

THE MEDICAL COUNCIL OF HONG KONG III. THE MEDICAL COUNCIL OF HONG KONG The Medical Council of Hong Kong was founded to assure and promote quality in the medical profession in order to protect patients, foster ethical conduct, and develop and maintain high professional standards. Empowered by the Medical Registration Ordinance (Cap. 161), the Medical Council maintains a register of eligible medical practitioners, administers the Licensing Examination, issues guidelines and a Professional Code of Conduct, exercises regulatory and disciplinary powers over the profession, and answers general enquiries from doctors and the public. All registered medical practitioners in Hong Kong are governed by the Code of Professional Conduct issued by the Medical Council. The Code is freely available to the public, and published on the website. All registered medical practitioners are required to follow the Code. Contravention of this Code may render a registered medical practitioner liable to disciplinary proceedings by the Medical Council.

UNDER WHAT CIRCUMSTANCES CAN I MAKE A CLAIM FOR MEDICAL NEGLIGENCE? IV. UNDER WHAT CIRCUMSTANCES CAN I MAKE A CLAIM FOR MEDICAL NEGLIGENCE? Doctors and other medical practitioners owe a duty of care to their patients when they are administering medical treatment. However, doctors are not obliged to achieve success with every case that they treat. The duty of doctors is to exercise reasonable skill and care towards each patient when administering medical treatment. Generally speaking, doctors are not deemed to be negligent if they act in accordance with a practice that is accepted as proper by a recognised body of medical opinion, even though a different practice may be adopted by other doctors to treat the same disease or injury. If a doctor does not follow the usual practice without good reason and this results in injury to a patient, then it is likely that the doctor has breached the "duty of care" requirement, and will be found to have been negligent. The following three elements must be established in determining a breach of duty : There is a usual and normal practice (as justified by precedent cases or approved by recognised medical bodies) for conducting the medical treatment in question; and the doctor responsible did not use that normal practice; and the practice that the doctor adopted, or the method he used, is one that no person in that profession with ordinary skill would have used if they had been acting with ordinary care (examples include a doctor ignoring an important step in the treatment, or applying a treatment in a way that no other reasonable doctor would have done). However, in many instances of medical treatment or operation, there is no uniform "general and approved practice". Rather, there may be different respectable schools of thought on the treatment that can be administered for a particular kind of disease or injury. If a doctor acts in accordance with one of these schools of thought, then that doctor is unlikely to be found liable for negligence merely because there is a body of opinion that would take a contrary view. After considering all of the evidence, including explanations of relevant medical reports, it is ultimately for the Court, rather than medical experts, to determine whether the defendant is liable for medical negligence. When there are multiple causes for a patient's medical condition in addition to the alleged negligence of the doctor (that is, more than one factor contributed to the patient's injury or illness), then the patient's claim for medical negligence will only succeed and may only result in full compensation if the alleged negligence of the doctor can be proven to have materially contributed to the injury suffered by that patient. People who suffer injury from a medical accident are often emotional and upset. Blaming the doctor may appear to be the only recourse. The seriousness of the original medical complaint, and the risks frequently involved in the medical treatment, may be forgotten. You must accept that your belief, however strongly held, that a doctor is to blame for a medical accident, is irrelevant under the law. A claim will not succeed unless it is proved, on the balance of probability (i.e. more than 50%), that: there were serious errors in your medical treatment which no competent doctor would have made and that the alleged facts, including the injury and resulting loss, are true; and a duty of care was owed to the claimant by the doctor (or other health carer) accused; and there was (i) a breach of that duty which (ii) caused or materially contributed to the claimant's injury and loss, i.e., that there was negligence. The idea that any patient who experiences any adverse effects resulting from a medical treatment can successfully bring a claim for medical negligence is somewhat misconceived. Medical negligence claims explore much more complex

issues, such as the standard of care provided and the performance of the medical professional in question. The emphasis of the claim is placed not on the result of any care provided, but on the standard of that care. The claimant needs to demonstrate that the standard of the care provided was below that expected of a trained professional. It is not enough for a patient to merely demonstrate that they received substandard care, or that the results of the treatment were poor. They must be able to prove that it was the poor performance of a medical professional that caused the unsatisfactory result. This process is known as establishing causation and is usually based on the evidence of an expert witness. It is this stage, proving that there is a direct link between the actions of a medical professional and the harm a patient is experiencing, which often proves to be the most difficult aspect of a medical negligence claim.

HOW TO MAKE A CLAIM FOR MEDICAL NEGLIGENCE? V. HOW TO MAKE A CLAIM FOR MEDICAL NEGLIGENCE?

Initially, you will need to obtain and collate all relevant medical records and notes for the entire treatment period from the medical professional or institution that treated you. Next, you will have to find an independent medical expert, give them the records, and ask the expert to comment on whether or not medical negligence was involved. You will need the following information: Contact details of the person potentially liable for the claim for medical negligence; a chronology of all of the events that have led you to think you have grounds for a claim for medical negligence; an account of the actual treatment given and any ill effects that resulted from it; documentation of any complaint you may have raised with the medical institution or practitioner; any other supporting documentation or details. For a medical negligence claim to be successful, broadly speaking it is important to establish that the errors that occurred during the medical treatment would not reasonably have occurred if the same procedure had been conducted by another competent medical professional. It needs to be proved that the treatment fell below acceptable standards and that the treatment has caused harm or injury to the patient. If you are not sure whether the treatment you have received would potentially warrant a claim for compensation based on medical negligence, here is a non-exhaustive list of common events that may justify closer scrutiny: A requirement for surgery that was not at first anticipated A bone fracture that has been missed Infections (acquired while in hospital) Harm brought on by incorrectly prescribed medicines A permanent disability An illness progressing to a stage where treatment is no longer an option An ongoing pain A recovery period that is longer than the expected period advised by the medical practitioner Inability to work or care for oneself Mistakes during cosmetic surgery Awareness during anaesthesia Failed sterilisation or vasectomy cases Brain injury or loss of memory Having to re-attend A&E; shortly after having been discharged Cancer misdiagnosis Surgical error which causes permanent damage to the body If, after considering all of the above, it seems that medical negligence could be established, prior to the commencement of action for medical negligence it is advisable that you send a written complaint to the relevant medical professional or institution detailing your concerns in full. If you receive no response or settlement offer, this is when you may consider contacting a specialist medical negligence solicitor for assistance. Medical negligence cases can be complex affairs so your solicitor will need to collate as much information to support your case as they can. In case of difficulty or delay in extracting records from potential defendants your solicitor can, if necessary, apply to the court for an order forcing disclosure and the production of the relevant records and notes. If the amount of compensation that you are claiming is over HK\$3,000,000, you must start your action in the Court of First Instance of the High Court. Claims for an amount under HK\$3,000,000 can be instituted in the District Court. Claims under HK\$75,000 can be pursued in the Small Claims Tribunal. Since medical negligence constitutes a form of personal injury, for more details on the legal proceedings involved, please refer to the "Personal Injuries" Section.

IS THERE A TIME LIMIT FOR FILING A MEDICAL NEGLIGENCE CLAIM? VI. IS THERE A TIME LIMIT FOR FILING A MEDICAL NEGLIGENCE CLAIM?

A medical negligence action is regarded as a personal injury action and therefore must be commenced within three years of the date when "the cause of action accrued" or the date of the claimant's actual or constructive "knowledge" of the injury. Generally speaking, an adult claimant has three years from the date on which the

cause of action accrued (the date on which the incident involving the negligence occurred.) or, if later, the date on which the existence of a cause of action for medical negligence became known. For an infant claimant (under the age of 18), the three-year period does not begin until the claimant reaches the age of 18. For a person of unsound mind, the three-year period does not begin until the date on which the person becomes sane. However, these restrictions are subject to the Court's discretion to allow the action to proceed despite the expiry of the three-year period.

HOW MUCH COULD MY CLAIM BE WORTH? VII. HOW MUCH COULD MY CLAIM BE WORTH? It is difficult to provide exact figures regarding how much compensation a successful claim for medical negligence would bring because each case is different in circumstances and no one case will be exactly the same as another. In general terms a claim for compensation based on medical negligence will be calculated by taking into account the past and future financial cost caused by the medical negligence, the pain and suffering that was caused as a result and the interest that has accrued from the time that the proceedings were served and payable from the financial loss attributable to the problem caused by the medical negligence together with the legal costs. The main objective of compensation is to place the claimant in the position that they would have enjoyed had the medical negligence incident not occurred, insofar as monetary compensation can achieve this. The usual compensatory categories include :

For a non fatal claim For a fatal claim We recommend that you consult a lawyer for a detailed explanation of how to organize and proceed with your claim for damages.

FOR A NON FATAL CLAIM FOR A NON FATAL CLAIM

a) Damages for pain, suffering and loss of amenities In assessing the amount of compensation to be awarded, the claimant's age, their previous and current medical condition, length of time they must spend in hospital, the kind and number of treatments or operations received, cosmetic or facial injuries, and psychological problems will be considered. The court will take into account the decisions made by previous courts regarding cases of a comparable nature and uses these as a guideline for the amount of compensation granted.

b) Loss of earnings Depending on the severity of the injuries sustained, the claimant is entitled to claim in full for loss of earnings during the sick leave period and for any subsequent loss of earnings (full or partial) that may be caused by disability resulting from the injuries sustained in the medical negligence incident. The claimant's age and the earnings of comparable workers are also relevant in determining claims for loss of earnings. Any income that is earned by the claimant after the medical negligence incident will be taken into account when assessing the claimant's entitlement to claim for loss of earnings.

c) Other special damages (various expenses) The claimant is entitled to be compensated for other amounts that are reasonably incurred as a result of the medical negligence incident. Common items include hospital fees, private doctor's fees, tonic food expenses and travelling expenses. On occasions, claims for other damages can be made based on the particular needs of the claimant, such as expenses for certain special equipment needed for their rehabilitation, subject to their need and reasonableness being established.

d) Interest on the above damages e) The claimant's legal costs Last revision date: 27 February, 2020

FOR A FATAL CLAIM FOR A FATAL CLAIM

a) Funeral expenses b) Damages for bereavement, currently set at HK\$231,000 c) Loss of dependency This refers to the loss suffered by those who depended on the deceased for support (if any), such as the deceased's children, spouse and parents. This is calculated with reference to the actual income and expenditure of the deceased's household, taking into account the age of the dependants.

d) Loss of accumulation of wealth This is assessed with reference to the value of the estate of the deceased as of his death and the value of the estate but for the medical negligence incident had the deceased died naturally at a later date. The calculation is also made with reference to any savings plan, or the likelihood of savings that may have occurred, had the deceased died later naturally.

e) Loss of services This claim is principally made by a surviving spouse, and is based on the surviving spouse's evidence that the deceased had assisted with household work, such as cooking and taking care of the children. An award of this kind will be made if the surviving spouse can prove that the dependants (children or other family members) have suffered a financial loss due to the loss of the gratuitous services rendered by the deceased spouse, which would have continued had he/she still

been alive. An example of this kind of financial loss is having to spend money to hire a domestic worker to handle the household work formerly undertaken by the deceased. f) Interest on the above damages g) The claimant's legal costs Last revision date: 27 February, 2020 CAN I APPLY FOR LEGAL AID FOR MY MEDICAL NEGLIGENCE CLAIM? VIII. CAN I APPLY FOR LEGAL AID FOR MY MEDICAL NEGLIGENCE CLAIM? 2. LEGAL AID 2. LEGAL AID Medical negligence cases are usually difficult, as they involve medical and legal issues that are beyond the grasp of ordinary citizens. Solicitors are usually engaged to advise on these cases. If you cannot afford to hire/consult a solicitor, then you can consider applying to the Legal Aid Department for legal aid. Legal aid will be granted subject to a test of your means (financial eligibility) and the merits of your case (whether or not you have substantial grounds for legal action). For more information, please see the Legal Aid topic. The Legal Aid Department provides legal representation to eligible applicants by providing them with a solicitor and, if necessary, a barrister in civil or criminal proceedings. Legal aid is available for cases involving personal injury or death, as well as medical, dental or legal professional negligence. Any person, whether or not ordinarily resident in Hong Kong, who is involved in the circumstances described above: i.e. you have suffered from medical negligence may apply for legal aid. Legal aid will be granted if the applicant is able to satisfy the statutory criteria as to the financial eligibility and the merits for taking or defending the legal proceedings. Means Test The purpose of the "means test" is to assess the financial resources of the applicant. Under the Ordinary Legal Aid Scheme, the upper financial eligibility limit is HK\$260,000. Financial resources of an applicant are his/her monthly disposable income multiplied by 12 plus his or her disposable capital. Merits Test The main purpose of the "merits test" is to determine whether an applicant has a reasonable claim or defence and whether or not the grant of legal aid to an applicant is justified. Apart from considering the chances of success, the Director may refuse legal aid in cases where he would be unable to enforce a judgment e.g. the opposite party is uninsured and has no valuable assets. The Director will also give due consideration to the importance of the case to the applicant in deciding whether or not to grant legal aid. 1. SUPPLEMENTARY LEGAL AID SCHEME 1. SUPPLEMENTARY LEGAL AID SCHEME The Legal Aid Scheme provides legal representation for the "sandwich class" whose financial resources are above the upper eligibility limit for the Ordinary Legal Aid Scheme (i.e. \$260,000) but do not exceed \$1,300,000. Under the Scheme, legal aid is available for cases involving personal injury or death, as well as medical, dental or legal professional negligence, where the claim for damages is likely to exceed \$60,000. It also covers claims under the Employees' Compensation Ordinance irrespective of the amount of the claim. The applicant must pay an initial application fee of \$1,000, plus an interim contribution of \$65,000 upon their acceptance of legal aid. If your case is successful, you have to pay to the Director of Legal Aid any expenses and costs incurred in the case that are not recovered from the opposite party out of the damages/compensation that is awarded to you by the court. In addition, you will have to pay 10 per cent of the damages you receive into the Supplementary Legal Aid Fund. If your case is settled before counsel is briefed to attend trial, this percentage will be reduced to 6%. LAW SOCIETY FREE LEGAL HELPLINE IX. LAW SOCIETY FREE LEGAL HELPLINE The Law Society Free Legal Helpline provides assistance to members of the general public who have suffered personal injuries in accidents and need help to make a claim for compensation. This Helpline was established in May 2013. A Panel of solicitors will provide telephone consultation to accident victims for up to 45 minutes free of charge. You can call the Helpline yourself (telephone no: 8200 8002), or a relative or a friend (who must be aged 18 or over) can make enquiries on your behalf. The helpline operates from 9 a.m. to 5:30 p.m., Monday to Friday. A voice mail service is active after business hours and during public holidays. DO NOT ENGAGE RECOVERY AGENTS TO HANDLE YOUR CLAIMS X. DO NOT ENGAGE RECOVERY AGENTS TO HANDLE YOUR CLAIMS Recovery agents are neither professionally qualified nor subject to any code of professional conduct. A recovery agent will finance a claim by paying the legal fees and other disbursements, and then if the claim is successful the accident victim has to hand over over a large share of his compensation to the recovery agent. There is no compulsory insurance covering any claims directed at recovery agents and they are of unknown

financial backing. Since accident compensation in Hong Kong is assessed on the basis of actual loss (no punitive damages), victims using recovery agents will not be adequately compensated if part of their compensation has to be paid to the recovery agents. The more seriously injured victims may not have sufficient means to maintain their livelihood. Recovery agency contracts are generally champertous in nature and are unenforceable. Maintenance (of which champerty is a more serious form) remains a criminal offence in Hong Kong and therefore recovery agents are liable to be prosecuted. Accident victims relying on recovery agents are likely to jeopardize their chance of getting the best possible redress. Accident victims should approach solicitors or the Legal Aid Department directly. As medical negligence cases uniquely require a combination of skills from both the legal and medical professions, it is important that you seek the services of a qualified, reputable and specialist firm of solicitors that have a strong background in this area of law. Such a firm should be able to provide you with expert advice on whether or not you are qualified to make a claim, and how to collate and present your supporting documentation. They will know how to start a claim for compensation and they will agree to act on your behalf if they believe you have a strong case.

QUESTIONS AND ANSWERS XI. QUESTIONS AND ANSWERS 1. WHAT WILL HAPPEN IF I MAKE A COMPLAINT ABOUT A DOCTOR TO THE MEDICAL COUNCIL OF HONG KONG? 1. WHAT WILL HAPPEN IF I MAKE A COMPLAINT ABOUT A DOCTOR TO THE MEDICAL COUNCIL OF HONG KONG? If you lodge your complaint with the Medical Council, it will first be investigated by the Chairman and the Preliminary Investigation Committee of the Council. If an inquiry hearing is recommended, the Medical Council may, if necessary, require you to give evidence under oath as a witness. You may then be questioned by the Council members who are hearing the case and by the lawyer who is defending the doctor. The Medical Council can impose punishments that range from a warning, a reprimand, or, in serious cases, removal of the doctor's right to practice. You should also note the following important points: The Council is only empowered to consider the professional misconduct of registered doctors. No monetary compensation can be awarded by the Council to the complainant. In addition to complaining to the Medical Council, the complainant may, at the same time, take legal action to claim civil damages against the medical practitioner(s) if they have been negligent in handling medical treatments. This information has been prepared with reference to the Medical Council's publication "How the Medical Council deals with Complaints". Complaints against registered dentists can be made to the Dental Council of Hong Kong. You may read the Dental Council's publication "Complaints against Registered Dentists" for more information. 2. HOW CAN I OBTAIN MY MEDICAL NOTES AND RECORDS FROM THE CLINIC OR HOSPITAL THAT TREATED ME? 2. HOW CAN I OBTAIN MY MEDICAL NOTES AND RECORDS FROM THE CLINIC OR HOSPITAL THAT TREATED ME? The medical notes and records pertaining to patients can be obtained by making a data access request to the medical practitioner, clinic or hospital concerned upon payment of the prescribed fees. The practitioner (doctor), clinic or hospital, as a data user that can collect and keep personal data on patients, is obliged to supply the requested data to the patient concerned within 40 days of such a request in accordance with section 19 of the Personal Data (Privacy) Ordinance (Cap. 486). Should a clinic, hospital, or medical practitioner refuse to provide you with the records of your diagnosis and treatments, you can make a complaint about their non-compliance with the provisions of the Personal Data (Privacy) Ordinance to the Privacy Commissioner for Personal Data. If a data user (in this case a hospital or medical practitioner) fails to comply with the Ordinance, the data user may face a fine or imprisonment. 3. HOW CAN I DETERMINE WHETHER OR NOT A DOCTOR HAS EXERCISED "REASONABLE SKILL AND CARE" IN ADMINISTERING MEDICAL TREATMENT OR CARRYING OUT AN OPERATION? ARE THERE ANY SPECIAL STANDARDS THAT CAN BE TAKEN INTO CONSIDERATION? 3. HOW CAN I DETERMINE WHETHER OR NOT A DOCTOR HAS EXERCISED "REASONABLE SKILL AND CARE" IN ADMINISTERING MEDICAL TREATMENT OR CARRYING OUT AN OPERATION? ARE THERE ANY SPECIAL STANDARDS THAT CAN BE TAKEN INTO CONSIDERATION? The standard of a doctor's skill and care is determined with reference to the state of the doctor's knowledge at the time of treatment. Advancements in medical science or medical knowledge between the date of the alleged negligence incident and the date of the court trial should be ignored. Evidence that relates to the state of knowledge and standard practice in other countries may not

be relevant to the standard of care that applies to doctors in Hong Kong. Also, standards of skill and care are determined with reference to the specialty of the defendant doctor. Medical specialists are required to meet the standard of an ordinary competent member in their field of specialty, but are not required to meet the standard of the most experienced or highly qualified member of that specialty. When considering the standard of an "ordinary competent member", you should seek advice from an impartial medical expert in the relevant specialty.

4. I AM A PATIENT AND AM BEING ASKED BY MY DOCTOR TO SIGN A "CONSENT FORM" THAT SHOWS THAT I ACCEPT THE TREATMENT OR OPERATION. IF I SIGN THIS CONSENT FORM BUT MY CONDITION WORSENS AS A RESULT OF THE TREATMENT OR OPERATION, CAN I STILL CLAIM AGAINST THE DOCTOR FOR COMPENSATION?

4. I AM A PATIENT AND AM BEING ASKED BY MY DOCTOR TO SIGN A "CONSENT FORM" THAT SHOWS THAT I ACCEPT THE TREATMENT OR OPERATION. IF I SIGN THIS CONSENT FORM BUT MY CONDITION WORSENS AS A RESULT OF THE TREATMENT OR OPERATION, CAN I STILL CLAIM AGAINST THE DOCTOR FOR COMPENSATION?

Consent from the patient is required before undertaking examinations, arranging investigations or prescribing a course of treatment or other intervention. However, a signature on a form is of itself not evidence of valid consent. There are three fundamental requirements for valid consent: the patient has the ability to understand what is proposed, the patient has been provided with the relevant information necessary to enable an informed choice, and that the consent is freely given. A signature on a form is of itself not evidence of valid consent. A valid consent must be obtained before a doctor can start treatment or provide care for a patient. This is especially the case when a patient has to undergo medical treatment or an operation in a hospital. Children under 16 or those who do not have sufficient understanding or intelligence normally require the consent of their parents or guardians before they can undergo medical treatment. A signed consent form is merely evidence that the patient signed the form, but it does not mean that the patient necessarily understood the significance or implications of the treatment that is proposed on the form. For such consent to be valid, the patient must know the specific treatment to which they are consenting and its nature and purpose. Therefore, the fact that a patient signed a consent form cannot in itself prevent a patient from making a claim for compensation against a doctor if medical negligence was involved.

WHAT IS MEDICAL NEGLIGENCE? I. WHAT IS MEDICAL NEGLIGENCE? Medical treatment in Hong Kong is generally of a very high standard and every year millions of people go through both the public and private healthcare systems. Medical practitioners (doctors, surgeons, physiotherapists, psychologists, dentists, nurses and health care assistants) provide an invaluable service to us; however, there can be times when even the highest trained medical professionals make mistakes in the treatment process. Medical negligence is professional negligence resulting from an act or omission on the part of a health care provider in which the care provided deviates from accepted standards of medical practice and causes injury or death to the patient. Most cases involve medical error of some sort. In cases where an individual has undergone some form of medical treatment that has gone wrong whereby the level of care fell below the reasonable standard at which a competent medical professional should operate, there may be cause to bring a claim for compensation due to medical negligence. When issues of medical negligence arise, the conduct and actions of the accused medical professional are weighed against the level of competency and professionalism his peers would have in the same or similar circumstances. It also means that if a general practitioner chooses to perform procedures normally performed by a specialist, he will be judged by the standards of the specialty in which he tried to act. It is important to note that suing for medical negligence is not a tool to be used by those who are dissatisfied with the results of their medical care. Generally, you cannot claim that a medical professional has been negligent simply because the medical professional failed to cure a condition. A person claiming medical negligence must suffer some real harm that has been caused by a substandard level of medical care. The damage suffered must be harm that a patient would not have experienced if a medical professional or institution had acted properly and not acted negligently.

COMMON EXAMPLES OF COMPLAINTS ABOUT MEDICAL PRACTITIONERS II. COMMON EXAMPLES OF COMPLAINTS ABOUT MEDICAL PRACTITIONERS

Patients rely heavily on the expertise of doctors when they receive medical treatment.

There are inherent risks involved in some medical treatments, and so, very often, there are occasions when patients are unhappy with the treatment that they have received. Here are some examples of common complaints about medical practitioners:- Failure to attend or treat a patient speedily; Failure to refer a patient to another doctor who is a specialist in the relevant disease or injury; Failure to explain a medical treatment and warn the patient adequately of the risks involved in the treatment; Failure to advise the patient of the various options for medical treatment; Wrongful diagnosis; Failure to remove a surgical instrument from the patient's body following an operation; Failure to arrange a follow-up session or further tests for the patient; Delayed diagnosis; Failure to obtain proper consent to treatment from the patient; Medication errors; Careless surgical procedures; Delayed referral to specialists; System errors in the clinic or hospital; Use of unsterilised instruments; Early failure of replacement hips; Misinterpreted X-rays, screening, and other testing; Liability for hospital-acquired infections; Administering an inoculation despite contra-indications. It is important to bear in mind that the unsatisfactory outcome of a medical treatment in itself is insufficient to support a contention that the medical practitioners treating you were negligent. You cannot sue your doctor for medical negligence simply because your illness has not been cured after a series of treatments.