




Welcome to today's Webinar  
Managing Your Professional Liability

Your Presenter is: Ms Libby Brookes  
Your Facilitator is: Ms Andrea Salmon

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**Acknowledgement**



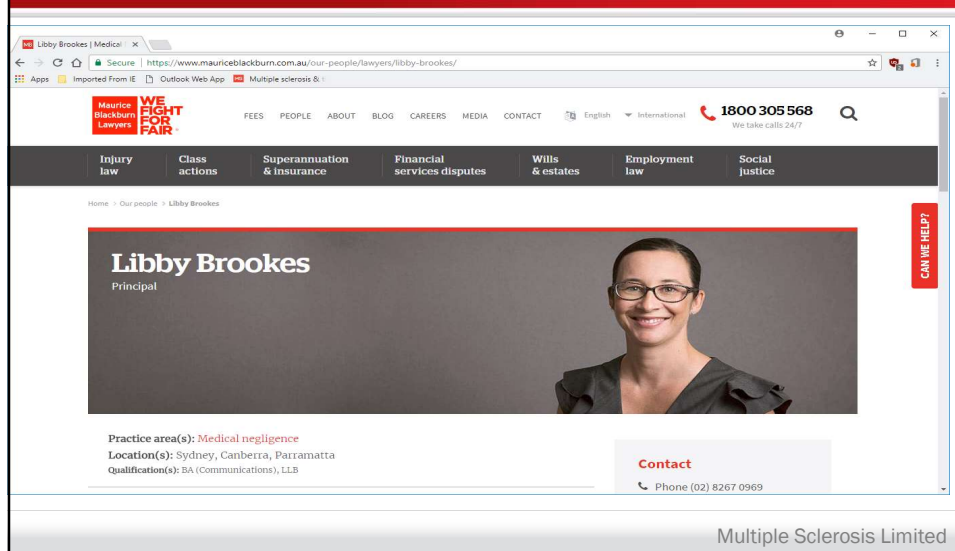
We acknowledge and pay respect to the traditional custodians past and present on whose lands we meet today.

We acknowledge the deep feelings of attachment and the relationship of Aboriginal people to country and respect the cultural authority of the elders in each community

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## Introduction to Presenter



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## Informed Choice



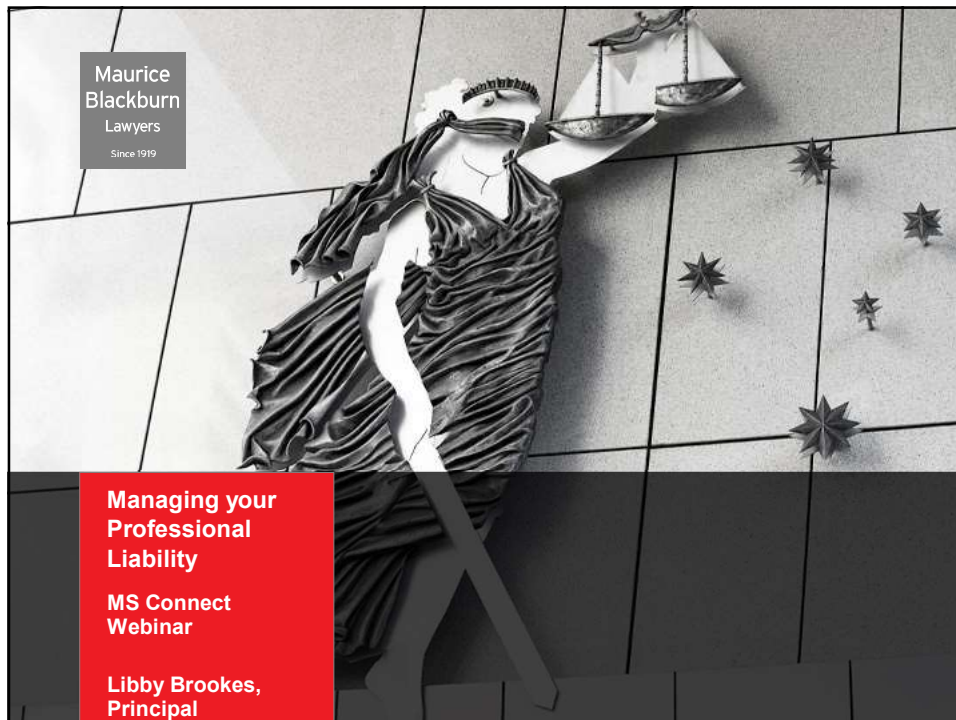
This presentation has been prepared and is presented by an independent expert.

The views presented are not necessarily the views of Multiple Sclerosis Limited.

Individuals are encouraged to seek further advice regarding the relevance of the information presented for their situation.

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## Overview

1. What is medical negligence
2. Medical records in trial
3. Privacy and medical records
4. Tips and examples re medical records good and bad

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## Maurice Blackburn Lawyers



- Founded in 1919 by Maurice Blackburn
- Australia's leading social justice law firm
- Specialty areas:
  - Industrial disputes
  - Class actions
  - Medical negligence
  - Asbestos
  - Superannuation
  - Personal injury law

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## Medical negligence



- Injury or death caused through an act or omission of a HCP
- The HCP's act or omissions need to be inconsistent with competent professional practice expected at that time in Australia
- The act or omission needs to have caused or materially contributed to the injury

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## Case examples

- Surgical/procedural injuries
- Medication errors
- Failure to refer for further investigations
- Misdiagnosis
- Delayed diagnosis
- Failure to provide appropriate advice and information
- Failure to follow up test results
- Wrong clinical decision under pressure

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## Measuring what is reasonable

- The standard is that of an ordinary skilled person professing to have that special skill
- The standard is not reduced if person inexperienced
- Courts look at expert opinion, protocols, policies, statutory obligation
- Case law

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## Liability investigation

- Vicarious liability: an employer must indemnify an employee for wrongs committed during course of employment
- What is the scope of your employment?
- Can a VMO, nurse practitioner, CMO be sued independently?
- Public hospital patients vs private hospital patients

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## Litigation process

- Determine facts
- Consider case theory
- Procure expert evidence and file Statement of Claim
- Subpoenas, further evidence on losses
- Defendant files defence and defence expert opinions
- Expert opinions on both sides refined
- Attempt to resolve case out of court
- Trial
- Appeal to a higher court

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## Defence to negligence

*A professional is not negligent if they acted in a manner that at the time the service was provided was widely accepted in Australia as being competent professional practice, unless the court finds that opinion to be irrational*

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## Reasons for errors

- Lack of adequate resources
- Shift work / tiredness
- Lack of education
- Lack of protocols / policies
- Lack of communication in multidisciplinary team
- Wrong decision under pressure

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## Medical records:

### Thompson v Haasbroek [2010] NSWSC 111

Thursday June 26 2003 14:48:44

Dr. [REDACTED]

Pain in neck and radiating down right arm. Panadeine does not work.  
Migraine gone on treatment. Zoloft working because mood OK

**Examination:**

**Respiratory:** No respiratory distress. No recession. Not using accessory muscles. Normal percussion on Left. Normal percussion on Right. Normal air entry on Right. Normal air entry on Left.

**GIT:** No abdominal tenderness. No distension. No hepatomegaly. No splenomegaly.

**Musculo-Skeletal:**

Right shoulder OA with cracking and cannot elevate shoulder above 90degrees  
Stiff and tender neck.

**Diagnosis:**

Neck pain with referred arm pain

**Management:**

Advised to have intra-articular injection into shoulder and neck.(soft tissue injection) 2 amps celestone and 10 mlo Marcaine

**Actions:**

Prescriptions printed:

CELESTONE CHRONODOSE INJECTION 3mg-3.9mg/mL

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## Vicarious Liability

### Stefanyszyn v Brown; Brown v Newcastle Private Hospital Pty Limited [2016] NSWSC826

**FACTS:**

- Mrs Stefanyszyn was a 61 year old woman was admitted to Newcastle Private Hospital for an elective vaginal hysterectomy performed by Dr Brown, gynaecologist
- During that procedure, a loop of suture material was inadvertently looped around the Mrs S's bowel.
- Over a period of about 4 days after the surgery, the blockage was not identified and addressed, and the patient's condition deteriorated until she ultimately suffered from a cardiac arrest resulting in her death.

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## Agreed facts:

- Dr Brown admitted he owed a duty of care, and that he breached the duty of care. The Judge said the following:

*“...It is common ground that during the operation a loop of suture material was inadvertently looped around Mrs Stefanyszyn’s bowel. Tragically, that error was not discovered until after her death. The result was that the blockage was not identified or addressed; infection set in; she repeatedly vomited faecal material; she inhaled some of that material with resulting pneumonia; her electrolytic balance became disordered; her oxygen levels deteriorated; and she suffered a fatal cardiac arrest...”*

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## Cross-claim

### **Stefanyszyn v Brown; Brown v Newcastle Private Hospital Pty Limited [2016] NSWSC826**

- Cross claim – doctor v private hospital (nursing staff failure to record observations / draw to doctors attention;
- Dr Brown alleged:
  1. A Dr may reasonably rely on its nurses to alert them to a deterioration of a patient’s condition; and
  2. The nurses had a duty to record vital signs and advise the Dr of deterioration in the patient’s health.

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## Allegations of Negligence

### **Stefanyszyn v Brown; Brown v Newcastle Private Hospital Pty Limited [2016] NSWSC826**

- Specifically it was alleged by Dr Brown that the nursing staff failed to:
  - Record post-operative observations, including the hourly graphic chart and clinical pathway documents and fluid charts;
  - Record post-operative observations at specific times; and
  - No clinical pathway document was completed.

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## Hospital admitted

- The Hospital admitted:
  1. Its nursing staff, for whom the Hospital are vicariously liable, failed to record observations in the clinical pathway document for Mrs S for the night duty on 3 December; and
  2. Its nursing staff, for whom the Hospital are vicariously liable, failed to record all of the observations in the 4 hourly graphic charts on 3,4,5 and 6 December

Agreed that Hospital owed Mrs S a non-delegable duty of care and this was not subsumed by any breach of the duty of Dr Brown

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## The Court Found:

- Dr Brown admitted he was responsible for breaching his duty of care and that it caused or materially contributed to Mrs S's death. He said he was 75% responsible and the hospital was also responsible.
- The Hospital denied that its actions, via its nurses, caused or materially contributed to the death and in the alternative said it was responsible 5%.

COURT FOUND: Hospital = 20%

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## Khan v Rathjen [2016] NSWDC 139

### FACTS:

- 16 October 2011: Mr Khan injured during an armed robbery at a Caltex store, grabbed a knife with his left hand
- Injury = palmer aspect of the index and middle fingers of left hand
- Consulted GP Dr Rathjen on 17 October 2011 and 25 October 2011
- Alleged Dr Rathjen failed to properly assess and diagnose hand laceration and to refer to either a hand surgeon or an ED for review and investigation

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## Khan v Rathjen [2016]

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### Dr Rathjen's medical records:

*"I'd finished the notes at the end of the day after seeing the rest of my patients. My only excuse I could say was after being at work finishing off my other patient notes and being tired, and from the assessment that I had made, I pretty much just put my conclusion down. That's not really an excuse. The notes are inadequate and poor. My intent was to expand on the notes because we had made arrangement to meet the following week, which had occurred."*

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## Khan v Rathjen [2016]

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### Dr Rathjen's medical records:

Dr Rathjen said he remembered Mr Khan not by reference to his records but because the case was:

*"Unique and memorable".*

However, his conclusion was that he suffered two superficial cuts. He agreed that it was vitally important for comprehensive medical records to be maintained to enable differing doctors to assess and properly treat patients. He said:

*"I recall what I did. My notes are insufficient, I admit that, however, I do recall examining Mr Khan appropriately at the time."*

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## Khan v Rathjen [2016]

Dr Rathjen's medical records:

*“Q: You admit that you could have made a mistake about your notes that day?”*

*A: By ‘mistake’, I mean not including things that should have been included, but not in regards to recall of what I did at the time.*

*Q: If you were fallible when it comes to something as important as your clinical notes, don't you accept that you might also be fallible in relation to the examinations that you performed on the plaintiff that day?”*

*A: Not at all.*

*Q: Don't you agree that if you're fallible in relation to something like that on a busy day, your memory as to what occurred might also be fallible?”*

*A: Not at all.*

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## Khan v Rathjen [2016]

The Judge concluded:

*“So too here, the plaintiff's presentation was unusual in the defendant's professional practice as a general practitioner. His examination of the plaintiff was neither mechanical nor routine. Rather, his evidence was motivated by a desire to exculpate himself from the plaintiff's claim that his professional conduct had been deficient.”*

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## Khan v Rathjen [2016]

### Awarded damages:

Non-economic loss	\$38,500.00
Treatment expenses past and future	\$17,500.00
Past wage loss	\$50,000.00
Future economic loss	\$100,000.00
Total	\$206,000.00

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## Limitation periods

- Why a limitation period?
- 3 years from date action was “discoverable”
- or 12 years from date of act/omission (whichever is earlier)
- Applies to minors or disabled people with a guardian

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## Discoverability

- 3 Criteria
  - person knew they were injured
  - person knew it was the fault of the potential defendant
  - person knew it was worth suing

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## Safeguarding patient privacy - technology

- Health service providers must take reasonable steps to protect the personal information they hold from misuse, interference and loss, as well as unauthorised access, modification and disclosure.
- Failure to take reasonable steps to protect health information may constitute a breach of the Australian Privacy Principles of the relevant State/Territory privacy laws.
- What constitutes 'reasonable steps' will depend on the nature of the information and the potential harm that could be caused by unauthorised access to it.

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## Text Messages:-

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Received on [REDACTED] 11:52:16 PM  
[REDACTED] suspect it is muscle spasm. Will see you next week

Sent on [REDACTED] 2:27:00 PM  
Still paining just whenever I maybe I just need to give it time. So frustrating. I looked back in our SMS and I've had left pulling pain right from first surgery so it's not scarring. [REDACTED] said give it time cuz anchor might be inflamed and over time it will settle. I feel terrible still telling it about it after all these months but I live with it all the time. Could I have a ultrasound on top of vagina would it see anything?

Received on [REDACTED] 2:50:24 PM  
Let's see how you go. Quite willing to do US

Sent on [REDACTED] 3:44:30 PM  
Ok. Would [REDACTED] know / heard of this following TIS? I need to get to bottom of this. You see me for half a hour but I live with this unfortunately it's impacted on my family life that's not positive. [REDACTED]

Received on [REDACTED] 3:15:31 PM  
Will see him on Tuesday.

Received on [REDACTED] 3:17:43 PM  
[REDACTED] you gotta be patient. We've made incredible progress and we'll continue to make progress from this. Nothing active to do. The [REDACTED] we'll take care of this I'm sure. 101 Voice2Text

Sent on [REDACTED] 3:12:10 PM  
I thought if you spoke to the Radiologist in your centre and ask him what's best imaging at seeing exactly where plastic anchors are on my left side than we might be closer to understanding pain [REDACTED]

Received on [REDACTED] 5:13:20 PM  
[REDACTED] Calm down. Give conservative treatment a chance to work.

Sent on [REDACTED] 5:14:54 PM  
I am okay just trying to work it out -

Received on [REDACTED] 5:14:54 PM  
I understand your frustration. But we are getting there

Sent on [REDACTED] 6:22:22 AM  
Did u talk to [REDACTED] I have urine leaking (urgency) ... And still pain esp when urinating ... Maybe I need to see a urologist

Received on [REDACTED] 5:04:40 PM  
Will arrange appt with [REDACTED] for you

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## Social Media

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According to the Australian Health Practitioners Regulation Agency's (AHPRA) National Board policy for registered health practitioners, Social Media Policy:

"When using social media, health practitioners should remember that the National Law, their National Board's code of ethics and professional conduct (the *Code of conduct*) and the *Guidelines for advertising regulated health services* (the *Advertising guidelines*) apply.

Registered health practitioners should only post information that is not in breach of these obligations by:

- complying with professional obligations;
- complying with confidentiality and privacy obligations (such as by not discussing patients or posting pictures of procedures, case studies, patients, or sensitive material which may enable patients to be identified without having obtained consent in appropriate situations);
- presenting information in an unbiased, evidence-based context, and
- not making unsubstantiated claims.

Additional information may be available from professional bodies and/or employers, which aims to support health practitioners' use of social media. However, the legal, ethical, and professional obligations that registered health practitioners must adhere to are set out in the National Boards' respective *Code of conduct* and the *Advertising guidelines*.

Australian Health Practitioners Regulation Agency, National Board Policy for Registered Health Practitioners, Social Media Policy, March 2014.  
<http://www.ahpra.gov.au/News/2014-02-13-revised-guidelines-code-and-policy.aspx>

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## Social Media

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### Sydney nurse who took explicit photo of patient under anaesthetic still practising in NSW

By medical reporter Sophie Scott  
Updated Fri 6 Nov 2015, 5:23pm

**Sydney school teacher Breanna (not her real name) checked into a private hospital for routine gynaecological surgery late last year and a few days later, the surgeon rang with the good news that she did not have cancer.**

But the doctor from Norwest Private Hospital in Sydney's north-west had another bombshell.

She told Breanna one of the nurses had taken an explicit photo of her while she was under anaesthetic.

"I felt like my world was exploding. I felt I was in great peril that this photo was going to destroy my life, my career and that my son would find out," she said.

But what has made her really angry is that there is little she can do to stop it happening to others.



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## E-mails

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- The Royal College of General Practitioners (RACGP) has recognised that practitioners are increasingly receiving requests from patients, other clinicians and third parties for health information to be sent to them electronically.
- It advises that General Practices should take reasonable steps in ensuring their communication of health information is adequately safe and secure and that GPs, health providers and patients should be aware of the risks associated with using email in the health environment.

<http://www.racgp.org.au/your-practice/ehealth/protecting-information/email/>

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## E-mails

### CONSULTATION RECORD:

Date: Tuesday, 6:48 AM

Presenting Problem: e-mail

Provider: [REDACTED]

History: See letter

Examination: No postural drop.

No longer looks Cushingoid.

Plan: 1. Repeat Synacthen after stopping OCP 1/12.

2. Temporary drop in T4 to 150 mcg off OCP.

3. FU TBA (no letter).

BP: 130/80

HT: 174 Wt: 64.8 BMI: 21.4

Date: Friday, 6:47 PM

Presenting Problem: e-mail

Provider: [REDACTED]

History: Thank you. I'm not only well, but I feel better than I have in years.

I have had no nausea AT ALL since 24 December.

I have no bruises, skin rashes or red welts. They have all gone and have not re-appeared.

My bones do not ache and the fluid retention in my face and hands, is all but gone.

The bloating too has gone and my bowel (for the first time in many years) is normal.

I have had no dizziness and the pain in my lower back has now completely gone.

I have reduced my Hycosine now to 6mg (from 8) and will continue on this until further advised.

The only other symptoms that are yet to go are the pins and needles in my legs, however they have reduced considerably. My legs still don't look like they aren't mine but hopefully in time - that too will sort itself out.

Thank you for your diligence and care.

Lastly, [REDACTED] may I please have a note from you advising that I do not have Addison's? Given that there is no cure for Addison's - I do require something in writing. I'm not asking that the word 'misdiagnosis' be used however.

[REDACTED] Thank you.

Date: Thursday, 6:54 PM

Presenting Problem: phone discussion

Provider: [REDACTED]

History: Has taken herself off Fludra 4 days and dropped evening Hycosine 2 mg. Feels fine and less bloated!

Plan: 1. Recheck UECs tomorrow.

2. Hycosine to just 6 mg mane.

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## Clinical notes

- Provides historical account of care given
- Indicates what was known at what time and by whom
- Entries generally contemporaneous and therefore carry more weight legally
- Used to identify potential witnesses
- Regularly subpoenaed

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## Questions? Contact us!

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## MSL Services



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## MSL Services - MS Practice



MS Practice is a free, online education series designed to support allied health professionals in the symptom management of people with MS.

<https://www.msaustralia.org.au/about-ms/ms-practice>

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## Registered NDIS Provider



MS is a registered NDIS provider in NSW, ACT, Vic and Tas. MS is approved to provide:

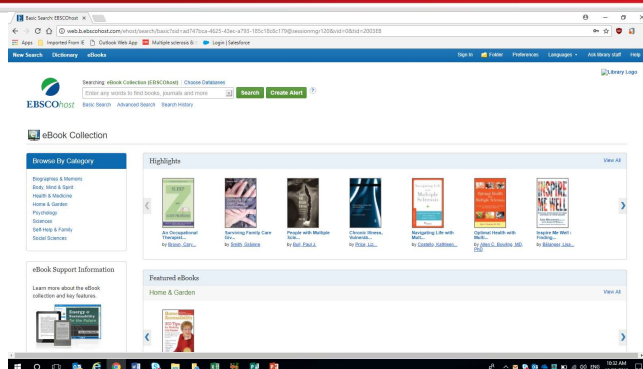
- Preplanning prior to your conversations (All areas)
- Support Coordination/Connection – assistance to help make your plan active (All areas)
- Short term accommodation (Vic)
- Community Participation (NSW)
- Exercise physiology and personal training (NSW)
- Specialist Continence Assessment (NSW and Vic)
- Physiotherapy and Occupational Therapy (NSW and Vic)

Want to learn  
more?  
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## Free E-books



<http://search.ebscohost.com/login.aspx?authtype=ip,uid&profile=eBooks>

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**Password: education**

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## ms shop



**WEBCAST: Chronic Pain Management**

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**Thank you**



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Please stay on after this webinar to complete a  
short survey.

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