Examining Medical Negligence

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What is Medical Law?

Civil Claim

- Negligence
- Contract
- Statutory – Australian Consumer Law

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The Key Elements – Medical Negligence

- A duty of care is owed
- The duty is breached
- The breach caused loss, harm or damage
- The loss, harm or damage was a reasonably foreseeable consequence of the breach, and
- The duty extends to the scope of the harm caused

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Elements of a Claim

- Duty of Care
- Breach of Duty
  - *Civil Liability Act* 2003 (*CLA*) ss9, 10, 21 and s22
- Causation of Injury
  - *CLA* 2003 s11
- Recognised Injury and Loss
- Entitlement to Claim
  - *Limitation of Actions Act* 1974 ss.11, 31 and 32

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Burden of proof

The Plaintiff carries the legal burden of proof on all aspects of Breach **and** Causation

- Section 12 CLA and common law.

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Duty of Care

- A duty of care is owed outside of the direct care provider / patient relationship to:
  - Relatives of a patient who it is reasonably contemplated may be harmed
  - Those who may be foreseeably harmed by another
  - The unborn

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Vicarious liability / non-delegable duty

Vicarious liability

- act/s of an employee in the course of their employment/ control over the work practice

Non-delegable duty

- special responsibility that can't be legally passed on to another

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Standard of Care

- Tort Reform 2002

The Bolam test – *"A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art … merely because there is a body of opinion that takes a contrary view"*: *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 122

- Rejected in Australia: *Rogers v Whittaker* (1992) 175 CLR 479
- Modified version now encompassed in *CLA* s.22

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Peer Professional Defence

22 Standard of Care for professionals

(1) A professional does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.

(2) However, peer professional opinion can not be relied on for the purposes of this section if the court considers that the opinion is irrational or contrary to written law.

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Section 22 continued

(3) The fact that there are different peer professional opinions widely accepted by a significant number of respected practitioners in the field concerning a matter does not prevent any 1 or more (or all) of the opinions being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

…

This defence may defeat an established claim

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Breach of Duty

Civil Liability Legislation

- The risk was foreseeable
- It was not insignificant
- A reasonable person in that position would have taken such precautions

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Causation

- Civil Liability Legislation
- The breach
  - Was a necessary condition of the occurrence of harm (factual causation / but for test);
  - It is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (scope of liability/ normative causation).

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Establishing a causal link

- *Tabet v Gett* (2010) 240 CLR 537

The more probable inference is that the negligence caused the injury.

But for test – More probable than not the injury would have been prevented or minimised.

- *Paul v Cooke* [2013] NSWCA 311

The breach must have a meaningful causal relationship to the harm suffered

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Loss of chance of a better outcome

Tabet v Gett (2010) 240 CLR 537

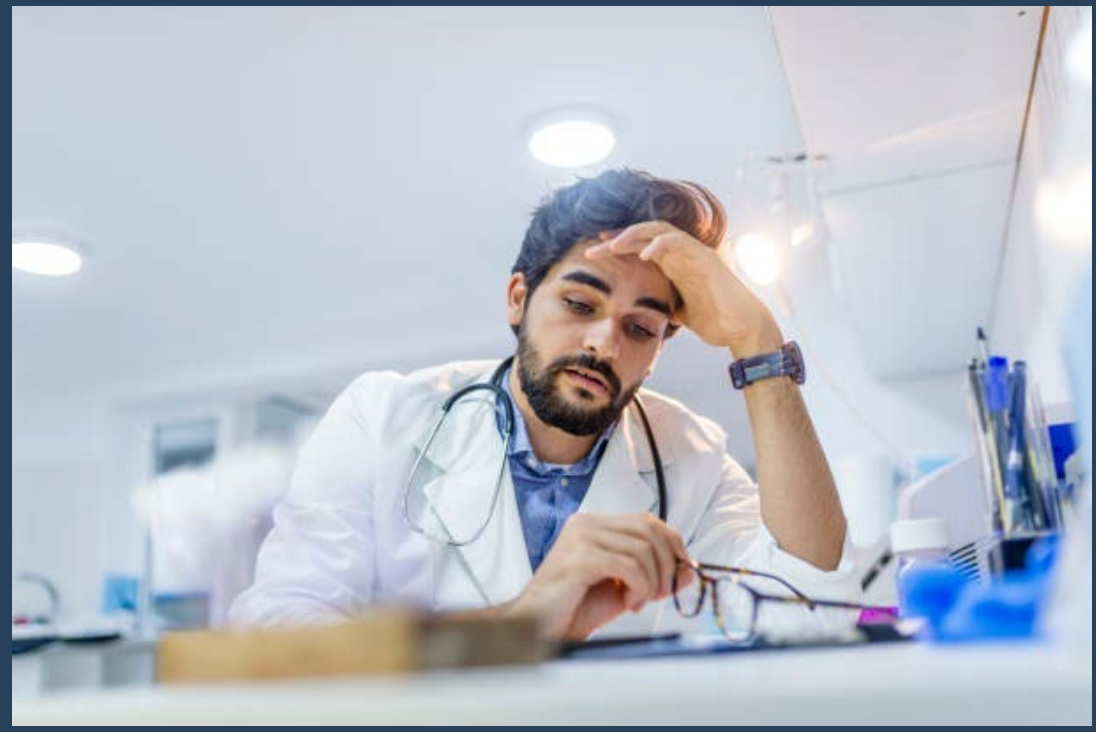
To allow recovery for loss of chance would

- offend the principle of causation
- unnecessarily tip the balance in favour of plaintiffs

Common Scenarios

- Failure to:
  - undertake an adequate examination
  - undertake adequate investigations
  - follow up tests, referral or patient
  - diagnose or make a differential diagnosis
  - warn of adverse risks (of surgery / medication, or symptoms to be vigilant of)
  - exercise reasonable skill and care during surgery
  - undertake reasonable observations

- Discharging a patient when it is not safe to do so
- Providing insufficient aftercare or advice
- Providing a misdiagnosis



Failure to warn

Rogers v Whitaker (1992) 175 CLR 479

- the nature of the matter to be disclosed
- the nature of the treatment
- the desire of the patient for information
- the temperament and health of the patient; and
- the general surrounding circumstances.

Wallace v Kam (2013) 250 CLR 375

- A medical practitioner will only be liable for the consequence of a material risk not warned of which would be **unacceptable** to the patient.

Poor aftercare…

Brown v Newcastle Private Hospital Pty Ltd [2016] NSWSC 826

- Day 1: attended Newcastle Hospital for an elective vaginal hysterectomy. During the procedure a loop of suture material was inadvertently looped around the bowel.
- Day 2: she began vomiting coffee coloured fluid, which continued to worsen.
- Days 3 and 4: she was noted to have falling oxygen saturations, declining health was apparent, and faecal vomiting.
- Day 5: oxygen saturation of 73%, following a large vomit of faecal matter she went into cardiac arrest, resulting in her death.

…Poor aftercare

- Dr Brown admitted he breached his duty of care, but alleged her death was not his fault alone.
- The hospital failed to ensure:-
  - post-operative observations - clinical pathway documents were adhered to;
  - clinical staff documented and raised any deviation in the patient's expected path of recovery.
- Liability was apportioned:-
  - Dr Brown 80%;
  - Hospital 20%.

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Discharging a patient from care…

Naidoo v Brisbane Waters Administration Pty Ltd [2017] NSWDC 372

- Admitted to under the care of Dr Grund, Psychiatrist
- During her stay she was heavily medicated with OxyContin, Stilnox and Valium
- She trialled day leave and was authorised to drive unsupervised
- On the day of discharge she had OxyContin at 8am, requiring her to sleep. She had been assessed by the psychiatrist the day prior, who had provided approval for the plaintiff to be discharged
- She was scheduled to leave at 10am, actually leaving at 2:30 - 3pm. She suffered a single motor vehicle accident shortly after leaving the hospital.

…discharging a patient from care

- Hospital - nursing staff allowed her to drive home in circumstances when they knew or ought to have known that it was not safe to do so
- Psychiatrist - failing to assess her at the time of discharge or to enquire about her relevant state
- Liability was apportioned as against
  - the Hospital: 1/3
  - the Psychiatrist: 2/3

Sliding doors …

Nouri v Australian Capital Territory [2020] ACTCA 1

- Twin pregnancy - Twin B was born with VACTERL association – severe disability requiring 24 hour care
- Argued – should have been told of particular issue at 30.4 weeks and would have terminated Twin B.
- Ms Nouri could have secured a selective termination in the United States of America
- The case failed

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…sliding doors

There were a number of obstacles to overcome

- The logistics of travel
- Funds and eligibility to enter the US
- The probability a termination would have been conducted in the US
- The balance of probabilities is not in favour of her having achieved that outcome

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Contributory negligence

Sections 23 & 24 *CLA*

- Standard of care required is same as proving negligence
- That of a reasonable person in the position of that person
- To be decided on the basis of what that person knew or ought reasonably have known at the time
- That is- an objective test

What is the injury related harm?

- For the plaintiff to prove the event caused an injury
- Evidentiary burden on the defendant to show negligence unrelated
- Can be an issue eg with progressive conditions, other contributing factors, aggravations

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Metro North Hospital and Health Service v Pierce [2018] NSWCA 11

- Telemetry testing procedure inducing CPSE and worsening of epilepsy
- The defendant denied the event caused damage – it naturally advanced
- Held: Plaintiff's condition was progressive, but accepted the CPSE worsened the condition by at least 50%

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Quantum

- General Damages - Pain, suffering and loss of amenity
- Special Damages - Medical treatment / aids, home adaptations, past & future - plus interest on past
- *Wilson v McLeay* damages - Costs incurred by a relative or friend in attending upon you where such attendance had a therapeutic nature;
- Past economic Loss & future loss of earning capacity, plus loss of super and interest on the past
- *Griffiths v Kirkemeyer* damages - Gratuitous Care reasonably required to meet the injury based need (subject to thresholds) or paid attendant care to meet injury related need, past & future
- Loss of Services to another due to injury related need (subject to thresholds), past and future

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General Damages

- Pain, suffering and loss of amenities of life
- Governed by CLA ss.61 & 62; Regulations ISV Scale
- Recognised permanent condition under PIRS, AMA
- Largely assessed by way of a percentage impairment by medical specialist
- Deficits and restrictions of daily living considered

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Case example

- January 2020 - Presentation to hospital at 38 weeks gestation - uncontrolled gestational diabetes, swelling and upper gastric pain.
- Blood tests liver enzymes at 4 times the normal level. Discharged.
- Represents 2 days later with placental abruption requiring emergency C-Section.
- The baby is deceased on delivery.
- Mum has been diagnosed with depression and an adjustment disorder. 2 years has passed. She has another child, is working part time and doing well.
- She is assessed by a psychiatrist who opines a 6% WPI under PIRS.
- ISV 5 - General damages - $7,900.00.

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Special Damages

- Cost of past expenses are recoverable if required and verified
- Future costs are recoverable if recommended, reasonable to meet need likely will receive
- Calculations – weekly ongoing cost discounted, deferred, or global
- Interest – CLA s.60

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Care & Assistance

- Services must be necessary and the need must be required to meet the disability
- The services do not need be paid
- The care is assessed at market cost where gratuitous
- Threshold test – must be provided or to be provided for at least 6 hours a week for at least 6 months – CLA s.59
- What is the need created and what is the plaintiff no longer able to do or causes aggravation of pain such that undertaking activity is unreasonable

Care & Assistance

- Proof required of need – usually by medical specialist
- Proof required of provision of care – usually statements of care providers
- Proof of reasonableness of past or future care – usually by Occupational Therapist

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Economic Loss

- On the balance of probabilities, has earning capacity been diminished by reason of the injury
- If so, has or will that reduction in earning capacity be productive of financial loss
- Loss of past actual earnings
- The future - what was their former earning capacity and what will the plaintiff now likely earn
- Capped at 3 times AWE – s.54 CLA
- May be “global award” – s.55 CLA; *Sutton v Hunter* [2022] QCA 208

Economic Loss

- Plaintiff had two weeks off work post injury
- Returned on reduced hours for 6 weeks, then back to previous position. No current ongoing loss.
- On account of their injuries they are restricted from advancing in their current organisation and the industry generally due to limitations on travel and working hours
- Future damages - Although no current loss, will be loss in future.
- Claim loss of progression using a comparator, weekly and deferred loss, then discounted for chance may not have secured promotion in any event.
- Alternatively consider global award.

Process

- Liability Evidence
- Pre –Court Proceedings / Court Proceedings – governed by *Personal Injuries Proceedings Act* 2002 (PIPA)
- Quantum Evidence
- Dealing with Defence
- Conclaves
- Settlement attempts
- Trial

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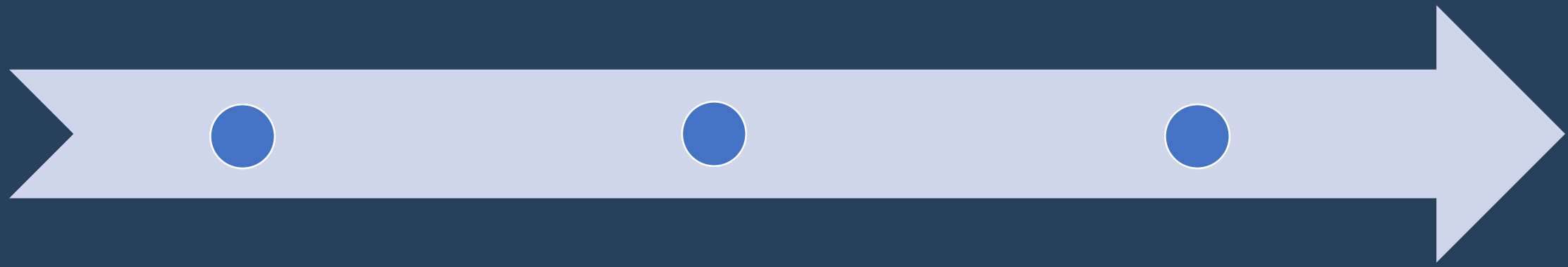
Proving Breach



Records and Ancillary Evidence

Expert opinion – Reasonable Standard of Care

Responding to Evidence and the Defence

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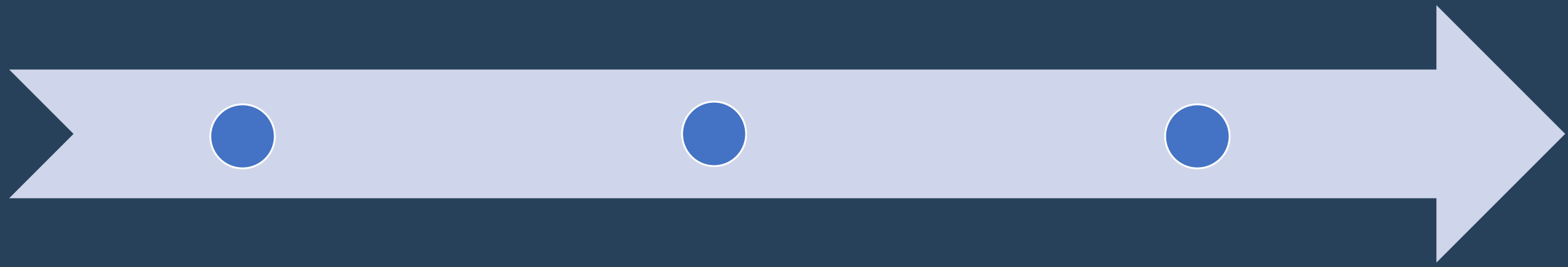
Proving Causation



Ascertaining the Why

Factual Causation and Expert Opinion

Scope of Liability

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Costs

- Medical Negligence claims expensive to run
- Economic viability of claim is relevant consideration
- Costs thresholds – *PIPA* s.56
- Lower limit currently $52,350 (regulation cost $4,380) upper limit $87,300

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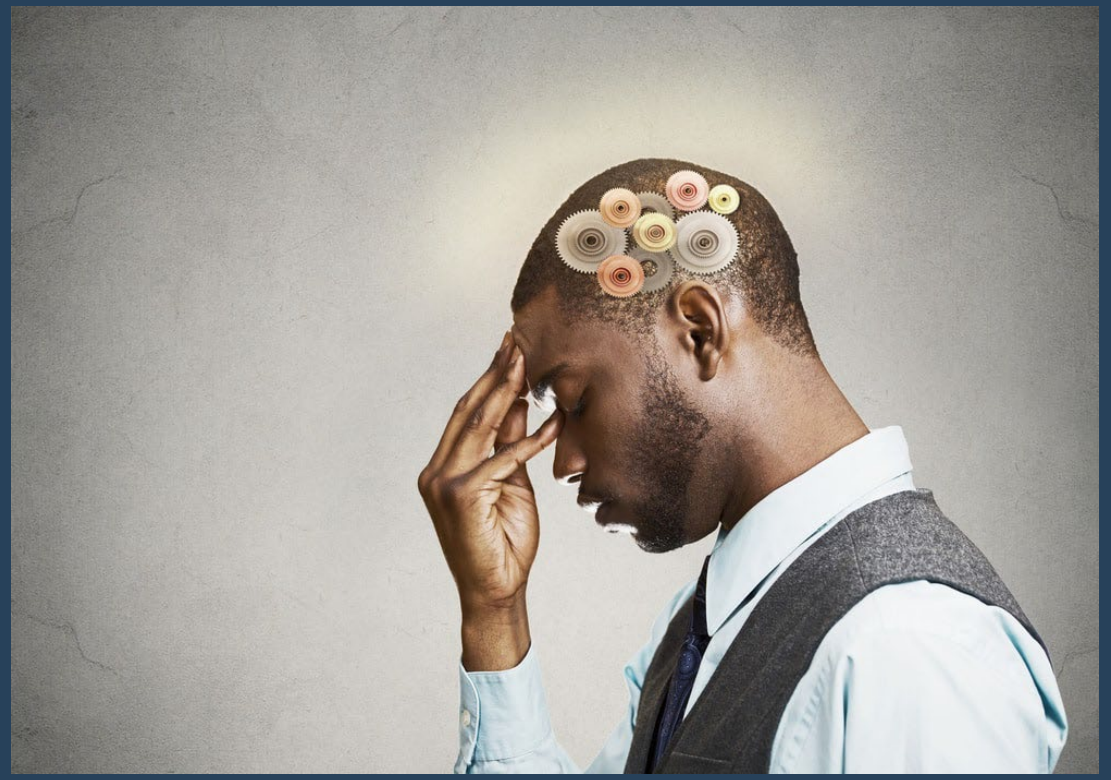
Commercial realities

- Age
- Employment status
- Pre injury status
- Extent of injury / deficit
- Complexity of claim



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Case Study 1

Failure to Undertake Adequate Examinations, Investigations, and Referrals

Chronology of Events

- Onset of pain and numbness - left leg, which continued to worsen.
- Attended two GP's at the same practice over a 3 month period.
- No medical history (other then depression).
- Care and investigations - consultations, x-ray of the foot and spine, and acupuncture.
- Provisional diagnosis - likely spinal or psychiatric cause.

Injury

- Diagnosis - Thromboembolic occlusion (clots) of the iliac and femoral arteries, ischaemic lower limb - caused by Antiphospholipid Antibody Syndrome.
- Treatment - Embolectomy (clot retrieval), investigation, Aspirin and Heparin.
- Outcome - Heparin-induced thrombocytopenia ("HITTS") causing occlusion of the vessels. Left above knee amputation.

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…Case Study 1…

Matters for consideration:

- Did either GP breach their duty of care?
- What caused the amputation? Clots caused by Antiphospholipid Antibody Syndrome, Vascular damage from the delay in management of the clots, or HITTS?

- Expert opinion- GP, Pathologist & Vascular Surgeon:
  - Both GP's acted below a reasonable standard of care - inadequate examinations / investigations.
  - Earlier treatment would have resulted in less ischemic damage with minimally invasive management techniques, reducing the volume of Heparin.
  - HITTS would not have developed.
- Expert evidence was provided in defence of breach and causation.

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…Case Study 1

- Quantifying the injury and loss:
  - Orthopaedic Surgeon
  - Prothetists
  - Physiotherapist
  - Psychiatrist
  - Occupational Therapist
  - Builder

Claim resolved at mediation – discounted for risk

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Case Study 2

Delayed Diagnosis and Management of Condition

Chronology of Events

- Presentation at hospital - history of headaches - 11 days with photophobia.
- Care and Investigations - Assessment, Lumbar Puncture - attempted and abandoned, MRI Brain.
- Provisional diagnosis - Bacterial Meningitis or drug seeking.
- Discharged - day 10. Attended a GP.
- Suffered a stroke the following day - admitted to hospital.

Injury

- Diagnosis - Cryptococcal Meningitis.
- Treatment - Antifungal medication and a shunt.
- Outcome - A worsening of the condition -further areas of damage from the condition or an inflammatory response (IRIS). Acquired brain injury with associated deficits, loss of vision and seizures.

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…Case Study 2…

Matters for consideration:

- Did the hospital perform reasonable investigations.
- What caused the claimant's ongoing deficits, seizure disorder and visual loss - the Cryptococcal Meningitis, the delay in managing the Cryptococcal Meningitis, or an IRIS response?

- Expert opinion - Emergency Physician, Neurologist and a Microbiologist / Infectious Disease Physician.
  - Breach of care conceded.
  - Had treatment commenced at an early stage (before neurological deficits occurred), a materially better outcome would have been achieved.
  - The deficits were caused by the advanced nature of the disease, and if worsened by IRIS, the IRIS was made more likely due to the advanced nature of the disease.
- Expert evidence was provided in defence of causation.

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…Case Study 2

- Quantifying the injury and loss:
  - Neurologist
  - Clinical Neuropsychologist
  - Psychiatrist
  - Neuro-Ophthalmologist
  - Occupational Therapist
  - Epidemiologist

Claim resolved at second mediation after litigation commenced– discounted for risk

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Case Study 3

Failure of Due Care and Skill in Surgery/Failure to Obtain Informed Consent

Chronology of Events

- History of abdominal surgery causing incisional hernia and separation of the rectus abdominus muscles.
- Significant gynecological and surgical history.
- Surgery - Laparoscopic repair with suturing of the divarication and overlay mesh repair. Post surgical symptoms of abdominal pain, urinary retention and pain in the lower limb.
- Further investigations revealed suture material in the bladder.

Injury

- Diagnosis - Nerve injury impacting lower limb. Tethered bladder causing retention.
- Treatment - Surgery to remove sutures from the bladder.
- Outcome - Ongoing pain, urinary retention and pain in lower limb.

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...Case Study 3...

Matters for consideration

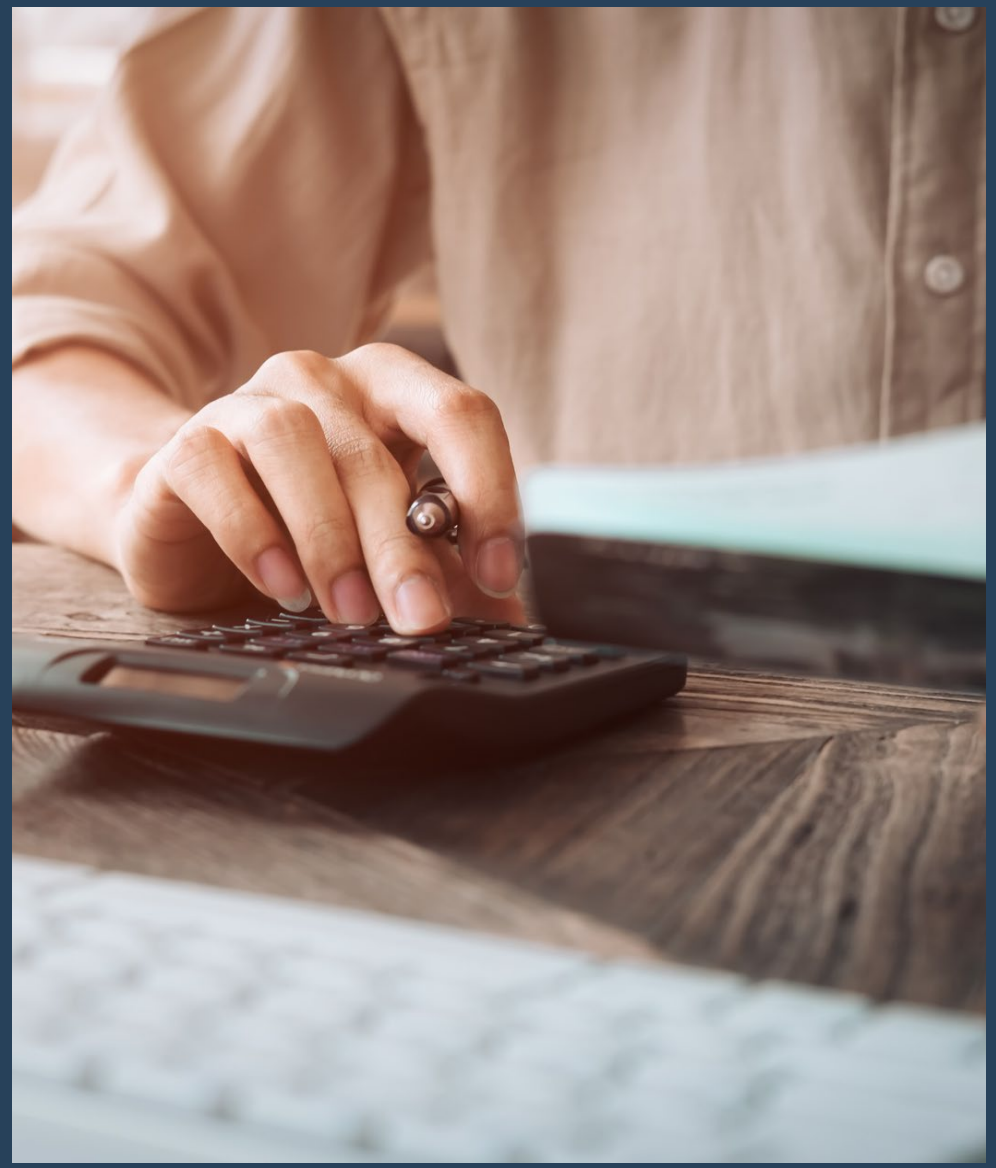
- Appropriate consent for the divarication repair.
- Whether the surgery was conducted with due care and skill.
- The cause of the nerve injury.
- Whether the bladder was sutured to the side wall.
- The cause of the ongoing pain and bladder retention.

- Expert opinion - General Surgeon, Neurologist and Urologist.
  - The surgery should have been by Laparotomy to reduce the risk of complications.
  - The bladder was stitched to the side wall in error, which is below the standard of care required, and further, should have been detected intraoperatively. This caused the bladder dysfunction and pain.
  - The neurological damage was likely due to trocar placement and occurred due to the closed nature of the procedure.
- Expert evidence was provided in defence of breach and causation.

…Case Study 3

- Quantifying the injury and loss:
  - Neurologist
  - Urologist
  - Psychiatrist
  - Occupational Therapist

Claim resolved pre-trial after two failed mediations on a commercial basis.



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Other Considerations

- Entities involved and number of parties
- Contribution by the claimant
- Entitlement
- Damages
- Cost and refunds
- Expectations

Quantum

- Entitlement
- Recognised heads of damage
- *Civil Liability Regulation* 2014
- Future loss - discounted and deferred

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