**RECENT DECISIONS**

# Work Injury Damages – Section 151D - More than just delay and prejudice

*Gower v State of New South Wales* [2018] NSWCA 132 (19 June 2018)

Link to decision

## Summary

On 19 June 2018, the NSW Court of Appeal in *Gower v State of New South Wales* [2018] NSWCA 132 dismissed a worker's appeal to have his extension of time application under section 151D of the *Workers Compensation Act 1987* ('the Act') allowed, in order to bring a claim for work injury damages ("WID") against his employer, the Department of Education ('DoE').

Whilst the usual issues were raised of explanation for delay and prejudice, the court also addressed the strength of the worker 's case in negligence against DoE and whether he had deliberately allowed the limitation period to expire.

### Background

The worker commenced proceedings in the District Court on 23 March 2016 claiming WID in respect of an injury suffered on 12 September 2003, 13 years earlier.

On that occasion, he was struck by a soccer ball that had been thrown by a student at West Wallsend High School where he was employed as a casual teacher. He subsequently underwent surgery to repair the damage to his nose.

Following his injury, he obtained a number of medical assessments, none of which assessed him as having reached the 15% whole person impairment ("WPI") threshold that would entitle him to recover WID under section 151H of the Act. However some doctors as early as 2005 had indicated that the worker had not yet reached "maximum medical improvement".

In 2012 (9 years later), the worker submitted a workers compensation claim for permanent impairment and pain and suffering after obtaining an opinion from psychiatrist, Dr Kim Street, who diagnosed him as having a major depressive disorder.

On 13 May 2014, a Medical Assessment Certificate ("MAC") was issued finding that his WPI was at least 15%. District Court proceedings were then commenced within two years.

In the Notice of Claim for WID, it was alleged that the student had deliberately thrown the soccer ball at him; and it was known that students at the school had a propensity to cause injury by throwing or kicking soccer balls at other students or teachers. However, none of these prior incidents were identified in the Notice of Claim.

Section 151D of the Act requires that court proceedings for a WID claim must be commenced within three years of the date of injury, unless leave of the Court is obtained.

The worker therefore filed a Notice of Motion seeking that leave. In reply, DoE filed a Notice of Motion seeking orders that the proceedings be struck out.

Judge Gibson in the District Court rejected the worker's application and struck out the WID claim. She essentially gave four reasons:

1. The worker knew of the limitation period (as his solicitor had told him about it) and deliberately allowed it to expire;

2. The worker did not provide a full or satisfactory explanation of his reasons for delay (neither did his solicitor);

3. The worker 's case on the face of it appeared weak and this was a further factor to consider when deciding whether to grant an extension of time; and

4. There was substantial evidence of actual prejudice in the form of missing witnesses and documents.

The worker then appealed to the NSW Court of Appeal.

## Decision

Justice White, with whom Justice Basten agreed, said that he would not extend a limitation period that had stretched beyond 12 years. The main reason given was that the worker could have made a claim for lump sum compensation (which would have resulted in time being suspended for WID) whilst his degree of permanent impairment was not fully ascertainable: paras 5 and 23.

The weakness of the case in negligence was also noted to be highly material and the presumption of prejudice (over and above any actual prejudice) was also strong: paras 150 and 190.

On that basis, the appeal was dismissed with costs.

Acting Justice Simpson, however, provided a separate judgment in dissent; noting she would have granted leave to the worker to commence WID proceedings out of time. This was on the basis that:

a) Allowing the limitation period to expire is not a valid basis to deny leave to commence proceedings out of time. Particularly as that delay occurred because the worker was waiting until he reached the 15% WPI threshold;

b) Weakness of the case in negligence is not of itself sufficient to justify refusing the leave to proceed out of time; and

c) In her opinion, no actual prejudice existed.

She did, however, note the *"serious difficulties"* that the worker would have had in attributing his current psychological symptoms to the 2003 accident.

On the issue of deliberately allowing the limitation period to expire, the Court found:

> *"The primary judge acted on a wrong principle in determining the case on the basis that Mr Gower had been advised of the limitation period and had not provided a satisfactory explanation for his reasons of delay. It was not unreasonable for the appellant to wait until he had reached the 15 per cent threshold".*

However, as noted above, the Court believed that the worker could have made a claim for lump sum compensation (which would have resulted in time being suspended for WID) while his degree of permanent impairment was not fully ascertainable.

Finally, on the issue of using the strength (or otherwise) of a plaintiff's case in negligence as a basis to deny leave, the Court found:

per White JA *"whilst the claim is a weak claim, it raises a real issue of fact to be determined and could not be summarily dismissed on that basis"*: para 149
and
per Simpson AJA *"it has not been shown that the primary judge erred in taking into account the weakness of the case. The weakness of the case is not, however, sufficient of itself to justify refusing the application"*: para 251.

## Implications

On section 151D specifically, the decision highlights that while delay and prejudice will always be the primary factors considered by the court in these applications, the strength of the worker 's case in negligence against the employer and whether the worker deliberately allowed the limitation period to expire, are also factors that can weigh in favour of declining to grant leave to commence WID proceedings outside the 3 year limitation period.

The decision also highlights the importance of employers and insurers knowing exactly what case in negligence is pleaded against them in a WID claim.

The Court of Appeal (Justice White in particular) noted that the worker's Statement of Claim "*did not plead with any specificity*" the risk of harm against which DoE was required to take precautions and what precautions it was required to take.

Further they noted that the worker did not specifically allege that the student who threw the ball was known to be violent or aggressive, or indicate what steps DoE should have been taken to prevent the student from engaging in violent or aggressive behaviour.

Clearly, if a worker cannot tell an employer what they did or did not do which led to their injury, or what steps ought to have been taken to prevent the injury, then there is a basis to raise this as part of any section 151D application.

## For more information, please contact:

**Michael Lamproglou**
Partner
T: 02 8257 5723
M: 0417 433 215
michael.lamproglou@turkslegal.com.au