

A Guide to Medical Law in Australia

Cerebral Palsy

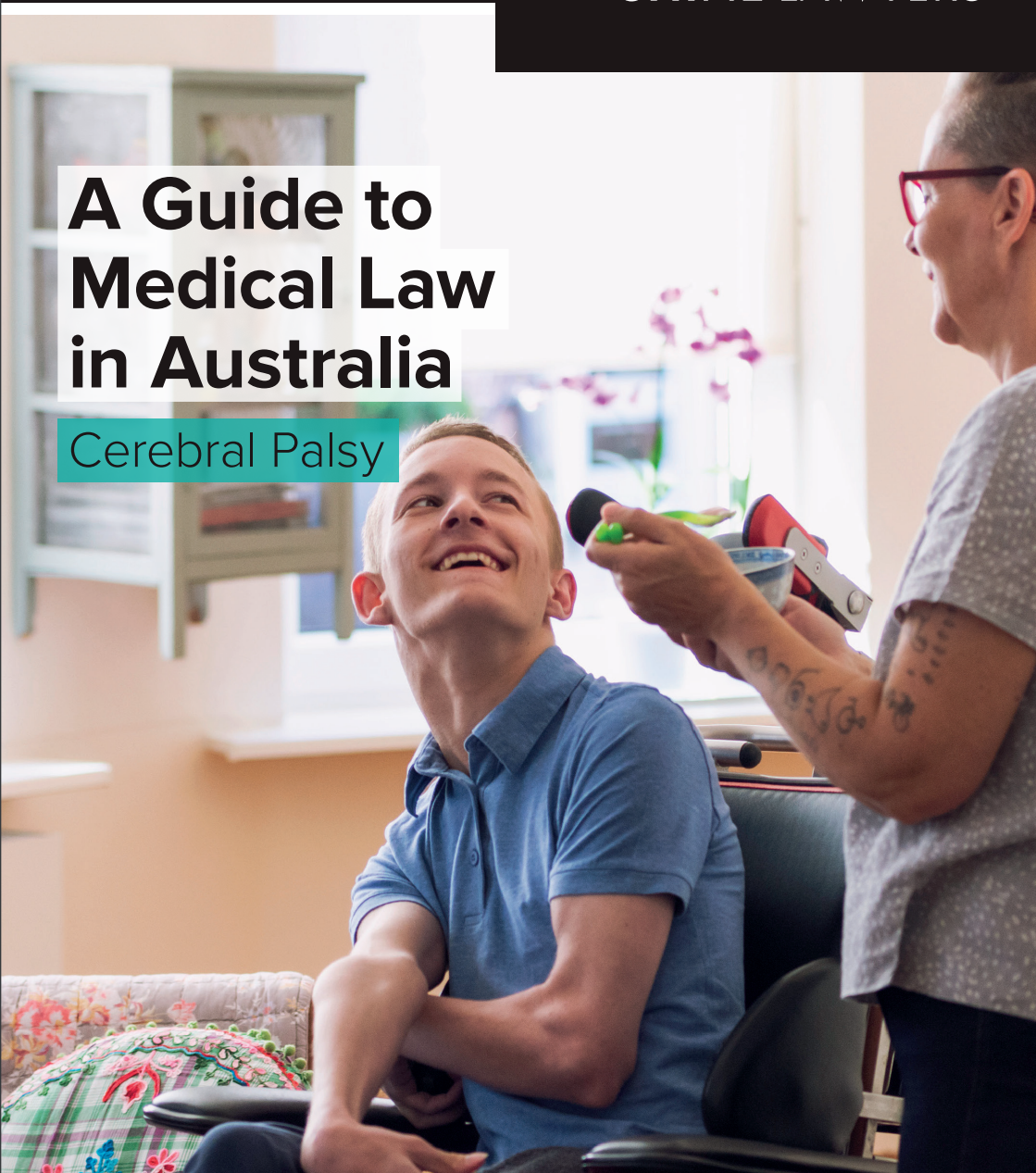


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Foreword

My team has the privilege of working with inspirational individuals and families living with cerebral palsy. Their journeys and the challenges they have overcome are nothing short of remarkable. Given the experiences we have gained alongside our clients, we felt compelled to share this knowledge and insight.

This guide focuses specifically on cerebral palsy medical negligence cases. The content has been produced to assist those affected and their loved ones to understand their legal rights, and to walk them through the legal process step by step.

For the clients we have helped seek justice, bringing a claim is never just about money. An award of compensation certainly relieves significant financial burden for parents and families however, more importantly, it provides the security of knowing their child or loved one will be provided for, and can live a life of independence and opportunity.

Our hope is that through this guide, families in similar circumstances will see that they are not alone, and have access to the support and guidance they need.

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Shine Lawyers' Medical Law Team

An expert team of legal practitioners with over 75 collective years of qualified practice, Shine Lawyers' Medical Law team represent individuals who have been harmed as a result of the negligence of healthcare providers.

Led by Department Manager Clare Eves who has worked in plaintiff litigation for over 15 years, the team is comprised of specialists who are solely dedicated to medical negligence cases. Clare is supported by teams of Senior Solicitors, Solicitors, Paralegals and Law Clerks based in Brisbane, Sydney and Melbourne, servicing clients all over Australia.



Clare Eves is a Senior Solicitor, Associate and the Department Manager of the Medical Law team. Clare has worked exclusively in plaintiff litigation since 2002 and joined Shine Lawyers in 2008 after relocating to Australia from the UK. Clare is a member of the Australian Lawyers Alliance (ALA) and the Queensland Law Society (QLS).



Bill King is a Senior Solicitor and Associate. Bill joined Shine Lawyers in 2005 and was admitted as a solicitor of the Supreme Court of Queensland in 1995. Bill is a member of the ALA and the Australian Patients Association.



Caryn Ger s is a Senior Solicitor and Associate. Caryn leads Shine Lawyers' NSW Medical Law Practice in Sydney and has practiced in the fields of medical law and product liability for more than eight years. Caryn has been a member of the Australian Lawyers Alliance since 2011.

“With a proven record in achieving results for clients who have suffered devastating and life changing events, we work closely with our clients and their families to navigate their legal journeys. We strive to ensure our clients receive the best standard of care, rehabilitation, emotional and financial support possible.

It has been a privilege to work collaboratively to prepare this guide for those living with cerebral palsy and their families. ”



John Watson is a Senior Solicitor. John joined Shine in 2015 and has specialised in medical law claims for more than six years. John is a member of the Queensland Law Society, the Australian Lawyers Alliance, the Sunshine Coast Law Association and the Suncoast Community Legal Service.

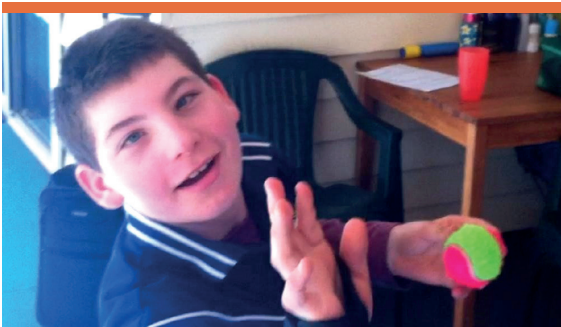


Karen Jarman is a Senior Solicitor. Karen joined Shine Lawyers in 2012 after relocating to Australia from the UK. She has over 14 years' experience in the legal industry and is a dual qualified solicitor, admitted to practice in Australia, England and Wales.



Kirstin Lean is a Senior Solicitor. Kirstin has been with Shine Lawyers since 2007 and is a highly qualified solicitor, with over 20 years' experience in the industry.

Our Inspirational Clients



Rex

Rex was awarded the funds needed to live a full and happy life.

Rex was born in a rural Queensland hospital in 2006 by emergency caesarean. Due to complications during his birth, Rex was born with a severe acquired brain injury, which resulted in cerebral palsy.

Rex's mother visited the hospital the day before his birth with symptoms of severe pre-eclampsia, a dangerous condition that called for Rex's immediate delivery. Rex was not delivered until the following morning, after his mother's condition worsened and he had developed severe distress.

Rex's parents were filled with joy at the birth of their son, but were apprehensive and concerned about the cost of recommended therapy and treatments.

Rex's parents consulted with Shine Lawyers' Medical Law team who travelled to the family's home town to better understand their situation. A compensation claim was successfully brought on Rex's behalf by his family, which resulted in Rex being awarded the funds needed to live a full and happy life.

Ethan

Ethan was sixteen months old when he acquired a severe brain injury immediately after a heart catheter procedure performed at hospital in 2003.

Up until his brain injury, Ethan had been developing at a normal rate, meeting all the usual milestones. Ethan's brain injury led to a diagnosis of spastic quadriplegic cerebral palsy causing severe developmental delay. He will require permanent care and medical assistance for the remainder of his life.

Ethan's parents consulted Shine Lawyers Medical Law team and a compensation claim was brought on his behalf. Shine's legal team were there every step of the way, providing guidance and support throughout the legal process. The claim was ultimately successful, and Ethan and his family can now look forward to the future.

Ethan and his family can now look forward to a future filled with happiness and opportunity.



What is cerebral palsy?

Cerebral palsy is a condition marked by impaired muscle control, caused by damage to the developing brain whilst the baby is in utero, during the process of labour, or at some stage during infancy.

Causes

The cause of the brain injury or malformation that leads to cerebral palsy is often unknown, however can be the result of a variety of known causes including:

- Congenital conditions affecting the developing brain
- An infection or virus affecting the baby in utero or shortly thereafter
- Prematurity
- A stroke or seizure occurring shortly after birth
- Oxygen deprivation in utero, during the labour process, or during infancy.

Characteristics

Cerebral palsy can cause both physical and intellectual impairments. The severity of an individual's disabilities will depend on the part of the brain that has been injured.

Common symptoms include:

- Low muscle tone
- Muscle spasms
- Stiffness in the limbs
- Poor muscle control, reflexes, coordination and posture
- Delayed development
- Affected speech
- Intellectual disability.



Indicators

Signs of cerebral palsy are not always immediately evident and in some cases, the damage, or the extent of damage, may not become known until early childhood.

Some indicators that may point to a diagnosis of cerebral palsy include:

- Poor state of the baby on delivery where urgent medical attention may be required
- Poor APGAR (Appearance, Pulse, Grimace, Activity, Respiration) scores which provide an assessment of the baby's wellbeing at birth
- Abnormal cord gas results (assessing blood taken from the umbilical cord) which may indicate a lack of oxygen has occurred
- Seizures
- Feeding difficulties
- Delayed development
- Poor muscle control
- Muscle spasms
- Lack of coordination.



Medical negligence in cerebral palsy cases

According to statistics published by the [Cerebral Palsy Alliance](#), one in every 500 babies born in Australia has cerebral palsy. Often, cerebral palsy is the result of unforeseen complications or events occurring during pregnancy, birth, or shortly thereafter, that impact upon the baby's brain development. However, in some instances, cerebral palsy can be directly caused by negligent medical treatment.

Healthcare providers have a duty to their patients to provide medical services to a reasonable standard of care.

When a healthcare provider falls below the standard of care expected or required, this can lead to serious and irreversible damage.

If a healthcare provider's negligence leads to cerebral palsy, the law is there to ensure that affected families have access to the compensation they need to live the fullest life possible without financial constraint and with the security of knowing their child will be provided for in the future.

In some instances, cerebral palsy can be directly caused by negligent medical treatment provided throughout a mother's pregnancy.

For many, the prospect of pursuing a claim against a healthcare provider can provoke concern, particularly where an ongoing relationship is necessary to meet the affected individual's care and rehabilitation needs. In some cases, the action is brought directly against the healthcare provider. However if the provider is an employee of the hospital or practice where the negligence occurred, legal principles may apply to hold the hospital or practice liable for the negligence of their employee, whilst they were acting within the scope of their employment.

It is important to remember that in the instance of a successful claim, in most cases the healthcare provider is not liable to pay the compensation personally. Healthcare providers are covered by professional indemnity insurance, so it is their insurer who will manage and meet the costs of the negligence claim.

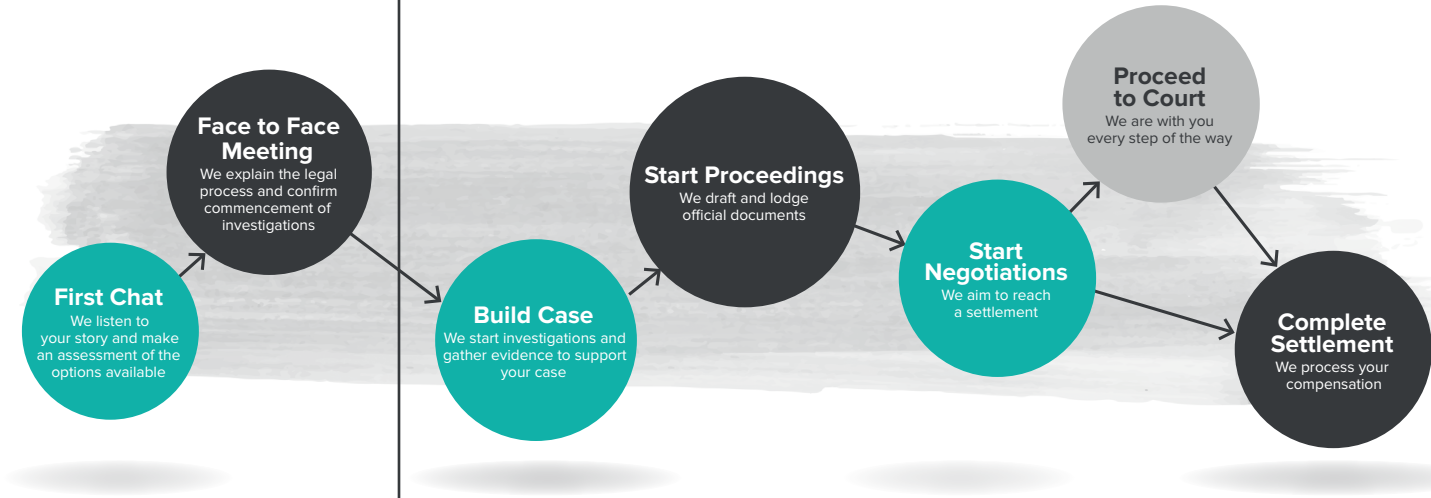
Understanding the legal process

How to bring a medical negligence claim

If you know someone who has cerebral palsy and believe it was caused by the negligence of a healthcare provider, the first step is to engage a law firm that specialises in medical negligence law. If an individual decides to engage Shine’s Medical Law team, we listen carefully to their story and provide an assessment of all available options.

If we believe there is a viable medical negligence claim, we take the time to explain the legal process so that the client and their family have an understanding of their rights, and are able to regain some control during what can be an exceptionally challenging time.

Should the individual wish to proceed with a claim, Shine’s legal team will begin investigations and gather the evidence required to build a strong case; this will include supporting documentation such as medical reports and test results. Once the evidence is obtained to support the case, we will commence the claims process on our client’s behalf.



When all of the evidence is finalised, our team will meet with the other party’s legal representatives and attempt to negotiate a settlement agreement on behalf of our client. If this is unsuccessful, the case will proceed to court and our team members stand by our clients every step of the way.

Once an agreement is reached, either through negotiations or through the court system, Shine’s Medical Law team will finalise all of the details and if the claim is successful, process the compensation payment.

Elements of a medical negligence claim

In order to establish a medical negligence claim, the following elements must be satisfied:

1. The affected individual was owed a “duty of care”
2. The duty of care was “breached”
3. Loss or harm occurred as a direct result of that breach (“causation”).

If all three elements are satisfied, “liability” has been established i.e. a party will be held legally responsible for the harm and loss suffered. In many cases, more than one party can be liable; it may be a general practitioner, a specialist or the hospital itself. A lawyer will assess the individual’s circumstances and advise which entity to bring the claim against.

1. The individual was owed a “duty of care”

A duty of care is a legal requirement that an individual, or a group of individuals, act toward others with the level of care and skill that a reasonable person in those circumstances would use.

Under Australian law, it is well-established that special relationships, such as a healthcare provider and patient, attract a duty of care¹. The scope of this duty requires healthcare providers to exercise reasonable care and skill in the advice and treatment that they provide².

Therefore, in most practitioner-patient relationships, showing that a duty of care exists is straightforward, and will not be a contentious issue.



Liability

Legal responsibility for one’s actions. If someone fails to meet that responsibility, they may be open to a law suit for any resulting loss or injury.

¹ Kondis v State Transport Authority (1984) 154 CLR 672

² Rogers v Whitaker (1992) 175 CLR 479

2. The duty of care was “breached”

A breach occurs when someone fails to act in accordance with the standard of care required under the law of negligence. To show there was a breach of a duty of care in cerebral palsy cases, it must be established that the healthcare provider’s actions or inactions fell below the standard reasonably required in the circumstances.

Examples of where a healthcare provider’s behaviour has fallen below the expected standard of practice include:

- Failure to address common risk factors during pregnancy or in delivery
- Failure to take appropriate and timely steps to deliver the baby once complications arise
- Delay in providing adequate care post-delivery
- Delay in diagnosing and/or treating an infection such as meningitis
- Failure to diagnose and/or treat jaundice
- Failure to diagnose and/or treat low blood sugar (in the infant).

When determining breach, the lawyer will ask questions, including:

Were problems detected during pregnancy (relating to mother and/or baby) that were not acted upon as required?

Was there a delay in a doctor or midwife attending, or any relevant examinations occurring?

Did the baby require resuscitation following delivery?

Was the baby sufficiently monitored during labour?

Was there a delay in, or failure to carry out, a caesarean section?

Were the baby's post-birth test scores (APGAR and cord gases) low or abnormal?

Were relevant referrals for specialist management made at the appropriate times?

Was an assisted delivery properly ordered?

Did the baby suffer fits or seizures shortly after birth?

Was the labour or delivery prolonged?

Were there any problems during an assisted delivery, such as the use of forceps or a vacuum?

Were any abnormal brain imaging results properly investigated?

3. Loss or harm occurred as a result of that breach (“**causation**”)

“Causation” requires proof that the act of negligence was the cause of injury or harm to the affected individual. In cerebral palsy medical negligence cases, this means proving the diagnosis was a result of the healthcare provider's failure to act in accordance with accepted standards.

The precise source of the cerebral palsy diagnosis will need to be determined by analysing medical reports. Once the cause is determined, the lawyer will investigate whether an alternative course of action was open to the healthcare provider that would have eliminated or minimised the risk of damage. If so, and the healthcare provider's failure to take that course of action can be said to have caused the cerebral palsy diagnosis, causation will be satisfied.

When addressing issues of causation, it is important to note that the court is concerned with causation “at law”, and the evidence does not need to demonstrate a medical certainty for the case to succeed. The court must be satisfied that on the balance of probabilities, the negligence caused, or substantially contributed to the harm.

If the cerebral palsy stemmed from circumstances outside the healthcare provider's control, causation will not be satisfied and a medical negligence claim cannot succeed.

Causation

For a successful claim, the plaintiff must show causation by demonstrating the defendant's act, or failure to act, caused their injury, and that injury was reasonably probable.

Important Considerations

It is important to note that the injured person and their lawyer are responsible for proving that a duty of care was breached, and how this breach ultimately caused or contributed to the outcome of cerebral palsy.

This is done by obtaining the opinion of independent medical experts who will determine whether the healthcare provider should have acted differently in the circumstances, and if so, whether the individual's injuries could have been prevented. The risk of harm and the management options that were available are judged by the prevailing standards at the time the harm occurred. This is based on what the healthcare provider knew, or ought to have known at the time.

It is also important to note that representatives for the healthcare provider may defend the claim if they can demonstrate by way of evidence that the healthcare provider acted in a way that was widely accepted by peer professional opinion.

Medical negligence is an extremely complex area of law and no two cases are the same. Strict time limits apply to these cases which specify when a claim needs to be filed with the court. These time limits vary depending on the state or territory the negligence occurred in. If this time scale is missed, an individual may be prohibited from bringing a claim. In exceptional circumstances, the court may extend these time limits at their discretion.

Notwithstanding time limit issues, most hospitals are only obliged to keep records for a certain number of years. Questions may also need to be asked of the healthcare providers who were involved, or those who witnessed the incident. Delaying the investigation of a claim may mean that crucial evidence is lost.

Generally, it is important to seek legal advice as soon as possible.

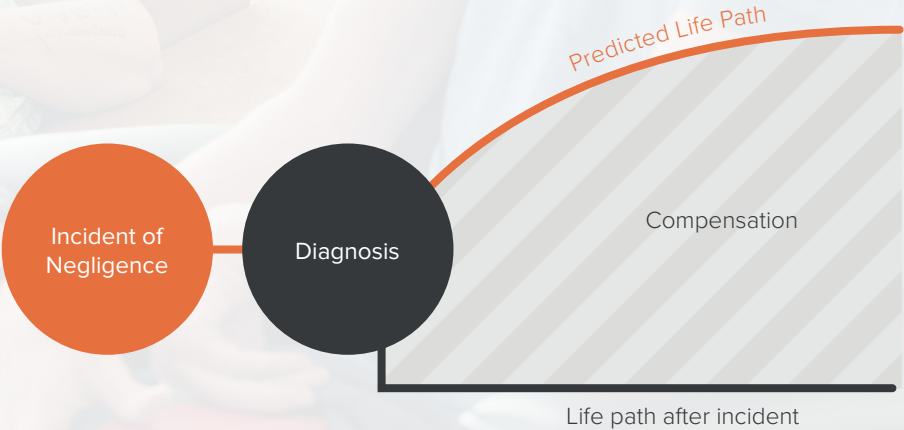
Compensation

If all three elements of negligence are present and liability is established, the affected person is entitled to receive compensation for the injuries they have suffered.

The amount of compensation an individual can recover is not a pre-determined amount. Compensation is dependent on the significance of the injury and is designed to restore the individual, to the fullest extent money allows, to the position he or she would be in if the injury had not occurred. It reflects the harm or loss suffered by the individual, rather than the degree of negligence of the healthcare provider.

Calculating Compensation

To calculate compensation, a determination must be made on the overall impact the disability will have on the child's expected life path. A comparison is made between this, and what the child's predicted life path may have been, had the child not suffered cerebral palsy.



Life Expectancy

While cerebral palsy is a condition that does not progress, certain characteristics of some conditions and other associated health issues may increase the likelihood of a shortened life expectancy.

Determining life expectancy is crucial to understanding the true loss an individual has suffered and assessing the level of compensation the individual is entitled to. This can be a challenge for the courts, however a range of evidence can assist in determining an individual's life expectancy based on their own unique circumstances. This is typically in the form of statistical data and expert evidence.

Statistical and expert evidence

Statistical evidence is prepared by appropriately qualified statisticians. In order to prepare this evidence, statisticians will analyse the life expectancy of other cerebral palsy sufferers of a similar age and with a similar condition to the injured individual.

Expert evidence is provided by a suitably qualified healthcare provider after they have the opportunity to assess the injured individual and take into account the individual's unique medical and social characteristics.

This involves consideration of the individual's:

- Degree of insight
- Degree of independence
- Extent of mobility
- General overall health
- Level of ongoing medical treatment and support
- Extent of damage suffered
- Presence and extent of any secondary medical complications.

Determining life expectancy is crucial to understanding the true loss an individual has suffered.

The approach of the Australian courts

In determining an individual's life expectancy, the court will take into account the evidence provided by a statistician. This provides a starting point to which clinical evidence is then introduced in order to determine where the individual fits within the statistical data. This depends on the extent of the injury and severity of ongoing symptoms.

The court will consider a number of factors that are not necessarily considered within the statistical data but may be important in terms of the individual's quality of life, and therefore their life expectancy. These can include the quality of care that can be provided, accessibility to medical care and resources, the love and devotion of the individual's family, and the individual's personal instinct and determination to survive beyond the odds.

Damages

In cerebral palsy cases, compensation is comprised of various “heads of damage”. These “damages” typically comprise of pain, suffering, loss of enjoyment of life (known as “general damages”) all expenses incurred to-date and required into the future, care and assistance, and economic loss. The compensation award is commonly paid as a once-and-for-all monetary sum.

Pain, suffering and loss of enjoyment of life

Damages can be claimed to compensate the individual for their pain, suffering, and loss of enjoyment of life. The amount of compensation awarded is dependent upon the extent of the injury or harm suffered, and no two awards for pain and suffering are the same.

As cerebral palsy has varying degrees of severity, many factors are considered to determine how the individual’s life has been impacted by the diagnosis. These factors include:

- Presence and extent of pain
- Extent of mobility
- Degree of independence the individual has
- Intellectual impairment
- Ability to participate in social activities
- Any speech or language impairments
- Adverse psychological reactions
- Other related symptoms or health conditions, such as epilepsy.



Heads of damage

Refers to the different types of loss that an individual may incur as the results of negligence.

All expenses incurred to-date and required into the future

An individual with a successful claim is entitled to compensation for all reasonable expenses incurred. With respect to past loss, any sums spent by the individual or the family will attract interest. A detailed record of all expenses and out of pocket costs should be kept in order to accurately calculate the amount of compensation that will be sought.

The only expenses that can be recovered are those that are reasonably required to meet the individual’s injury-related needs. To prove expenses are reasonably required, experts across a range of disciplines will be employed to analyse the necessity of all ongoing expenses, aids and equipment. In addition to out of pocket expenses incurred, an award of compensation will also be made for the likely costs of expenses that will continue into the future.

Medical expenses

An individual with cerebral palsy will be required to attend multiple medical and paramedical appointments for ongoing treatment. The cost of these appointments can be claimed, as well as reasonable travelling expenses incurred in attending these appointments.

These appointments may include, but are not limited to, consultations with the following medical experts and specialists:

- General Practitioner
- Paediatrician
- Rehabilitation Physician
- General Physician
- Physiotherapist
- Occupational Therapist
- Speech Pathologists
- Assistive Technology Experts.

In most cases, a medical expert will consider the ongoing medical treatment an individual is likely to require into the future. In doing this, the expert will undertake a detailed assessment of the individual's case, evaluate their likely future treatment needs, and provide an estimate of the costs. This estimate will form part of the claim.

Consumables

Consumables are items or products that an individual will regularly require as part of their treatment and care. These will vary considerably for each individual, however consumables that are commonly required include:

- Medications, including prescription and over the counter products
- Nappies and pads
- Ointments and creams
- Gloves and wipes
- Nasogastric / PEG (Percutaneous Endoscopic Gastronomy) formula and feeding equipment.

The expert will undertake a detailed assessment of the individual's case, evaluate their likely future treatment needs, and provide an estimate of the costs.

Only those consumables that are required as a result of the injury may be included as part of the damages award. If an individual is using consumables that have been provided at no cost, these may still be compensated for into the future, so long as they are reasonably required to meet injury-related needs. This is also the case for any necessary consumables that have not been utilised to date due to monetary constraints.

Aids, appliances & equipment

Significant sums of money are required to purchase the aids, appliances and equipment that are needed to help an individual with cerebral palsy to manage their disability. These commonly include:

- Mobility aids such as crutches, walking sticks/ frames, and manual and electronic wheelchairs
- Limb splints and other items to reduce muscle contractures and preserve range of movement in limbs
- Assistive technology aids such as learning aids, computer equipment, and software and hardware designed specifically for individuals with disabilities
- Specialised desks and other learning related equipment
- Electric beds, bed hoists, frames, grab rails and apparatus to assist with transfers
- Electric motor vehicle wheelchair hoists and other assistive driving technology.

Rehabilitation needs

In addition to the aids and equipment commonly required to physically care for an individual with cerebral palsy, the cost of the individual's reasonable rehabilitation needs will also be met.

In most cases, there is a demonstrated need to be involved in regular physiotherapy, gym work and hydrotherapy. Where such facilities are not in close proximity to the home, the court has previously considered the cost of modified home-based gym equipment and a heated hydrotherapy pool to be reasonable, where essential to the ongoing maintenance of the condition. In such cases, the ongoing running costs and maintenance involved with relevant equipment may also be included as part of a claim.

Transport expenses

In some cases, vehicle modification to allow for safe travel may be required. Such modified vehicles will have a different capital cost and may incur additional running and maintenance costs, which may be recovered as part of the compensation. Often individuals with cerebral palsy are not able to travel with a seat belt due to the need for extra support. There are many options available such as specialist car seats, safety harnesses, booster seats and seat-belt covers and a specialised assessment should be undertaken to assess those needs.

Case management expenses

The ongoing management of medical appointments, as well as the coordination of ongoing care, aids, equipment, and medication needs can be time consuming and onerous. The cost of a case manager (most of whom have a background in occupational therapy or social work) who can facilitate the management of these needs can also be recovered.

Vacation expenses

Travel and family vacations can be difficult due to the need for equipment, accessible travel and accommodation requirements. When an individual with cerebral palsy intends to travel interstate or

overseas, it is important that the additional travel costs, such as increased airfare and accommodation costs, are considered. Additional commercial care costs and specialised vehicle use whilst on holiday would also need to be factored in.

Home modifications

Depending on the severity of the disability, individuals may suffer difficulty with mobility. In severe cases, some individuals may be unable to mobilise at all.

There are many aids and devices available to assist with mobility, designed for inside and outside the home. The suitability of the injured person's home to accommodate the required aids and equipment is a relevant consideration. Aids and equipment for inside the home are often large and require a lot of space to be utilised efficiently. Where reasonable, the cost of any modifications to the existing family home will form part of the compensation award.

Once adulthood is reached, a greater level of independence may be required, and a desire to move outside of the family home. In these circumstances, the court may consider a second claim for home modifications, or in extreme cases, a purpose-built home to accommodate the individual and any carers to meet the ongoing injury-related needs.

It is essential that experts have a good understanding of the original layout of the home and importantly, the individual's needs, including what may be needed to facilitate access to the home and essential areas within the home. Modifications to switches, taps, handles and environmental controls may also be required to allow the individual a greater level of independence in their home.

Once adulthood is reached, a greater level of independence may be required, and a desire to move outside of the family home.

Care and Assistance

The care and assistance needs of an individual with cerebral palsy can vary widely. Some individuals may require basic assistance with domestic chores, whilst others may need 24-hour care and supervision. When compensation is calculated, a distinction is drawn between the care provided to date, and the care that will be required in the future. Both scenarios may attract compensation, regardless of whether the care to date has been provided commercially or “gratuitously”.

Gratuitous care is care and assistance that has been provided free of charge, usually by family members or loved ones.

An individual is entitled to claim for the equivalent cost of this care and assistance if the care was required to meet their injury related needs, and is over and above the care generally required for a similar-aged child without a disability.

In most states and territories, legislation aims to restrict claims for gratuitous care, and compensation will only be paid if a “care threshold” is met. In cases involving an injury of cerebral palsy, this threshold is almost always met and exceeded, allowing for compensation to be awarded. It is generally paid in terms of hours expended, and is calculated based on commercial rates.

An individual is entitled to claim for the equivalent cost of this care and assistance if the care was required to meet their injury related needs, and is over and above the care generally required for a similar-aged child without a disability.

Care required is often a combination of personal care, domestic assistance and the management of medical and travel needs. It will often include:

- Assistance getting in and out of chairs/beds
- Helping with toileting and bathing
- Assistance with dressing
- Assistance with driving to and from appointments
- Domestic and household tasks, including mowing the lawns, gardening, vacuuming, mopping, laundry, meal preparation and cooking, grocery shopping and household maintenance.

It is helpful for family members and caregivers to keep a diary documenting what care is provided and why. This will assist the court in making a detailed calculation of past care provided to date.

In most instances, significant compensation is recovered to fund the cost of ongoing care. The allowance is generally made for all future care to be provided by a commercial care provider to allow respite for the family and to preserve family relationships. Often the need for care will increase as the child ages, and additional assistance (both in and outside of the home) becomes necessary.

Additional carer costs

In circumstances where substantial care needs arise, the law may make an allowance for the additional cost involved in having attendant care within the home. This may involve a separate dwelling area or an additional bedroom if the carer does not reside onsite and overnight care is required. In cases where a live-in carer is required, home modifications may allow for additional bedrooms or for living quarters for the carers.

Additional funding may also be required for a carer's training needs, particularly if complex requirements arise i.e. hoisting and specific equipment training, paramedical training, oxygen administration etc.

Educational and technology

Individuals affected by cerebral palsy may experience learning difficulties which can impact their ability to participate within educational establishments. Learning may also be impeded by other aspects of the condition, such as:

- Difficulties in fine motor and gross motor coordination
- Communication deficits
- Short attention span
- Motor planning difficulties
- Perceptual difficulties
- Language difficulties.

These can impact on literacy, numeracy and other classroom skills and activities.

The costs associated with overcoming educational challenges can be included in a compensation claim. These generally include expenses associated with:

- Home schooling or a combination of home schooling and mainstream schooling
- Additional tutoring or a teacher's aid
- Special equipment such as alternative-augmentative communication systems, modified computers and desks.

Upon completion of secondary education, compensation may be recovered to support tertiary education costs, and to assist employment solutions, or transition to a work type program.

Economic Loss

Individuals affected by cerebral palsy may face limitations in terms of employment. In cases where the disability is severe, the individual may miss out on the opportunity to enter the workforce all together. Compensation can be claimed to reflect this loss of earning capacity.

In many cases, the challenge is to determine what this monetary loss is likely to be. As the injury is suffered in the early stages of life, there is no prior work history on which to base a calculation of the cost of missed employment opportunities. The court will therefore consider a range of evidence to make a determination, including family members' work histories and academic achievements. A likely career is then projected based on a degree of likelihood. Where the evidence does not support a career path with any reasonable certainty, the court may use average weekly earnings to determine what the individual should be awarded.

When considering whether an individual affected by cerebral palsy has capacity to engage in paid employment, their learning and study capability may be considered by the court. Where learning is severely compromised, an analogy may be drawn between the difficulty experienced with study, and the difficulty that would be experienced in attempting to enter the workforce. Physical impairments that may impact upon a person's ability to work will also be carefully considered.

Once the economic loss has been calculated with some reasonable degree of likelihood, the court may make further discounts to account for unforeseen events and changes of fortune that cannot be predicted, and that may impact on an individual person's earning capacity in any event. This is an allowance for things such as injury, unemployment and illness.

In many cases, the challenge is to determine what this monetary loss is likely to be. As the injury is suffered in the early stages of life, there is no prior work history on which to base a calculation of the cost of missed employment opportunities.

Depending on when the claim resolves, compensation may be awarded for past loss of earnings suffered to date, in addition to the future expected loss. Compensation may also be awarded for the loss of benefit to receive superannuation on these earnings, and is calculated by way of a percentage for past and future loss.

Fund management

Not all individuals with cerebral palsy have an intellectual disability. However, where an intellectual impairment occurs, the individual may be rendered incapable of managing a large sum of money or their own affairs. In such cases, an administrator is appointed to manage the individual's settlement fund, and the reasonable cost associated with administering the funds and ongoing management of the fund is compensated for.

In cases where an intellectual disability renders the person incapable of managing their own affairs, steps can be taken to organise their affairs, including preparing a will on their behalf, with the cost of the same included in the general compensation claim.

How much compensation can be claimed?

The exact amount of compensation that can be claimed will vary significantly from case to case, and is dependent on the particular circumstances of each claim.

In Australia, legislation governs the amount of compensation that may be awarded in medical negligence cases. In most areas, there are caps on the amount of compensation that may be paid and these vary between states and territories. A legal expert will provide guidance on any limitations that may apply to your case.

A fair and just award of compensation will provide individuals and their loved ones with the resources required to give the affected individual the care and support they need to live a full and happy life.

Contact

Should you require further information regarding any of the content featured within this guide, please do not hesitate to contact Clare Eves, Medical Law Department Manager, or a member of our team.

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Glossary

APGAR

A score given to a baby at birth that determines their health and whether additional medical assistance is needed. It stands for Appearance, Pulse, Grimace, Activity, Respiration.

Breach

A failure to act in accordance with one's duties under the law.

Causation

For a successful claim, the plaintiff must show causation by demonstrating the defendant's act, or failure to act, caused their injury, and that injury was reasonably probable.

Cognitive function

Any activity of the brain that leads to knowledge. These can include reasoning, memory, attention and language. All cognitive functions lead to the attainment of information.

Cognitive impairment

Refers to any interference in brain function, including difficulties with intelligence, learning and memory.

Compensation

The monetary sum paid to an individual with a successful legal claim. The amount covers injury or loss suffered because of the wrong doing or guilt of another.

Consumables

Products that are intended to be used up relatively quickly and which consumers use regularly.

Cord gases

Measures umbilical cord blood gas as a way of assessing a newborn baby's health.

Duty of care

A requirement that an individual, or a group of individuals, act toward others with the level of care that a reasonable person in the circumstances would use.

Epilepsy

A disorder of the nervous system characterised by the tendency to have recurrent seizures.

Gratuitous care

Care provided to an individual without payment, such as nursing and domestic services, often by family.

Heads of damage

Refers to the different types of loss that an individual may incur as the results of negligence.

Healthcare provider

Any medical practitioner or service that provides legitimate treatment or assistance for injury or illness.

Hypoxia

A condition where an area of the body does not receive an adequate supply of oxygen.

Hypoxic event

An event that prevents oxygen from reaching part of the body.

Jaundice

A condition characterised by yellowing of the skin or whites of the eyes that arises from excess of a chemical called bilirubin.

Liability

Legal responsibility for one's actions. If someone fails to meet that responsibility, they may be open to a law suit for any resulting loss or injury.

Life-expectancy

The number of years that an individual is expected to live.

Medical negligence

An act, or failure to act, by a health care provider that falls below the accepted standard of practice required in the circumstances, and causes injury or death to the patient.

Nasogastric feeding

Also known as intubation, this is an alternative method of feeding where eating or swallowing is difficult. Food passes through a tube, which is placed through the nose and passes into the stomach.

Pre-eclampsia

A condition that can affect pregnant woman generally during the second half of their pregnancy, or immediately after the delivery of the baby. It is characterised by high blood pressure, fluid retention and protein in the urine, and can lead to serious complications if not properly treated.

Professional indemnity insurance

Insurance for professionals who provide services or advice to their customers. It will cover the legal costs and expenses incurred by professionals if they provide inadequate services.

Settlement agreement

An agreement between two disputing parties about a legal case that occurs outside of court.

Time limits

A time limit can apply to a legal cause of action preventing a person from bringing a claim after a certain period of time. The time limit will generally start when the initial injury is sustained.



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