



Compensation for Wrongful Birth: New South Wales

Obtaining compensation for medical negligence is not usually a simple process; wrongful birth compensation claims are arguably more difficult. Most people obtain legal representation and at an early stage seek advice on whether a claim will be both successful and worthwhile.

The use of the label 'wrongful birth' has been debated, however it is generally used to refer to a claim for the costs of raising a child who has been born in the context of some form of medical negligence. Examples include errors in contraceptive advice, failed sterilisations and loss of an opportunity to terminate a pregnancy such as when antenatal testing disclosing foetal abnormalities has not been properly performed or communicated.

Despite the different name, wrongful birth claims are essentially of a medical negligence type and so legal advice helps answer four key questions:

- Can the claim be made, or has a time limit expired?
- Will the claim succeed, using one or more of the common legal pathways of negligence, breach of contract or breach of the Australian Consumer Law?
- Is there sufficient evidence to prove that the advice or treatment error caused some form of damage, that the law will provide financial compensation for?
- Will financial compensation be recoverable, such as from an insurer, and will the amount be sufficient to justify the claim on a cost / benefit basis?

Causation - Proving that 'Damage' was Caused

Even if a doctor or other health professional has made an error (in other words, has not exercised reasonable care), a claim for compensation will not be possible unless it can be proved that the error probably caused the damage that the person complains of. In wrongful birth claims that can be complex. For example, when antenatal testing disclosing foetal abnormalities has not been properly performed or communicated, the pregnant woman will need demonstrate that she would have terminated the pregnancy.

Compensation for damage in a wrongful birth claims is a complex area. The main area of compensation is for the costs of raising the child; however some States and Territories have imposed restrictions to permit recovery only of 'disability' costs.



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Calculating Financial Compensation

In addition to the question of what can be claimed as costs there are other complexities. Recovery may depend on the income or financial position of the parents.

The law is not presently clear on recovery beyond the age of 18 years. Nor is the effect of National Disability Insurance Scheme payments entirely clear. Some jurisdictions limit recovery of loss of parental income.

Compensation payments are usually made direct to a claimant. In these cases the claimant is the parent/s, not the child.

Time Limits - Can a Claim be Made?

A claim for compensation arising from medical treatment must usually be made within 3 years. The 3 year claim window is calculated from the date of discoverability. That means the date on which the person knows or ought to know that injury has occurred, that the injury was caused by the fault of the proposed defendant and that the injury was sufficiently serious to justify the bringing of an action. It is generally not possible to make such claims later than 12 years after the date of injury, unless a court is willing to grant an extension.

Carroll & O'Dea Lawyers has prepared this information sheet to provide general information on compensation for medical advice or treatment, however legal advice directed to the specific circumstances of a proposed claim should be obtained.