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MEDICAL NEGLIGENCE

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In Australia, we are all fortunate enough to have access to some of the most advanced medical treatment and health services in the world, but sometimes, despite best efforts, doctors and treatment providers cause unnecessary injuries and damage when their services fall below the acceptable standard of care. This is often referred to as medical malpractice or “negligence”, as it is more commonly known.

Sadly, doctors and treatment providers negligence can cause significant damage, both physically and psychologically to an individual and there are debilitating complications and needs for expensive ongoing treatment or medication arising from the negligent act.

Family members almost always suffer some form of nervous shock. Usually, this arises after being informed by a doctor or treatment provider that a loved one’s procedure/treatment didn’t go as expected and that they have suffered some form of usually serious complication or injury. Loved ones of course are forced to live through this trauma with the injured person. Fortunately, **the law recognises that it is reasonably foreseeable for close family members to suffer nervous shock or develop a psychological condition** in such circumstances which may also entitle them to compensation.

- ## ELEMENTS OF NEGLIGENCE

Generally speaking, there are a number of elements that exist in a medical negligence claim that would give rise to a finding in negligence. An injured person must show:-

1. That they were owed a duty of care; and
2. That there was a breach of that duty; and
3. As a consequence of that breach, damage or injury have been occasioned which might have been avoided but for the negligent act.

- ## EXAMPLES OF TREATMENT WHERE NEGLIGENCE MAY OCCUR.

Claims for medical negligence are not limited to treatment provided by a doctor or hospital. They can extend to the following treatment providers/institutions:-

- Treatment received by a Chiropractor or osteopath, for example, neck manipulations leading to dissection and stroke.
- Treatment by physiotherapists for example, advice to mobilise prematurely after suffering a fracture leading to more serious injury and damage.
- Dental malpractice, for example removal of a wisdom tooth without proper x-rays to identify the location of the nerve with consequent nerve/jaw damage.
- Nursing Home Negligence such as lack of supervision in a patient that ought to have been assessed as a falls risk resulting in a fall or injury which may otherwise have been avoided with proper risk assessments and adequate supervision.

- General Practitioner and doctor negligence- including failure to carry out proper tests/investigations, failure to correctly interpret test results, failure to refer to a specialist, failure to prescribe correct medication, failure to diagnosis or misdiagnosis etc.
- Hospital negligence, this includes treatment received in the emergency department or as inpatient, for example, failure to carry out relevant tests/investigations, failure to properly interpret tests or investigations, failure to properly diagnose or treat a particular condition, discharging a patient when it may have been inappropriate to do so, incorrectly administering the incorrect medication or dosage etc.
- Negligence in nursing, for example failure to identify a fall's risk and implement adequate measures, failure to administer correct medication or correct dosage, failure to correctly insert tubing or other equipment resulting in injury or death.
- Radiology Centre Negligence, for example incorrectly reporting on an x-ray, CT scan MRI scan or any other radiological investigation
- Pharmacy errors such as dispatch of wrong drugs or incorrect dosage)
- Incorrectly performed operation or other procedure
- Misdiagnosis or failure to diagnose
- Failure to inform (or a delay in informing) about test results or similar key information
- Failure to warn about side effects or risks
- Obstetric malpractice, negligence and mistakes for example a failure to carry out the correct testing or to interpret the testing correctly, failure to identify congenital birth defects, failure to identify foetus distress during labour and act accordingly etc.
- Cosmetic and plastic surgery malpractice- such as incorrectly performed operations or procedures or failing to provide the correct aftercare resulting in wound breakdown or infection.

Of course, **this list is by no means exhaustive** and there may be other scenarios and examples of treatment not mentioned above which may still give rise to a valuable claim. If you are in doubt, it doesn't cost you anything to seek legal advice and take advantage of the "no win, no fee" services that most firms offer.

- WHAT SHOULD I DO IF I HAVE SUFFERED AN INJURY?

If you have suffered an injury or complication and you believe it arose due to a negligent act, it is always best to attend to the following matters:-

1. Report the injury to the treating doctor/provided and demand a meeting to discuss your concerns. Sometimes, public hospitals will conduct an internal review and often may request a Roots Causes Analysis (RCA report) which can be very helpful as it almost always identifies the errors that occurred leading to injury or death.
2. In some cases, and subject to obtaining legal advice beforehand, it may be beneficial to report the injury and malpractice to the local branch of the Health Care Complaints Commission (HCCC) in your State. This can be done by filling out a complaints form. The HCCC will usually write to the doctor in question requesting answers to various questions concerning the treatment in question. Again, it would not be prudent to do this on your own volition unless you've sought legal advice as to the pros and cons of taking this course of action.
3. In the case of the death of a loved one, an autopsy or post-mortem followed by a coronial inquest can also be quite useful in determining the cause of death.

- ## CAN I CLAIM ON BEHALF OF A DECEASED FAMILY MEMBER?

Often, a negligent act could result in death. A common question that arises frequently is whether the family can make a claim in circumstances where a father, mother, son or daughter may have passed away.

Close family members are generally entitled to a claim for the nervous shock suffered following the death of a loved one. In some circumstances, there may also be rights to make a claim under the Compensation to Relatives Act for such things as funeral expenses, loss of financial and non-financial contributions that were being provided by the deceased to the household.

- ## THE PROCESS OF A MAKING A CLAIM

Injured persons can make a claim by engaging a competent personal injury firm of solicitors to represent them. The process of claiming varies from state to state.

- ## NEW SOUTH WALES

In NSW, no formal documents are required to be formally served in order to make a claim. A lawyer can simply request your clinical records from all of the relevant treatment providers and proceed from there. There are no provisions that require notice to be given to the doctor or treatment provider. The law governing medical negligence claims in NSW is contained in Sections 5O – 5N of the *Civil Liability Act* 2002 (NSW).

Section 5O provides that a court is prevented from making a finding of negligence against a defendant professional where it can be shown that he or she acted in accordance with a practice widely accepted as being competent by peer professional opinion , unless that opinion is irrational.

- ## DUTY OF CARE – SECTIONS 5B AND 5C CIVIL LIABILITY ACT NSW

The meaning of reasonable foreseeability has been adapted from law handed down through the court system known as the common law.
A risk is foreseeable if the person knew of it or ought to have known of it. It also has to be not an insignificant risk and a reasonable person would have taken precautions to prevent that risk. The Act then provides a further list of criteria to ascertain whether a reasonable person would have taken precautions. These factors include:

- the probability that the harm would occur if care were not taken;
- the likely seriousness of the harm;
- the burden of taking precautions; and
- the social utility of the activity which creates the risk of harm.

These last provisions cause considerable problems with their interpretation by the court. The issue of the “burden” of taking precautions is further clarified in the Act where it is confirmed that such precautions also would include the burden of taking precautions to avoid similar risks of harm to the one under consideration. Liability is not affected by:

- the fact that a risk could have been avoided by doing something in a different way;
- the subsequent taking of action that would have avoided a risk (had the action been taken earlier). This is obviously intended to avoid the “wisdom of hindsight”.

- ASSUMPTION OF RISK – SECTIONS 5F – 5I

No duty of care to warn another person of a risk that is "obvious" unless:

- the plaintiff requested information about the risk;
- there is a requirement in the written law to warn; or
- there is a risk of death or injury from professional services.

'Obvious risk' means:

- a risk that is obvious to a reasonable person in the injured person's position;
- matters of common knowledge.

Risks can be obvious even though there is a low probability of occurrence. They can also be obvious even though they are not prominent, conspicuous or physically observable.

A person is presumed to be aware of an obvious risk unless they can prove that they were not aware of it. For these purposes, the person does not need to be aware of the precise risk but merely the type or kind of risk – the onus is on the injured person.

'Inherent risk' is a risk of something occurring that cannot be avoided by reasonable care and skill.There is no liability in respect of an inherent risk but it does not excuse defendants who still have a duty to warn people of them.

A detailed Chronology always needs to be prepared and a concise letter of instruction needs to be sent an expert in the relevant field of practice. The letter of instructions usually contain some very carefully crafted questions as to liability, causation, breach and in some cases damage. A tele conference is usually arranged with the expert to vent out the relevant issues before a final report is written. It is crucial to obtain an opinion that clearly states that the medical treatment provided falls below the accepted standard of care.

Once a supportive report is obtained, proceedings can be commenced in either the District Court of the Supreme Court.

A summary of the general time frames and the process of claim in NSW is contained below for ease of reference:-

1. Engage a lawyer.
2. Obtain clinical records from the doctors and hospitals -16-20 weeks.
3. Prepare a Chronology and Letter of Instructions 20-30 weeks.
4. Brief Counsel – 40-50 weeks.
5. Commence Court proceedings – 52- 70 weeks.
6. Pre-Trial Conference – 86 weeks.
7. Status Conference 98 weeks.
8. Mediation – 104 weeks.
9. Hearing – 126 weeks.

- QUEENSLAND

In QLD you have one month after consulting a lawyer to serve a Section 9A notice, which is technically a letter of demand setting out the impending cause of action.

Then once you've done the notice you have 12 months to do the PIPA application form which must be accompanied by an expert report.

Technically The limitation is strictly 3 years from the date the cause of action arises and is not based on discoverability. In other words, the 3 year limitation period is more strict and extensions will only be granted with the leave of the court in exceptional circumstances.

The law governing medical negligence in QLD is contained in the *Personal Injuries Proceedings Act* 2002 (QLD).

Section 9A(1) of the PIPA act states:
'This section applies to a claim based on a medical incident happening on or after the commencement of this section that is alleged to have given rise to personal injury.' (emphasis added)

Section 9A(14) provides a definition of 'medical incident':
'medical incident means an accident, or other act, omission or circumstance involving a doctor happening during the provision of medical services.' (emphasis added)

A summary of the process of claim in QLD is as follows:-

1. Engage a Lawyer.
2. Serve 9A notice of claim – within 4 Weeks month of engaging a lawyer.
3. Obtain Clinical records from the doctors and hospitals – 20-24 weeks
4. Prepare a Chronology and Letter of Instructions – 30-36 weeks
5. Brief Counsel – 36 weeks
6. Serve PIPA form 1 & 2 within 12 months of engaging a lawyer.
7. Attend Compulsory Conference – within 4 months of serving PIPA.
8. Commence Court proceedings – 1 months after compulsory conference Pre-Trial Conference – 4 months after commencement of proceedings
9. Status Conference 8months after commencement of proceedings
10. Mediation – 12-15 months from commencement of proceedings.
11. Hearing – 8-12 months from the mediation date.

- AUSTRALIAN CAPITAL TERRITORY

In ACT, the law requires the claimant to serve a notice of claim onto the potential defendant within the earlier of nine months of the incident or appearance of symptoms or four months of instructing a lawyer regarding the possible claim and the defendant being identified.

In ACT, the law relating to limitation is similar to NSW in that the time for commencement of proceedings is 3 years from the date of the accident or 3 years from when the cause of action first becomes discoverable. In the case of a child the limitation period is six years.

The law is contained in Sections 42-44 of the *Civil Law Wrongs Act 2002* (ACT).

The process of making a claim can be summarised as follows:-

1. Engage a Lawyer.
2. Serve notice of claim – within 9 months of the incident or injury or 4 months of engaging a lawyer
3. Obtain Clinical records from the doctors and hospitals – 4-6 months after engaging a lawyer.
4. Prepare a Chronology and Letter of Instructions – 2-3 months after receiving all clinical records.
5. Brief Counsel – 1 month after receiving supportive expert's opinion.
6. Commence Court proceedings – 1 months after compulsory conference Pre-Trial Conference – 4 months after commencement of proceedings
7. Status Conference 8 months after commencement of proceedings
8. Mediation – 12-15 months from commencement of proceedings.
9. Hearing – 8-12 months from the mediation date.

- VICTORIA

In Victoria, there is no formal requirement to serve a notice of claim onto a prospective defendant in medical negligence matters.

Two things are required prior to proceedings being commenced:-

1. A supportive experts report on the issue of liability; and
2. A Serious Injury Certificate as required by the Wrongs Act 1958 (VIC). The serious injury certificate needs to certify that your physical injuries exceed 5% whole person impairment pursuant to the AMA guidelines 5th Edition or 10% whole person impairment under the AMA 5th Edition guidelines if you have psychiatric injuries.

In Victoria, you must bring a claim within 3 years from the date that you discover or should have discovered all of the following facts:-

- That an injury has occurred;
- That the injury was caused by the fault of another;
- That the injury is sufficiently serious to justify the bringing of a claim.

In the case of a child or a person under a disability, a claim must be commenced within 6 years of the date the above facts were or should have been discovered.

You must act reasonably to discover these facts. Delay in discovering these facts may prevent from making a claim for compensation.

Below is a timeline which gives you a guide as to the process involved in bringing a claim in Victoria:

1. Engage a lawyer
2. Obtain clinical records from the doctors and hospitals -16-20 weeks
3. Prepare a Chronology and Letter of Instructions 20-30 weeks
4. Brief Counsel – 40-50 weeks
5. Arrange a medical examination for purposes of a serious injury certificate 52-70 weeks
6. Commence Court proceedings – 52- 70 weeks
7. Pre-Trial Conference – 86 weeks
8. Status Conference 98 weeks
9. Mediation – 104 weeks .
10. Hearing – 126 weeks

- DAMAGES

Damages vary between the jurisdictions but generally speaking if you can establish all of the elements of negligence, you may be entitled to an award for damages which includes the following:-

1. General Damages for pain and suffering.
2. Past and future treatment expenses.
3. Past and future loss of earnings.
4. Past and future domestic assistance or homecare.

If your injuries are serious enough to prevent you from working, then you may also have rights to make a claim for Total and Permanent Disablement (TPD).

Having the correct legal team with extensive knowledge about the intermingling connection between the law and the medicine in these types of matters is paramount as often, inexperienced lawyers commonly make the mistake of dismissing a matter as not being viable due to lack of skill or experience. A skilled legal practitioner will be able to dissect all of the medical material and consider all the available angles and options including a thorough discussion with the experts on the telephone in order to maximise your chances of success in bringing a claim.

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