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## RANKIN ELLISON CASE NOTES

### COURT OF APPEAL CONSIDERS NINE AND A HALF YEAR EXTENSION OF LIMITATION PERIOD

#### Gower v State of New South Wales [2018] NSWCA 132

Section 151D of the *Workers Compensation Act 1987* (NSW) ("1987 Act") provides a three year limitation period for commencing a claim for work injury damages, which commences from the date of injury. In *Gower v State of New South Wales [2018]* NSWCA 132, the NSW Court of Appeal considered an Appeal to extend that period by approximately nine and a half years. Though the Appeal was ultimately rejected, the Court's reasoning indicates a willingness to extend the limitation period in certain circumstances.

#### Material Facts

Mr Shane Gower ("Appellant") was employed by the State of New South Wales ("Respondent") as a high school teacher. Whilst in the course of his employment on 12 September 2003, the Appellant was struck in the face with a soccer ball that had been thrown by a student. The Appellant consequently suffered a broken nose and developed a major depressive disorder.

In the years following his injury the Appellant obtained various expert medical opinions in respect of his psychological condition. Due to stabilisation issues the Appellant was unable to obtain a favourable permanent impairment assessment until May 2012. He made a claim for lump sum compensation and pain and suffering against the Respondent shortly thereafter. A medical assessment certificate was issued on 13 May 2014 which confirmed that the Appellant's degree of permanent impairment was at least 15% (as required by Section 151H of the 1987 Act to claim work injury damages).

The Appellant subsequently filed a claim seeking work injury damages ("WID") in the District Court on 23 May 2016, some twelve years after the deemed date of injury.

The Respondent sought interlocutory Orders that the proceedings be struck out on the basis that the three year limitation period for making a WID claim had well and truly expired. The Appellant made a competing application to the Court, seeking leave to commence the relevant proceedings out of time.

The District Court rejected the Appellant's application and dismissed the proceedings on the following bases:

1. Despite being advised of the limitation period by his solicitor, the Appellant deliberately allowed it to expire.
2. The Appellant did not fully or satisfactorily justify his reasons for delay.
3. The Appellant's case was not strong enough to warrant an extension of the limitation period.
4. Permitting an extension of the limitation period would cause actual prejudice to the Respondent.

The Appellant lodged an Appeal against the trial Judge's decision, contending that her Honour had erred in making the above findings.

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## NSW Court of Appeal

Section 151DA(1)(a) of the 1987 Act provides that the limitation period is suspended whilst the worker's degree of permanent impairment is in dispute or is not fully ascertainable. Though it was open to the Appellant to make a lump sum compensation claim inside the limitation period so as to suspend same, it would have been disadvantageous for him to do so. That was due to the fact that his medical evidence at that time assessed only 4% WPI in respect of his physical injury.

It was not until May 2012 that the Appellant obtained medical evidence assessing at least 15% WPI in respect of his psychological injury. The majority determined that it was not unreasonable for the Appellant to delay the commencement of proceedings until such time as he received that supportive evidence. The Court therefore determined that the trial Judge had erred in respect of findings 1 and 2 above.

The Court of Appeal agreed with the trial Judge to the extent that the merit of the Appellant's case was highly material in relation to its decision to extend the limitation period.

The crux of the Appellant's work injury damages claim was that the Respondent had negligently failed to enforce its "no ball" policy. However, the Appellant failed to disclose sufficient evidence in his pre-filing statement to substantiate that allegation. Section 318 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) ("WIM Act") prohibits litigants from relying on evidence that was not previously disclosed in his/her pre-filing statement. The Court deemed the Appellant's claim to be weak since his ability to adduce evidence in support of his claim was impinged by the operation of that provision.

Finally, the Respondent contended that significant actual prejudice would arise if the Appellant were granted leave to commence proceedings. The Appellant sought to lead

evidence that a soccer ball was kicked at his head by another student in a separate incident, which was indicative of a tendency for students to engage in such behaviour. That student had since died and as such the Respondent was unable to obtain evidence to defend that allegation.

Further, since more than a decade had passed since the date of injury, the Respondent contended that certain witnesses were no longer available, that the memories of the available witnesses had since deteriorated, and that medical and school records were no longer available. The majority accepted that the Respondent would suffer actual prejudice if the extension of time was permitted.

The Court of Appeal rejected the Appellant's Appeal.

## Implications

The Court did not grant the Appellant leave to commence proceedings outside the three year limitation period. However, that decision was based on the merit of the Appellant's claim and the likelihood that actual prejudice would arise.

Importantly, the Court's decision indicates a possibility for injured workers to commence work injury damages claims even if they are made outside the limitation period so long as the case has merit and the Respondent suffers no prejudice.

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