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Three-and-a-half centuries of protecting our children

The suspension of limitation periods for people under a disability has been established for over three-and-a-half centuries.[1] Provisions have always existed to protect the right to commence legal proceedings against a tortfeasor if the plaintiff is under a disability.[2] In the case of children, the disability lifts on reaching the age of majority.

The issue of reduced limitation periods in children's medical negligence claims is of particular concern. While the medical profession and the insurers call for the implementation of the Review of the Law of Negligence report's recommendations,[3] some states are still considering their position.[4] This call to reverse a centuries-long tradition of protecting our most vulnerable should not proceed for the following significant reasons.

The problem of increasing medical indemnity premiums is not related to an increase in medical negligence claims. Insurers are scaring many doctors with claims of litigation volumes which do not exist, allowing them to increase premiums and laugh all the way to the bank.

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Open disclosure in health care settings is not yet occurring, so a patient's requisite knowledge to commence legal proceedings is currently not guaranteed.

Children should not lose their autonomy on something this important if there is no sound policy reason furthering the public interest.

The possibility for serious harm in a medical procedure and the life-long potential impact warrant careful consideration of the implications of reducing limitation periods.

Medical mistakes have been concealed in years gone by due to fear. The increased reporting of adverse events in health care settings today is improving systems and awareness, and preventing future incidents. However, we are a long way from full and frank open disclosure. While the reporting of adverse events may be encouraged within a health care setting's hierarchy, it does not necessarily lead to full disclosure to the patient. This means that an incident may be reported to the hospital administrator, but the patient themselves may never know what in fact occurred. Until this practice is rectified, we cannot entertain the idea of reduced limitation periods for children's claims.

Improved open disclosure, of itself, may lead to a reduction in protracted complaints, and the long tail which so seems to concern the insurers should dissipate in time.

Making an injured child's rights contingent on the action of his or her parent or guardian[5] also fails to see important public policy reasons for their protection in the past. Why should someone lose autonomy over their own body and personal well being because their parent or guardian fails to protect legal rights and entitlements on their behalf, in circumstances where the child suffers injury due to the fault of a third party?

Stripping away a child's right to make their own legal decisions on reaching adulthood by passing that responsibility to the parent or guardian, fails to recognise the parent or guardian's preoccupation in dealing with the trauma and the child's recovery and rehabilitation. It also ignores the realities of a parent or guardian's capacity to always act in the best interests of the child.

When a child is negligently injured, the primary concern of the parent or guardian of that child should not be the child's legal position. While it is in the public interest, and in the interests of the parties concerned for claims to settle quickly, there are some compelling reasons why this is not always possible in children's claims, nor is it in the best ▶

interests of the child.

When a child is negligently injured in a medical procedure in a regional hospital, for example, special factors arise in having to exercise legal rights within a short period. If the child requires ongoing treatment over a number of years as a result of the incident, the parent or guardian may have no other hospital to take the child for treatment other than the one where the incident occurred. It is difficult to sue a hospital you have to visit regularly and where you hope to receive the best possible care for your child's rehabilitation.

Furthermore, a child's time to bring legal action should not be cut short particularly if one considers their physiological development. For example, an incident causing paediatric brain injury, if settled early, may well underestimate the degree of deficit and the impact thereof on the injured child. It is no wonder that insurers are calling for reduced limitation periods which will make it cheaper for them when doctors negligently injure patients.

The longer the period of time that passes between the incident causing injury and the court's examination of the facts, the more uncertain and prejudicial the process. However, it is the plaintiff who ultimately must convince the court that he or she can prove their case.

As open disclosure becomes entrenched in health care practice and more focus is placed on maintaining good records, the medical profession will gain improved certainty when negligence is alleged. But ultimately the health care system needs to assist patients who are the victims of adverse events with relevant facts essential to their understanding of the incident. The focus should be on injury prevention and openness with the patient. A quick fix in the form of reduced limitation periods for children's claims that will not resolve the concerns of the medical profession and their long tail problems must be avoided. We should fight for our children's rights and defend over three-and-a-half centuries of their protection. PL

Endnotes:

1. Statute 21 Jac I C16 (1623) 'An Act for Limitation of Actions and for Avoiding of Suits in Law'
2. Except in Tasmania where the *Limitation Act*, section 26 has been in force for 30 years.
3. Review of the Law of Negligence, Commonwealth of Australia, September 2002.
4. New South Wales has implemented an interpretation of the recommendation, see *Limitation Act* 1969, sections 50F and 62D.
5. Review of the Law of Negligence, Commonwealth of Australia, September 2002, recommendation 25.

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