

MEDICAL NEGLIGENCE

The concept of negligence arises out of a general duty on all members of society to take reasonable care to avoid injury or damage to other people. If you suffer injury or damage through another person's failure to fulfill this duty you can take action in negligence.

A claim in negligence requires the following three elements:-

1. The existence of a Duty of Care
2. Breach of the Duty of Care
3. Loss or Damage resulting from the breach of Duty of Care

These same principles apply to medical practitioners who are required to exercise reasonable care and skill in the treatment of patients. This duty extends to all aspects of the medical practitioner's involvement with the patient including the process of diagnosis, warning the patient regarding risks and side effects, administering appropriate treatment in a timely manner as well as acting with reasonable care and skill in the performance of medical procedures.

Failure to act with reasonable care and skill

Medical practitioners are under a duty to act with reasonable care and skill in administering treatment. Sometimes adverse outcomes result from medical treatment even where reasonable care and skill has been exercised by the practitioner. In these cases the medical practitioner will not be found to be negligent, provided that appropriate advice has been given to the patient regarding the risks associated with the treatment

Whether there has been a departure from reasonable standards of care and skill in any given circumstance is usually a complex question. Investigations of this issue require the complete medical history and records to be analysed by an independent medical specialist consultant. In some cases it becomes apparent that a clear medical "bungle" has occurred. In these cases the medical mistake is often obvious and negligence may not be difficult to prove or liability may be admitted. These cases are rare.

More commonly a dispute will arise as to whether the treatment in question was consistent with the exercise of reasonable care and skill by the medical practitioner. This question can only be determined by detailed analysis of all of the circumstances at the time. In any given set of circumstances it is not uncommon for there to be conflicting medical specialist opinions. In such cases the Court is required to decide which of the competing medical specialist opinions is to be preferred.

Alternatively, there can be agreement between the medical experts but a dispute can arise between the patient and the medical practitioner as to the history of events, usually concerning the patient's complaints and/or development or symptoms during the course of treatment. In these cases the history recorded in the doctor's medical notes is a critical and frequently determining factor although it is not uncommon to find that the medical notes are incomplete or contain inaccuracies. In those cases the Court is required to hear all the relevant evidence and determine the factual history issues in dispute between the parties. This may not involve any medical questions if the dispute relates entirely to the history of events.

Duty to warn of risks associated with treatment

Medical science is imperfect and all treatments are accompanied by some degree of risk. The law requires medical practitioners to exercise reasonable care, not only in diagnosis and treatment, but also in the provision of advice about appropriate forms of therapy. A doctor has a duty to warn a patient of all material risks inherent in proposed treatment. These can be risks of "side effects" or the possibility that the proposed treatment may fail or result in some other adverse outcome.

A risk is material where a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it. It is important to understand that where the patient is properly advised of the risks associated with proposed treatment and the treatment is competently carried out but results in an unfavourable outcome, the patient has no right to claim in negligence. This is because no breach of duty of care by the medical practitioner arises in these circumstances, regardless of the severity of the loss or damage suffered.

Failure to diagnose or treat expeditiously

The medical practitioner's obligation to act with reasonable care and skill includes the duty to diagnose and administer treatment with reasonable and appropriate care, skill and expedition.

Failure to diagnose in a timely manner can lead to failure or delay in the provision of medical treatment with potential adverse medical consequences. In other cases appropriate diagnosis can be made but there may be failure to administer necessary treatment or inappropriate delay in the administration of treatment resulting in loss or damage.

In these circumstances, to prove negligence it is necessary to show that the failure to diagnose or provide appropriate timely treatment was due to lack of reasonable care and/or skill on the part of the medical practitioner. It is not sufficient simply to establish that the medical practitioner's diagnosis or treatment was incorrect. It must be shown, in addition, that the error or delay would not have occurred had the medical practitioner exercised reasonable care and skill. Independent specialist medical advice based on the full medical record is usually required to assess this question. It is critical to understand that a mistaken diagnosis, or a failure or delay in the administration of treatment, may not be found to be negligent if the same error would have been committed by a competent medical practitioner exercising reasonable care and skill in the same circumstances.

Causation – proving that the negligence caused loss or damage

In addition to establishing that treatment failed to comply with reasonable standards of professional care and skill (negligence), it is necessary to establish that this failure resulted in harm or loss which would not otherwise have occurred. Hence it is necessary to identify the medical problems which the patient would have suffered in any event had the treatment or procedure been competently performed or had appropriate risk warnings been given. Any claim is limited to the additional loss or damage which has been sustained over and above that which would have arisen had negligence not occurred in the course of treatment.

Negligence of other medical providers

Negligence concepts are generally applicable to all medical providers such as hospitals, pharmacists, physiotherapists, chiropractors, podiatrists and others, and are not limited solely to medical practitioners. In each case, the medical provider is required by the law to provide treatment to the standard of reasonable competency within their professional field. Failure to comply with this standard of care resulting in injury or loss can be the subject of a negligence claim.

How is the amount of compensation calculated?

The first step in the calculation of compensation is to establish the extent of loss or damage caused by the medical negligence. Once the extent of this loss or damage has been identified, compensation can be awarded in the following categories:

1. Pain and suffering.
2. Medical treatment expenses incurred up to the present and anticipated future care and treatment expenses.
3. Travel expenses.
4. Loss of income up to the present and future anticipated loss of income.
5. Loss of superannuation benefits.
6. Compensation for loss of life expectancy.
7. Compensation for voluntary services/assistance provided by immediate family members.

Significant injury

You will need to prove that you have a significant injury. This is defined as a permanent impairment of greater than 5% of the whole body pursuant to the AMA guides or a psychiatric impairment greater than 10% of the whole body pursuant to the AMA guides. Usually an assessment by an approved medical practitioner trained in the AMA guides will be required to assess the level of impairment and determine the percentage of injury. In most claims an impairment assessment cannot be determined until the injuries are stable and unlikely to change substantially.

The initial investigation process

Medical negligence claims generally require extensive preliminary investigation to ascertain whether negligence can be established. This requires the full record of treatment and medical history to be obtained and an independent highly qualified specialist consultant to review the records and provide a detailed report. The costs of this process are generally significant. In most cases, it is not possible to express an opinion on the likely success of the claim until the initial investigation process has been completed.

In some cases, it becomes apparent after the initial investigation that negligence cannot be proven. In these cases the claim may not be able to proceed. If on the other hand a decision is made that the claim has potential to proceed, frequently further investigations and enquiries into the finer points or further issues raised in the initial investigation will need to be made. It is necessary to continually monitor the outcome of these further investigations and proceed on a step by step basis to investigate and build up the evidence required to support the claim.

This article contains general information only and is not provided as legal advice. Professional advice should be taken before any course of action is pursued, or any information here is relied upon.

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