

# County Court decision overturns long-standing Medical Panel process

*Rosata v City of Melbourne & Anor [2023] VCC 630*

MAY23

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## At a glance

- The decision of *Rosata v City of Melbourne & Anor* [2023] VCC 630 has taken respondents in Victoria by surprise and may overturn a process that has been bedded down over the last 20 years.
- In *Rosata*, the County Court held that the Medical Panel can only make one determination in each proceeding. This is the position irrespective of the number of respondents, or when they are brought into the claim.
- This ruling has challenged the position about whether a determination is binding on a respondent who was not party to that referral.
- The decision also raises some important new questions for all participants in personal injury claims in Victoria.

## Background on the established process

Back in 2003, as part of Victorian tort law reform to address what was being referred to as the ‘insurance crisis’, legislation was introduced to require many personal injury claimants to establish they had suffered a ‘Significant Injury’ by meeting certain injury thresholds to claim general damages. This involved the claimant obtaining a Certificate of Assessment from an approved medical practitioner that certified the claimant’s injuries met the injury thresholds.

Once served with a Certificate of Assessment and associated documents, the respondent was subject to some strict procedural requirements. These included allowing the respondent, at its cost, to refer the claimant to an independent Medical Panel for a binding determination on whether the injury thresholds were met. If the respondent missed the strict timeframe for referral, then the legislation ‘deemed’ the injury to be a Significant Injury and general damages would be allowed.

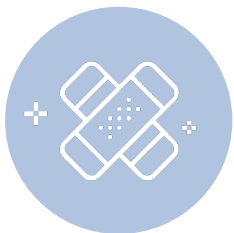
If the claimant was proceeding against multiple respondents that each had made a referral, the Medical Panel was able to combine those referrals and issue just one determination.

In cases where there were delays between the claimant proceeding against additional respondents, the long-held practice was that the respondent that was ‘late to the party’ would not be bound by an earlier determination of a Medical Panel but, instead, could make their own referral. In doing so, it could provide the Medical Panel with any submissions it considered appropriate.



This practice meant that there could be different outcomes. For example, the Medical Panel may have determined the injury met the injury threshold, entitling the claimant to include general damages against that referring respondent, and in a subsequent referral, it may have reached a different determination. There could be various reasons for the different determinations, including new information or a change in the injury.

There have also been many cases where one respondent has made a referral, but another has missed the strict deadline. For the tardy respondent, the injury would be deemed a Significant Injury.



### Background to the *Rosata* decision

In *Rosata*, the plaintiff, Luigi Rosata, served the City of Melbourne with a Certificate of Assessment signed by Dr David Kennedy along with the associated documents. The City of Melbourne referred Mr Rosata to a Medical Panel. The Medical Panel determined Mr Rosata's injuries satisfied the 'Significant Injury' threshold, entitling him to claim general damages against the City of Melbourne.

The plaintiff subsequently identified a further respondent, Citywide, a contractor and service provider to the City of Melbourne. He then served a Certificate of Assessment on Citywide, which made a further referral to the Medical Panel. Citywide's action was consistent with the usual practice.

In contrast to the first determination, the newly convened Medical Panel issued a determination that Mr Rosata's injuries did not meet the 'Significant Injury' threshold.

Mr Rosata's lawyers then issued an application in the County Court for orders that Citywide be bound by the first determination and not be able to avoid the claim for general damages by relying on the second determination.

### The *Rosata* decision

His Honour Judge Fraatz determined the second referral and, in turn, the second determination was not valid, holding that a Medical Panel can deliver one determination only.

His Honour placed considerable emphasis on sub-section 28LZH(1) of the *Wrongs Act*, which states that:

*A determination by the Medical Panel that the degree of impairment resulting from an injury satisfies the threshold level must be accepted by a court in any proceeding on the claim as a determination of significant injury for the purposes of this Part.*

In other words, His Honour said that once there was a determination by the Medical Panel that the threshold was met, then the Court was bound to accept, and apply, that determination to the whole of the claimant's proceeding. Accordingly, unless this decision is successfully appealed, or another Court (not bound by His Honour's decision from a precedent perspective) takes a different position, then all respondents to a claimant's claim may be bound by a Medical Panel's referral determining the claimant has a Significant Injury.



### Clarity is now needed on some important new issues

The decision creates some new questions. For example, what happens when a Medical Panel has determined that a claimant's injury is not a Significant Injury? Are all parties bound by that determination?

There is certainly an argument to say that should be the case. Sub-section 28LZH(2) of the *Wrongs Act* mirrors the provision His Honour placed primary reliance on (28LZL(1)) but applies to a determination by the Medical Panel where the degree of impairment resulting from an injury does not satisfy the threshold level. In that case, the *Wrongs Act* says the Court must accept the determination that the injury is not a Significant Injury for the purposes of the Part.

Another question arises about what happens when a respondent was 'deemed' to have accepted a claimant has a Significant Injury because they did not make a referral in the requisite time. Will sub-section 28LZH(2) take precedence, in the same way His Honour has said a determination that attracts sub-section 28LZH(1) will?

The Convenor of Medical Panels is yet to issue any statement or guidance on the implications of the decision. We are also yet to learn whether the decision will be appealed.

We eagerly await hearing from the Convenor of Medical Panels, or the Court's clarity, on these important issues. In the meantime, we suggest respondents continue to exercise their rights to make a referral with the time period prescribed by the *Wrongs Act* until the issue is resolved.

**You can find the decision [here](#).**

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