

# **MOTOR ACCIDENTS (AMENDMENT) ACT 1993 No. 72**

NEW SOUTH WALES



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**MOTOR ACCIDENTS (AMENDMENT) ACT 1993 No. 72**

NEW SOUTH WALES



**Act No. 72, 1993**

An Act to amend the Motor Accidents Act 1988 with respect to the commencement and duration of third-party policies, the form and making of claims, the rights and liabilities of the Nominal Defendant and the assessment of damages; and for other purposes. [Assented to 18 November 1993]

**The Legislature of New South Wales enacts:**

**Short title**

1. This Act may be cited as the Motor Accidents (Amendment) Act 1993.

**Commencement**

2. This Act commences on a day or days to be appointed by proclamation.

**Amendment of Motor Accidents Act 1988 No. 102**

3. The Motor Accidents Act 1988 is amended as set out in Schedule 1.

**Explanatory notes**

4. Matter appearing under the heading “Explanatory note” in Schedule 1 does not form part of this Act.

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**SCHEDULE 1—AMENDMENTS**

(Sec. 3)

(1) Section 12:

Omit the section, insert instead:

**Commencement and duration of third-party policy**

12. (1) A third-party policy taken to have been issued for a motor vehicle has effect for the period for which the licensed insurer who is taken to have issued the policy is on risk in accordance with this section.

(2) In this section:

“**new insurer**” means the licensed insurer whose insurance is later in time;

“**old insurer**” means the licensed insurer whose insurance is earlier in time;

“**period of grace**” means the period of 14 days after the registration, or renewal of registration, of a motor vehicle expires;

SCHEDULE 1—AMENDMENTS—*continued*

**“period of registration”** means the period, not exceeding one year, for which the registration or renewal of registration of a motor vehicle is effected, but if, within that period, the registration or renewal of registration is cancelled or surrendered, it means the period for which the registration or renewal of registration is actually in force.

(3) The old insurer and the new insurer may be the same licensed insurer or different licensed insurers.

(4) In the case of the registration (but not the renewal of registration) of a motor vehicle, the licensed insurer is on risk for the period of registration of the motor vehicle.

(5) If registration is renewed before the previous period of registration expires, the old insurer is on risk until the previous period of registration expires and the new insurer comes on risk immediately after the previous period of registration expires.

(6) If registration is renewed during the period of grace, the old insurer is on risk until 12 midnight on the day registration is renewed and the new insurer comes on risk immediately after 12 midnight and is on risk for the balance of the period of registration of the motor vehicle effected by the renewal of registration.

(7) If registration is renewed after the period of grace expires, the new insurer comes on risk at the time the renewal of registration is effected. The motor vehicle is not an insured motor vehicle from the expiry of the previous period of registration until the time the renewal of registration is effected.

(8) There is no period of grace following the cancellation or surrender of the registration (whether registration or a renewal of registration) of a motor vehicle.

(9) A licensed insurer ceases to be on risk on the cancellation of a third-party policy under section 13, subject to section 13 (7).

(10) A licensed insurer is on risk in respect of a motor vehicle under a third-party policy relating to a motor vehicle to which a trader’s plate is fixed:

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SCHEDULE 1—AMENDMENTS—*continued*

- (a) only during the period for which the policy is issued;  
and
  - (b) only during the period for which the trader's plate is issued; and
  - (c) only while a trader's plate is fixed to the vehicle.
- (2) Section 27 (**Claim against Nominal Defendant where vehicle not insured**):
- After section 27 (4), insert:
- (5) For the purposes of this section, and any regulations made for the purposes of this section, "motor vehicle" includes a trailer.
- (3) Section 28B:
- After section 28A, insert:
- Nominal Defendant as tortfeasor**
- 28B. (1) The Nominal Defendant may join another person, or may be joined, for contribution or indemnity in respect of a claim or proceedings under this Act as if the Nominal Defendant were a tortfeasor.
- (2) Joinder of the Nominal Defendant is required to be effected in accordance with this section.
  - (3) A person seeking to join, the Nominal Defendant in respect of a claim or proceedings must give the Nominal Defendant notice of the person's intention to do so. The notice must include a copy of the notice of claim under section 43 given to the person.
  - (4) The notice must be given within 3 months after the claim is made against the person under section 43, or within 3 months after the person becomes a party to proceedings in respect of the claim, whichever occurs first.
  - (5) The court may extend the period for giving notice to the Nominal Defendant if the person seeking to join the Nominal Defendant gives a full and satisfactory explanation for not having given notice within the 3-month period.
  - (6) Within 2 months after notice is given, the person giving notice must provide the Nominal Defendant with full details of the allegations made against the Nominal

SCHEDULE 1—AMENDMENTS—*continued*

Defendant (or against the person to whom the Nominal Defendant is taken to have issued a third-party policy).

(7) An application may not be made to join the Nominal Defendant as a party to proceedings before the court after 3 years from the date on which the claim under section 43 in respect of which contribution or indemnity is sought must be made, except with the leave of the court.

(8) If the Nominal Defendant is sought to be joined because the identity of another motor vehicle is not known, joinder may not be effected unless due inquiry or search to identify the vehicle has been made. The inquiry or search may be proved orally or by affidavit of the person who made the inquiry or search.

(9) Except as provided by this section, nothing in this section affects any rules of court relating to the joinder of parties.

(4) Section 31 (**Recovery from owner or driver**):

Omit section 31 (3), insert instead:

(3) The Nominal Defendant is not entitled to recover any amount under this section from the owner or driver of a motor vehicle, or a trailer, which, at the relevant time, was not required to be registered or was exempt from registration or, if required to be registered, was not required to be insured under this Act.

(5) Section 43 (**Time for and notice of making of claims**):

Omit section 43 (2) and (3).

(6) Section 43A:

After section 43, insert:

**Late making of claims**

43A. (1) A claim may be made more than 6 months after the date determined under section 43 (in this section called “**a late claim**”) if the claimant provides a full and satisfactory explanation for the delay in making the claim. The explanation is to be provided in the first instance to the third-party insurer concerned (if there is one) or to the Nominal Defendant.

SCHEDULE 1—AMENDMENTS—*continued*

(2) Evidence as to any delay in the onset of symptoms relating to the injury suffered by the injured person as a result of the motor accident may be given in any such explanation.

(3) This subsection applies if the person against whom the late claim is made is insured by a third-party insurer.

(a) If, within 2 months after receiving a late claim for which no explanation for delay is provided, the insurer does not reject the claim or ask the claimant to provide a full and satisfactory explanation for the delay in making the claim, the insurer (and the person against whom the claim is made) lose the right to challenge the claim on the ground of delay.

(b) If, within 2 months after receiving an explanation for delay in the making of a late claim, the insurer does not reject the explanation, the insurer (and the person against whom the claim is made) lose the right to challenge the claim on the ground of delay.

(c) If court proceedings are commenced in respect of a late claim, an insurer (or the person against whom the claim is made) who has not lost the right to challenge the claim on the ground of delay may apply to have the proceedings struck out on the ground of delay only within 2 months after the statement of claim is received by the insurer.

(4) A court may strike out proceedings commenced in respect of a late claim if the court is satisfied that the claimant does not have a full and satisfactory explanation for the delay in making the claim.

(7) Section 44 (**Form of notice of claim**):

(a) After “set out” in section 44 (1) (b), insert “or be accompanied by”.

(b) After section 44 (1), insert:

(1A) A notice of claim given to an insurer may, if approved by the Authority, require the claimant to do either or both of the following:

(a) furnish a medical certificate relating to the claim signed by a medical practitioner;

SCHEDULE 1—AMENDMENTS—*continued*

- (b) authorise the insurer to obtain information and documents relevant to the claim from persons specified in the authorisation.

## (8) Sections 44A, 44B:

After section 44, insert:

**Other approved forms**

44A. (1) The Authority may approve forms (other than the form for a notice of claim) for use by insurers for the purposes of this Part.

(2) Approved forms may include, but are not limited to, a certificate of earnings and a rehabilitation plan.

**Challenging claims for failure to comply with s. 44 or 44A**

44B. (1) If, within 2 months after receiving notice of a claim under section 43 (4), the insurer does not reject the claim for non-compliance with section 44, the insurer loses the right to challenge the claim on the ground of non-compliance with that section.

(2) If court proceedings are commenced in respect of a claim, an insurer who has not lost the right to challenge for non-compliance with section 44 may apply to have the proceedings struck out on the ground of the relevant non-compliance only within 2 months after the statement of claim is received by the insurer.

(3) A court may not strike out proceedings if the relevant non-compliance is technical and of no significance.

(4) In this section, a reference to an insurer includes, in the case of a third-party insurer, a reference to the person against whom the claim is made.

(9) Section 45 (**Duty of insurer to try to resolve claim etc.**):

After “(wholly or in part)” in section 45 (2), insert “or determined (wholly or in part) against the person against whom the claim is made”.

(10) Section 48 (**Duty of claimant to co-operate with other party**):

- (a) After “insurer” in section 48 (1), insert:

for the purpose of giving the person and the insurer sufficient information:



SCHEDULE 1—AMENDMENTS—*continued*

- (a) to be satisfied as to the validity of the claim and, in particular, to assess whether the claim or any part of the claim may be fraudulent; and
  - (b) to be able to make an early assessment of liability; and
  - (c) to be able to make an informed offer of settlement.
- (b) After section 48 (2), insert:
- (2A) The reasonableness of a request, may be assessed having regard to criteria including the following:
    - (a) the amount of time the claimant needs to comply with the request;
    - (b) whether the information sought is cogent and relevant to a determination of liability or quantum of loss, having regard to the nature of the claim;
    - (c) the amount of information which has already been supplied to or is available to an insurer to enable liability and quantum of loss to be assessed and an offer of settlement made;
    - (d) how onerous it will be for the claimant to comply with the request;
    - (e) whether the information is privileged;
    - (f) whether the information sought is sufficiently specified;
    - (g) the time of the request and whether the claimant will be delayed in commencing proceedings by complying with the request.
- (11) Section 52 (**Time limitations on commencement of court proceedings**):
- (a) Omit section 52 (2), insert instead:
    - (2) If notice is given to the other person's third-party insurer then despite subsection (1) the claimant is entitled to commence court proceedings if any of the following occurs:
      - (a) the insurer denies all liability in respect of the claim;
      - (b) the insurer admits partial liability in respect of the claim but the claimant is dissatisfied with the extent to which liability is admitted;

SCHEDULE 1—AMENDMENTS—*continued*

- (c) in the case of a late claim within the meaning of section 43A, the insurer rejects the claimant's explanation for delay in making the claim.
- (b) From section 52 (3), omit "must be made in accordance with section 43", insert instead "is made".
- (12) Section 54 (**Proceedings against insurer if insured dead or unable to be served**):
- (a) After "the claimant" where firstly occurring in section 54 (1), insert "and a person claiming contribution or indemnity between joint tortfeasors".
- (b) After "the claimant" in section 54 (1) (b), insert "or the person claiming contribution or indemnity".
- (13) Section 72:
- Omit the section, insert instead:
- Maximum amount of damages for provision of certain home care services**
72. (1) Compensation, included in an award of damages, for the value of services of a domestic nature or services relating to nursing and attendance:
- (a) which have been or are to be provided by another person to the person in whose favour the award is made; and
- (b) for which the person in whose favour the award is made has not paid and is not liable to pay,
- must not exceed the amount determined in accordance with this section.
- (2) No compensation is to be awarded if the services are provided, or are to be provided:
- (a) for less than 6 hours per week; and
- (b) for less than 6 months.
- (3) If the services provided or to be provided are not less than 40 hours per week, the amount of compensation must not exceed:

SCHEDULE 1—AMENDMENTS—*continued*

- (a) the amount per week comprising the amount estimated by the Australian Statistician as the average weekly total earnings of all employees in New South Wales for:
- (i) in respect of the whole or any part of a quarter occurring between the date of the injury in relation to which the award is made and the date of the award, being a quarter for which such an amount has been estimated by the Australian Statistician and is, at the date of the award, available to the court making the award—that quarter; or
  - (ii) in respect of the whole or any part of any other quarter—the most recent quarter occurring before the date of the award for which such an amount has been estimated by the Australian Statistician and is, at that date, available to the court making the award; or
- (b) if the Australian Statistician fails or ceases to estimate the amount referred to in paragraph (a), the prescribed amount or the amount determined in such manner or by reference to such matters, or both, as may be prescribed.
- (4) If the services provided or to be provided are less than 40 hours per week, the amount of compensation must not exceed the amount calculated at an hourly rate of one-fortieth of the amount determined in accordance with subsection (3) (a) or (b), as the case may be.
- (5) Unless evidence is adduced to the contrary, the court is to assume that the value of the services is the maximum amount determined under subsection (3) or (4), as the case requires.
- (6) No compensation is to be awarded if the services would have been provided to the person even if the person had not been injured by the motor accident.
- (7) Except as provided by this section, nothing in this section affects any other law relating to the value of services of the kind referred to in subsection (1).

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SCHEDULE 1—AMENDMENTS—*continued*

(14) Section 72A:

After section 72, insert:

**Respite care**

72A. An award of damages may include compensation for necessary and reasonable respite care in respect of a claimant who is seriously injured and in need of constant care over a long term.

(15) Section 79 (**Determination of non-economic loss**):

From section 79 (1), omit “is significantly impaired”, insert instead “has been, or in the near future is likely to be, significantly impaired for a continuous period of not less than 6 months”.

**EXPLANATORY NOTE**—item(1 5)

Section 79 (1) presently provides:

No damages shall be awarded for the non-economic loss of an injured person as a consequence of a motor accident unless the injured person’s ability to lead a normal life is significantly impaired by the injury suffered in the accident.

As amended, section 79 (1) will provide:

No damages shall be awarded for the non-economic loss of an injured person as a consequence of a motor accident unless the injured person’s ability to lead a normal life **has been, or in the near future is likely to be, significantly impaired for a continuous period of not less than 6 months** by the injury suffered in the accident.

The Supreme Court has held, in *Matthews v Dean* (1990) 11 MVR 455, that significant impairment must be assessed at the time of the hearing.

As originally proposed, the verbal threshold was intended to operate in the narrative sense: “the injury must significantly disrupt the personal or working life of the applicant”. The current position, taking account of case law, is that the degree of impairment is assessed at an arbitrary point of time. In view of current court delays, this could be some years after the accident. The interpretation has resulted in the exclusion of claims where the victim has suffered major trauma but has substantially recovered.

Schedule 1 (15) amends the section to introduce a period for which the impairment must exist. Damages for non-economic loss are to be available if the injured person’s ability to lead a normal life was or will be significantly impaired for a continuous period of at least 6 months. This means that if, at the time damages are assessed (either during settlement negotiations, mediation, arbitration or by a court) the injured person’s ability to lead a normal life has been significantly impaired for 6 months, or is likely to be significantly impaired for at least 6 months, the person is entitled to damages for non-economic loss, subject to the deductible.

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SCHEDULE 1—AMENDMENTS—*continued*

The assessment of a past period of impairment will be a matter of fact. The assessment of a future period of likely impairment will require a degree of judgment and prediction.

The amendment is intended to ensure that the only claimants who will benefit from likely significant impairment in the near future will be those for whom medical evidence indicates that the injuries would almost certainly cause the onset of significant impairment (i.e. the commencement of a period of significant impairment) in the relatively near future. An example might be a claimant with a badly broken hip, where it is virtually certain that the hip will become severely arthritic within a few years.

The intention is to prevent arguments that there may well be some degree of impairment some time in the future. If the period of impairment has not ceased at the date of assessment, there must be clear evidence that there is a real likelihood of impairment continuing in the future to produce a continuous period of impairment of at least 6 months.

The amendment is not intended to provide access to general damages by virtually every claimant who suffers injury and has the potential for long term degeneration, particularly when combined with the debilitating effects of advancing age.

(16) Schedule 4 (**Savings, transitional and other provisions**):

(a) At the end of clause 1 (1), insert:

the Motor Accidents (Amendment) Act 1993.

(b) After Part 4, insert:

**Part 5—Provisions arising from the enactment of the  
Motor Accidents (Amendment) Act 1993**

**General application of amendments**

9. An amendment made by the Motor Accidents (Amendment) Act 1993 applies to:

(a) motor accidents occurring before the commencement of the amendment as well as to motor accidents occurring after that commencement; and

(b) claims made and proceedings brought before the commencement of the amendment that have not been finally determined before that commencement as well as to claims made and proceedings brought after that commencement,

except as provided by this Part.

**Commencement and duration of third-party policies**

10. Section 12, as substituted by the Motor Accidents (Amendment) Act 1993, does not apply to a third-party

SCHEDULE 1—AMENDMENTS—*continued*

policy that is taken to have been issued before the commencement of Schedule 1 (1) to that Act.

**Late making of claims**

11. Section 43A does not apply to a claim made before the commencement of that section.

**Challenging claims for failure to comply with s. 44 or 44A**

12. Section 44B does not apply to a claim made before the commencement of that section.

**Maximum amount of damages for provision of certain home care services**

13. Section 72, as substituted by the Motor Accidents (Amendment) Act 1993, does not apply to a motor accident occurring before the commencement of Schedule 1 (13) to that Act.

**Respite care**

14. Section 72A does not apply to a motor accident occurring before the commencement of that section.

**Determination of non-economic loss**

15. Section 79, as amended by the Motor Accidents (Amendment) Act 1993, does not apply to a motor accident occurring before the commencement of Schedule 1 (15) to that Act.

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*[Minister's second reading speech made in—  
Legislative Assembly on 19 May 1993  
Legislative Council on 27 October 1993]*