

MAURICE BLACKBURN CASHMAN v BROWN (M176/2010)

Court appealed from: Court of Appeal of the Supreme Court of Victoria
[2010] VSCA 206

Date of judgment: 25 August 2010

Date special leave granted: 10 December 2010

The respondent was employed by the appellant as a salaried partner its legal practice in Melbourne. She claims that between 8 January 2003 and 17 November 2003 she was 'systematically undermined, harassed and humiliated' by a fellow employee, as a result of which she suffered injuries, including severe anxiety and depression, eczema, headaches and agoraphobia.

On 24 March 2006 WorkCover referred the respondent for opinion of a medical panel set up under the *Accident Compensation Act 1985* (Vic) ('the Act'). The panel was asked, inter alia, to determine the degree of impairment suffered by the respondent. Its determination was as follows: '[T]here is a 30 per cent psychiatric impairment resulting from the accepted psychological injury when assessed in accordance with s 91(2) for the purposes of ss 98C, and 134AB(3) and (15) of the Act. The degree of psychiatric impairment is permanent ...'

Because the degree of impairment of the respondent had been assessed by the medical panel to be 30 per cent, her injury was deemed to be a serious injury within s 134AB(15) of the Act. This entitled the respondent to commence a common law proceeding. In its defence to the proceeding, the appellant denied that the respondent had suffered injury. In her reply, the respondent claimed that the appellant was estopped, or precluded from going behind the opinion of the medical panel. Prior to the trial in the County Court of Victoria, Judge Lacava referred a special case to the Court of Appeal. The special case raised the question as to the consequences, in a proceeding at common law for damages, of it being deemed, pursuant to s 134AB(15) of the Act, that the respondent suffered from a serious injury.

The Court of Appeal (Ashley and Mandie JJA, and Ross AJA) held that the appellant was prohibited in the proceeding from making any assertion and leading or eliciting any evidence which was inconsistent with the opinion of the medical panel. The Court relied on s 68(4) of the Act, which states: "For the purposes of determining any question or matter, the opinion of a Medical Panel on a medical question referred to the Medical Panel is to be adopted and applied by any court, body or person and must be accepted as final and conclusive by any court, body or person ...".

The grounds of appeal include:

- The Court of Appeal erred in holding that, by the combination of s 68(4) and s 134AB(15) of the *Accident Compensation Act 1985*, the opinion formed on 28 June 2006 by a medical panel (constituted by two medical practitioners) that the respondent's degree of psychiatric impairment was 30% has the result that, for the purposes of the trial of the respondent's common law damages claim -
 - (a) the respondent will be deemed to suffer from "serious injury" both as to pain and suffering and loss of earning capacity consequences;

- (b) the opinion of the medical panel, with "its mandated serious injury consequences", must be adopted and applied in the common law damages trial; and
- (c) the appellant is not entitled to put in issue that fact that, at the time the opinion was expressed, the respondent suffered serious injury, namely a permanent severe mental disturbance or disorder.