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Health Care Update

Australia's Legal Environment – Health Law

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IN THIS ISSUE

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Welcome to the eleventh issue of the Health Care Update. In this issue, Partner Mark Doepel and Special Counsel Steven Canton have prepared a national update on Australia's legal frameworks in relation to health law and medical negligence.

Mark and Steven take you through the relevant state and territory laws, legal access, pre-litigation processes, length and settlement of claims, involvement of Government agencies, damages regimes, and defences.

They also consider recent trends in litigation and medical negligence around Australia, with a particular focus on medical negligence class actions and the upward trends in medical malpractice awards.

We hope you find this issue informative and useful. If there are any topics you would like us to cover in the future, please contact Kerri Thomas, or alternatively if you have any questions on this update, please contact Mark or Steven.

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BACKGROUND

The following provides a brief background into the nature of Australia's legal environment in relation to health law and medical negligence.

From 1999 to 2002, Australia went through what has been termed an "insurance crisis". During this period, public liability and professional indemnity insurance premiums rose to unsustainable levels. There is some debate as to what precipitated the crisis, but it is generally agreed that it was a combination of the collapse of HIH insurance in 1999, a number of overly generous court decisions, and an explosion in litigation (with a significant number of cases being commenced).

That led to the commissioning of the Negligence Review Panel in 2002, chaired by Justice David Ipp (judge of the Court of Appeal of the Supreme Court of New South Wales). On 30 September 2002, the Panel issued its report known formally as the 'Review of the Law of Negligence Final Report' and informally as the 'Ipp Report', which made 61 recommendations to reform the law on negligence in Australia.

Noting that in Australia negligence law is not uniform across the country but rather unique to each state (Queensland, New South Wales, Victoria, Tasmania, South Australia, and Western Australia) and territory (Northern Territory and the Australian Capital Territory), all states and territories took steps to implement reforms based on the recommendations in the Ipp Report.

However, those reforms were not mirrored across the states and territories, but rather were implemented on a state-by-state basis.

RELEVANT STATE AND TERRITORY LAWS

Each state/territory implemented the following legislation:

New South Wales

Civil Liability Act 2002 (NSW)

Victoria

Wrongs Act 1958 (Vic)

Queensland

Personal Injuries Proceedings Act 2002 (Qld)

Civil Liability Act 2003 (Qld)

Western Australia

Civil Liability Act 2002 (WA)

South Australia

Civil Liability Act 1936 (SA)

Australian Capital Territory

Civil Law (Wrongs) Act 2002 (ACT)

Northern Territory

Personal Injuries (Liability and Damages) Act 2003 (NT)

Tasmania

Civil Liability Act 2002 (Tas)

Whilst each state/territory has similar guiding principles, there is a variance in the application of those principles in each state/territory. For this reason, damages (in particular) can vary significantly between different states/territories.

Of note, the application in the Northern Territory to judgments is largely common law based.

ACCESS TO THE LEGAL SYSTEM

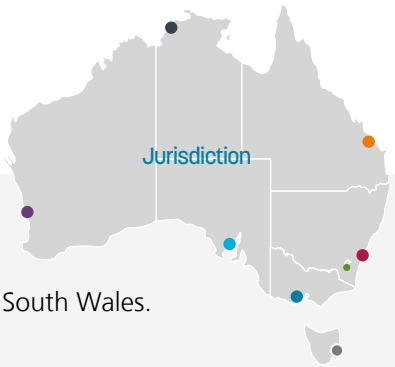
Whilst each state's and territory's laws can be sophisticated and nuanced, the legal system in Australia is easily accessed by anyone who believes that they have been wronged.

For small claims up to say $40,000 (depending on the state/territory), parties can bring self-represented proceedings before a Tribunal. Such matters are costs-exclusive, which is to say that each party pays its own costs regardless of the outcome.

In relation to matters that must proceed to court, there is ready access to "no win, no fee" law firms, which can bring proceedings on behalf of injured persons.

For more sophisticated matters there is also access to litigation funders, which can support the costs of such matters.

PRE-LITIGATION PROCESSES



Often insureds are made aware of claims before any significant dispute has developed – either because of a readily apparent complication, or because there has been a request for records by lawyers. That process can often ensure that facts or circumstances are promptly notified to insurers.

Those initial interactions can also give rise to attempts to resolve matters informally before they proceed to litigation. In some cases, this strategy can be invoked when claims are particularly weak. Rather than "no win, no fee" law firms gambling on costly litigation, they will see if there is any appetite for settlement of the claims.

In other cases, and depending on the jurisdiction involved, pre-litigation processes might be the gateway through which courts can be accessed. We outline those states/territories in the following pre-litigation processes.

Commencing Litigation

New South Wales

There is no formal notice process in New South Wales.

Victoria

Prior to proceeding with litigation, a claimant needs to serve Prescribed Information, certifying a 5% whole person (physical) impairment. Claims can be commenced by a simple Writ; thereafter 12 months to file a detailed Statement of Claim.

Queensland

The *Personal Injuries Proceedings Act* (PIPA) requires a *potential* claimant to issue an Initial Notice to the *potential* respondent for disclosure of the claimant's medical records. Before a claim can be started under PIPA, a claimant must obtain an opinion from a suitable medical expert identifying alleged medical negligence based on the disclosed records. Any subsequent claim must be commenced within 1 year of the records being disclosed and attach the expert opinion relied upon.

Western Australia

There is no formal notice process in Western Australia.

South Australia

The *Uniform Civil Court Rules 2020* require claimants intending to initiate a claim to provide a pre-action claim to the potential respondent/s. Additional requirements need to be met for personal injury claims, including those related to medical negligence. Specific time limits apply to the pre-action requirements of potential parties.

Australian Capital Territory

The claimant must serve a Personal Injury Claim Notification as well as records prior to commencing proceedings.

Northern Territory

Any claim which meets the jurisdictional limit of the Supreme Court of Northern Territory (>$250,000) is required to comply with *Practice Direction No. 6 of 2009 – Trial Civil Procedure Reforms*, which requires pre-action conduct including notice of the claim, relevant disclosure and participation in alternative dispute resolution or costs implications may follow for non-compliant party.

Tasmania

In the lower Magistrates Courts, more than 90 days before filing the proceedings, the claimant must serve a notice of the intended action and supporting documentation.

Table 1

LIMITATION PERIODS

Court proceedings for personal injury or (medical) negligence matters generally have to be commenced within three years from the time the injury arose. Those limitation periods can sometimes circumvent pre-litigation processes.

The Statutes of Limitations in each state/territory are as follows:

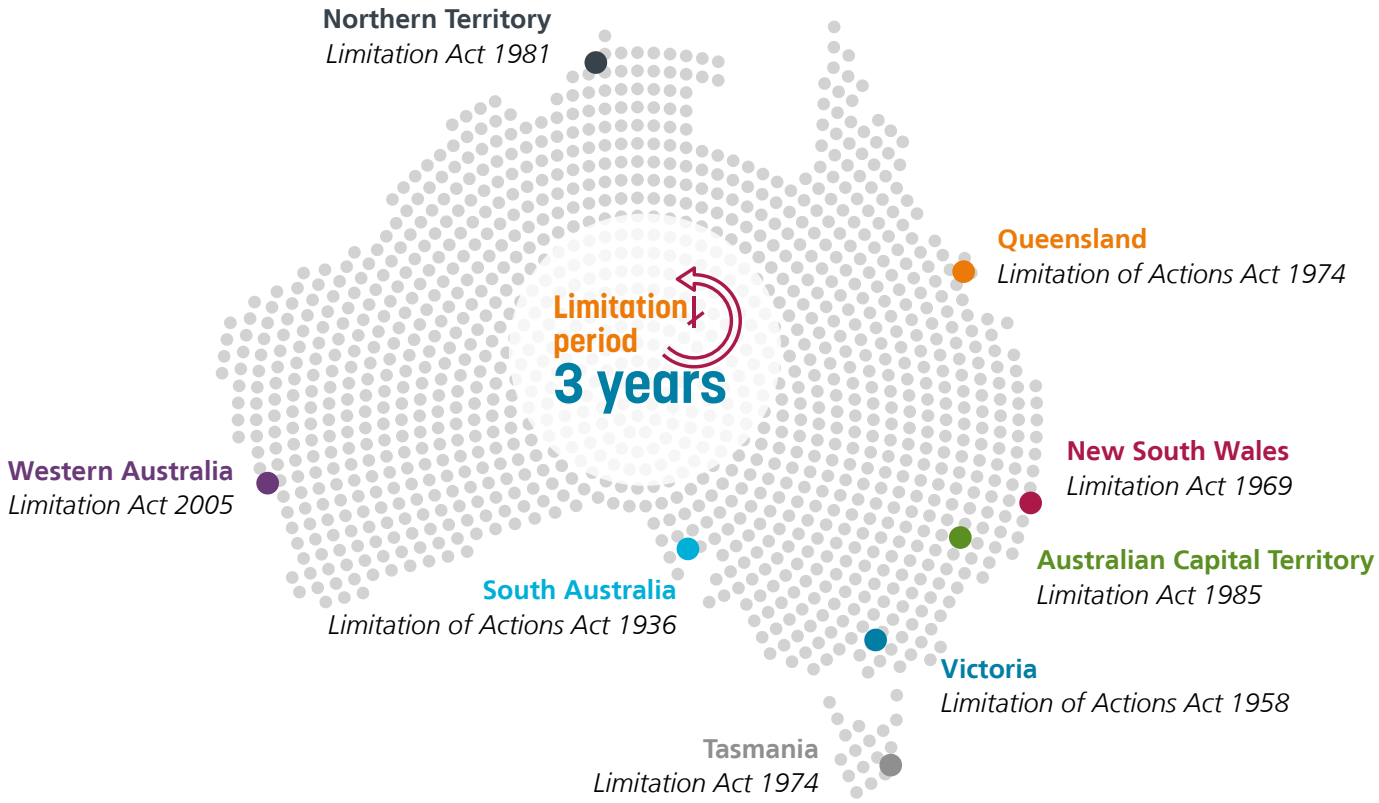


Table 2

Whilst limitation periods can be a useful defence, in that they add an extra layer of risk for a plaintiff, limitation periods are seldom the main factor forcing matters to resolve. The 3-year periods are usually based on the "discoverability" of a claim, which often only arises when lawyers are consulted. Some states also have a "long stop" 12-year limitations period, but even those can be extended in certain circumstances (e.g. infant claim).

THE LENGTH OF A CLAIM

As noted in our commentary on limitation periods, it can often take three years for a claim to proceed to litigation. This is often because prospective plaintiffs are focused on seeking remedial treatment rather than damages. It is also because plaintiff solicitors are often under-resourced and are prioritising the most time critical matters.

Once a claim is filed at court, it usually takes between one and two years for simple matters and between two and three years for more complex matters to progress to a hearing (assuming the case does not settle at mediation, as they frequently do). Thereafter, it is a matter for the judge who heard the case as to how long it is until judgment is issued. It is not uncommon for this to take 6-12 months or longer.

Therefore, in total, it is often

six or seven years

between an incident and a final hearing.

SETTLEMENT OF CASES

That said, once proceedings have commenced there are usually two Alternative Dispute Resolution (**ADR**) mechanisms – an informal settlement conference or a mediation. Thus, matters are usually resolvable within 3-4 years of the initial incident if the parties can reach an appropriate compromise.

In some states/territories, informal settlement conferences are utilised early in the litigation process where issues are clear and there is a reasonable chance that the matters can be resolved.

Alternatively, mediation usually comes later in the litigation once the parties have obtained at least expert evidence. This ensures that, despite the complexities of the case, there is a reasonable understanding of the issues in dispute.

Further, in some states/territories, courts mandate that matters proceed to mediation before they can be advanced to a hearing.

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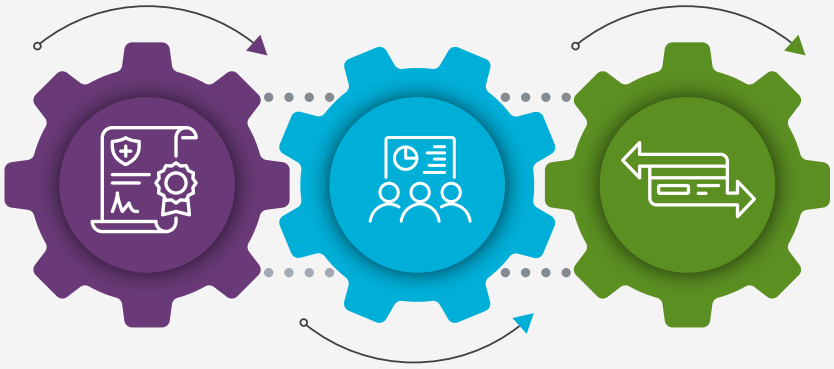
INVOLVEMENT OF GOVERNMENT AGENCIES IN SETTLEMENT

In Australia, different government bodies provide access to assistant services. Medicare, Australia's health care system, supplements or pays for basic services such as access to medical practitioners. Centrelink, Australia's social service administrator, provides welfare benefits when employment has been affected. The National Disability Insurance Agency (**NDIA**) provides access to support services when there is a disability or impairment.

When a medical negligence case is settled, there is an expectation that Medicare, Centrelink, and the NDIA will be reimbursed by the practitioner for the support services that they have provided to the claimant (because of the alleged fault of the practitioner).

After cases settle, there is usually then a process whereby:

A deed of settlement or release is entered into



10% of the settlement sum is paid to Medicare, which then deducts any monies owed to it and reimburses the plaintiff the remainder of the 10%.

Centrelink is consulted as to the amount of any payback, and

The NDIA follows a slightly more complex process whereby parties normally find that there is merit in consulting it both before and after settlement. This is because the amount of the settlement, and the nature of the damages claimed, can substantially affect the amount of the NDIA payback.

DAMAGES CLAIMED – ESPECIALLY FOR PAIN AND SUFFERING

Heads of Damage

Whilst every case is different, the damages claimed usually include:

non-economic loss (i.e., general damages for pain and suffering)

past and future out-of-pocket expenses (i.e., medical costs)

past and future economic loss (i.e., lost wages)

loss of earning capacity

past and future domestic assistance or attendant care (i.e., care costs), and

costs.

Non-Economic Loss

Non-economic loss has a different cap in each jurisdiction and is re-indexed annually. Non-economic loss is also referred to differently in each jurisdiction. The current caps and terminology are as follows:

Jurisdiction	**Terminology**	**Cap on Damages** (as at 1 August 2023)
New South Wales	Non-economic loss	$705,000
Victoria	Non-economic loss	$713,780
Queensland	Injury Scale Value – General Damages	$436,100
Western Australia	General Damages	No cap
South Australia	Scale Value	$406,420
Australian Capital Territory	General Damages	No cap
Northern Territory	Non-pecuniary damages	$775,200 (680,000 monetary units)
Tasmania	General Damages	No cap

Table 3

Potentially problematically in the settlement of matters is that non-economic loss awards are often based on scales or indexed relative to a most extreme case. Whilst the problem lies is that in jurisdictions such as New South Wales, non-economic damages scales start on an exponential rather than linear basis. Such exponentiality occurs mostly in the area of 24% to 33% (as below). For this reason, non-economic damages are typically awarded and argued in this territory.

Percentage of a most extreme cases	Indexed Value
24%	$39,000
25%	$46,000
26%	$56,500
27%	$70,500
28%	$98,500
29%	$127,000
30%	$162,000
31%	$183,500
32%	$211,500
33%	$232,500

Table 4

Costs

Subject to the jurisdiction, costs can also be a significant component of the plaintiff's claim. In New South Wales and the Australian Capital Territory we have recently seen a number of matters whereby the amount claimed for costs is akin to, or more than, the amount claimed in damages. Such substantial costs, usually two to three times more than what might be spent in the defence of the matter, can be a difficult issue in settlement negotiations.

This can sometimes lead to costs being "agreed or assessed", which is akin to costs awarded upon judgment. Where matters proceed to a judgment, typically the loser pays the winner's costs. These are normally paid on a "party/party" basis. We note that:

> *"Party/party costs are intended to reimburse one party, usually the successful party, for legal costs which they have paid or owe to their solicitor, where these costs have been agreed or assessed as being fair and reasonable. However, party/party costs normally provide only partial reimbursement of a client's total legal costs. It is like the gap between a doctor's actual charge and the amount [subsidised by the government]."*[1]

That gap is generally about 25% of the overall costs, meaning that overall about 70-75% of costs are reimbursed if a successful party wins at hearing.

For completeness, where a typical claim in a medium level court was settled within a year of being made, or say around the stage of mediations, defence costs would typically be in the range of $30,000 - $50,000 (give or take). If a claim is then defended up to court, substantial additional work is performed in terms of investigations, engaging experts, and preparing witnesses, such that costs are likely to rise to approximately $120,000 - $150,000. Costs may then continue to rise subject to the length of the hearing, such that a matter may cost $150,000 to $250,000 to run to the end of a hearing.

1 https://www.olsc.nsw.gov.au/Documents/Fact%20Sheet%203%20Types%20of%20costs%20July2015%20AC.pdf

DEFENCES TO CLAIMS

Single-defendant matters

In single-defendant matters, defences are usually based on:

direct factual defences against the specifics of the plaintiff's claim

legal defences based on the principles of negligence (duty, breach, causation, remoteness)

the defendant, normally being a health practitioner, acted in accordance with competent professional practices, and

the plaintiff was contributorily negligent.

There may also be defences around assumption of risk, recreation activities, the limitations period (as mentioned on page 8), and the limit of the jurisdiction (i.e., that the award sought is more than what that particular court is empowered to award).

Multi-defendant matters

Where there are multiple defendants, this gives rise to a convoluted system of both joint and several liability and proportionate liability. Whether joint liability or proportionate liability applies typically depends upon the head of damage being claimed. Claims for pain and suffering and non-economic loss are generally awarded as joint and several liability whereas claims for economic loss are generally awarded on the basis of proportionate liability.

Vicarious liability

Non-employed physicians, or "independent contractors" are typically not subject to principles of vicarious liability.

However, this is subject to two factors. The first is that a practice or a hospital may have a non-delegable duty that acts as a form of reduced-vicarious liability such that the institution finds itself liable for a proportion of the claimant's injuries. The second is proof of the employment relationship. This can be difficult to establish as a court will look at the entire indicia of the relationship, and not solely at the terms of the employment contract.

Practitioners with their own insurance

In addition, where practitioners – regardless of whether they are employees or contractors – have their own insurance, this can often be triggered regardless of the relationship. For example, in New South Wales, this is governed by a combination of the *Employees Liability Act 1991* (NSW) ss 3 and 6, and to a lesser extent s 66 of the *Insurance Contracts Act 1984* (Cth).

Medical practitioners must be supplied with a minimum cover amount of $5 million as legislated in the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (Cth); although cover limits typically range from $5 million up to $20 million.

GENERAL TRENDS

Claim numbers

It is difficult to track the number of medical malpractice claims, given that the majority settle. However, the national registering body, the Australian Health Practitioner Regulation Agency (**Ahpra**), provides an indication as to the number of complaints.

In the 2021/2022 year, 14,313 practitioners had a complaint made against them, which is approximately 1.7% of all health practitioners.[2] In the 2019/2020 year, 13,006 practitioners had a complaint made against them, representing 1.6% of all health practitioners.[3] This suggests that the number of complaints, relative to practitioners, has remained relatively steady in the last 3-4 years.

Class actions

Medical negligence class actions are very much a part of the legal environment.

As of August 2023, there were currently, at least, the following medical negligence class actions (or potential class actions):

a. IVF treatment with a particular emphasis on genetic testing

b. vaginal mesh or tape implants

c. inappropriate breast augmentation procedures

d. dangerous and unsafe hours worked by medical practitioners

e. birth control complications arising from use of Essure

f. the Cosmetic Institute class action, and

g. the underpayment of junior doctors.

Trends in litigation generally

As a general premise, we note that:

a. **Cyber** – cyber risks and cybersecurity are likely to continue to grow as a new source of disputes. This may have a considerable impact on medical negligence in relation to the rise of eHealth and telehealth matters.

b. **Number of disputes** – it is expected that the number of disputes will continue to rise. The value of claims and the type of claims (in particular, claims for psychiatric damages) are increasing.

c. **Costs in litigation** – The amounts awarded by way of damages are likely to continue to rise.

d. **Technology** - Australian courts embraced electronic hearings during COVID-19, whereby parties appeared virtually, or whereby social distancing was maintained by having only barristers attend hearings (whilst solicitors instruct virtually). Given the courts' high caseloads (expected to increase in coming years), remote hearings will continue to be used for the foreseeable future, particularly for hearings that are procedural in nature. and

e. **Regulatory** – there has been a significant increase in regulatory activity. This has led to legislative reforms, including in relation to safe harbour principles for companies that enter into administrative processes. Further, government agencies such as Australian Securities Investment Commission, have undergone significant changes to senior personnel, which is likely to lead to renewed activity against corporations. Similarly, the Australian Competition and Consumer Commission often blocks mergers that it considers would lead to an anti-competitive market.

2 https://www.ahpra.gov.au/Publications/Annual-reports/Annual-Report-2022.aspx

3 https://www.ahpra.gov.au/publications/annual-reports/annual-report-2020.aspx

Trends in medical malpractice

Over the past five years medical malpractice awards has tended to increase significantly. We note the below comments by our Victorian colleagues:

> *During the last decade, Victorian practitioners have observed a significant upward trend in personal injury awards for general damages being handed down in the State. General damages are awarded for pain and suffering, and loss of enjoyment of life. There is no precise formula governing the calculation of common law general damages, but courts will look to the particular facts of a case and assess a monetary sum that is fair and reasonable to compensate plaintiffs for their loss.*
>
> *Traditionally, Victorian courts have been relatively conservative in their awards for general damages. For example, King v Woolworths Ltd[4] saw an award of $55,000 for pain and suffering, and loss of enjoyment of life from back injuries sustained in the course of employment. Six years later, in Verdesotto v Astaas P/L[5], a fair and reasonable award of general damages for a back injury was assessed at $80,000. However, these relatively low value sums for general damages are a thing of the past—this decade has seen a significant upward trend. In 2011, the Plaintiff was awarded $350,000 after falling from a ladder while working for the Defendant in Boehm v Strongback Pty Ltd[6]. Also in 2014, the Plaintiff was awarded $350,000 for pain and suffering after injuring her back while cleaning a bathroom owned by the Defendant in Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd[7].*
>
> *Awards for general damages for psychological injury have also followed this trend. Annetts v Australian Stations Pty Ltd; Tame v New South Wales[8] confirmed that persons responsible for tortious conduct causing psychiatric injury are liable for the reasonably foreseeable consequences of their conduct. In 2003, a Plaintiff was awarded $55,000 for psychiatric injury caused by fellow pupils at secondary school in Lisa Eskinazi v State of Victoria[9], but in 2015, a labourer was awarded $380,000 for bullying, harassment and abuse from the Defendant employer in Mathews v Winslow Contructors (Vic) Pty Ltd[10], and in 2017, $210,000 was awarded to a Plaintiff for psychiatric injury sustained in the course of her employment in Wearne v Victoria[11].*
>
> *Anecdotal evidence shows that New South Wales general damages awards have traditionally been the highest handed down in Australia. Recent cases in the State include a $220,000 payout for a wrist injury in Stenning v Sanig[12], $178,000 for a hand injury in Vo v Tran[13] and $220,000 for a knee injury in Fogg v Kane Constructions (NSW) Pty Ltd[14].*
>
> *The recent decisions in Victoria suggest that Victorian courts are becoming more generous when awarding general damages sums and the gap between Victoria and New South Wales is rapidly closing. Insurers and underwriters need to be alert to the types of claims being made in the personal injury domain and the increasingly large payouts that are being awarded for general damages.[15]*

4 King v Woolworths Ltd [1999] VCC 3
5 Verdesotto v Astaas P/L [2005] VCC 527
6 Boehm v Strongback Pty Ltd [2011] VSC 463
7 Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No 7) [2014] VSC 542
8 Annetts v Australian Stations Pty Ltd; Tame v New South Wales (2002) 211 CLR 317
9 Lisa Eskinazi v State of Victoria [2003] VCC 38
10 Mathews v Winslow Contructors (Vic) Pty Ltd [2015] VSC 728
11 Wearne v Victoria [2017] VSC 25
12 Stenning v Sanig [2015] NSWCA 214
13 Vo v Tran [2016] NSWSC 1043
14 Fogg v Kane Constructions (NSW) Pty Ltd [2015] NSWSC 648
15 https://www.sparke.com.au/insights/trends-in-general-damages-awards-in-victoria/

Why Sparke Helmore?

Our Sparke Helmore health care team is led by Partner Kerri Thomas and made up of other partners and senior lawyers who have extensive experience in both health and insurance law. With one of the largest insurance teams in Australia, we combine national scale with strong local insurance knowledge and expertise in each of our nine offices.

In the medical malpractice and health care facilities space, we advise a variety of domestic and international insureds, insurers, underwriting agencies and cover holders, including the London Market and Lloyd's syndicates. We have extensive experience advising medical defence organisations acting for hospitals, clinics, registered health practitioners and other medical service providers such as aesthetic clinics, radiology and pathology practices, medical practitioners, allied health professionals (psychologists, counsellors, beauty therapists, physiotherapists) clinical researchers and alternative therapists. We understand the often-complex relationships and issues that emerge between the practice and the medical providers.

Our team understands Australian Health Practitioner Regulation Agency (Ahpra) requirements, including on a state-by-state basis, and can assist your insureds with medical malpractice complaints, investigations, defamation and coronial inquires. In addition to defending litigated actions in courts and tribunals, our experience extends to representing health professionals and health facilities in regulatory and disciplinary hearings and coronial investigations.

As a full-service firm, we are able to draw on the expertise of our specialists in our Workplace, Technology, Property and Construction, M&A and Government teams to assist in broader health care matters as well as our Global Insurance Law Connect network (of which we are the sole Australian member) for any offshore health related legal needs.

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To find out about the ways that we can help you, please contact a member of our team:

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