

# Medical Negligence Litigation: A Comprehensive State of Play

Reading time:

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Patient complaints, medicolegal litigation, AHPRA notifications, and investigations into conduct and behaviour are accepted aspects of the healthcare industry. Learning from medical errors and omissions is a vital part of any healthcare system's quality and safety improvement efforts[1].

## State of play

There is a small increase in the amount of litigation across all Australian jurisdictions. Being sued remains rare and going to a public trial is even rarer. MIPS has observed a steady increases in complaints and investigations.

Emerging issues and trends in medico-legal issues include:

- Higher numbers of disciplinary proceedings arising out of poor professional conduct such as inappropriate use of social media
- Telehealth related issues including possible claims/complaints from:
  - failure or delay in diagnosis
  - missing or poor follow up
  - inadequate or no patient examination
  - privacy and security breaches including recording consultations
- COVID-19 related issues such as:
  - failure to prevent exposure
  - failure to communicate potential adverse effects and material risks
  - errors in administering the vaccine
  - failure to obtain valid informed consent to receiving a COVID-19 vaccine
- Medicare and PSR investigations

Members should notify MIPS in a timely manner of any likelihood of a claim or complaint or adverse or unexpected outcome to a patient.

## A claim in negligence requires:

- A duty of care to the person who suffered harm or loss.
- The duty of care has been breached.
- The breach caused the loss or harm suffered by the person.

## Causes of litigation

The most common causes of litigation against healthcare practitioners are:

- **Negligence**
  - Failure to:
    - Diagnose a condition or delay in diagnosis.
    - Provide sufficient and/or adequate advice.
    - Disclose material risks.
    - Obtain valid informed consent.
- **Trespass to the person**
  - Undertaking a medical intervention that involves touching a person without his or her consent.

- Performing any clinical intervention without a person's valid informed consent
- **Breach of contract**
  - Uncommon, but often combined with negligence.
  - Failure to provide care at the promised standard.
- **Breach of fiduciary duty**
  - Failure to keep fiduciary duties, such as:
    - Maintaining confidentiality
    - Avoiding conflicts of interest.

## What does it take for an action in negligence to succeed?

1. Establishing that a duty of care was owed by a healthcare practitioner to a patient.
2. Establishing the expected standard of care, and breach of that established duty of care by the healthcare practitioner.
3. Establishing "causation", that is, the breach of the duty of care caused, or materially contributed, to the damage or loss suffered.
4. Establishing that the loss or damage was reasonably foreseeable.
5. Consideration if losses and/or damages are assessable monetarily.

## What is loss of chance in medical litigations?

If the treatment that would and should have been commenced upon diagnosis, may not necessarily have made a difference in the patient's overall outcome, but may have given them the chance of a better outcome, then this has been considered a loss of chance.

MIPS resources

- Webinars
  - [Ethical and legal solutions to modern healthcare challenges](#)
  - [Practising under adversity - claims, complaints & investigations](#)
  - [MIPS panel: Common practice scenarios - what would you do?](#)
- Articles
  - [Practising under adversity - claims, complaints & investigations](#)
  - [A solid defence](#)
  - [Legal tips for junior practitioners](#)
  - [Working under pressure and avoiding legal hazards](#)

[1] Nowotny, B. M., Loh, E., Lorenz, K., & Wallace, E. M. (2019). Sharing the pain: lessons from missed opportunities for healthcare improvement from patient complaints and litigation in the Australian health system. *Australian Health Review*, 43(4), 382-391.

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