Medical Law

CHAPTER CONTENTS

Introduction

There are a wide range of laws that apply to various aspects of medical treatment. This chapter will provide a broad overview of these laws and their application in certain scenarios. It will start by exploring the consent to medical treatment that a patient provides to a medical practitioner (including who is capable of providing consent and making decisions) and what happens when that consent is not obtained. It will then consider what happens when medical treatment, whether consented to or not, may be negligent and gives rise to a claim for damages. The rules and regulations around the release of a patient's personal information by a medical practitioner will also be discussed. Finally, the chapter will provide a broad overview to health product regulation and safety.

Whilst this chapter will explain the broad concepts that apply to medical law, it is a complex area and expert legal advice is strongly recommended.

Consent to Medical Treatment

Before a person can consent to or refuse medical treatment, they need to have a reasonable understanding of what that treatment involves. In a medical context, this is often referred to as 'capacity' or 'competency'. This means having the ability to understand the actual treatment information being provided and acting on that information.

To have adequate competency (see *re C* [1994] 1 All ER 819 (QBD) – Justice Thorpe) a patient needs to be able to follow these processes:

- understand and remember treatment information
- believe the information
- use the information to arrive a choice about the treatment
- communicate the decision.

Consent that is obtained through fraud or misrepresentation is not 'real' consent. This means that if the information is received in a manner that is unclear or misleading or from someone without appropriate qualifications to provide the information the patient is not properly informed to provide consent.

Types of consent

Where consent is provided to medical treatment by a person, it must be freely given (*Beausoleil v Sisters of Charity* (1964) 53 DLR 65). The consent provided can either be:

- express—for example, an individual signs a form consenting to a particular surgical procedure
- 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 a blood test, or an individual attending at a pharmacy to have a prescription filled and then taking the medication the doctor has prescribed.

Who can provide consent?

Depending on the situation, consent can be given by the patient, their parent/guardian, the courts or a substitute decision maker.

Adults

There is a general presumption that an adult has capacity to make their own medical decisions (*MB* [1997] SCR 514 at 513) (s 11 *Guardianship and Administration Act 2000* (Qld) (Guardianship and Administration Act)). A person who is 18 years of age or older and competent can consent or refuse to consent to medical treatment. As outlined above, 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.

A person over 18 years of age may not be able to consent to medical treatment if they have impaired decision-making capacity. Impaired decision-making capacity can be due to a range of reasons and can be ongoing, intermittent or temporary. Examples of impairment include:

- medical conditions that significantly impair cognitive function or the ability to communicate such as dementia, advanced multiple sclerosis, intellectual impairment and some mental illnesses
- medical treatment such as being in an induced coma or under general anaesthesia
- traumatic injuries such as an acquired brain injury.

Whether these conditions are temporary or permanent, it is important to understand the wide range of reasons why an adult person may be incapable of providing consent.

Children

Unlike adults, children under the age of 18 are presumed not to have capacity to make their own medical decisions, and this responsibility usually falls to the child's parent or guardian. This is not, however, a blanket rule.

A child under 18 may be able 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 and Community Services 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 and individual maturity and the complexity of the medical treatment being consented to.

The ability for a parent to consent to their child's treatment is also limited. In Marion's Case, the High Court of Australia said that a parent can only consent to procedures that are in the child's best interest and there are some special medical procedures that will require a court's consent. These 'special medical procedures' may include, but are not limited to:

- invasive and irreversible surgery where the consequences of the surgery are very serious (e.g. a hysterectomy in a teenager – Marion's case)

- withdrawal of treatment against the advice of treating practitioners (see *Re Baby D* (No. 2) [2011] FamCA 176)
- organ donation (see *Re GWW & CMW* (1997) FLC 92/748)
- gender re-alignment surgery (see *Re Alex* (2004)); Re Kelvin [2017] FamCAFC 258; *Re Matthew* [2018] FamCA 161).

Queensland Health's *Guide to Informed Decision-making in Healthcare* provides more information at section 3.1.1 about the overlap between a child's and parent's authority to provide consent. For further details on medical treatment and children see the *Queensland Law Handbook* chapter 'Parents, Children and the Law'.

Courts

The Supreme Court can assist in cases involving incapacitated individuals or minors and medical treatment. The Supreme Court has the power 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 such as:

- authorising treatments
- reinstating life-sustaining treatment (see *Northridge v Central Sydney Health Service* (2000) 50 NSWLR 549)
- authorising of the withdrawal or withholding of medical treatment.

The Federal Circuit and Family Court of Australia can also withhold or grant consent to medical treatment for a child relying on its welfare jurisdiction in the *Family Law Act 1975* (Cth). These powers are applicable in cases where:

- separated or divorced parents cannot agree on treatment (e.g. vaccinations; see *Makinen v Taube* [2021] FCCA 1878)
- the parents and the child do not agree about medical treatment
- the treating doctor does not agree with the decision made by the parents and/or the child concerning the treatment.

Any decision made by a court must put the best interests of the incapacitated person or the child first.

Substitute decision makers

Legislation establishes a substitute decision-making framework whereby decisions are made on behalf of an individual lacking capacity. Applying this legislation, a person over the age of 18 years may, while they still have capacity, prepare for any future incapacity and healthcare decision making under the *Powers of Attorney Act 1998* (Qld) (Powers of Attorney Act) by preparing an:

- Advance Health Directive (ss 35–36 Powers of Attorney Act)
- Enduring Power of Attorney appointing an attorney who is authorised to make decisions in relation to the healthcare of the individual (s 32 Powers of Attorney Act).

These documents can be complex, and legal advice should be sought on an individual's unique circumstances to ensure that the written documents reflect the person's wishes.

Advance health directives

An advance health directive is a document that allows an individual to make known their wishes regarding their future medical treatment. 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 Powers of Attorney Act)
- it can direct the withholding or withdrawal of a life-sustaining measure in certain situations (s36(2) Powers of Attorney Act)
- it cannot be used to authorise, justify or as an excuse for euthanasia (s 37 Powers of Attorney Act)
- 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) Powers of Attorney Act)
- an individual can make directions in relation to a special health matter, including 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 advance 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).

Enduring power of attorney

An enduring power of attorney provides a broader authorisation for a substitute decision maker to act in relation to financial or personal matters for the person lacking capacity. A personal matter includes health matters but does not include special health matters, which have been explained above (s 32 Powers of Attorney Act). This document, and the authority contained within it, will only be recognised in Queensland if was prepared in Australia or New Zealand. Outside of these jurisdictions, Queensland does not recognise foreign enduring powers of attorney as valid.

Consent in an emergency

In cases of emergency or necessity, it may not be possible to obtain the consent of an individual to treatment. It may also not be possible to provide full advice about the treatment before it is performed.

In some circumstances, a patient's consent for one procedure may be extended to cover additional treatment if there is an unforeseen emergency. For example, if a patient having a hernia repair was found to have an infected testicle, which was at risk of serious infection if not removed immediately, that would constitute an emergency (*Marshall v Curry* [1933] 3 DLR 260). If, however, a patient having a c-section then had a sterilisation procedure performed without any immediate risk, that would not amount to an emergency as the patient could have provided consent later and returned for the procedure (*Murray v McMurchy* [1942] 2 DLR 442).

When a person is unable to provide consent, consent can be provided by a person's health attorney, who may have been appointed by statute or an enduring power of attorney, or by an advance health directive. For example, if you have an advance health directive stating that you do not wish life sustaining treatment measures in emergency circumstances, such as CPR or assisted ventilation, this will apply in the appropriate circumstances. For more information see the *Queensland Law Handbook* chapter on 'Laws Relating to Individual Decision Making'.

Medical treatment without consent

Consent is the 'key that unlocks the door to treatment' making a doctor's action lawful but not obligatory. This means that whilst a patient who has capacity can consent to treatment, they do not have to proceed with the treatment if they do not wish. If none of the exceptions referred to above apply to a situation and medical treatment is received without consent, there are two potential avenues for a claim for damages:

- battery
- medical negligence arising out of a failure to warn.

Assault or battery

In Queensland, any physical contact with another person is generally unlawful unless the recipient has consented to that contact. Very few, if any, medical procedures can be performed without touching a patient. For this reason, consent is the essential factor that distinguishes appropriate treatment from an assault or, as it is known at law, battery. To provide valid consent to medical treatment, there must be freedom of the will (*Beausoleil v Sisters of Charity* (1964) 53 DLR 65), information must be provided in broad terms as to the nature of the procedure (*Chatterton v Gerson* [1981] QB 432) and the person must have capacity to give the consent. If treatment is provided without consent, excluding emergencies, the treating health practitioner or health service provider may be liable for assault in a criminal context or battery in a civil context.

It is important to investigate whether consent was obtained prior to treatment and, if not, the patient may have a claim for battery regardless of whether they can prove damage was sustained. This is distinct from other claims for medical negligence and means that the patient is not required to establish loss or damage to be entitled to compensation.

Failure to warn of a material risk

To obtain informed consent, the treating practitioner must provide a proper explanation of the medical treatment and risks associated with the treatment. While this does not mean that a health professional must list every risk associated with the treatment, they do have a duty to warn a patient of a material risk (see *Rogers v Whittaker* (1992) 175 CLR 479).

A risk is material if:

- 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 be, aware that the particular patient would be likely to attach significance to the risk.

There are certain circumstances where a health professional is justified in withholding information, such as the information causing more harm than good to the patient's physical or mental health.

If a patient brings a claim for failure to warn of a material risk, they must prove that:

- the health practitioner did not advise them of the risk that eventuated
- due to the risk materialising, the patient suffered an injury
- if the patient was aware of the risk before the treatment, they would not have proceeded.

In this type of claim, an expert report commenting on the doctor's failure is not required, however, a claimant will require evidence that they would not have proceeded with surgery at the time had they been warned of the risk. Their own evidence given after the treatment and with the benefit of hindsight will not be sufficient.

Medical Negligence

Unlike other areas of accident and injury law, a medical negligence claim requires a claimant to provide significant and potentially costly evidence early in the claims process. Claimants are encouraged to seek expert legal advice about the application of this information to their specific circumstances.

Was the treatment negligent?

Negligence is a failure to take reasonable care to avoid causing injury or loss to another person. The general principles of negligence are covered in the *Queensland Law Handbook* chapter 'Accidents and Injury'. Health professionals have a duty to take reasonable care for the safety of their patients and must provide an appropriate level of care throughout the treatment.

Sometimes medical treatment does not have the desired outcome and can, unfortunately, make a condition worse. It may be the case that a risk that the patient consented to materialises or a complication arises during the treatment, which was handled appropriately but nevertheless led to a negative outcome. There are many examples of when a patient may be unhappy with the treatment they received, however, that does not necessarily mean the treatment was negligent.

If a person wishes to complain about their treatment, negligent or not, a complaint can be lodged with the Office of the Health Ombudsman (OHO). The OHO will investigate the circumstances of your treatment and investigate further steps, if necessary.

How to make a claim for damages?

The process for starting a medical negligence claim against a doctor is found at s 9A *Personal Injuries Proceedings Act 2002* (Qld) (Personal Injuries Proceedings Act). If the incident did not involve a doctor, s 9A does not apply.

A claim against a doctor is commenced by a claimant giving an initial notice requiring the doctor and/or clinic or hospital to provide copies of all relevant medical records. The claimant then needs to obtain a report from a suitably qualified and independent expert confirming that:

- there was a failure by the treating doctor or medical facility to meet the appropriate standard of care
- because of that failure the claimant suffered an injury.

Unless a claimant can provide this expert report, they cannot proceed with a claim. If the treatment did not involve a doctor (e.g. a nurse or allied health professional), an expert report is not required to proceed with a claim.

This report and the Part 1 Notice of Claim must be provided within 12 months of receiving the records from the respondent.

The claims process is complicated. Expert legal advice should be obtained at the earliest opportunity.

Assessing damages

The principles of compensation only allow for recovery of damages associated with injuries that would not have occurred but for the treatment. This means that the impact of underlying conditions (i.e. the injury or illness for which the treatment was sought) will not be compensable.

Time limits

An adult claimant has three years from the date of the treatment to institute proceedings, but notice should be provided within nine months of the date of the treatment.

The position is different for children who usually have three years from their 18th birthday to bring a claim. If, however, the child's parent or guardian has consulted a lawyer about the potential entitlement to claim, then certain steps must be taken within 18 months of the consultation (s 20C Personal Injuries Proceedings Act).

Confidentiality and Privacy of Medical Records

Confidentiality versus privacy – what is the difference?

'Privacy' and 'confidentiality' are terms that are often associated with medical treatment records. It is important to understand that they do not mean the same thing. Privacy is covered by Commonwealth and state legislation, which addresses how specific personal information can be used. Confidentiality is a broader obligation that limits the access to information provided by a patient to their healthcare provider during treatment.

Confidential information

The obligation of confidentiality comes from various sources including legislation, ethical codes and the common law. In Queensland, the duty of confidentiality in relation to public health services is also specifically provided for in the *Hospitals and Health Boards Act 2011* (Qld).

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)).

Private information

The *Information Privacy Act 2009* (Qld) regulates how personal 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).

Both Acts set out requirements in relation to the collection, storage, use and disclosure of personal and sensitive information by health agencies. Those requirements are known as the National Privacy Principles (NNPs) and the Australian Privacy Principles (APPs) respectively. Under the NPPs, a health agency must:

- not collect personal information unless it is necessary (NPP 1(1))
- 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 reason it was collected (with some exceptions) (NPP 2(1))
- take steps to make sure the information is accurate, complete and up to date (NPP 3)
- make sure the information is secure (NPP 4)
- set out the health agency's policy on its management of personal information (NPP 5)
- provide access to documents holding 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 for which 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

The process for accessing medical records will depend on whether the relevant records are held by a public or private practitioner or facility, how much information is being sought and whether the information is a complete record or specific information.

Public system

There are three ways a patient can request their records in the public system:

- administrative access
- application under the *Information Privacy Act 2009* (Qld)
- application under the *Right to Information Act 2009* (Qld).

In Queensland, each hospital and health service (HHS) handles the medical records that are held in the hospitals and clinics in its area. The Queensland Office of the Information Commissioner advises that '… each HHS is an independent agency, so will have different procedures in place to access to medical records'. If you are seeking access to your records, it would be worthwhile taking some preliminary steps such as:

- identifying the correct HHS that runs the facility where your records are held. If you are seeking records from multiple medical facilities that spread across multiple HHSs, you will need to make separate applications for access to those records
- contact the relevant HHS or go online to request more information about the process and the information required by that HHS.

Some information is exempt from being released. For example, if the personal information of another person is contained in the medical records, it may be exempt. Finally, if it has been 10 years since your treatment, or if you were a minor at the time of your treatment then 10 years from your 18th birthday, the records may have been destroyed under the Health Sector (Clinical Records) Retention and Disposal Schedule.

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

Private system

Unlike public medical records, private health records are governed by national legislation rather than state legislation. In particular, the system is covered by the *Privacy Act 1988* (Cth) and the Australian Privacy Principles (AAPs).

In accordance with these principles:

- a person has the right to access personal information held by a private sector health provider such as a general practitioner (AAP 12.1)
- access to the information may be refused on several grounds (APP 12.3)

- charges for access may be imposed in some circumstances but these fees must not be excessive (APP 12.8)
- a person can request to correct personal information held about them (APP 13).

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

My Health Record

Most Australians will now have access to an online summary of their records through My Health Record. This digital summary contains information such as allergies, current medications, medical history, pathology test results and immunisation records.

Any person with a profile can choose to:

- remove their records
- grant or limit access to their digital records by health providers
- be notified when the records have been accessed
- nominate another person to manage their records.

Whilst this information will not provide a patient with a copy of their complete records, it offers an online option for obtaining certain limited information, which may be useful.

Health Product Regulation and Safety

Most people at some stage in their life will use medicines to relieve symptoms of an illness or require a medical device to improve their quality of life. As with other consumer products, Australians are entitled to expect that therapeutic goods are safe and of a high standard. It is the responsibility of the Therapeutic Goods Administration (TGA) to ensure not only the ongoing quality of these products but also the manufacturing, supply and advertising processes.

Medicines can be prescribed by a doctor, recommended by a pharmacist or bought at a supermarket. This may 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 accompanied by consumer information explaining what the goods are used for and how they work, contraindications, precautions and possible side effects, guidelines for proper use and storage, 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 about 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 serious and sometimes permanent injury can be caused by an adverse reaction to a medicine or a faulty medical device.

People who are affected 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 *Queensland Law Handbook* chapters 'Consumers and Contracts' and 'Accidents and Injury' for further information about the liability of manufacturers of defective products.

Legal Notices

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