



## Compensation for Medical Negligence

Obtaining compensation for medical negligence is not usually a simple process. Most people obtain legal representation and at an early stage seek advice on whether a claim will be both successful and worthwhile.

The decision on whether to bring a claim is always that of the individual, but legal advice helps answer four key questions:

1. Can the claim be made, or has a time limit expired?
2. Will the claim succeed, using one or more of the common legal pathways of negligence, breach of contract or breach of the Australian Consumer Law?
3. Is there sufficient evidence to prove that the advice or treatment error caused some form of damage, that the law will provide financial compensation for?
4. Will financial compensation be recoverable, such as from an insurer, and will the amount be sufficient to justify the claim on a cost / benefit basis?

It is important to remember that making a claim for compensation does not usually prevent a person from obtaining benefits, if entitled, from Medicare, private health insurance, Centrelink, income insurance or the National Disability Insurance Scheme.

### The Law - Negligence and other Pathways

Claims for compensation in relation to medical advice or treatment are usually claims under the tort of negligence. Such claims focus on the existence of a duty of care, which is often uncontroversial in a doctor / patient relationship. Compensation cannot be obtained simply because there has been an adverse outcome, but rather requires evidence that the doctor or other health professional has not exercised 'reasonable care'. For example, a failure to test for heart problems may not be reasonable care, if a patient complains of sudden severe chest pain. Claims are sometimes made for breach of contract but even then the focus is on whether reasonable care has been exercised. Claims under the Australian Consumer Law are relatively uncommon and have a more technical focus, by reference to legislation.

### Causation - Proving that 'Damage' was Caused

Even if a doctor or other health professional has made an error (in other words, has not exercised reasonable care), a claim for compensation will not be possible unless it can be proved that the error probably caused the damage that the person complains of. For example, a doctor may make an error in the diagnosis of cancer, leading to a delay in the treatment of the disease. But if the cancer was already incurable, the delayed diagnosis and treatment may have made no difference to the outcome for that person. If the error complained of is a failure to provide a warning, such as of the risks of surgery, that error may not have caused any damage if the patient would have agreed to the surgery even if a warning was given.



**Bill Madden, Special Counsel**  
Email: [bmadden@codea.com.au](mailto:bmadden@codea.com.au)  
Phone: (02) 8226 7316  
Location: Sydney, Melbourne



**Robert Algie, Partner**  
Email: [ralgie@codea.com.au](mailto:ralgie@codea.com.au)  
Phone: (02) 8661 0251  
Location: Campbelltown, Parramatta



**Rebecca Tidswell, Special Counsel**  
Email: [rtidswell@codea.com.au](mailto:rtidswell@codea.com.au)  
Phone: (02) 8226 7315  
Location: Sydney, Newcastle

Version: May 2022

Liability limited by a scheme approved under Professional Standards Legislation.

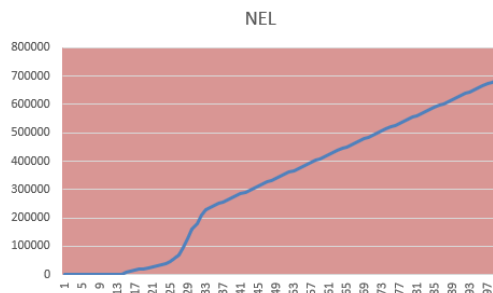


### Calculating Financial Compensation

The pie chart below illustrates how a claim may be constructed, with amounts for items such as medical expenses, loss of income, nursing / care costs (including care provided without payment by a family member or friend) and so on. The compensation sum will usually include an amount for pain, suffering and loss of enjoyment of life (sometimes called general damages or non-economic loss). In addition, the compensation sum will usually include an amount for the majority of the legal costs incurred by the person making the claim.



Some compensation components have thresholds or caps. For example, non-economic loss awards are subject to thresholds and caps. The graph below provides an indication. Claims for less than 15% of a most extreme case do not permit recovery for non-economic loss. Claims between 15% and 32% allow for recovery but at a reduced rate. Claims of 33% and above allow for a pro rata award, by reference to the maximum which is presently about \$700,000.



A cap exists for loss of income compensation, by reference to three times average weekly earnings.

### Repayment Obligations

If compensation is recovered, the claimant may be obliged to make repayments and or may be subjected to a reduction or cancellation of other benefits. Payments made by Medicare are usually refundable and these may include contributions for nursing home care costs where relevant. Private health funds usually seek repayment of benefits paid and may reduce some future benefits. Centrelink will usually seek refunds and may suspend or reduce ongoing benefits, as may the National Disability Insurance Scheme.

### Time Limits - Can a Claim be Made?

A claim for compensation arising from medical treatment must usually be made within 3 years. The law does vary across Australia, but in New South Wales for example the 3 year claim window is calculated from the date of discoverability. That means the date on which the person knows or ought to know that injury has occurred, that the injury was caused by the fault of the proposed defendant and that the injury was sufficiently serious to justify the bringing of an action. It is generally not possible to make such claims later than 12 years after the date of injury, unless a court is willing to grant an extension.

*Carroll & O'Dea Lawyers has prepared this information sheet to provide general information on compensation for medical advice or treatment, however legal advice directed to the specific circumstances of a proposed claim should be obtained.*