

Malpractice Update

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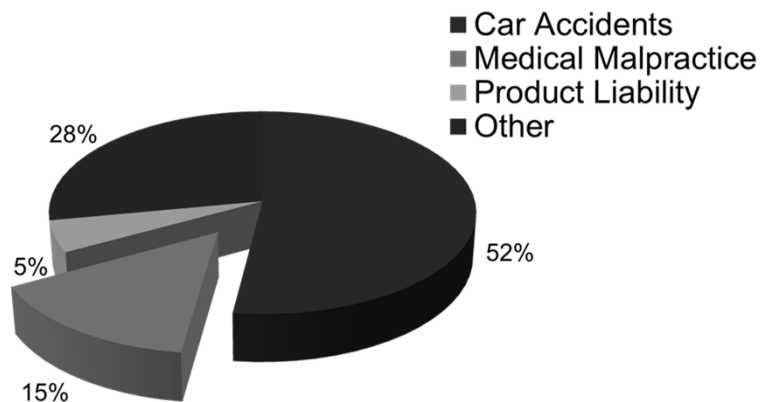
Some questions you should never ask:

- **Is that your real hair color?**
- **Are you pregnant?**
- **Did you have a face lift?**
- **Does this dress make me look fat?**
- **Have you ever been sued before?**

Some Statistics

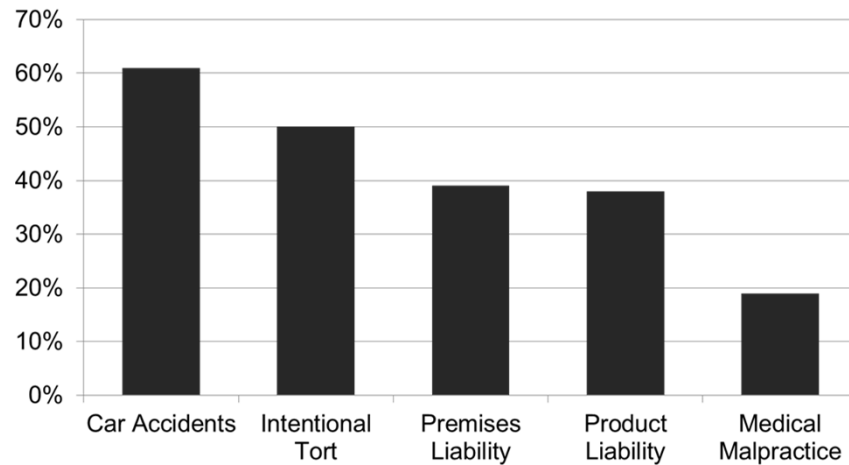
- **Percent of physicians sued by age 65:**
 - **75% of physicians in low risk specialties**
 - **99% of physicians in high risk specialties**
- **7.5% of physicians are sued each year**
- **Residents & fellows can be sued**
- **<10% of suits actually lead to trial**
- **Plaintiffs win 27% of cases in trial**
- **86,000 physicians have had at least one monetary judgment against them**

Personal Injury Lawsuits



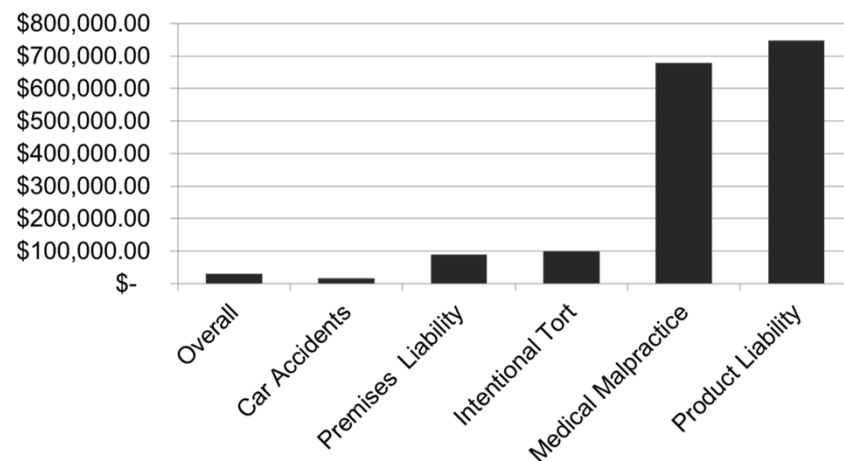
U.S. Department of Justice, Bureau of Justice Statistics 2005 data

Personal Injury: Plaintiff Success Rate



U.S. Department of Justice, Bureau of Justice Statistics 2005 data

Personal Injury: Median damages



U.S. Department of Justice, Bureau of Justice Statistics 2005 data

How Common Are Medical Errors?

- 44,000 to 98,000 medical error deaths per year
 - Institute of Medicine “To Err Is Human” 1999
- 1.5 million medication errors per year
 - Institute of Medicine 2006
- 15% of diagnoses are erroneous
 - Am J Med 2008; 121 (5A), S2-23
- 210,000 to 440,000 medical error deaths per year
 - Journal of Patient Safety 2013; 9:122-8

How much does
malpractice cost the
United States?



National Practitioner Databank

- **Administered by the U.S. government**
- **Database of:**
 - **Medical malpractice payment**
 - **Loss or restriction of medical license**
 - **Adverse clinical privileging actions**
 - **Negative finding by state medical boards**
 - **Negative action by private accreditation organization**
 - **Exclusion from Federal or State health programs**
- **Access: hospitals, professional societies, state/federal licensing bodies**

How Much Does Malpractice Cost?

- **Total 2014 National Practitioner Data Bank:**
 - **\$3.9 billion**
 - **\$12 per American**

2014 National Practitioner Database Data:

	Total Amount	Per Capita
Ohio	\$67 million	\$5.77
Pennsylvania	\$346 million	\$27.06
Michigan	\$80 million	\$8.11
West Virginia	\$28 million	\$15.29
Indiana	\$95 million	\$14.41

Northeastern United States has the highest per capita pay-outs:

New York:	\$36.15
New Jersey:	\$29.59
Pennsylvania:	\$27.06
Massachusetts:	\$26.26
Rhode Island:	\$24.29

Source: Diederich Healthcare
<http://www.diederichhealthcare.com/the-standard/2015-medical-malpractice-payout-analysis/>

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How Much Does Malpractice Cost?

	Estimated Cost (Billions)
Indemnity Payments	\$5.72
Administrative Expenses	\$4.13
Lost Clinician Work Time	\$0.20
TOTAL	\$10.05

Cost per American = \$31/year

Defensive Medicine Estimated Cost: \$45.59 billion

Total Cost per American = \$174/year

Health Affairs 2010; 29:1569-76

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Obstetrics:

- 1 out of 3,711 births results in a malpractice claim
- Average value (including defense) of OB claims is \$1.1 million
- Cost per delivery to cover liability = \$296

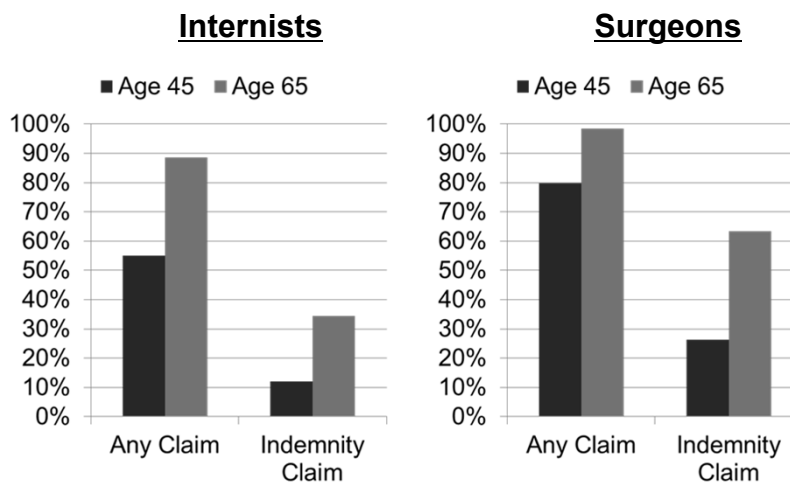
Is Malpractice Included In Physician Fees?

- Level 4 OP new visit (99204): 3.67 RVUs = \$131.22
 - 2.43 wRVU = \$86.88
 - 1.02 eRVU = \$36.47
 - 0.22 mRVU = \$7.87
 - Malpractice expense accounts for 5-6% of Medicare new patient reimbursement
- Level 4 OP return visit (99214): 2.21 RVUs = \$79.02
 - 1.50 wRVU = \$53.63
 - 0.61 eRVU = \$21.81
 - 0.10 mRVU = \$3.58
 - Malpractice expense accounts for 4-5% of Medicare return patient reimbursement

Who gets sued in the United States?

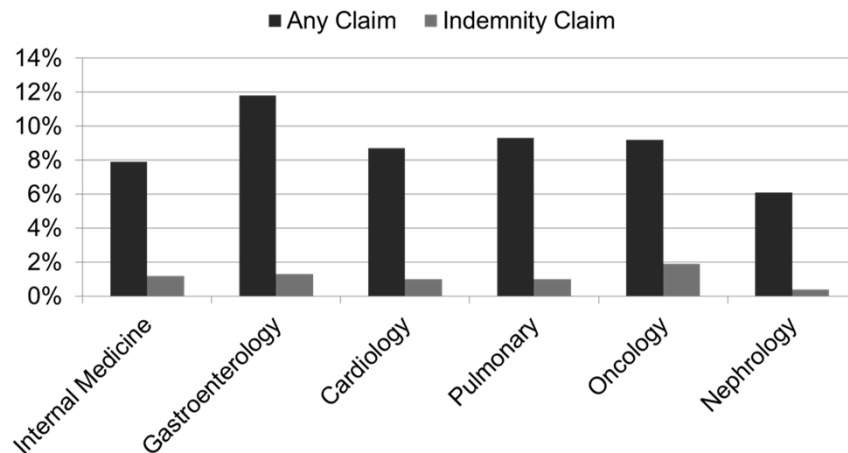


Probability Of A Malpractice Claim



Jena AB et al. N Engl J Med 2011;365:629-636

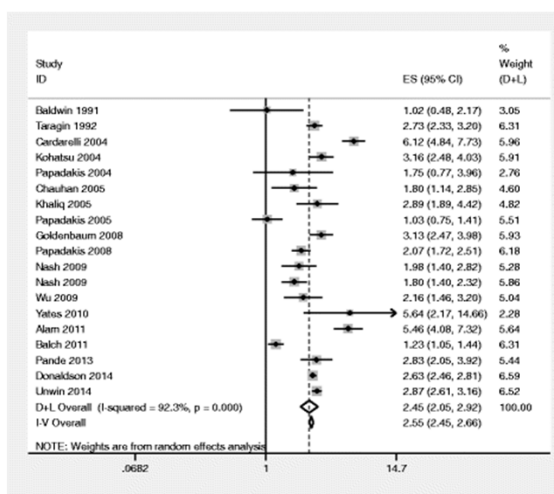
Annual Probability Of A Malpractice Claim



Jena AB et al. N Engl J Med 2011;365:629-636

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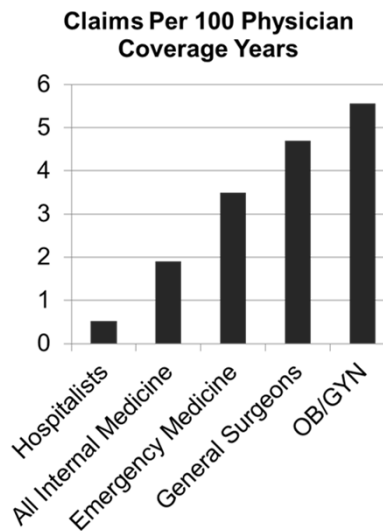
Male Physicians Are 2.5 Times More Likely To Be Sued Than Female Physicians



BMC Medicine 2015 13:172 doi:10.1186/s12916-015-0413-5
CC BY: BMC Medicine. <http://www.biomedcentral.com/>

Do Hospitalists Have Higher Malpractice Risk?

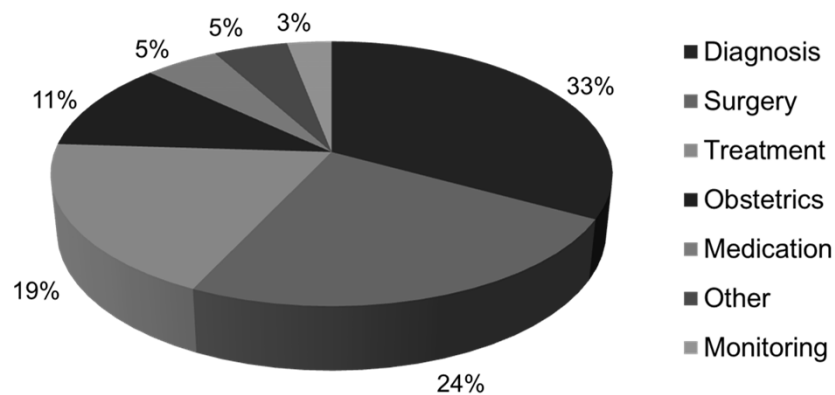
- Database of 52,000 malpractice claims from 20 insurers (30% of all U.S. closed claims)
- 1997-2011



J Hosp Med 2014; 9:750-5

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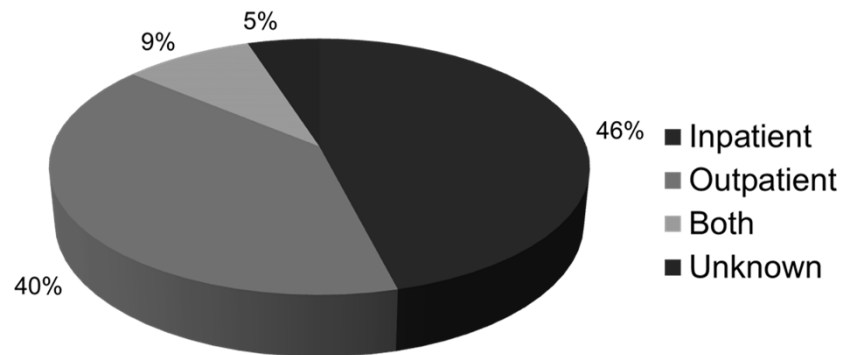
Payment Amounts By Malpractice Allegation



Source: Diederich Healthcare
<http://www.diederichhealthcare.com/the-standard/2015-medical-malpractice-payout-analysis/>

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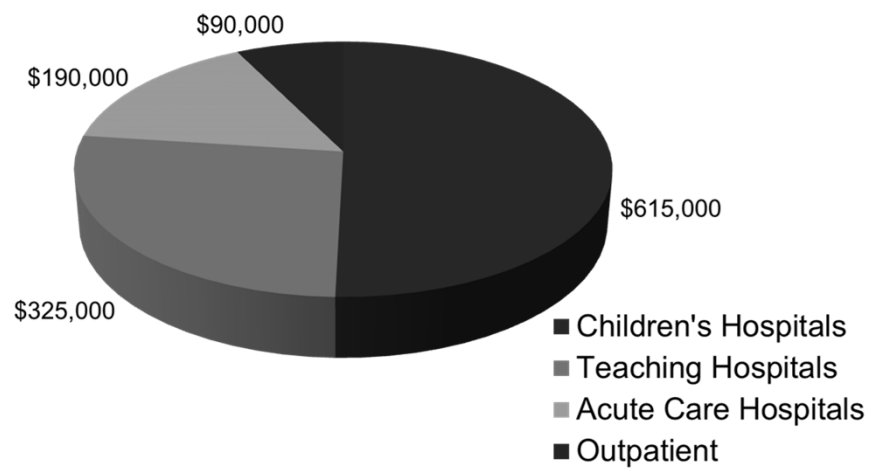
Where Injury Took Place



Source: Diederich Healthcare
<http://www.diederichhealthcare.com/the-standard/2015-medical-malpractice-payout-analysis/>

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Average Claim By Hospital Type:



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Average Payout Amounts

• Quadriplegic, brain damage, life care	\$944,664
• Major permanent injury	\$574,344
• Significant permanent injury	\$426,918
• Death	\$355,231
• Minor permanent injury	\$231,377
• Major temporary injury	\$198,587
• Emotional injury	\$104,892
• Minor temporary injury	\$76,056
• Insignificant injury	\$33,696

Source: Diederich Healthcare
<http://www.diederichhealthcare.com/the-standard/2015-medical-malpractice-payout-analysis/>

Payment Is Less For Claims That Close Quickly:

Time To Close	Number	Indemnity Payment	Cost To Defend
< 1 year:	665	\$111,704	\$6,081
1-2 years	706	\$421,136	\$21,761
2-3 years	492	\$444,095	\$57,398
3-4 years	281	\$462,652	\$51,718
4-5 years	138	\$585,185	\$67,020
5-6 years	59	\$438,822	\$82,463
6-7 years	30	\$1,124,318	\$131,448
> 7 years	48	\$580,116	\$117,083

Malpractice insurance

Types Of Malpractice Insurance

- 1. Claims Made – insurance coverage period covers period of time the claim is filed**
 - **Requires purchase of a tail to cover any claims filed after the coverage period**
 - **Tail coverage = 150-300% of annual premium**
- 2. Occurrence – insurance coverage period covers period of time when the actual event occurred**
 - **Does not require purchase of a tail**

Example #1

- **Dr. Surgeon does a cholecystectomy in 2013**
- **Malpractice claim filed in 2014**
- **In 2013, Dr. Surgeon was insured by company A**
- **In 2014, Dr. Surgeon was insured by company B**
- **Claims made policy: company B covers the claim**
- **Occurrence policy: company A covers the claim**

Example #2

- **Dr. Surgeon does a cholecystectomy in 2013**
- **Dr. Surgeon leaves practice January 2014**
- **Malpractice claim filed in March 2014**
- **In 2013, Dr. Surgeon was insured by company A**
- **When leaving practice, Dr. Surgeon did not purchase a tail**
- **Occurrence policy: company A covers the claim**
- **Claims made policy: Dr. Surgeon is responsible**

Average U.S. Malpractice Premiums For Internal Medicine Specialties*

	"No Surgery"	"Major Surgery"
Allergy	\$8,198	
Cardiology	\$17,268	\$58,173
Critical Care	\$23,218	
Gastroenterology	\$17,702	\$36,494
Heme/Onc	\$15,514	
Internal Medicine	\$16,961	
Palliative	\$8,198	
Pulmonary	\$19,195	
Geriatrics	\$14,560	
Nephrology	\$14,402	
Infectious Disease	\$19,736	
Endocrinology	\$13,558	
Rheumatology	\$14,479	

*Report on the CY
2015 Update of the
MP RVUs for the
Medicare PFS

Who Pays The Highest Premiums*?

- **Neurosurgery** **\$106,901**
- **Obstetrics** **\$66,024**
- **Thoracic surgery** **\$59,569**
- **General surgery** **\$59,808**
- **Vascular surgery** **\$58,970**
- **Orthopedics** **\$52,344**

*Report on the CY
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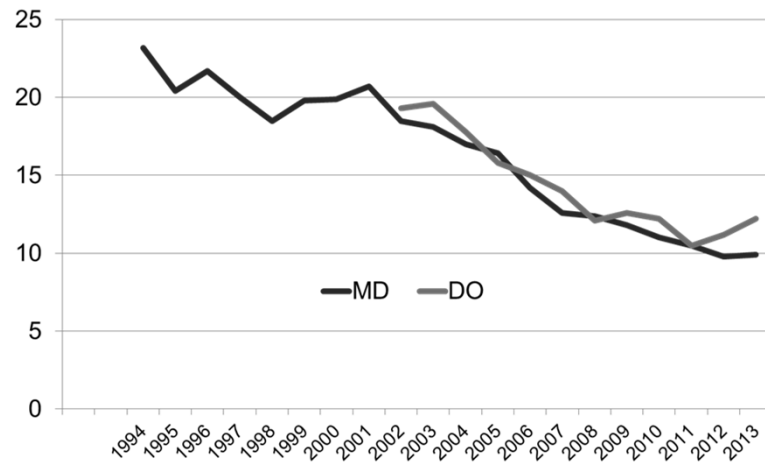
Geographic Variation In Premium Prices*

Specialty	Lowest Rates	Highest Rates
Internists	\$3,375 Minnesota	\$47,707 Miami, FL
General Surgeons	\$10,868 Wisconsin	\$190,829 Miami, FL
OB-GYN	\$16,240 Central California	\$214,999 Long Island, NY

***Standard rates July 1, 2015 for \$1 million individual claim and \$3 million total annual all claims**



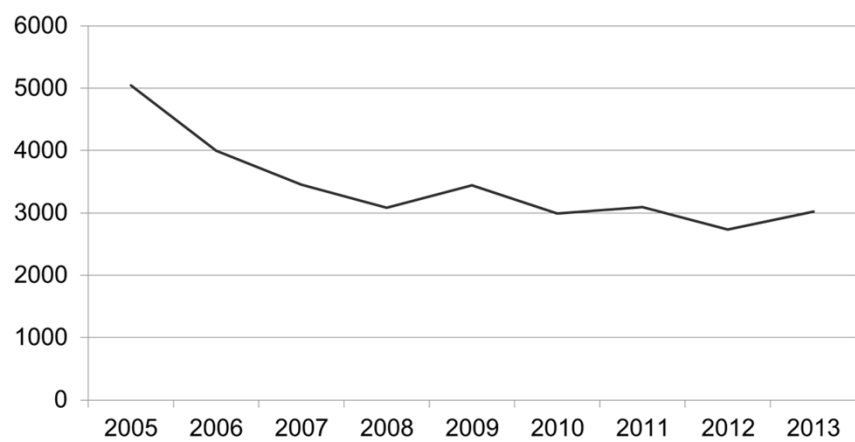
Paid Claims Per 1,000 Physicians



JAMA. 2014;312(20):2146-2155

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Malpractice Closed Claims Per Year: Ohio



Malpractice In Ohio 2013: 3,019 claims

- **No payment: 76%**
 - 67% suit abandoned or closed without prejudice
 - 4% dismissed by summary judgment
 - 3% defense verdict
 - 2% settled
- **Payment: 24%**
 - 21% settled
 - 2% alternative dispute resolution
 - 0.66% plaintiff verdict

Malpractice In Ohio 2013

- 3,019 claims
- Total paid to claimants = \$266,688,492
 - Average = \$376,679 per claim
 - Average for internal medicine claim = \$208,770
 - 59 claims were > \$1,000,000
- Highest average indemnity payments:
 - Anesthesia \$1,479,258
 - OB/GYN \$1,306,760
- Average cost to defend a claim with no payment: \$35,493

Geographic Variability In Ohio

Region	Total Claims	Claims With Indemnity	Average Indemnity Per Paid Claim
Northeast Ohio	1550	364 (23%)	\$411,153
Southwest Ohio	589	138 (23%)	\$158,217
Central Ohio	376	88 (23%)	\$430,981
Northwest Ohio	347	85 (24%)	\$251,957
Southeast Ohio	143	30 (21%)	\$382,085

Cost Of Malpractice Insurance In Ohio:

	Central Ohio	Northeastern Ohio
Company "A"	\$16,093	\$24,354
Company "B"	\$17,275	\$24,223
Company "C"	\$12,842	\$22,173

- **2012 data**
- **Insurance policies between different companies may not be equivalent**
- **Ohio premiums have fallen 22% since tort reform**

Malpractice Courts In Ohio

1. Court of Claims

- Decided by judge
- No jury
- Cases filed against State of Ohio

2. Court of Common Pleas

- Decided by jury

Statute Of Limitations

- One year that can start from:
 1. Date of malpractice event
 2. Date of discovery of injury
 3. Date of termination of physician/patient relationship
- Wrongful death claims: 2 years
- For children: 1 year after the child turns 18
- The “180 day” letter
 - Allows 6-month extension beyond the statute of limitations for the patient/attorney to complete investigation into a possible claim

Statute Of Repose

- **“Limitation to the statute of limitations”**
- **4 years**
- **Exception: foreign object left in the body after procedure**

Immunity

- **Hospitals owned by government**
- **Physicians employed by government**
- **State is the defendant**
- **Must be tried in the Court of Claims**
- **\$250,000 cap on pain and suffering damages**

Ohio Damage Caps:

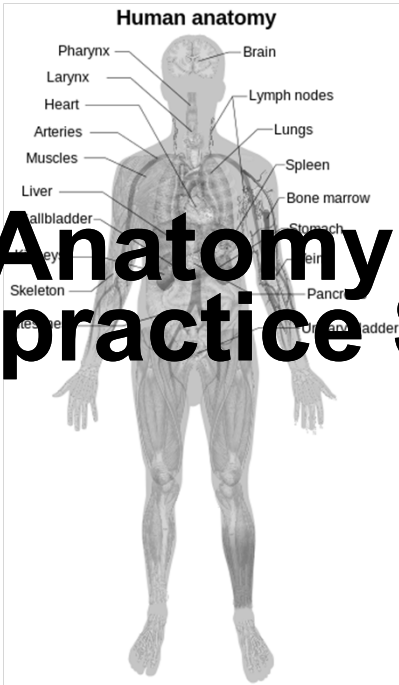
- **Non-economic damages:**
 - **\$250,000 or 3 times the economic damages to maximum of \$350,000/plaintiff and maximum of \$500,000/occurrence**
 - **Maximum increases to \$500,000/plaintiff and \$1,000,000/occurrence if there is:**
 - **Permanent & substantial physical deformity**
 - **Loss of a limb**
 - **Loss of body organ system**
 - **Injury preventing self-care**
 - **Cap does not apply to wrongful death cases**

Senate Bill 281 (tort reform) – April 11, 2003

Ohio Damage Caps (continued):

- **Compensatory (economic) damages:**
 - **No limit**
- **Punitive damages:**
 - **Limited to 10% of net worth to a maximum of \$350,000**
 - **Limited to 2 times the compensatory damages**

The Anatomy Of A Malpractice Suit



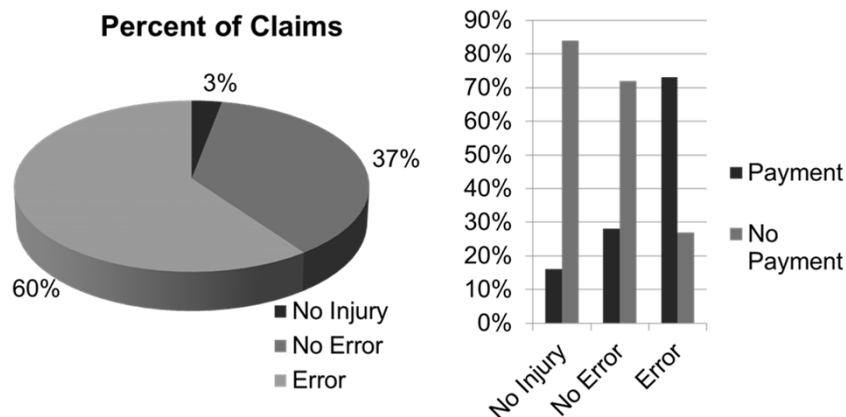
Frederick Sowards Polling Law, Columbus, OH



Who Can Be An Expert Witness In Ohio?

- Can testify to:
 1. Standard of care
 2. Probable cause of event
- Must practice in same specialty or specialty substantially similar to defendant
- Must do $\geq 50\%$ of time in clinical medicine

Are Malpractice Cases Frivolous?



Does Medical Error Disclosure Increase Lawsuits?

- University of Michigan
- “Disclosure-with-offer” program implemented 2003
- New claims/month fell 7.03 to 4.52 per 100,000 encounters
- New lawsuits/month fell 2.13 to 0.75 per 100,000 encounters

Ann Intern Med 2010; 153:213-221

Can You Say “I’m Sorry”?

“In any civil action brought by an alleged victim of an unanticipated outcome of medical care or in any arbitration proceeding related to such a civil action, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim, and that relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care are inadmissible as evidence of an admission of liability or as evidence of an admission against interest.”

Ohio Revised Code Section 2317.43 – September 13, 2004

Some Cases

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The danger of being the only one without immunity...

- **Unrestrained driver found hanging from a tree after motor vehicle accident**
- **No health insurance**
- **Multiple traumatic injuries: ruptured spleen, pneumothoraces, thoracic vertebral fracture with paraplegia, broken arms**
- **After emergent spine surgery, vision loss**
- **Mother sues for \$35 million**
- **All physicians have immunity except neurosurgery resident**

The danger of being the only doctor with insurance...

- Patient underwent neck surgery for cancer
- Re-admitted with neck abscess
- Worsened swelling after needle aspiration
- Sent to radiology for CT-guided drainage
- Has respiratory arrest when placed on CT table
- Responding anesthesiologist is unable to intubate
- Emergent tracheostomy by different surgeon
- Original surgeon is uninsured
- Radiologist named in the lawsuit

When residents & fellows run the show...

- Post-partum woman in motor vehicle accident
- In ED, resident does FAST scan: negative
- Undergoes surgery for arm fracture
- 3 days later, sudden cardiopulmonary arrest requiring CPR & total of 24 L fluids (6 units PRBCs)
- Autopsy by coroner (unsupervised fellow): pulmonary emboli and 2.4 L liver hematoma.
- Coroner's cause of death: blunt force trauma to the liver

Communication...

- **Patient admitted to the hospital with pancreatitis**
- **Abdominal CT shows incidental finding of 3 pulmonary nodules**
- **Radiologist recommends follow up CT and note FAXed to primary care physician listed in chart**
- **PCP had recently left practice and physician assistant assumed patient panel**
- **2 years later, patient found to have stage IV lung cancer and dies**

When your employer changes...

- **18 year old admitted with diffuse myalgias. Previously healthy.**
- **Family reports patient had been screened for sickle cell anemia in kindergarten and was negative**
- **Admitting physician suspects sickle cell anemia regardless and treats accordingly**
- **Patient sustains cardiopulmonary arrest and later dies. Testing later returns showing sickle cell anemia**
- **Physician's group is purchased by a new company which settles claim 1 week prior to trial**

A compelling expert witness...

- Patient with ESRD seen in the ED for shingles involving the left chest & abdomen
- Next day returns because of weakness & hypotension. CXR shows new cardiomegaly.
- Cardiology and thoracic surgery called for suspected pericardial tamponade.
- Cardiac echo tech had left for the day so a CT was ordered. Patient arrests in CT scanner as echo tech and cardiologist arrive and do pericardiocentesis
- Plaintiff's expert states that all ED physicians should be able to do cardiac ultrasound

The danger of VIPs...

- VVIP admitted with PE 1 week after surgery
- Seen in ICU by on-call resident; ICU attending manages with heparin by phone from home
- PTT measurements not done at times ordered
- Next morning, heparin is held to place IVC filter
- VVIP develops shock and dies 2 weeks later
- Death results in headlines across the U.S.
- Lawsuit results in headlines across the U.S.

**A few final key
points...**

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**Ted Munsell
Carpenter, Lipps, & Leland, LLP**

