

# HEALTH CARE LIABILITY ACT

## Medical Negligence Compensation



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On 19 June 2001 the Minister for Health, Mr Knowles made his second reading speech to the NSW Legislative Assembly in relation to the *Health Care Liability Bill*. The Bill passed through the Lower House unamended a few days later and came before the Legislative Council soon after where it was passed with one minor amendment. The Governor assented to the Bill on 5 July 2001 so (apart from Part 3) it is now in force.

Enactment of legislation of this type has been the subject of extensive debate for some years, however the introduction of the Bill at this time seems to have been prompted by a recent "call" by the major NSW medical indemnity organisation, seeking a further full years premium (payable over 5 years) and an 8% premium increase.

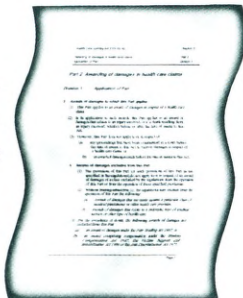
The Bill's objects include "fair and sustainable compensation for persons who sustain severe injuries from the provision of health care" and "to keep the costs of medical indemnity premiums sustainable".

### Introductory Remarks

The *Health Care Liability Act 2001 NSW* has two main areas of focus:

- 1 Modification of the law concerning medical negligence compensation, reducing the benefits available to injured

patients; and  
 2 Regulation of the medical professional indemnity insurance industry.  
 This article will address only the modification of the law regarding medical negligence compensation, which will affect legal practitioners representing both plaintiffs and defendants.



**Commencement**

It is important to note that clause 5 provides for the Act to have application to an award of damages that relates to an injury received or to a death resulting from an injury received, *whether before or after the date of commencement, unless proceedings have been commenced in a court before that date.*

The Minister said this was “*necessary if the reform package is to have an impact in the shorter term on the cost of indemnity cover.*” Most practitioners were aware of this as a likely provision, so an unusually high number of claims were lodged at the Court registries over the weeks leading up to passage of the Bill.

The Act commenced on the date of assent.

Part 3 which deals with professional indemnity insurance, will commence later, on a day to be appointed by proclamation.

**Application**

The legislation does not apply to all areas which might generally be thought of as “medical negligence”.

Regard must be had to the definition of a health care claim set out in Clause 4 and in particular to the requirements that the health care provider be a medical practitioner, a public health organisation or the licensee of a licensed facility. A medical practitioner is one registered under the Medical Practice Act 1992, however there may later be Regulations extending this definition.

The definition clause makes particular reference to the requirement of professional indemnity insurance, presently of any kind but later of an approved type. In this regard the Act might be considered as being based on a similar philosophy to the Professional Standards Act.

**Exclusions**

Clause 6 sets out a number of potential and existing exclusions from the legislation.

Firstly, regulations may later be made excluding awards of damages of a particular class. In the discussions leading up to final drafting of the Bill, reference was made to the possibility of excluding entrepreneurial medical practitioners such as cosmetic surgeons from the benefits provided by the legislation.

Clause 6 specifically excludes awards of damages under the *Fair Trading Act* and claims arising on an “occupiers liability” basis. Presumably, entitlements under the *Trade Practices Act* will not be affected.

I suspect that the scope and operation of these exclusions will be of a fertile ground for debate and litigation. ▶

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## General Damages

Clause 13 establishes a regime similar to previous versions of the motor accidents legislation in New South Wales.

A threshold is established at 15% of a most extreme case, with a sliding scale of reduced damages extending from 15% to 32%. No deduction is made for non-economic loss exceeding 33% of a most extreme case.

The percentages are determined by reference to an upper limit of \$350,000 for a most extreme case; which under Clause 14 may be increased over time.

## Economic Loss

An upper limit of \$2603 net weekly earnings is established under clause 9, to be adjusted in line with the *Motor Accidents Compensation Act 1999*.

Future economic loss predictions, under Clause 10, must be based on assumptions that accord with the claimants most likely future circumstances, but for the injury.

## Discount Rate

Clause 11 establishes a discount rate of 5%, which contrasts with the pre-existing 3% rate. Provision is made for that rate to be changed from time to time by Regulation.

Although superficially minor, the 2% change will reduce lump sum awards for long term claims significantly. For example, a 40 year future care lump sum will be reduced by 25%.

## Interest

Clause 15(1) precludes an award of interest for non-economic loss.

In relation to other past losses, interest is to be calculated by reference to the Commonwealth Government 10 year benchmark bond rate or as may otherwise be specified by Regulation. The benchmark bond rate is significantly less than the rates available under the *Supreme Court Act*.

It is important to note that this clause does not affect post-judgement interest.

## Gratuitous Care

Damages for gratuitous attendant care services are not greatly affected. However the Act provides that such damages cannot be awarded unless the Court is satisfied that there was a reasonable need for the services, which has arisen solely because of the injury; and that the services would not otherwise have been provided to the claimant but for the injury.

## Exemplary Damages

A claimant's right to exemplary or punitive damages is extinguished by Clause 17.

## Contributory Negligence

Clause 16 introduces reductions for the contributory negligence of the deceased person into claims under the *Compensation To Relatives Act*.

## Good Samaritan Protection

Immunity from negligence compensation claims is

established for a medical practitioner or nurse providing care in circumstances of an emergency at or near the scene of an accident, in good faith and on a voluntary basis (clause 27).

## Structured Settlements


Clause 18 establishes a regime enabling payment of damages other than in the form of a lump sum, however it only applies *where the parties agree* to settle the claim by making a structured settlement and apply to the Court for such an order.

## Joint Tortfeasors

Careful attention should be paid to Clause 28 which deals with the circumstances where a claimant may recover damages from a health care provider and another person not being a health care provider.

The concern obviously is to deal with the Court having to assess damages on two different bases. Sub clause 3 provides that the amount of damages that may be recovered by the claimant from the third party is to be reduced.

## Review

Clause 36 originally provided that the Minister is to review this Act as soon as possible after the period of five years from the date of commencement, to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. The Legislative Council amendment had the effect of reducing the review period to one year. 



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