Medical negligence overview

Simon McGregor, APLA Policy Manager

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This article compares the key elements which influence the conduct of medical negligence claims in various jurisdictions throughout Australia.

Limitation periods

Victoria and WA are the only states with six year periods; all other states report a three year period. Most limitation acts specify that the period does not run until the plaintiff reaches the age of majority, although this age varies between eighteen years (WA and Queensland) and twenty-one years (SA).

Procedural issues

Practitioners in SA must formulate their claim ninety days prior to issuing, or face cost penalties. Victorian plaintiffs can no longer sue at common law for damages arising from negligently performed surgery following workplace injury: see Kidman v Sefa [1996] 1 VR 86, Mahony v Kruschich (Demolitions) Pty Ltd (1985) 156 CLR 522.

Access to records

Public institution records are available under the Freedom of Information Act in all jurisdictions, but plaintiffs do not have access to records kept by private institutions. In NSW, practitioners can use the Private Hospitals & Day Procedure Centres Act 1988 and Schedule 1 Part 6 of the separate regulations for each of those respective institutions, but there is no right of access to a doctor's private rooms records at all.

Pre-trial and interlocutory discovery are available for access to all private medical records in WA, Queensland, SA and Victoria, but these procedures incur additional costs and are usually discretionary court orders applied with varying standards. In Queensland, the discretionary threshold is rarely passed.

A plaintiff's prospects of obtaining medical records from private institutions varies greatly. Since Breen v Williams, APLA has campaigned for such intervention, and it is most regrettable that the current Federal Government is ignoring the findings of the Senate Community Affairs References Committee Report of June 1997, Access To Medical Records, which recommended a universal right of patient access to records. There is no sound policy reason why all plaintiffs should not have the same right of access, and this is clearly an area which needs federal legislative intervention.

In light of this disappointing federal approach, the states may need to follow the ACT's lead and enact similar legislation to the Health Records (Privacy & Access) Act 1997. The Act commenced on 1 February 1998, and provides all 'consumers' of 'health services' with a right of access to all factual matters and expressions of opinion entered on the record after the commencement of the Act (see Faulks R., 'Access to Health Records in ACT', Plaintiff, Issue 25, p.14). Both terms are broadly defined, so that most access situations will be covered by the Act.

Review & reform

NSW was the only state to report an official review of medical negligence liability, namely the Joint Departmental Review being conducted by the Attorney General and the Minister for Health, although Queensland and Victoria report background lobbying by Medical Defence Organisations (MDO).

Defences & Indemnity

As practitioners representing plaintiffs who are usually impecunious as a result of their misfortune, we are sensitive to costs issues and the way they can be increased by the conduct of the defence in these matters. On this front, NSW practitioners labour against the most intransigent defence organisations, with frequent examples of refusal to indemnify insured doctors. Mediations seem to be used as a fishing expedition where no sensible offer is made, and briefing of experts is conducted in a partial and biased manner.

Causation defences are increasingly popular in Victoria, especially where the doctors are at considerable risk on liability. MDOs are also encouraging doctors to get their reports proofed by them prior to sending them on to plaintiff solicitors.

Delays in getting instructions and approving settlements are increasing in WA as hospitals internal procedures become more detailed and cumbersome. In Queensland there are reports that top silks are being retained by MDOs so that plaintiffs cannot get cab rank access to the best advocates.

Recent cases

Recent cases of note which were not otherwise reported in Plaintiff include:

Tai v Saxon, WA FC SC, Matter no. 960113. The first superior court approval of the Rogers v Whitaker point in WA.

Royal Perth Hospital & Whitaker v Frost, WA FC SC, Matter No. 970069. Appeal on question of whether a hospital duty doctor owed the same standard of care as a specialist cardiologist was answered in the affirmative.

Green v. Chenoweth, Qld CA, Appeal No. 10998 of 1996, 11 November, 1997. Action for damages against a surgeon for failure to warn. Held that even if plaintiff had received warning she would have consented to surgery, although there was a chance she may have refused. Held that a negligent failure to warn cannot give rise to a cause of action unless (at least) it is proved, on the balance of probabilities, to have brought about some relevant action or inaction. Plaintiffs appeal against trail judge dismissing her action dismissed.

Stay tuned to Plaintiff for case notes on the following interesting matter: a long running case in the Supreme Court of SA involving an Orthopaedic Surgeon and a Neurosurgeon. ■