direct the solicitor to repay to his or her client the whole or any part of the costs which the client has been ordered to pay to any other party;
- (c) direct the solicitor to indemnify any party other than his or her client against the whole or any part of the costs payable by the party indemnified.

(2) The Court may refer the matter to a taxing officer for inquiry and report before making such an order.

(3) The Court may order that notice of such an order against a solicitor is to be given to the solicitor's client in a specified manner.

(4) A solicitor is not entitled to demand, recover or accept from his or her client any part of the amount for which the solicitor is directed by the Court to indemnify a party pursuant to such an order.

(5) Nothing in this section limits the generality of section 148B or any other provision of this Act.

Explanatory note - items (7) and (8)

Item (8) will enable the District Court to penalise a solicitor whose serious neglect, incompetence or misconduct delays proceedings (in the same way as the Supreme Court may by the amendment proposed in Schedule 1 (2)).

Item (7) is a consequential amendment.

**SCHEDULE 3 - AMENDMENT OF LOCAL COURTS
(CIVIL CLAIMS) ACT 1970 No. 11**

(Sec. 3)

Amendment - increase in limit of jurisdiction

Section 12 (**Limits of jurisdiction**):

(a) Section 12 (1):

Omit "\$10,000", insert instead "\$40,000".

(b) Section 12 (2):

Omit "\$20,000", insert instead "\$40,000".

Explanatory note

The amendments contained in Schedule 3 will increase to \$40,000 the general limit on a Local Court's civil jurisdiction (current limit \$10,000). It will also increase to \$40,000 the limit on a Local Court's jurisdiction in motor accident cases (current limit \$20,000).

[*Minister's second reading speech made in -
Legislative Assembly on 14 March 1991
Legislative Council on 1 May 1991*]