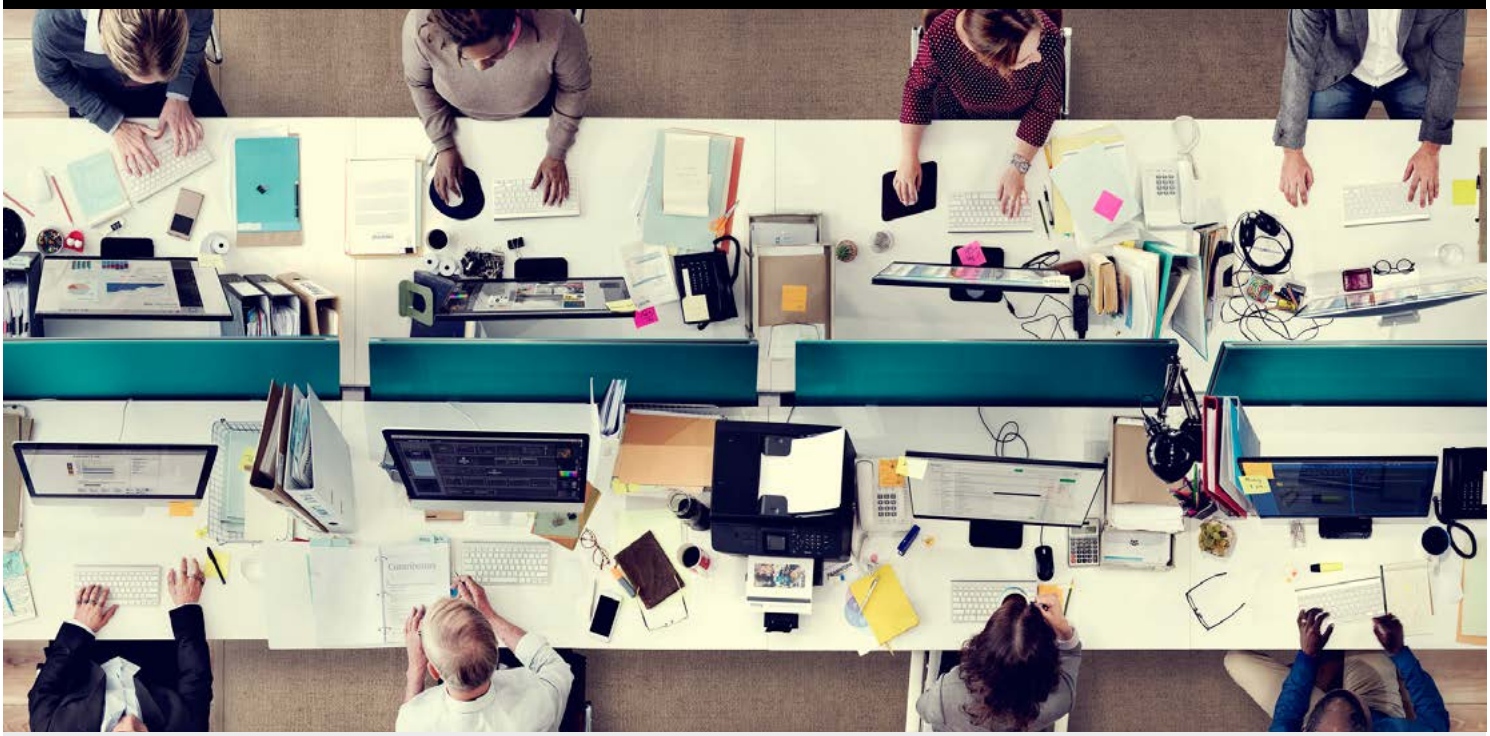
Turks LEGAL

INSURANCE ▪ COMMERCIAL ▪ BANKING



LEGISLATIVE DEVELOPMENTS

There are no legislative developments to report this month.

RECENT DECISIONS

- **What happens when a disease claim is made against two employers?**

  Thuy Nga Lang v Core Community Services (First Respondent) and Rosary Village (Second Respondent) (2018) NSWWCC 153 (6 June 2018)

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

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

RECENT DECISIONS

What happens when a disease claim is made against two employers?

Thuy Nga Lang v Core Community Services (First Respondent) and Rosary Village (Second Respondent) (2018) NSWWCC 153 (6 June 2018)

Link to decision

Summary

This decision relates to a disease claim/lump sum claim where the allegation is made against two employers.

The decision is interesting because a previous lump sum agreement between the worker and one of the employers was found not to be relevant.

Background

The worker began working for Rosary Village as a kitchen hand in 2001. She first felt pain in her lower back in late 2002. She did not report it but sought medical treatment. The worker took no time off work but continued to experience pain.

In April 2003, she started concurrent employment with Core Community Centre as a carer. The worker's pain in her lower back worsened as a result of both employments.

The worker resigned from her employment with the Community Centre in October 2004 due to back pain but continued to work for Rosary Village. Although her pain continued, she did not want to report her pain as she wanted to retain her job.

In October 2005 while at Rosary Village, she suffered a frank incident to her lower back while lifting a patient. She did not report the lower back pain to the employer but saw a GP who gave her a WorkCover medical certificate.

However, the worker did not present the medical certificate to the employer.

Finally in April 2008, after a change in shifts and continuing pain, she received a WorkCover certificate from her GP and presented it to Rosary Village, had two weeks off, and resigned on 23 April 2008.

Interestingly, on 13 October 2007, the worker signed a Complying Agreement with the other employer, the Community Centre, for 7%WPI with a date of injury of 30 October 2014.

Decision

It is not clear from the judgment precisely what compensation was claimed in the proceedings, however, at the very least, a claim for lump sum compensation was made pursuant to section 66 of the *Workers Compensation Act 1987* ('the Act').

The Arbitrator had to deal with a number of issues.

Injury

Arbitrator Beilby found a disease injury. Based on section 16 of the Act, she found Rosary Village was liable as the employer who last employed the worker in employment that was a substantial contributing factor to the aggravation etc of the disease.

Estoppel

Understandably, the lawyers for Rosary Village argued that the complying agreement entered between the worker and the Community Centre made the Community Centre liable for the injury. This submission was based on

back to top

the argument that the worker could not deny (i.e. was estopped from arguing) that there was a compensable injury with the Community Centre on 30 October 2014 that resulted in a section 66 lump sum entitlement.

The arbitrator rejected that submission on the basis that the worker had worked for a number of injurious years after that date of injury, which resulted in the worker bringing a totally different allegation of injury to the Workers Compensation Commission. Furthermore, in the present claim, the worker was also alleging injury to other body parts apart from the lumbar spine.

Late Notice and Late Claim

It was established that a claim in some form was made by correspondence sent to Rosary Village dated 26 March 2009. Rosary Village argued that, as the claim was made more than 6 months after the injury, the worker was barred from making a claim particularly as there was no evidence as to why the worker delayed the claim.

However, the Arbitrator, relying upon on *Gow v Patrick Stevedores* (2002) NSWCC60, found that for disease lump sum claims, the date of injury is the date that lump sum claim was made. That date in these proceedings was 23 August 2017. This is also consistent with *Stone v Stannard Bros. Launch Services P/l* (2004) NSW CA 277. The claim was not considered to be late as a result.

For more information, please contact:

Craig Bell
Partner
T: 02 8257 5737
M: 0418 673 112
craig.bell@turkslegal.com.au

back to top

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;

back to top

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.

back to top

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

back to top