

# ANATOMY OF A CIVIL LAWSUIT

This section contains a brief introduction for physicians to the process of a lawsuit in the civil court system, including a discussion of the burden of proof and the method of calculating compensation for the plaintiff (the person claiming compensation in the lawsuit).

## 1. The Lawsuit

Civil litigation involves disputes between people, corporations, or other legal entities. The time between the alleged incident and the last allowable day for the initiation of the lawsuit (the limitation period) varies with the type of case. Most cases involving medical reports are based on “tort” which is an injury other than a breach of contract, for example, motor vehicle injuries or medical malpractice claims. Tort claims are based on the allegation that the defendant was negligent; that is, he or she did not meet the standard of care required in the circumstances.

The actual civil trial can take place between two and six years after the lawsuit is first commenced. With complex cases, the time frame to trial is on the longer side. The court system is backlogged and starting in 1997, all civil cases must undergo a form of alternative dispute resolution prior to trial.

## 2. The Process

The first step is for the plaintiff (the person commencing the lawsuit) to have his or her lawyer file a document called a “statement of claim” with the court. This statement of claim is then personally served on the defendant (the person responding to the lawsuit). The defendant and his or her lawyer have a short period of time in which to file a “statement of defence” answering the allegations in the statement of claim.

The next step in the lawsuit is the investigation and preparation of the case by the plaintiff and the defendant. During this period, “examinations for discovery” are held. In this, each of the parties (plaintiffs and defendants) are asked questions under oath, orally or in writing. Many questions which are not able to be answered at the time of the examination are provided later, and are referred to as “undertakings”.

Before the parties are given a trial date, they appear before a judge for a pre-trial conference. The judge’s responsibility is to try resolving or settling some or all of the contentious issues. Alternate dispute resolution, likely in the form of mediation, is also undertaken to assist in the resolution of some or all of the issues. If this is not successful, then the parties set a date for a trial.

### 3. The Burden of Proof

The plaintiff in a negligence lawsuit has the responsibility of proving his or her case on a “balance of probabilities”. This means that the court (be it judge and jury, or judge alone) must be satisfied that the four essential elements of the lawsuit have been proven on a greater than 50% probability, or “more likely than not” or “probably versus possibly.” If any of the four elements are not so proven, then the lawsuit for negligence will fail.

The plaintiff must prove the following elements in a negligence claim:

1. A duty of care is owed by the defendant to the plaintiff.
2. The defendant did not meet the standard of care required in the circumstances.
3. The plaintiff suffered some loss or injury.
4. The loss or injury is substantially related to, or caused by, the breach of duty of care.

### 4. Evaluating a Plaintiff’s Claim

Damages refer to the sum of money required to place the plaintiff in the same position he or she would have been, but for the negligence. The patient has the responsibility of quantifying the claim being made against the defendants.

Claims that may be made include any or all of the following:

a) **Pain and Suffering:** general damages for loss of enjoyment of life, and permanent disability. This amount is presently limited by three 1978 decisions of the Supreme Court of Canada. The maximum amount for any one person who has suffered personal injuries, in 1978, was set at \$100,000. This amount increases with inflation, and in 2002 is approximately \$281,000.

b) **Past Loss of Income:** is calculated from the date of the injury to the date of the settlement or trial, based on information obtained from prior employers, income tax returns filed, and similar documentation.

c) **Out-of-Pocket Expenses:** relating to items such as medications, mileage, special equipment and supplies, attendant care, etc. which would not have been incurred but for the negligence of the defendant. This does not include any expenses related to the lawsuit.

The subrogated interests of various parties may also be included under this heading, pursuant to indemnification agreements. For example, in medical malpractice cases, the Ministry of Health usually gives the patient’s lawyer instructions to recover those funds

spent on behalf of the Ontario Health Insurance Plan (OHIP) which would not have been incurred but for the negligence of the physician or hospital.

d) Prejudgment Interest: is calculated on the past expenses, listed as a, b and c above. The calculation will be determined by the rules of court of each province or territory.

e) Future Loss of Income: usually an actuarial calculation of the projected income which the patient will not be able to earn due to the injury.

f) Future Costs for Care and Other Expenses: an estimation of the expected costs which may include attendant care, nursing care, homemaker expenses, medication costs, special equipment costs, etc.

g) Claims of Family Members: in some jurisdictions, family members are permitted to make claims for compensation for care and companionship that they have lost from the patient, together with compensation for time spent in providing nursing, homemaking and other services to the patient.