



Richmond and Bennison

## **NEGLIGENCE BY DOCTORS AND OTHER HEALTH PROFESSIONALS – A GUIDE TO YOUR ENTITLEMENTS**

This guide includes the following:

- Adverse outcomes contrasted with negligent outcomes.
- What is negligence?
- If my treatment has been negligent can I sue for compensation?
- What economic loss compensation can I claim for?
- When can I claim compensation for my pain and suffering and loss of enjoyment of life?
- What is considered to be a significant injury?
- How long do I have before I lose my right to sue?
- What if a person dies as a result of a health provider's negligence?
- If I wish to see if I may have a claim, what should I do?

Sometimes when you are provided with medical treatment you do not achieve the anticipated result. This is unfortunate however it does not necessarily mean that your health provider was at fault. On other occasions mistakes are made by your health provider as everyone makes mistakes from time to time. Sometimes mistakes are made because people are too busy, too tired or because they attempt a task that is beyond their level of competency.

At times you may query a health provider as to why you have not achieved the expected result. Sometimes you are not provided with adequate answers which may lead you to wonder if your health provider made a mistake with your treatment.

Richmond and Bennison can assist you in ascertaining the reason why the result of your health treatment is not that which was anticipated. If it becomes apparent that the result of your treatment was due to fault on the part of your health provider we can assist you in obtaining just compensation.

### **Adverse outcomes contrasted with negligent outcomes:**

No, sometimes you just do not get the result that was hoped for. Rarely will health providers give you a 100% guarantee of cure or improvement. Much is unknown about the human body and when and how it will recover. In these circumstances you are not entitled to compensation.

Usually a health provider is not negligent in providing their service if it is established that the health provider acted in a manner that (at the time the service was provided) was widely accepted in Australia by a significant number of respected practitioners in the same field as competent professional practice in the circumstances.

Only if the adverse outcome suffered by you is caused by negligence, that is, the treatment falls outside the boundaries of what other practitioners would provide, are you are entitled to claim compensation.

### **What is medical negligence?**

Medical negligence occurs when the treatment provided to you falls below the standard of care that is considered acceptable. The relationship between health provider and patient is a special relationship and therefore the standard of care required of a health provider can be quite high. The standard to be applied by a court to determine if a health provider has acted with due care is usually to be determined by reference to:

- what could reasonably be expected of a person possessing that skill; and
- relevant circumstances pertaining at the date the service was provided.\*

The types of events that may constitute medical negligence include the following:

- Misdiagnosis of your condition.
- Delay in diagnosis of your condition.
- Failure to refer you for appropriate treatment or providing incorrect medication.
- You must also be warned of the risks associated with the treatment that you have been provided with. Sometimes, if you had been warned of the risk and the likelihood of the risk occurring you would not have proceeded with the treatment. If this occurs, your health provider may have been negligent.

### **If my treatment has been negligent can I sue for compensation?**

If your treatment has been negligent then you have a right to sue for compensation provided that the negligent treatment has caused you to suffer an injury. The negligent treatment does not have to be the only cause of your injury, but you do need to show that the negligent treatment or service contributed to your injury.

### **Claiming for economic loss:**

You are entitled to sue for **medical expenses or associated costs** incurred as a result of negligence, and **lost earnings or earning capacity** caused by the negligent treatment.

If you have claimed the cost of the additional medical treatment you needed following negligent treatment from Medicare or from a private health provider, then you are required to repay the amount paid by Medicare or your private health provider if you recover damages.

You may also claim for the loss of income that you suffer as a result of the negligently caused injury. You can be compensated for your **past loss of earnings and your future loss of earning capacity**. There is a limit placed by legislation on how much you may recover for your lost earnings and earning capacity.

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\* The standard of care is not determined by comparing the service provided with that considered reasonable at a later date and following advances in treatment.

Sometimes if you have been injured by the treatment provided, you will be unable to properly care for yourself. In those circumstances family and friends will often assist. You can claim for the value of the assistance provided<sup>†</sup> to you in some circumstances.

No damages may be awarded to you for **gratuitous attendant care services** unless the court is satisfied that:

- there is (or was) a reasonable need for the services to be provided to you; and
- the need for the service to be provided has arisen (or arose) solely because of the injury to which the damages relate; and
- services would not be (or would not have been provided to you in any event.

Further, no damages may be awarded to you for gratuitous attendant care services if the services are provided, or are to be provided:

- for less than 6 hours per week; and
- for less than 6 months.

You may also be able to claim for the **gratuitous care** you provide for others. If you usually care for others but due to negligently caused injury you are unable to provide the care that you would usually provide (such as for your children or an elderly parent) you may be able to claim for the loss caused by your inability to care for others. You cannot make such a claim unless you can establish:

- that the care was provided to your dependants; and
- you were providing this care for at least 6 hours per week; and
- you had been providing the care for at least 6 consecutive months before the injury; and
- there was a reasonable expectation that, but for the injury the gratuitous care would have been provided to your dependants for at least 6 hours per week and for a period of at least 6 consecutive months.

### **Claiming compensation for pain and suffering and loss of enjoyment of life:**

The negligent treatment that has caused your injury may also cause you pain and suffering and some or all of your enjoyment of life. You are only entitled to claim damages for your pain and suffering and loss of enjoyment of life if you satisfy a test of significant injury. There is a limit on the amount of damages that can be claimed.

### **What is a significant injury?**

You can only claim damages for your pain and suffering if you are found to have suffered a significant injury. An injury is personal or bodily injury and includes -

- pre-natal injury.
- psychological or psychiatric injury.

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<sup>†</sup> Gratuitous attendant care

- disease.
- aggravation, acceleration or recurrence of an injury or disease.

A significant injury is defined as one of the following:

- For a physical injury if the degree of permanent impairment of the whole person resulting from the injury has been assessed as greater than 5%; or
- Where the injury is loss of a foetus; or
- Where the injury is a psychological or psychiatric injury arising from the loss of a child due to an injury to the mother or the foetus or the child before, during or immediately after the birth; or
- Where there is a loss of a breast; or
- Where the injury is a psychiatric injury, that the degree of permanent impairment of the whole person resulting from the injury is greater than 10% and that the impairment is a primary psychiatric reaction and not secondary to a physical injury.

*Only if you meet one of the above tests can you be compensated for your non-economic loss.*

### **Time Limits:**

Most people have 3 years in which to commence proceedings at common law. The 3 year period starts from the date that you:

- became aware, or should have been aware, that you have suffered an injury; and
- should have known the injury was caused by the fault of another person or organisation; and
- that your injury was sufficiently severe to warrant you bringing a claim (date of discoverability).

If you do not issue proceedings within that period you will probably lose your right to sue. Only in limited circumstances a person may obtain an extension of time within which to sue and this period cannot be extended more than 12 years from the date of discoverability.

If you are under the age of 18 years or a person suffering from a disability that prevents you from making decisions for yourself, you have six years from the date of discoverability to commence proceedings. Again, It is only in limited circumstances that a you may obtain an extension of time within which to sue and this period cannot be extended more than 12 years from the date of discoverability.

### **Death as a result of a health provider's negligence?**

If a person dies due to a health provider's negligence the person's dependants have the right to sue for damages. Generally this is restricted to the right to claim damages for economic loss and the cost of the loss of the services the person used to provide for you. For example, the deceased person may have provided care for children and performed work around the house such as repairs and maintenance.

Generally, dependants of a deceased person cannot claim for the pain and suffering and loss of enjoyment of life they have suffered as a result of the death of the person. This is considered by the courts to be normal grief that everyone will inevitably face.

If however you have suffered a psychiatric injury as a result of the death of the person, in certain circumstances you will be able to claim for the injury caused to you by that death. This can include pain and suffering, loss of enjoyment of life you have suffered (if you meet the threshold test of significant injury), as well as any loss of income suffered by you as a result of the person's death.

If a person dies after commencing proceedings, the executor of the person's will can continue the claim but only claim for past pain and suffering, loss of enjoyment of life and loss of earnings caused by the injury.

### **How to check if you have a claim**

It is often very difficult to establish if you have been injured as a result of negligence. If you believe that this is possible you should seek legal advice.

Our lawyers at Richmond and Bennison have had many years of experience in investigating and prosecuting claims against health providers. Our lawyers, will, if it looks likely that injury has occurred as a result of negligence, investigate your claim and make recommendations to you. You would be advised as to the likelihood of you meeting the significant injury test. If investigations reveal that it is likely that your injury was caused by negligence we will advise you about your options and if you instruct, prosecute your claim in a cost effective and efficient manner.

Should you require further information or any assistance in relation to a health provider's negligence please ring Tim Finemore or Michael Moran, of Level 2, 116 Hardware, Street, Melbourne on (03) 9670 0488 or Toll Free on 1800 620 979.

Disclaimer: This information is of a general nature and should not be used to ascertain the entitlements of any particular individual. There can be exceptions to the above circumstances and individuals should obtain specific advice to address their circumstances. Further the law changes and information contained herein may no longer be accurate.