

Case Note

First in, not necessarily best dressed? Victorian Court of Appeal allows multiple Medical Panel determinations, setting aside the Rosata decision

Citywide Service Solutions Pty Ltd v Rosata; Kabbout v Crown Melbourne Ltd [2023] VSCA 281

Background

Luigi Rosata and Samih Kabbout issued separate court proceedings for injuries sustained in unrelated slip and fall incidents. In Victoria, a claimant who suffers injuries, which are not caused by a workplace or transport accident, may only claim general damages (“pain & suffering” damages) if s/he has a “Significant Injury”.

In Mr Rosata’s case, a Medical Panel determined that he had suffered a Significant Injury as against the first defendant. Later in the proceeding, Mr Rosata joined a second defendant. Upon referral by that party, a second Medical Panel determined that Mr Rosata had not suffered a Significant Injury.

In Mr Kabbout’s case, a Medical Panel determined that he had not suffered a Significant Injury – a finding, which favoured the first defendant. Later in the proceeding, Mr Kabbout similarly joined a second defendant. The second defendant neglected to refer Mr Kabbout to a Medical Panel, which meant the defendant was deemed to have accepted that Mr Kabbout had a significant injury.

1. In the *Rosata* proceeding, was the first Medical Panel determination binding on all defendants?
2. In the *Kabbout* proceeding, was the defendant who failed to refer Mr Kabbout entitled to rely on the previous Medical Panel determination?

County Court decision

On 2 May 2023, His Honour Judge Fraatz delivered judgment in the *Rosata* proceeding. His Honour determined that the first Medical Panel determination was binding on all defendants, including the defendant who had successfully referred Mr Rosata to the Medical Panel later in time. His Honour’s reasoning was that, after succeeding at the first Medical Panel, Mr Rosata should not be restricted from pursuing general damages for his injuries.

His Honour’s decision was appealed by the defendant who succeeded against Mr Rosata at the Medical Panel. Due to the similar circumstances, the *Kabbout* proceeding was also referred to the Victorian Court of Appeal.

Victorian Court of Appeal decision

The Victorian Court of Appeal unanimously overturned Judge Fraatz's decision and determined that the issue of Significant Injury can be resolved differently across defendants in the same proceeding. As a result:

1. In the *Rosata* proceeding, the defendant who subsequently defeated the plaintiff at the Medical Panel could rely on this determination, and
2. In the *Kabbout* proceeding, the defendant who failed to refer the plaintiff was not entitled to rely on the earlier Medical Panel determination.

The end result is that Mr Rosata and Mr Kabbout were entitled to recover general damages against some of their respective defendants, but not others.

In a joint judgment, the Court pointed to the following factors:

1. There is no provision in the *Wrongs Act*, which specifically prevents different Medical Panels from providing different determinations.
2. A number of provisions in the *Wrongs Act* contemplate the possibility of the Significant Injury issue being resolved differently across defendants in the same proceeding. For example, section 28LR provides that acceptance of a certificate of assessment by one defendant does not bind the others.
3. The fact that the Medical Panel Convenor is empowered, but not required, to consolidate referrals by multiple defendants admits of the possibility that there will be cases where referrals have not been consolidated. Necessarily, this means there could be multiple (possibly inconsistent) referrals.
4. Although the speedy resolution of the Significant Injury issue is important, the language of the *Wrongs Act* should not be "tortured" to the point where a defendant is denied procedural fairness. Defendants should not be bound by referrals in which they were unable to provide material or make submissions.
5. A Medical Panel determination between a plaintiff and defendant cannot override the provisions of the *Wrongs Act*, such that another defendant need not engage with the Significant Injury process at all. The Significant Injury process should not be seen as a hierarchy, with the Medical Panel sitting at the apex. Rather, it should be perceived as a set of gatekeepers which plaintiffs and defendants must deal with sequentially. The Medical Panel exists to resolve disputes between claimants and respondents, provided the parties have passed through the preceding gates.

The Court acknowledged that its decision could lead to anomalous outcomes in multi-defendant claims and alter entitlements to contribution. However, the fact that this construction may render less than ideal results is no basis for failing to give proper effect to the statutory text of the *Wrongs Act*.

Takeaways

The first Medical Panel determination in a case will not bind the other defendants, including those joined later to proceedings. This means there can be multiple and conflicting Medical Panel determinations across defendants in the same proceedings.

Defendants joined later to proceedings should always take care to evaluate whether it is appropriate to refer a plaintiff to a Medical Panel. Such defendants must still engage with the Significant Injury mechanism, even where a Medical Panel has already determined the Significant Injury issue.

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