

Calculation of Quantum in Medical Negligence Proceedings in Australia

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Kennedys

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Types of Claims

Health Law in Australia

- Highly specialised
- Lawyers are generally 'defendant' or 'plaintiff' lawyers
- Defendant lawyers:
 - Act for the practitioner, hospital or entity
 - medical negligence, coronial inquests, disciplinary matters (Ahpra/Medical Board), Medicare investigations, Health Complaints Commissioner, health records/FOI, employment, criminal
- Plaintiff lawyers:
 - Act for the patient - medical negligence, coronial inquiries

Medical Negligence Claims

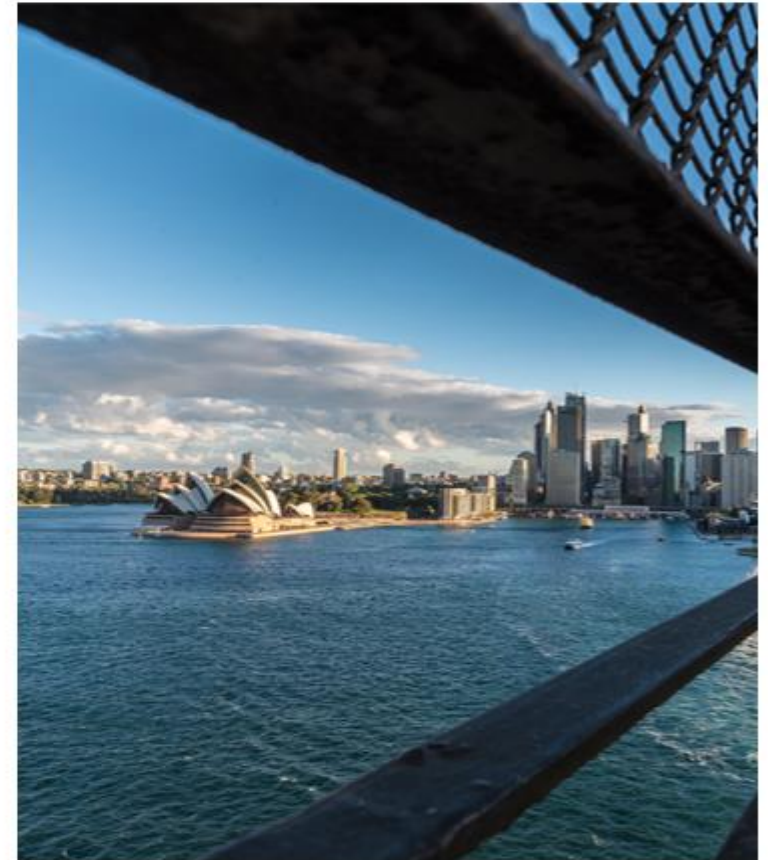
- Claim for compensation
- Mixture of legislation and common law
 - Legislation:
 - Law of negligence
 - When claims can be made (limitations period)
 - Types of damages that can be claimed
 - Common law:
 - Law of negligence
 - Quantum



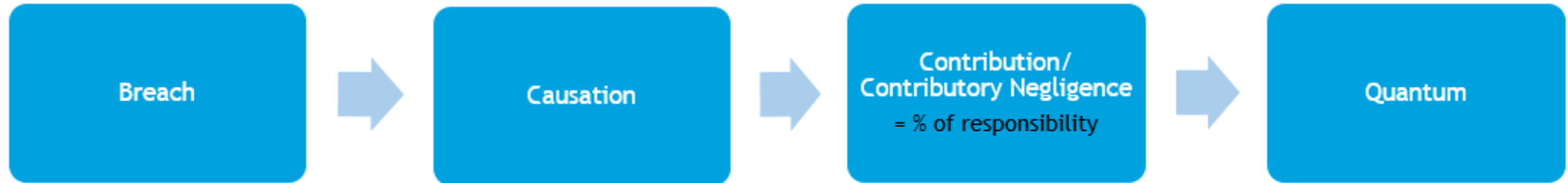
Quantum Assessment in Australia

Tort Reform in early 2000's - States introduced different mechanisms to reduce claims and overall cost

- Set caps and thresholds to regulate recovery of damages
 - i.e. caps on General Damages / Care / Economic loss
 - This had the effect of:
 - Removing smaller claims
 - Restricting recovery in larger claims
- Compensation is paid as a lump sum (not periodically)
- Reductions in payment of future costs to avoid over-compensating the plaintiff:
 - Discount rate - 5% (Vic) 6% (WA)
 - Discount of 15% (or more) for vicissitudes of life
- Management of Funds In Court for minors / under a disability. Fees charged modest (0.64% in Vic)



Elements of a claim



Quantum Assessment

1. General Damages: Past and future pain and suffering

2. Special damages: Quantifiable past loss and future loss

Past Loss

- Medical and like: (medical treatment, allied health treatment, medication, travel)
- Repayments for funds / services received (Medicare, NDIS, Private Health Insurers, Centrelink)
- Care costs (gratuitous / attendant care, loss of ability to care for dependants)
- Loss of earnings
- Penalty interest
 - In Victoria and NSW, this is 10%
 - In WA, this is 3-6%

Future Loss

- Medical and like: (medical treatment, allied health treatment, medication, travel)
- Care costs
- Loss of earning capacity
- Loss of dependency (if patient died)

Example of litigated damages assessment:

Vlaming v von Marburg [2020] VSC 340

- ENT surgeon removed tumours to right ear in series of surgeries. Caused facial nerve injury on the right side, loss of hearing, visual impairment and psych injury
- Benign tumour did not contribute to injuries
- Injuries had profound impact on day-to-day life - embarrassed by appearance, avoided socialising, loss of hearing
- Required quarterly GP and ENT attendances, also psychiatric treatment
- Earned approx. \$80k gross p.a. in construction. Court found reasonable will face hurdles in future to employment

Quantum

- General Damages: \$280,000
- Past medical and like expenses: \$3,132
- Future medical and like expenses: \$52,586
- Past loss of earnings \$13,515
- Future loss of earning capacity \$100,000

Example of litigated damages assessment:

Public Trustee as Administrator of the Estate of Matthew Leonard v Atileo [2023] TASSC

- Altercation with security guard outside Hobart nightclub in July 2014, patron fell backwards and sustained significant head injury
- Two months in ICU, 7 months rehabilitation
- Plaintiff was quite young (37 at time of trial)
- Mobilised in a wheelchair
- Requirement for 24 hour care
- Reduced life expectancy (68)

Quantum Assessment s

- General Damages: \$350,000
- Medical and like expenses: \$2.4 million
- Gratuitous care: \$127,000s
- Future attendant care: \$8.5 million
- Loss of Earnings: \$1.5 million
- Administrative costs: \$1.55 million

- Court applied a 20% discount for contributory negligence

Calculating Settlement

1. Calculation Quantum (& estimate costs)
2. Calculate risk of success of claim - %
3. Calculate contribution - %
4. Discount quantum of claim by risk of success and contribution

Example

Calculation of Quantum:

\$350,000 general damages

\$450,000 special damages

\$200,000 costs

- quantum: \$1,000,000

Risk of claim succeeding: 50%

Contribution: 50% to surgeon, 50% to hospital

Assessment:

- $\$800,000 \times 50\% \text{ (risk)} = \$400,000$
- $+ \$200,000 \text{ (P costs)} = \$600,000$
- $\times 50\% \text{ (contribution)} = \$300,000$

Example of settlement assessment 1: Neurosurgery case

Young patient (27), significant lower back condition post-surgery

Plaintiff's claim:

\$450,000 general damages, Special damages:

Our assessment

Summary

Past Medical and Like Expenses	\$	70,057
Future Medical and Like Expenses	\$	690,347
Health Insurance Commission	\$	15,731
Past Gratuitous Attendant Care	\$	14,500
Future Attendant Care	\$	949,347
Future Equipment costs	\$	129,592
Future Community Access costs	\$	89,612
Past Loss of Earnings and Super	\$	42,683
Interest on past economic loss	\$	4,000
Future Loss of Earning Capacity and Super	\$	2,530,724
Interest	\$	8,000
Total Special Damages estimated at	\$	4,544,593

Head of Damage	Low Range	High Range	Recommended
General damages	\$250,000	\$300,000	\$300,000
Past medical and like expenses	\$60,000	\$85,000	\$70,000
Past care costs	\$10,000	\$14,000	\$10,000
Past economic loss	\$15,000	\$30,000	\$30,000
Future medical and like expenses	\$50,000	\$184,000	\$184,000
Future care costs	\$50,000	\$180,000	\$150,000
Future economic loss (FARLOW basis)	\$300,000	\$800,000	\$500,000
Sub total	\$735,000	\$1,593,000	\$1,244,000
Risk discount: 35%	\$477,750	\$1,035,450	\$808,600

Example of settlement assessment 2: Orthopaedic case

46 year old woman with significant hip condition following surgery

Plaintiff's claim:

General Damages: \$400,000 + Special Damages:

PAST	
Past medical and like expenses	\$93,394.60 \$95,630.40
Past paid care	\$36,050.00
Past gratuitous care	\$42,014.97 \$93,194.16
Past section 28ID Wrongs Act damages	\$5,868.66
Past economic loss	\$115,321.50
Penalty interest	\$53,695.29 \$105,869.60
FUTURE	
Future medical and like expenses	\$72,241.47 \$86,266.47
Future equipment and modifications	\$158,952.10
Future attendant care	\$175,873.84 \$603,149.35
TOTAL	\$588,591.67 \$1,300,302.24

Our assessment

Head of Damage	Low	High	Recommended
General damages	\$150,000	\$300,000	\$250,000
Past medical and like expenses	\$30,000	\$80,000	\$70,000
Future medical and like expenses	\$20,000	\$70,000	\$60,000
Past gratuitous / paid care	\$15,000	\$80,000	\$49,000
Inability to care for dependents	\$5,000	\$5,000	\$5,000
Future Care	\$50,000	\$300,000	\$100,000
Past economic loss	\$20,000	\$100,000	\$90,000
Future economic loss	\$0	\$0	\$0
Interest on past losses	\$15,000	\$35,000	\$25,000
Total Damages	\$305,000	\$970,000	\$649,000

Total plaintiff claim	\$649,000
Less 25% litigation risk discount	\$486,750
Plus plaintiff's costs of \$150,000	\$636,750
Less 10% contribution from the Hospital	\$573,075
Plus defence costs of \$90,000	\$663,075
Total	\$663,000

Key take-outs

1. Quantum:
 - a) General Damages (pain and suffering)
 - b) Special Damages (quantifiable loss)

2. Assessment of damages influenced by:
 - a) Impact on life
 - b) Medical needs
 - c) Impact on capacity to work
 - d) Need for care
 - e) Other loss (i.e. dependency)

3. Assessments of damages are increasing (verdicts and flow on to settlements)



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