

Trespass to person: Understanding a growing risk in medical practice

Reading time:

MIPS

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When patients suffer harm or injury from medical treatment, they have historically relied on the law of medical negligence to compensate them for their pain and suffering and/or economic loss. More recently, MIPS has observed an increase in trespass claims against practitioners, either as the only claim brought against the practitioner, or pleaded alongside a medical negligence claim.

What constitutes trespass to person?

Trespass to person is defined as a direct and intentional interference with another person's bodily integrity without lawful justification. In healthcare settings, this primarily manifests as battery, which is unauthorised physical contact.

One of the most notable trespass cases in the Australian healthcare context is the [2012 New South Wales Court of Appeal case Dean v Phung](#). A workplace injury left the plaintiff with minor dental damage (chipped front teeth). His dentist subsequently performed extensive treatment over 53 consultations, including root canal therapy and crowns on all teeth, at a cost exceeding \$73,000.

The plaintiff argued this treatment was excessive, unnecessary and well beyond what was required to treat the chipped teeth. He alleged that the dentist knew this but proceeded anyway. The court found that because the dentist had not informed the patient that the treatment was unnecessary before obtaining consent, the defence of consent failed. The patient had been misled about the fundamental nature and purpose of what was being performed.

In summary, the case highlights that if treatment is recommended that the practitioner knows cannot address the patient's condition, is undertaken solely for a non-therapeutic purpose and that is not disclosed to the patient, then this amounts to trespass. Informed consent in relation to the risks and benefits of the procedure will not fix that if the patient is not made aware of the non-therapeutic nature of the procedure.

Real-world implications

MIPS has observed an increase in claims where both negligence and trespass are pleaded. For example, a plastic surgeon performed breast implant surgery using implants chosen based on a commercial arrangement with a product representative rather than clinical suitability. The plaintiff successfully argued treatment was undertaken for non-therapeutic purposes, leading to settlement before trial.

In another case, a dentist performed ten veneers to improve the cosmetic appearance of a patient with dental decay but failed to treat the patient's underlying decay. The patient argued that the consent was invalid because the dentist knew that the treatment provided could not resolve her disease and was performed primarily to maximise income. This claim could not be defended.

Why these claims pose unique risks

Trespass to person claims carry consequences beyond standard negligence litigation. Successful plaintiffs can receive aggravated or exemplary damages, which are not available to plaintiffs in negligence claims. More importantly, as proven trespass claims often involve recklessness or a degree of dishonesty or deception, MIPS does not cover aggravated or exemplary damages under the Policy.

Protecting your practice

Robust informed consent processes and contemporaneous documentation form your primary defence. Treatment must only be offered if there is a genuine therapeutic purpose and can address the patient's underlying problem. If treatment is offered, information must be provided to patients about the exact procedure to be performed, the purposed benefits of the procedure, the

risks and alternatives (including no treatment) of the procedure, and be obtained without coercion. Whilst oral consent is legally valid, you're strongly encouraged to document in the patient's health record the information provided to the patient and their consent or refusal to consent. Written consent is strongly advised for complex procedures.

Treatment must always align with therapeutic requirements. For purely cosmetic procedures, patients require explicit disclosure. The Medical Board's [guidelines on non-therapeutic cosmetic treatment](#) provide valuable guidance. When proposing treatment that might be considered unusual for the condition or is significant and irreversible, obtain a specialist opinion first.

Comprehensive record keeping is equally vital. Documentation should capture information relevant to diagnosis and treatment, your clinical opinion and rationale, treatment options discussed and why the agreed treatment was proposed (clearly articulating therapeutic purpose), information and warnings provided, consent discussions (noting verbal consent and filing written consent forms), and details of treatment performed.

MIPS support

MIPS members benefit from comprehensive indemnity cover up to \$20 million, access to expert medico-legal advice 24/7, and accredited CPD resources addressing risks like trespass claims. When consent questions arise or treatment planning involves complexity, our team provides guidance to help you navigate these challenges confidently.

Understanding trespass to person claims represents more than legal risk management. It reinforces core principles of patient-centred care: transparent communication, legally robust informed consent practices, and treatment firmly grounded in therapeutic benefit. By prioritising these elements, you protect both your patients and your professional future.

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