



Best Practices in Medical Malpractice Litigation

Tips for Making Pleadings Useful

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Top Considerations:

- Preparation is key
- Proper Pleadings
- Avoid Pleadings Motions
- Civility/Communication

1. Preparation is key

- Interview all potential claimants
- Obtain and review relevant records or documents
- Create a chronology (dates and timing)
- Consult expert(s) on standard of care and causation
- Review relevant medical literature
- Understand the causation issue
- Consider damages (including past and future losses)
- Short limitation period:
 - Plead pseudonym [John/Jane Doe] for unknown defendant(s)
 - Consider a tolling agreement, if possible
- Defence:
 - Interview health care provider
 - Review the medical records
 - Create a chronology (e.g., dates and timing)
 - Consider crossclaims

2. Proper Pleadings

Plaintiffs:

- Plaintiff to plead ALL elements of the cause of action
- Plead particulars of negligence; breach of fiduciary duty
- Identify parties properly: Use caution with John and Jane Does
- Plead sufficient facts to tell the story and define the issues
- Use clear and concise language
- Avoid offensive boilerplate pleadings; use precedents cautiously
- Plead proper statutes and subrogated claims
- Make sure you have instructions! (e.g. all FLA claimants)

Defence:

- Admit what can be admitted
- Plead specific denial of important facts which are incorrect in the claim
- Include facts which if not pleaded would take plaintiff by surprise
- Contributory negligence details, if known
- Failure to mitigate details, if known
- Plead limitation period only if it is an issue

3. Avoid Pleadings Motions

- Plead with a view to avoiding motions:
 - Do not include parties that have no causes of action (e.g. those born or married after cause of action arises)
 - Do not include pleadings that violate rules/statute (e.g. including CPSO or QCIPA review findings)
- Do not plead cause of action statute barred on its face (e.g. death case brought more than two years after death)
- Motions should be brought only if:
 - It could end the claim entirely (i.e. unfixable fatal flaws)

- It could significantly narrow the issues in dispute
- Allowing pleading to remain as is would be prejudicial
- Claim is so deficient that it is impossible to respond

4. Civility/Communication

- Communication between counsel starts at the pleadings stage
- Indulgences re timing should be granted routinely
- Frank discussions right after pleading re necessary parties
- Cooperate regarding documents right after Claim served
- Communicate re readiness to proceed
- Attempt to resolve pleadings issues that would otherwise result in a motion