

Briefing Note: Financial Planning for your Medical Malpractice Action

Purpose of this Note: To warn MCA members of problems and costs in running negligence actions, even when using the contingency fee legislation in NSW, and the need for a financial plan.

A) How long can it take ? How much does it cost ?

Legal action to seek redress for injuries caused by any type of medical malpractice is very difficult. Many cases take of the order of 10 years. Just to do initial inquiry work and get an opinion of a barrister as to if your case may have "legal merit" can cost several thousand dollars. To run even a simple court case you need around \$50,000 as available cash. A complex case will cost you many times this to run. The hospital and doctors you wish to sue are probably well insured against negligence claims. This 'medical defence' cover allows them to spend hundreds of thousands of dollars in opposing any case you bring, and also to fight appeals to the NSW Appeal Court and then the High Court if you win at first. They may also start to counter-sue you for defamation if you go public about your case. Stephen Rice in his 1988 book '*Some doctors make you sick*' estimated that each year 70,000 Australians suffered ill effects due to medical negligence in hospitals. That of these victims on average 250 took some type of legal action and probably a dozen or so got to a court room. The chance of a victim winning in court seems to be of the order of 25% or so. Because medical professionals have such a good defensive system and thus win most of the time they often seem to claim (quite wrongly MCA feels) that the public generally make vexatious complaints, unfounded claims and have unrealistic expectations of medicine.

B) Can I get help with fees ? (Legal Aid , Insurance, and Contingency agreements)

1) Legal aid in NSW generally does not cover negligence actions against professionals. In recent years government in NSW has been adding laws to protect NSW professionals; both by putting limits on how much they can be sued for and by stopping legal aid for such cases. NSW Legal Aid are an Independent Commission and thus do not have to justify refusing to help you. In any case if you have any assets (such as owning a house etc.) you probably do not qualify for legal aid. In any case today's legal aid can be an expressway to bankruptcy for you as it is only a loan and you cannot be sure of the quality of the legal advice so obtainable, it could be of negative value to you. Quality Assurance is totally unknown by the legal profession.

2) Insurance cover is not available on an individual basis to consumers for this type of legal expense. Some group general legal expenses plans do exist and may provide some support, at least in respect to getting some free advice or initial legal work done. If you have any work related group insurance cover (i.e. via your employer or trades union) then it is worth asking to see if you have any such legal expenses cover.

3) Some solicitors will give initial advice on a free basis ('pro bono') and you should also contact the Law Society of NSW for details of any other pro bono facilities. If your case raises some important legal aspect you could be lucky and get some assistance.

4) Contingent fees. Under recently introduced law ^(note 1) your solicitor can now bargain to arrive at a private contract to make the fees (and the barrister's fees) for his/her time payable only if you win your case. This is known as putting the legal work on a 'contingent fee' basis. However (s)he is then allowed to bargain to charge you an excess of up to 25% (the upper limit that the law allows) when you do eventually pay the fees. It is up to you and the lawyer to come to an agreement. The deal you get depends on how good you are at bargaining with a lawyer ! The one thing that the NSW law specifically forbids the lawyer from offering you is a "percentage of winnings" deal. (These are common in the USA where a lawyer can offer to fight your case and will take say 30% of the damages awarded to you by a court or nothing if you lose your case in court.) Also be clear that in any case you will normally have to pay the expenses in running your case as they occur, these can be thousands of dollars. It is normally just the charges for the lawyer's own time that are 'contingent' on winning the case. As barristers cannot sue their clients for unpaid fees they often demand (via your solicitor) their fees up front. So don't think that contingency fees 'NSW style' automatically provide a viable path to suing a hospital who damaged you.

5) Have a financial plan ready from before day one to cope with losing your case.

If you start a legal action to sue someone for negligence but lose your case the way the law works in NSW is that you have to pay the legal court expenses of both sides ! This can be very expensive indeed for you. Part of your planning at the start **must** normally include finding out about bankruptcy planning. The law is the 1966 Federal Act. If you lose long before someone serves you with a Statement of Liquidated Claim you should consider :

- An informal offer of payment by instalment,
- Part payment only (remember they can offset bad debts against tax),
- Applying to a court for a formal instalment payment plan (But note with garnishee orders forced on you by creditors if you are in work they have to leave you with 80% of the maximum single weekly payments, under Sec37(1)(a)(1) of the Workers Compensation Act 1987 (around \$200 a week) ,
- Entering voluntary bankruptcy.

If you may have to become a bankrupt:

- Plan as far ahead as possible to be ready for the worst outcome. (See an accountant about this before you even actually decide to fight your medical negligence case.)
- If the worst actually happens be a voluntary bankrupt (do not let them file against you). You must file (get free help from

LIAC or a Community Legal Centre) (1) A Debtors Petition (2) A Statement of Affairs with an affidavit verifying this, swear this to a JP (Banks have a JP on their staff) or if you want to pay a fee see a solicitor and get them to do it all.

- Now you are a bankrupt. All harassment of you by creditors (i.e. the 'heavy mob' that may have been following you around for repayment) must by law stop. The Insolvency & Trustee Service will however arrange to take your personal property bank account, home etc. BUT they cannot take: ordinary clothing, necessary household goods, tools of trade (to value \$2000, some life insurance and annuities, a car worth under \$2,500, any money that you got as compensation for personal injury or any goods (i.e. Car and house) that you bought fully or mostly with such compensation money.
- They can make you pay from your income. If you have no dependents you can earn up to around \$24,000 per year before they can force you to do this.
- Normally after 3 years from the date the Statement of Affairs was filed your debts are all cancelled. You are a discharged bankrupt. **But** you will be considered a very bad credit and employment risk for a long time, you will not be allowed to hold a trade licence for up to 10 years.

C) An actual example of 'winning' in the NSW courts.

Even if you win you could end up in deep financial trouble. For example in a recent case in NSW a young worker suffered both injury at work and iatrogenic injury due to treatment and is now chronically disabled for life and will never work again. Under workers compensation arbitration approx. \$170,000 was awarded to the worker for immediate losses. However nothing was paid to the worker as the other side refused to accept this arbitration decision, as was their right under the law. The employers insurers wished instead to fight it out in court. Legal advice to the worker from a solicitor was to accept this challenge and go to court and sue for \$600,000 to cover both immediate and long term losses. Thus the worker spent over \$100,000 in borrowed funds on legal expenses etc. and won in court. The worker's integrity was attacked in court and medical and sexual history questioned. Privacy just does not exist for medical victims in court. The worker won but felt raped by the court. The judge instructed the jury that the maximum that they could award was \$87,000. They found for her for this maximum amount. \$50,000 went back to the workers compensation authority. Medical expenses needed as a result of the injuries (not covered by Medicare and all charged at 'compo' rates) are well over \$30,000. Thus the worker never saw the 'winnings' and has massive debts of over \$100,000 after winning in court. (A doctor involved in the case has since been struck off for reasons not connected with this case but is also demanding thousands of dollars in unpaid medical fees.) The worker has been told by new solicitors that the court case was managed negligently. But the worker is now insolvent and so has no way of suing the other solicitors, and has been told via the NSW Law Society pro bono scheme that it would not be worth trying to sue the solicitors because the amount recoverable would be smaller than the costs. to mount the action.

D) Some Does and Don'ts

In NSW as a victim of medical malpractice do not believe any figure that you may be told you could win in a court case. Do not borrow against such supposed winnings.

Do run your personal finances assuming at all times that you have seen the last of any money you pay out to or into trust funds of solicitors/barristers. Do seek some low cost, preferably free, legal advice ^(note 2) as soon as possible. Perhaps you can at least cause the other side much legal inconvenience without spending much at all ? Perhaps if your case is a good one you can still get some limited out-of-court compensation for yourself at least ? (Most probably you will have to swear never to tell about the negligence etc. in such cases as a condition of getting such compensation. So don't expect to be free to inform and protect other medical consumers from suffering the same damage you suffered. Such secrecy provisions seem to be what "practical medical ethics" on privacy are about.)

Do see good accountant before you start. Do not expect to get what you feel is 'a fair go' in court. Remember NSW courts do not dispense natural justice as you understand it. You may find that Judges may treat doctors almost as gods who can do no intended wrong and thus are incapable of being found negligent. NSW courts use a dated degraded colonial form of British Law. It has long been said that 'British Law is about protecting the property of the rich' 'in the public interest' ^(note 3) and today British Law is becoming widely recognised as one of the most expensive and inefficient forms of legal system in existence. Do tell MCA about your case so that we can warn others in very general terms about what happened to you.

note 1 1993 amendments to NSW Legal Profession Act 1987. Section 186 (conditional costs agreements) Section 187(3) (25% excess limit) Section 188 (no percentage of winnings agreements are allowed)

note 2 For free legal information try :

Legal Information Access Centre (LIAC) at the State Library in Macquarie Street (plus some regional libraries in NSW have LIAC facilities) Law Society of NSW, 170 Phillip Street Redfern Legal Centre, 73 Pitt Street, Redfern (Plus your own intelligence: Use your local public libraries and university libraries (yes anyone can walk in and use them as just reference libraries) Some 'high street solicitors' know as much about specialist litigation applied to your case of medical malpractice as you do right now !)

note 3 "the public interest" = what is in the interests of the rich and powerful groups within society. (i.e. what is NOT in the interests of victims of professionals)