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## RANKIN ELLISON CASE NOTES

### Onus Of Proof In Civil Litigation

*Parrish v Olympic Roadways Pty Ltd & Broome [2018] NSWDC 258*

The witness of a fatal motor vehicle accident recovered workers compensation benefits, compensation under the *Motor Accidents Compensation Act 1999* (NSW), and an award of damages under the *Civil Liability Act 2002* (NSW). *Parrish v Olympic Roadways Pty Ltd & Broome [2018] NSWDC 258* concerned the latter of those claims. His Honour Judge Levy's judgment serves as an important reminder as to the legal rules pertaining to the onus and standard of proof in a civil action for damages.

#### Material Facts

The Plaintiff, Barry Parrish, is a former NSW Police Sergeant. On 24 May 2006, the Plaintiff responded to a motor vehicle accident in which a truck had crashed into a guardrail on the outer edge of a four lane highway. The highway continued to operate as normal whilst the Plaintiff carried out his policing duties at the scene of the accident. At some stage thereafter, two further trucks were travelling adjacent to one another in the direction of the crash site. One of those trucks ("the relevant truck") was owned by the First Defendant, Olympic Roadways Pty Ltd, and was being driven by the Second Defendant, Rodney Broome. Upon nearing the crash site, the relevant truck attempted to merge behind the adjacent truck as directed by Police indicator signage. In doing so, the relevant truck clipped the rear end of the adjacent truck which caused the Second Defendant to lose control and collide with a stationary Police vehicle. The force of that collision catapulted the Police vehicle into the initial truck driver who died instantaneously. The Plaintiff was forced to dive several meters onto asphalt so as to avoid the same fate. He landed forcefully on his knees and chest causing him to sustain

physical injuries to his neck, low back, left hip, and lower limbs. The Plaintiff also suffered Post-Traumatic Stress Disorder as a consequence of the accident. He was ultimately medically discharged from the Police Force.

The Plaintiff was paid workers compensation benefits by his Employer and recovered compensation under the *Motor Accidents Compensation Act 1999* (NSW) in respect of his injuries. He subsequently commenced action in the District Court against the Defendants to recover compensatory damages under the *Civil Liability Act 2002* (NSW). The proceedings were primarily concerned with the determination of several contested facts; namely the cause and severity of the Plaintiff's injuries and ongoing disabilities.

#### District Court Trial

The Plaintiff's case was that the subject accident caused the aggravation of and rendered symptomatic his underlying physical and psychological conditions. He argued that if it were not for the subject accident he would not be plagued by ongoing disability and therefore would not have suffered any loss. The Defendants' position was that significant components of the Plaintiff's injuries and ongoing disabilities were not caused by the subject accident but rather were a consequence of unrelated policing injuries. The Defendants argued that substantial deductions ought to be made to any prospective award of damages to account for the Plaintiff's pre-existing and supervening injuries.

In determining negligence the Court applied Sections 5D and 5E of the *Civil Liability Act 2002* (NSW), which require that the

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Plaintiff prove his loss. Section 5D sets out the relevant test of causation – that the Defendants’ negligence was a necessary condition of the occurrence of the harm and that the scope of the Defendants’ liability extended to the harm suffered by the Plaintiff. The Court also placed emphasis on the legal principle that a *tortfeasor must take a Plaintiff as he/she finds them*. In this case, the Defendants were required to take the Plaintiff as he was found with whatever underlying asymptomatic pathology and predisposition to psychological injury he may have had. Therefore, the only way in which the Defendants could avoid liability was to prove on the balance of probabilities that the Plaintiff’s ongoing disabilities were caused solely by underlying pathological causes and not the subject accident.

The Court considered the totality of the medical evidence in relation to the cause, nature, and resulting disabilities of the Plaintiff’s injuries. In the Plaintiff’s fifteen years of service prior to the subject accident he sustained a multitude of physical injuries including blunt trauma to various body parts, lacerations and puncture wounds to various body parts, a multitude of twisting and straining injuries to his knees, significant recurring bilateral shoulder problems, various fractured bones, a cervical spine injury, hip bruising, lumbar spine pain, and early onset of arthritis. He was also exposed to grossly traumatic events including the Thredbo land slide, witnessing deceased children, and a murder suicide.

Notwithstanding the Plaintiff’s extensive medical history, the Defendants failed to lead any significant evidence to support that his work capacity was impaired at the time of the subject injury. In the absence of any such evidence, the Court inferred that the prior injuries did not adversely affect his fitness to work as a police officer as at the time of the subject injury. Further, it was assumed by the Court that the Plaintiff would not have been permitted to work in full and unrestricted duties by the Police Force if his work capacity was diminished following the subject injury caused by the motor vehicle accident. The Court found that the subject accident permanently aggravated the Plaintiff’s underlying pathology so as to render it symptomatic in circumstances where it was not previously so. It followed that the

permanent aggravation of his conditions would not have occurred but for the subject accident. On that basis, the Court was satisfied that the Plaintiff had made out the causation test under Section 5D of the *Civil Liability Act 2002* (NSW). Liability was established and the Plaintiff’s claim therefore succeeded.

With respect to damages, the Defendants argued that the Plaintiff’s extensive pre-accident injury history as well as the effects of his further post-accident knee injury should limit any monetary award. Judge Levy reiterated that the Plaintiff’s pre-existing injuries and their sequelae did not present an impediment to his continued employment as a police officer. Further, the contemporaneous medical evidence suggested that his post-accident knee injury was relatively minor and did not contribute to his ongoing disability. The Court therefore rejected the Defendant’s submissions on damages.

#### Implications

It is well established that the Plaintiff bears the onus to prove his/her cause of action on the balance of probabilities. That is to say that it is not the Defendant’s responsibility to disprove the Plaintiff’s claim. However, in circumstances where the Plaintiff must be taken as he/she is found and the Defendant/s seek a finding that the Plaintiff’s injuries are due to underlying or supervening causes not related to the subject accident, then the onus of proof is reversed and the Defendant/s must discharge his/her evidentiary burden of proving that allegation.

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