

RECENT DECISIONS

Stable hand gets a start despite slow-running lawyers

Jones v Spackman [2014] NSWDC 139 - 22 July 2014

[Link to decision](#)

Summary

This case looks at the factors that a court will take into account when deciding whether a plaintiff should be allowed to commence proceedings for work injury damages more than 3 years after the date of injury.

Legislation

Section 151(D) of the *Workers Compensation Act 1987*.

Background

Ms Jones was employed by Graeme Spackman as a stable hand. She sustained severe facial injuries on 14 January 2004 while clipping the hooves of a sedated horse, which (it seems) was not adequately sedated.

A claim for workers compensation was made shortly after the accident. She first consulted a solicitor regarding her claim on 3 February 2005. A claim for the permanent impairment compensation was not made until late 2007. On 24 April 2008, Ms Jones' solicitors served notice of a claim for work injury damages.

The claim for permanent impairment compensation resolved for 30% whole person impairment on 17 April 2009.

The insurer arranged in March 2009 for investigators to conduct an investigation into the circumstances surrounding Ms Jones' injury. The investigator obtained a statement from the person who administered the sedative to the horse.

Ms Jones' solicitors did little to advance her work injury damages claim. The lack of progress concerned Ms Jones, who consulted a new solicitor on 14 May 2010. The new solicitor also did 'very little on the case.' Ms Jones consulted a third solicitor on 11 July 2011.

A pre-filing statement was eventually served on 16 April 2012. As required by the relevant legislation, an application for mediation was filed in March 2013 and the mediation took place on 22 May 2013. The claim was not settled at that time.

Proceedings were commenced in the District Court on 2 August 2013. A defence was filed on 28 August 2013, which relied upon section 151(D) of the *Workers Compensation Act 1987* which requires the plaintiff to obtain the permission (leave) of the court to proceed with a claim more than 3 years after the date of injury.

Decision

The judge hearing the application for leave granted permission for Ms Jones to continue with her action for damages.

Among other reasons, the judge accepted that the delay was largely because of a failure of Ms Jones' solicitors to diligently pursue her claim, despite complaints made from time to time by Ms Jones about the lack of progress. The judge stated that it would be 'wrong in principle' to attribute the solicitors' lack of diligence to Ms Jones.

The judge did not consider the defendant to have been seriously prejudiced by loss of evidence, and that, on the balance of probabilities, a fair trial could be held. The judge concluded that it would be 'fair and just' to allow the case to proceed.

Comment

The case provides a recent application of the principles set out in *Itek Graphix Pty Ltd v Elliot* (2001) NSWCA 442 which explained that the four main reasons for having time limits on bringing a claim for damages were:

- (a) as time goes by, relevant evidence is likely to be lost;
- (b) it is oppressive to a defendant to allow an action to be brought long after the circumstances that gave rise to it have passed;
- (c) it is desirable for people in the community to be able to arrange their affairs and utilise resources on the basis that claims can no longer be made against them;
- (d) the public interest requires that disputes be settled as quickly as possible.

In applying these considerations to the case of Ms Jones, the judge decided that:

- There was no evidence of prejudice to the defendant, because it had been on notice of the claim for compensation soon after the injury, had been put on notice of the claim for work injury damages four years later, and was able to obtain a statement from a principal witness (the person who administered the sedative to the horse).
- The plaintiff herself had been diligent in seeking legal advice, and encouraging her solicitors to progress her claim, but was let down by the lack of action taken by those solicitors.
- It was 'fair and just' and 'what the justice of the case requires' to allow the plaintiff to proceed with her claim.

The judge also confirmed that:

'There is no need under workers compensation [for the plaintiff] to provide a full and satisfactory explanation for the delay' but 'the whole of the delay ... must be examined in dealing with whether the discretion [to grant leave] should be exercised.'

For more information, please contact:



Sam Kennedy

Partner

T: 02 8257 5733

M: 0417 269 105

sam.kennedy@turkslegal.com.au



Eliza Hannon

Lawyer