

# Trespass to person: Understanding a growing risk in medical practice

Reading time:

MIPS

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Medical negligence claims have long been part of the healthcare landscape, alleging breaches of duty that caused patient harm. However, Australian practitioners are increasingly facing a different type of legal challenge: trespass to person claims alongside traditional negligence allegations. Understanding this trend is essential for protecting both your patients and your practice.

## 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 (unauthorised physical contact, such as performing treatment without valid consent), though it can also include assault (causing reasonable fear of imminent unlawful contact) or false imprisonment (unlawfully restraining someone's freedom of movement).

The key distinction from negligence lies in consent. Whilst negligence focuses on whether proper care was provided, trespass claims centre on whether treatment was performed without legally valid informed consent.

## The Dean v Phung precedent

The **2012 New South Wales Court of Appeal case Dean v Phung** established critical principles that continue to shape this area of law. 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 unnecessary and ineffective, alleging the dentist knew this but proceeded anyway. The court found that because the dentist had not informed his patient 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.

Justice Basten articulated three essential principles. First, consent requires basic information about the nature of the proposed procedure, but if the procedure cannot actually address the patient's condition, no valid consent exists. Second, inadequate advice about risks may breach duty of care but will not necessarily vitiate consent. Third, if treatment is undertaken solely for a non-therapeutic purpose not disclosed to the patient, there is no relevant consent.

## Real-world implications

MIPS has observed concerning patterns in trespass claims. One 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 10 veneers using superannuation access whilst failing to adequately treat the patient's underlying decay. The patient argued consent was invalid because the treatment could not resolve her disease and was performed primarily to maximise superannuation extraction. 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 in negligence claims and critically, are not covered under professional indemnity insurance. Additionally, established trespass findings typically trigger regulatory investigation and cause significant reputational damage.

# Protecting your practice

Robust informed consent processes and contemporaneous documentation form your primary defence. Consent must cover the exact procedure to be performed, properly inform about risks, benefits and alternatives (including no treatment), and be obtained without coercion. Whilst oral consent is legally valid, you're strongly encouraged to document this in the patient's health records. 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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Medical Indemnity Protection Society ABN 64 007 067 281 | AFSL 301912

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