



WORKING IN A MEDICAL MINEFIELD

Medical negligence is an extremely complex and emotional area of law, writes **Briana Everett**, requiring an in-depth medical understanding and an ability to detach from the devastating circumstances of people's lives

Since the groundbreaking High Court decision of *Rogers v Whittaker* in 1992, which established that a patient should be advised of all the risks of a procedure, the level of medical negligence litigation in Australia has grown significantly.

Today, the medical negligence landscape is characterised by an emergence of claims regarding increasingly popular procedures such as bariatric surgery (obesity/weight-loss surgery) and cosmetic surgery, however the growth of negligence claims has been curtailed thanks to tort reform and the majority of cases are now resolved through negotiation and settlement.

Although the level of litigation in Australia has begun to level off, the state of the country's health system remains a critical concern. A recent report by the Australian Government's Productivity Commission revealed that between 2007 and 2008, New South Wales experienced 59 "sentinel events", meaning there were 59 incidents which caused the death or serious injury of a patient which were attributable to a mistake or error by the public hospitals of NSW. The Commission's report also revealed that across the country there were 29 procedures involving the wrong patient or body part; 37 cases of medical instruments being left in patients after surgery and 29 medication errors leading to death, between 2007 and 2008.

Thanks to the massive media coverage of high profile cases such as the recent epidural disaster in which Grace Wang's spinal canal was injected with antiseptic instead of anaesthetic, or the notorious Jayant Patel "Dr Death" case, Australians are well aware of the impact that medical negligence has on the community. It's these cases and the shocking statistics that continue to highlight the need for greater regulation and accountability and the vital role that lawyers play in ensuring that patients receive compensation and support.

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SLATER & GORDON

An emotional and complex journey

Lawyers working in the area of medical negligence deal with people who have experienced enormous suffering and trauma as a result of substandard medical care and with that comes a great deal of emotion and stress.

"I have [worked on] a number of cases where the wife has died in childbirth," says head of Maurice Blackburn's medical negligence practice and obstetrics specialist Kathryn Booth. "Dealing with the husband, for example, is very sad [and] when you go to the homes of people with children who have cerebral palsy, it's tough."

Medical negligence lawyers are confronted with the most difficult litigation, according to Booth, because the stakes are so high. "[In the brain damage cases] you might be fighting over millions of dollars and therefore they're fairly aggressively fought," she explains. "Quite often you feel like you're carrying around the weight on your shoulders, acting for people who have children with cerebral palsy, because the last thing you want to do is lose their case."

In addition to the emotional hurdles, medical negligence lawyers are confronted with a particularly complex area of law. "It is the hardest area of personal injury without a doubt," says Booth. "With medical negligence we're dealing with an enormous range of medicines, whether it be obstetrics, emergency care, diagnosis, infectious diseases, and we're not doctors so we have to make a determination as lawyers – as lay people – whether [a particular procedure or treatment] might amount to medical negligence."

Slater & Gordon's national medical law practice group leader Bill Madden agrees and points out that medical law is inherently complex because of the facts behind each case, the complexity of the medicine and the associated legal issues which are at the forefront of tort law.

"Unlike, for example, a car accident where the person was well beforehand and injured after, in medical cases there is usually a history," Madden explains. "So for example, a case about delayed diagnosis of breast cancer or prostate cancer requires a careful analysis of what may have happened anyway, even without the delay."

Working in the area of medical negligence requires a familiarity with medicine but Madden says that the pace of change in medicine also brings its own challenges when assessing what was, or was not, appropriate treatment a few years ago. "Consideration of late terminations of pregnancy and the legal duties of a doctor to a mother and the foetus are quite complex," he adds.

GREATER REGULATION OF COSMETIC SURGERY NEEDED

In August this year, Kathryn Booth from Maurice Blackburn acted for the partner of Lauren James, who died three days after receiving liposuction in 2007.

Following the liposuction surgery, which she received at the Centre of Cosmetic and Plastic Surgery (COCAPS) in Caulfield North, Victoria, James suffered from severe pain and bleeding. After an investigation, the Coroner found that the doctors and surgeons at the clinic failed to appreciate that James was showing signs of post-operative complications which required examination rather than just further pain relief.

"[The] findings by Coroner Spanos support our arguments that the Centre of Cosmetic and Plastic Surgery's post operative management of Lauren was inadequate and that in the hours before Lauren's death there was a wholly inadequate clinical response by Dr Tam Dieu," said Booth. "Lauren developed complications after the surgery. Her partner Simon Dal Zotto was caring for her at home and repeatedly asked for help. When doctors became aware that Lauren's condition was deteriorating, she should have been admitted to hospital. This was a preventable death in a healthy young woman."

Booth said cosmetic procedures should not be undertaken lightly and warned that all cosmetic surgery, however small, carries a risk. "There should be stronger government regulation of the cosmetic surgery industry so that patients are put first," she said.

Booth is acting for Dal Zotto in a civil law suit, against COCAPS and the doctors involved in James' care, for the injury, loss and damage suffered by Dal Zotto after James' death.

"The past three years have been the most painful time in my life," Dal Zotto said earlier this month. "Every day I think of Lauren and what could have been ... What I want people to realise is that cosmetic surgery is not as simple as it looks on TV or in the glossy magazines. You have to be aware of the risks."

WHAT'S TO LOVE ABOUT MEDICAL NEGLIGENCE LAW?

"Medical law is full of novelty and complexity. Each case is different factually, the medical science aspect is interesting and constantly changing and the legal issues are at the cutting edge of tort law," says Bill Madden from Slater & Gordon. "Being a small specialist area, there is a real collegiate atmosphere with good relationships between the lawyers called up to represent the opposing parties."

Adding to the complexities of the medical issues themselves, medical negligence lawyer Catherine Henry highlights the high level of risk associated with the practice area.

"It's hard to think of an area of practice involving greater risk than medical negligence," she says. "Clinical negligence lawyers [in the UK] don't take anywhere near the degree of risk that we do. They have a well funded legal aid system. There has been no legal aid available in New South Wales, at least for civil litigation, since the early 1980s."

The latest developments

This year's High Court decision of *Tabet v Gett* was an important development in the medical negligence area, creating fundamental change in the way claims are structured for injured patients.

The High Court considered the issue of whether the loss of chance of a better medical outcome, without the establishment of causation of actual physical injury, can be compensable damage, unanimously deciding in the negative. A patient cannot recover damages for negligence when the patient's loss of chance to have a better medical outcome is less than 51 per cent.

"This decision will require lawyers to focus more carefully on the precise consequences of, for example, a delayed diagnosis of cancer," Madden explains.

Another development highlighted in the lead up to the recent federal election was the proposed introduction of a National Disability Insurance Scheme, with all political parties committing to major reform of the disability sector. According to Madden and Henry, the introduction of such a scheme may see some changes to the way care is delivered to the catastrophically injured, impacting on future claims for compensation.

"The proposed National Disability Insurance Scheme is being carefully watched by plaintiff lawyers," says Henry. "The Productivity Commission has been asked to look into the possibility of a new National Disability Care and Support Scheme – a no fault scheme. Plaintiff groups favour a combination model such as that introduced in Tasmania in the motor accidents jurisdiction allowing the injured to opt out if they wish to sue for common law damages."

Depending on the long-awaited outcome of the federal election, initiatives helping Australia move towards an e-health system and the increasing use of technology also have the potential to change the medical negligence landscape, according to Madden, with more claims arising based on system failures.