

Navigating Negligence: A Roadmap of Medical Negligence Claims

Important:

It is important to note that whilst the Health Consumers' Council aims to assist consumers, we cannot provide legal advice. The below is intended as a guide only and must not be taken as legal advice. There are six sections to this document; please read to the end. This document was developed in partnership with Law Access and Asanka Gunasekera.

1. What is Medical Negligence?

Medical negligence is very difficult to define and there is no one-size-fits-all definition. However, according to the Encyclopaedic Australian Legal Dictionary, medical negligence refers to “*a breach of the standard of care owed by a medical professional to a patient in medical treatment.*”¹

What is a ‘Standard of Care’?

Medical practitioners owe an obligation to their patients to avoid harm that is reasonably foreseeable, sometimes referred to as a “*duty of care*”.²

¹ Lexis Advance, *Encyclopaedic Australian Legal Dictionary* (online at 14 March 2022) ‘negligence’.

² *Tabet v Gett* (2010) 265 ALR 227, [108].

This duty will depend on what is considered “*widely accepted practice*” in the medical field.³ For example, it is widely accepted among medical practitioners that a patient must be warned of all material risks associated with a potential treatment.⁴ Another example of a “*widely accepted practice*” may include:

- a neurosurgeon performing a particular test, such as an angiogram or a CT, when a patient presents with particular symptoms;⁵ or
- a radiologist notifying patients if their mammogram (breast x-ray) reveals visible evidence of breast cancer.⁶

Failure by a medical practitioner to comply with “*widely accepted practice*” may constitute a breach of the standard of care owed to you as the patient.

³ *Civil Liability Act 2002* (WA) s 5PB.

⁴ *Rogers v Whitaker* (1992) 175 CLR 479.

⁵ *Naxakis v Western General Hospital* (1999) 162 CLR 540.

⁶ *O’Gorman v Sydney South West Area Health Service* [2008] NSWSC 1127.

2. Am I Out of Time?

You have three years to commence a medical negligence action for a personal injury.⁷ The three years must be calculated from:

- (a) the date you first started to see symptoms of the injury;⁸ or
- (b) the date you become aware of the injury.⁹

An example of the former could be the date that your hip begins to hurt. An example of the latter could be the date that a doctor confirms a diagnosis such as cancer.

However, there are exceptions to the general three-year rule. For example, a medical negligence action for personal injury incurred in the course of childbirth must be commenced within *six* years.¹⁰

⁷ *Limitation Act 2005* (WA) s 14(1).

⁸ *Limitation Act 2005* (WA) s 55(b).

⁹ *Limitation Act 2005* (WA) s 55(a).

¹⁰ *Limitation Act 2005* (WA) s 7(2)(a).

3. Do I Have a Medical Negligence Claim?

A lawyer is ultimately the person that can advise whether you have a claim. Your lawyer will consider the following –

Have you suffered harm?

For example, you might have been left with permanent scarring or ongoing pain after undergoing medical treatment. Alternatively, a malignant cancer in your body may have metastasized due to a practitioner's failure to undertake relevant tests or diagnose you.

What were the effects of suffering that harm?

For example, you might be unable to participate in former recreational activities, you might be unable to work, or you might require further treatment to correct the harm.

Do you believe that the harmful effects were caused by a doctor's negligence?

Here you should consider whether your doctor has breached the standard of care. For example:

- Were you warned of the possibility of suffering harm prior to undergoing the medical treatment?
- Did the medical treatment go as planned, or did something go wrong?



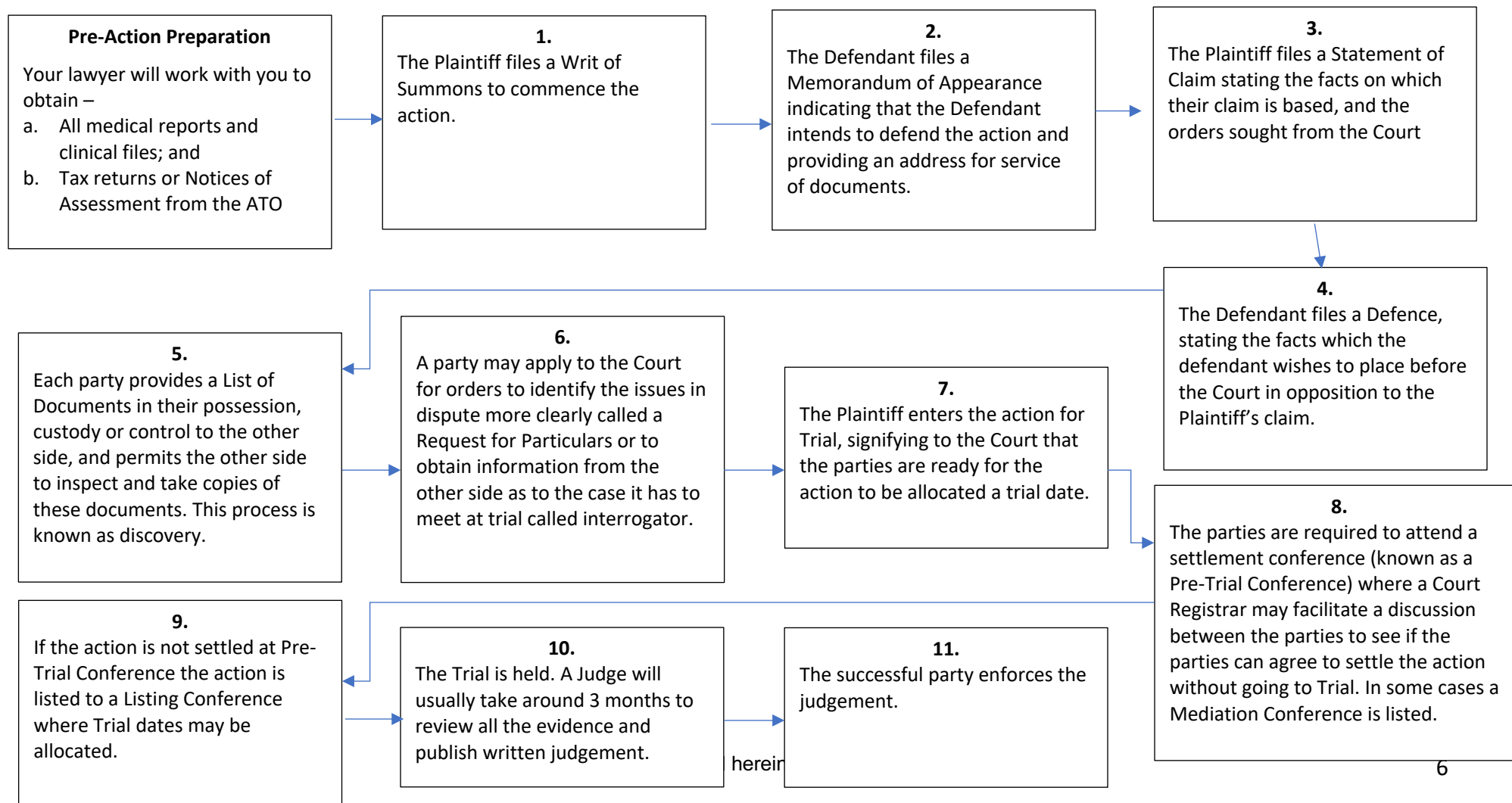
4. If it looks like you have a medical negligence claim, you should see a lawyer.

See HCC's website here for information on lawyers and accessing legal advice: <https://www.hconc.org.au/individual-advocacy/9-information-on-your-legal-options/>

Click here for the Law Society of WA's 'find a lawyer' tool: <https://www.lawsocietywa.asn.au/find-a-lawyer/>

5. Roadmap of a Medical Negligence Claim

If you proceed down the path of a medical negligence claim, it will look something like the following:



6. Legal Costs

- Legal costs often add stress and worry when pursuing a medical negligence claim.
- It is therefore important to talk openly with your lawyer **BEFORE** signing any contract.
- Each law firm operates differently.
- Some lawyers operate on a “*no-win-no-fee*” basis. Other lawyers will have an hourly rate set on a “*deferred fee*” basis.

No Win – No Fee

Many personal injury lawyers charge legal costs in this way.

A “*win*” typically includes a settlement of a sum of money considered reasonable by your lawyer. It is not limited to winning a civil trial and it does not stop a lawyer from seeking payment upfront if you reject their advice to settle.

It is important to note, however, that if you do not “*win*” (and do not reach a settlement) you may still be responsible for paying **THE OTHER SIDE’S** legal costs. This may be so even though your own lawyer does not charge you a fee. It is important to check this with your lawyer.

Hourly Rates

The rates for lawyers are adjusted every two years and current rates can be found here:

<https://www.wa.gov.au/organisation/legal-costs-committee>

You and your lawyer can negotiate different rates by written contract.

Getting an Estimate

The way that your lawyer charges you is governed by the *Legal Profession Act 2008 (WA)*.

According to section 260, your lawyer is obligated to provide you with either:

- (a) an estimate of the total legal costs; or
- (b) an explanation of the major factors that will affect the calculation of costs.

If you are not happy with the estimate, you should negotiate **BEFORE** signing any document your lawyer gives you.

Disagreements over Costs

If you are not happy with the legal costs at the conclusion of your case, you have several options.

You can:

- (a) negotiate with your lawyer; or
- (b) go before the Court to argue your costs (often called “*a taxation*”).

END OF DOCUMENT