Comasters
LAW FIRM AND NOTARY PUBLIC

MEDICAL NEGLIGENCE

This article seeks to explain what medical negligence is and what making a medical negligence claim entails (including the time limit in which a claim must be made and who a claim can be made by).

A. WHAT IS MEDICAL NEGLIGENCE?

Medical negligence, also known as medical malpractice, relates to a lack of reasonable care provided by a health service provider such as a doctor or a psychologist, or a health service organisation such as a hospital. In Australia, the law recognises that all medical and allied health personnel owe a duty of care to their patients. If this standard of care is not met and an individual suffers harm, then the health practitioner or organisation has conducted themselves in a medically negligent manner.

B. MAKING A MEDICAL NEGLIGENCE CLAIM

In Australia, the law for medical negligence varies between states and territories. In NSW, medical negligence can only be claimed if suffering of physical, financial or psychological harm as a result of the negligent treatment can be proven.

To attest that harm was caused by negligent treatment, the claimant must be able to prove causation. This basically means that the individual making a claim must be able to prove the following:

1. The health care practitioner or organisation owed the claimant a duty of care;
2. The health care practitioner or organisation breached their duty of care;
3. The negligent actions of the practitioner or organisation caused the individual to suffer harm; and
4. That, had the negligent treatment not occurred, the individual would not have sustained any harm.

C. EXAMPLES OF ACTIONS THAT MAY GIVE RISE TO A MEDICAL NEGLIGENCE CLAIM

An individual may be able to make a medical negligence claim if harm was suffered as a result of the following actions of the health practitioner or organisation:

- Failing to diagnose or misdiagnose a condition or disease
- Failing to provide the correct type or dose of treatment/drug
- Failing to conduct surgery with reasonable care and skill
- Failing to provide reasonable post-operative care
- Failing to conduct or act on test results
- Failing to seek informed consent for treatment or surgery

D. MAKING A MEDICAL NEGLIGENCE CLAIM ON THE BASIS OF THERE BEING A 'FAILURE TO WARN'

An individual may also be able to make a medical negligence claim on the basis of the health practitioners' failure to warn. This type of negligence occurs when a healthcare provider fails in his or her duty to inform the patient of any risks that may be incurred with the projected treatment or surgery. In this case, the claimant has suffered harm and seeks to make a claim on the basis that he or she would not have progressed with the treatment or surgery had he/she been warned by the health practitioner of the associated risks.

E. TIME LIMITS ON MAKING A MEDICAL NEGLIGENCE CLAIM

To make a medical negligence claim in NSW, an individual needs to do so within a specified time frame. This is because under the *Limitations Act 1969* there is a statute of limitation on all personal injury claims, thereby restricting the time that an individual can use to make a claim.

Most medical negligence claims should be made within three years of a cause of action (negligent treatment) being discoverable. This is a period of three years starting from the date when the claimant knows or ought to know the following facts:

1. An injury has occurred, or harm has been suffered;
2. The injury or harm suffered was caused by the negligent treatment of the person/organisation being sued; and
3. The injury or harm suffered is significant enough to warrant making a claim.

For people with disabilities, there is a suspended limitation period for the duration of the person's disability. This means that the limitation period to make a medical negligence claim does not apply if an individual has a disability. The three years post-discoverability period, however, still applies if the person with a disability had or has a capable parent or guardian.

F. WHO CAN MAKE A MEDICAL NEGLIGENCE CLAIM?

In NSW, the following people can make a medical negligence claim:

1. The person who experienced the negligent treatment.
2. A parent or guardian of the person/child who experienced the medical negligence.
3. A family member, friend or representative who is chosen to make a claim by the person who suffered from negligent treatment.

warrant authorises an officer to enter the premises and ensure that the tenant or resident leaves.

G. GOING TO COURT

Most medical negligence cases tend not to end up in court. This is because court proceedings do not preclude settlement negotiations. As such, despite the commencement of court proceedings, an out-of-court settlement can still take place between both parties. Medical negligence cases typically settle out of court, with the insurers of the health practitioner/ organisation offering an amount reasonable to the claimant to compensate for their suffering.

H. CONCLUSION

In conclusion, a medical mistake is not necessarily the result of negligence. Despite doing their best to treat and advise their patient, a health practitioner or organisation can still make a mistake. It is only considered negligent if the healthcare provider/ organisation did not perform their work with 'reasonable care'.

Comasters is able to accept instructions from clients in either **commencing** a medical negligence claim or in **responding** to one.

Comasters Law Firm can advise and assist clients with matters relating to medical negligence

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