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## LawTalk Blog



# Duty of care and your medical treatment

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If you've suffered a personal injury and feel that someone is responsible for causing that injury, to make a claim for medical negligence compensation against that person you need to establish that a duty of care was owed to you and that the duty of care was breached.

## What does duty of care mean?

A simple example is people driving cars on the road. Each driver on the road has a duty of care to other road users to drive in a safe manner and according to road rules. If a driver breaches that duty by failing to follow the road rules, such as running a red light or failing to give way and they cause an accident that injures you, then you can take a personal injury claim against that driver for breaching that duty of care and driving without due care.

A breach of a duty of care is commonly referred to as [negligence](#); so you would be making a claim for compensation due to [someone's negligence](#).

Before you can allege a breach of the duty of care you first need to establish that you and the person you allege has breached a duty of care are in a "relationship that requires a duty of care.

The injured person needs to show that the alleged negligent party should have foreseen they were at risk of causing injury as a result of their failure to provide the duty of care.

# What about duty of care in relation to medical treatment?

So what does all this mean in the context of medical treatment?

The law recognises particular relationships in the context of duty of care and one of those relationships is doctor and patient.

Where the relationship of doctor and patient exists then in the eyes of the law a sufficient relationship of “foreseeability” exists between them. In other words there is no necessity to **prove** that the injured person is someone that the negligent party ought to have foreseen could be injured by any failure in duty of care.

In a case of medical treatment a person that suffers injury as a result of any medical treatment does however need to establish that the doctor and/or hospital (which includes allied health professionals, dentists and so on) failed to act in a manner widely accepted in Australia by members of the same profession, as competent and professional practice at the time the injury occurred.

The duty of care and the breach of that duty of care is assessed at the date of the injury and under the laws as at that date. The reason for this is that medical standards and practices evolve over time and the doctor and/or hospital should only be held to the standard applicable at the time the injury occurred.

Let's look at a couple of examples that might better explain how it works.

## Example 1

In 2005 Mr X undergoes a laparoscopic procedure to repair a hernia.

During the procedure a hole is made (unintended) in Mr X's bowel which is not diagnosed at the time. Mr X subsequently becomes very ill and requires further surgery to repair the hole.

The doctor performing the surgery, due to the doctor patient relationship, owes a duty of care to provide the medical treatment with due skill care and attention.

The doctor performing the surgery is a general surgeon. In order to show that there was a breach of duty of care Mr X will need to establish that the doctor failed to act in a manner widely accepted in Australia by general surgeons as competent professional practice as at the date of surgery on 2005.

## Example 2

Mrs Y attends her GP several times over a period of 6 months in 2016 in relation to persistent symptoms of headache, nausea and blurred vision.

She is prescribed pain relief and told she has a virus. After several months of ongoing symptoms she attends a new GP who refers her for a CT scan and as a result a brain tumour is identified.

Once again, due to the doctor patient relationship, there is no necessity for Mrs Y to establish that a failure in the doctor's duty of care could lead to injury. However in order to establish an actual breach of the doctor's duty of care Mrs Y needs to show that the GP failed to act in a manner widely accepted in Australia by general practitioners as competent professional practice. In this scenario, by failing to arrange appropriate tests and examinations at an earlier time, there is a potential breach of duty of care. The standard expected will be the standard as at 2016.

It can be very tricky in some medical negligence claims such as example number 2 to establish the exact date when the breach of duty occurred.

In all medical negligence cases all relevant medical records regarding the treatment, including records from general practitioners, specialists and hospitals need to be obtained and an expert opinion sought from a doctor that practices in the same field in order to assess whether or not a breach of duty has occurred.

Once a breach of duty is established it is of course then necessary to establish that "loss" has resulted from the breach of duty. If there has been no damage resulting from the breach of duty then a patient has no basis to pursue a medical negligence claim. This is referred to as causation.

It is imperative in medical negligence cases that advice is sought from a solicitor with experience in this area and that a medical opinion is sought from a medical expert on both the issues of negligence and causation as early as possible.

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