



Medical Law

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Introduction

Providing medical treatment to a person is a visible aspect of health care. There are a wide range of laws that may apply in relation to that treatment. An operation, for example, can only be performed with the consent of the patient, and the responsible surgeon is legally required to provide sufficient information to the patient in order for any consent provided to be valid. Further, the patient consenting must have the capacity to do so.

Any personal information collected about a patient during contact with the health practitioner must be treated in accordance with the relevant privacy laws and must not be used or disclosed in a way that is inconsistent with those laws. If the patient experiences complications during or after the surgery, they may wish to access their medical records if the explanation provided by the health practitioner or the hospital of admission is not satisfactory. The patient may wish to complain about the treatment they received or the conduct of the health practitioner, or bring other legal action against the practitioner.

The law surrounding medical treatment is very complex and expert legal advice is recommended.

Consent to Medical Treatment

Before a person can consent to or refuse particular medical treatment, they need to have a reasonable understanding of what that treatment involves. The treating health practitioner is required to provide a proper explanation of the medical treatment and the risks involved. A health professional has a duty to warn a patient of a material risk inherent in proposed treatment (see the High Court of Australia decision in *Rogers v Whittaker* (1992) 175 CLR 479; [1992] HCA 58). A risk is evident if in the particular case:

- a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it
- the health practitioner is, or should reasonably be, aware that the particular patient, if warned of the risk, would be likely to attach significance to the risk.

Other factors relevant in deciding what information to provide and the recognition that this often depends on the circumstances are:

- the condition of the patient and their general health
- the nature of the medical treatment
- what will happen if the treatment fails or goes wrong
- how likely it is that a failure or particular risk may occur
- the seriousness of the effect on the patient's health or life if a particular risk occurs
- whether the patient appears to want a full explanation of what is involved, the nature and the availability of alternative treatment
- the personality or temperament of the patient
- whether the treatment is needed because of an emergency (e.g. a car accident).

The law recognises that a health professional is justified in withholding information in certain circumstances. These include:

- reasonable grounds for believing that the physical or mental health of the patient might be seriously harmed by knowing particular information
- a patient does not wish to know all the information associated with their medical treatment. However, this does not mean the medical practitioner is not required to provide any information. In order for consent to be informed and valid, the patient must still be provided with enough information to enable them to properly consent
- the patient is unable to provide consent (e.g. the patient is unconscious). Treatment in this situation can only be provided if it is reasonably necessary in the best interests of the patient. When a person is unable to provide consent, consent can be provided by a person's statutory health attorney (for more information see the chapter on *Laws Relating to Individual Decision Making*).

Types of consent

Where consent is provided to medical treatment by a person it must be freely given. The consent provided can either be:

- express—for example a person signs a form consenting to a particular surgical procedure or
- implied—for example, by the actions of the individual attending at a pathology centre, handing over the collection request form and presenting an arm for the blood test.

Consent and competent adults

There is a general presumption that an adult is competent to make medical decisions. A person who is 18 years of age or older and competent can consent or refuse to consent to medical treatment. A person making such a decision must be able to understand the relevant medical condition and the choices available in relation to the treatment of the condition. If consent to treatment is provided by a competent patient, the treatment provided is lawful. However, if the treatment is provided without consent, the relevant health practitioner or health service provider may be liable for assault or trespass. There are, of course, exceptions to the requirement for consent. For example, in cases of emergency or necessity, it may not be possible to obtain the consent of an individual to treatment. In those circumstances, the general position is that the provision of the treatment in the absence of consent will not constitute an assault or trespass to the person and therefore not attract civil or criminal liability.

Consent and children

A parent or guardian of a child generally has authority to consent or refuse medical treatment on behalf of their child. However, a child under 18 can make their own medical decisions where they have sufficient understanding and intelligence to fully understand the treatment (see *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 and *Secretary, Department of Health & Community Services (NT) v JWB and SMB* (Marion's Case) (1992) 175 CLR 218). A variety of

factors can impact on any assessment of the capacity of a child to provide consent to medical treatment including their age, maturity and the seriousness (or not) of the medical condition. For further details on medical treatment and children see *Parents, Children and the Law*.

Absence of Capacity to Consent to Medical Treatment

A person over 18 years of age is unable to consent to medical treatment where the person has impaired decision-making capacity. Impaired decision-making capacity can be due to a wide range of things, including dementia, acquired brain injury, intellectual impairment and mental illness. It can be ongoing, intermittent or temporary.

Legislation establishes a substitute decision-making framework whereby decisions are made on behalf of an individual lacking capacity within the parameters set out in the legislation (see the *Laws Relating to Individual Decision Making* chapter for more information).

A person over the age of 18 years may, while they are still competent, prepare for any future incapacity and healthcare decision making under ss 35-36 of the *Powers of Attorney Act 1998 (Qld)* (Powers of Attorney Act) by preparing an advance health directive or appointing an enduring power of attorney authorised to make decisions in relation to the healthcare of the individual (s 32 Powers of Attorney Act).

The Supreme Court's *parens patriae* jurisdiction also provides a mechanism to assist in cases involving incapacitated individuals and medical treatment. This is an inherent jurisdiction of the Supreme Court to protect the person and property of those who are unable to look after themselves, and it covers both adults lacking capacity and children. An application needs to be made to the Supreme Court, and the court has broad powers that can cover authorising treatments (e.g. blood transfusions to children against the wishes of the parents and child), reinstatement of life-sustaining treatment (see *Northridge v Central Sydney Health Service* (2000) 50 NSWLR 549) or authorisation of the withdrawal or withholding of medical treatment. Any decision made by the court must put the best interests of the incapacitated person or child first.

The Family Court can also withhold or grant consent to medical treatment for a child relying on its welfare jurisdiction in the *Family Law Act 1975* (Cth). The Family Court's powers are very important in cases where the parents and the child do not agree about medical treatment or a doctor is concerned about the decision made by the parents and/or the child concerning treatment (see *Marion's case* (1992) 175 CLR 218; [1992] HCA 15). More recently, the Family Court has exercised its powers to permit the parents of an infant to authorise and give consent on behalf of their child to the withdrawal of medical treatment (*Re Baby D* (No. 2) [2011] FamCA 176 (6 March 2011)). Further information about decision making where an adult has impaired decision-making capacity is set out in the *Laws Relating to Individual Decision Making* chapter.

Advanced Health Directive

An advanced health directive is a document in which an individual is able to direct what future medical treatment they will consent to or refuse in particular medical situations. Under the Powers of Attorney Act some key features of the directive include:

- it only operates if the individual has impaired capacity in relation to ‘healthcare’ treatment (s 36)
- it can direct the withholding or withdrawal of a life-sustaining measure
- an individual can make directions in relation to a special healthcare matter
- it cannot be used to authorise, justify or as an excuse for euthanasia (s 37)
- it can direct that a person (an attorney) be appointed to make decisions about a health matter if the advance directive is inadequate (s 35(1)(c)).

A ‘special healthcare matter’ in relation to an adult includes the removal of tissue from an adult while alive for donation, sterilisation, termination of pregnancy, participation in special medical research or experimental healthcare (sch 2 ss 6–7 Powers of Attorney Act). Where the individual does not have an advanced health directive and there is no other authorised entity, the Queensland Civil and Administrative Tribunal can provide consent for special healthcare other than electroconvulsive therapy or psychotherapy (s 68 *Guardianship and Administration Act 2000* (Qld)).

Protecting Confidential Patient Information

Information given in confidence by a person to a health practitioner is protected at law as confidential information.

A medical practitioner’s obligation to maintain confidentiality is not absolute, and there are certain situations where disclosure of confidential information can occur without the practitioner breaching their obligation of confidence. These situations may include but are not limited to:

- the person consenting to the release of the information
- child abuse and neglect of a child requiring mandatory reporting under the *Child Protection Act 1999* (Qld)
- a court order (e.g. subpoena) requiring the release of documents for a proceeding or attendance at the proceedings to give evidence
- an emergency situation necessitating the provision of information to the treating doctor or hospital
- legislation requiring a doctor to release information to a health authority when they treat a person with a diagnosis of a notifiable conditions (e.g. certain sexually transmitted diseases) (s 70 *Public Health Act 2005* (Qld)).

If an individual’s treating health practitioner discloses their confidential information without lawful reason, the individual may have the ability to take legal action against the practitioner based on one or more of the following grounds:

- breach of contract
- possibly in negligence
- in equity for breach of confidence.

Statutory obligations of confidentiality of public hospitals and other public health services

In Queensland, the duty of confidentiality in relation to public sector health services is also specifically provided for in the *Hospitals and Health Boards Act 2011* (Qld) (HHB Act). A designated person must not disclose confidential information about a patient who has received a public sector health service unless the disclosure is required or permitted under this Act. Breaches of this obligation of confidentiality can attract a substantial fine (s 142 HHB Act). The obligation of confidentiality extends to a wide variety of ‘designated’ people within the relevant health service including (s 139 HHB Act):

- a health service employee such as a doctor or nurse
- a board member of the service
- an employee of the Department of Health
- the Chief Health Officer
- a health professional other than a health service employee
- a contractor who accesses confidential information under a contract for IT.

Disclosure of confidential information is permitted under the HHB Act in the following circumstances where:

- it is required or permitted by an Act or law (s 143)
- consent has been provided (s 144(a))
- the disclosure is for the care or treatment of the person to whom the information relates (s 145)
- the disclosure is about the general condition of the patient and is communicated in general terms (s 146(1)(a))
- the disclosure is to a person who has sufficient personal or professional interest in the health or welfare of the person (e.g. disclosure to the patient’s treating GP or to a spouse (s 146(b))
- it will prevent or lessen a serious risk to life, health or safety of a person, or to public safety (s 147)
- the disclosure is made to the Health Ombudsman (s 156)
- it is in the public interest (s 160).

Privacy in the Health Care System

Personal and sensitive health information collected by a hospital, health service or a health practitioner is also protected by both state and Commonwealth privacy legislation. The *Information Privacy Act 2009* (Qld) (Information Privacy Act) regulates how this information is handled by public hospitals and health services in Queensland. Similar protection is provided to personal information about an individual collected by private sector health providers such as private hospitals, general

practitioners and medical centres under the *Privacy Act 1988* (Cth) (Commonwealth Privacy Act). Both Acts set out requirements in relation to the collection, storage, use and disclosure of personal and sensitive information by health agencies in the form of principles known as the National Privacy Principles (NPPs) and the Australian Privacy Principles (APPs) respectively. Under the NPPs, a health agency must:

- not collect personal information unless it is necessary for its functions or activities (NPP 1(1)) and not collect sensitive information (which includes health information) unless consent is provided or another exception applies (NPP 9)
- only use or disclose the collected personal information for the primary reason it was collected (NPP 2(1)). Some exceptions to this general rule include where:
 - consent is provided
 - disclosure is necessary to prevent a serious imminent threat to an individual's life or a serious threat to public safety
 - another law requires or authorises the use or disclosure
- take reasonable steps to make sure the information collected, used or disclosed is accurate, complete and up to date (NPP 3), and to make sure the information it holds is secure (NPP 4)
- make sure there is a document which sets out the health agency's policies on its management of personal information (NPP 5)
- provide access to documents containing personal information if requested by the individual whose personal information it is (NPP 6).

The APPs that apply to organisations such as general practitioners' practices and private hospitals impose similar obligations regarding collection, security, use and disclosure. For example, a person's GP can only use or disclose the information they hold about the person for the purpose it was collected (i.e. the healthcare or treatment of the individual). It can only be used or disclosed for other purposes in limited situations including if the individual consents (APP 6.1, 6.2).

Access to Medical Records

Public health services in Queensland

Access to documents held by public health services in Queensland can be obtained by individuals under either the Information Privacy Act or the *Right to Information Act 2009* (Qld) (Right to Information Act). In addition to the right to information provided under legislation, Queensland Health has in place an administrative access policy through which a person can make a written request to access their own health records. Using this method of access does not affect a person's rights under the Information Privacy Act or Right to Information Act. Where administrative access to health documents is not possible or a person chooses not to use that process, a request for access to records can be made under either Act.

Requesting access to documents under the Information Privacy Act is generally free of charge, and the relevant health service is required to inform the person about this. Access charges may apply for services such as photocopying.

A request for access to personal information may be refused if the disclosure of the information (s 51 Right to Information Act and s 64 Information Privacy Act):

- might be prejudicial to the physical or mental health or wellbeing of the applicant
- would be against the public interest.

There is a process set out in NPPs 7 of the Information Privacy Act in relation to amending documents containing personal information held by a health agency.

For further information on right to information and correction of information see the *Right to Information and Freedom of Information* chapter.

Private health services

Medical records held by private health services are accessible under the AAPs.

Under APP 12.1, a person has the right to access personal information held by a private sector health provider such as a general practitioner. However, access to the information may be refused on a number of grounds (see APP 12.3).

Charges for access may be imposed in some circumstances but these must not be excessive (APP 12.8). There is also a process set out in APP 13 for a person to make a request to correct personal information held about them.

For more information on the NPPs and the APPs see the *Right to Information and Freedom of Information* chapter.

Medical Negligence

Negligence is a failure to take reasonable care to avoid causing injury or loss to another person. The general principles of negligence are set out in further detail in the *Accidents and Injury* chapter.

Health professionals are under a common law duty to take reasonable care for the safety and wellbeing of their patients. Breaches of that duty may give rise to claims for damages. As many medical treatments involve highly specialised and technical skills, a court will usually need evidence from medical specialists about correct procedures and usual safeguards followed in particular medical treatments before a decision can be made about whether or not a particular health professional has been so careless in providing that treatment to a patient as to be considered negligent.

Difficulties in medical negligence cases

Very few medical negligence cases are simple. Often a lawyer will have to collect a great deal of information, such as hospital records and expert reports, before they can tell the patient whether there is a good case. Even then, after a case begins and opposing medical opinions are presented, the case becomes more difficult as the court has to choose which medical opinions to accept.

Common difficulties

From the patient's point of view, there are some common difficulties encountered in medical negligence cases. Medical treatment very often includes a risk of some sort. Very rarely can the total safety of any procedure, even if it is performed with proper care and skill, be guaranteed. This means that just because the treatment has been unsuccessful, or even harmful, it does not mean that there has been negligence.

What amounts to negligence of a professional person is a matter of opinion and judgment. The court does not base its judgment on what the patient or the practitioners concerned have to say, but on the opinions of suitably qualified experts. Often these experts disagree about what is the cause of the problem, or about what the practitioner should have done in the circumstances.

It is often difficult to decide what the patient's health would have been like if the problem had not occurred. The court tries to work out whether a patient would still have had the treatment if warned of the risks and whether the presenting condition would have impaired their future health and independence in any event.

Assessing damages

Apart from the difficulties in succeeding in a medical negligence case, assessing the damages is also difficult. A client in a medical negligence case is almost always suffering from a medical problem prior to the alleged negligence. Only the medical problems that flow from the negligence will lead to compensation. Other subsequent medical problems, which cannot be shown to flow from negligence, do not attract compensation.

Obtaining independent medical reports

Almost no medical negligence case can be won without supportive and credible evidence from an independent specialist health professional, and it can be difficult to find a health professional who is prepared to become involved in such a case. Obtaining independent medical reports can also be very costly.

Taking legal action

The investigation and pursuit of a possible medical negligence claim is a very complicated matter. Any person considering a claim against a health practitioner should seek legal advice.

More information on legal proceedings relevant to a negligence claim can be found in the *Complaints about Professionals* chapter.

Health Product Regulation and Safety

Most people at some stage in their life will use medicines of some description to relieve symptoms of an illness or require a medical device to improve the quality of their life. In Australia, the Therapeutic Goods Administration (TGA) is responsible for the regulation and safety of medicines and medical devices (therapeutic goods) available in Australia. Legislation administered by the TGA governs the manufacture, supply, advertising and ongoing monitoring of therapeutic goods in Australia to ensure they are safe and fit for their intended purpose. The applicable legislation includes the:

- *Therapeutic Goods Act 1989* (Cth)
- *Therapeutic Goods Regulations 1990* (Cth)
- *Therapeutic Goods (Medical Devices) Regulations 2002* (Cth)
- *Therapeutic Goods Advertising Code 2015* (Cth).

Medicines, whether prescribed by a doctor, recommended by a pharmacist or bought at a supermarket, can include things such as paracetamol, vitamins and antibiotics. Medical devices may include artificial knees and hips. A therapeutic good will also include human blood, blood products and tissues.

Most therapeutic goods must be entered on the Australian Register of Therapeutic Goods before they can be supplied in Australia. Therapeutic goods are usually required to be accompanied by consumer information stating what the goods are used for and how they work, contraindications, precautions and possible side effects, guidelines for proper use and storage, and unwanted effects or overdose and what to do in such situations.

Problems with medicines or medical devices should be reported to the TGA. The problems may relate to safety of the product or issues regarding the quality or effectiveness of the product. Recalling the product is one regulatory response to a therapeutic good that may be unsafe to consumers.

Unfortunately, recalling a product does not always occur in time and many people have suffered serious and sometimes permanent injury as a result of an adverse reaction to a medicine or a faulty medical device. These people may have a legal right to seek compensation from the supplier or manufacturer and anyone else involved in the design, testing, production and marketing of the product.

The law in this area is complex and people are encouraged to seek legal assistance if they have been adversely affected by a therapeutic good.

See the *Consumers and Contracts* chapter and the *Accidents and Injury* chapter to provide further information regarding the liability of manufacturers of defective products.

Legal Notices

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