LECOM 2019 Summer CME Conference

MISDIAGNOSIS – from the Bedside to the Courtroom

Richard E. Ferretti, Esq.
General Counsel
LECOM

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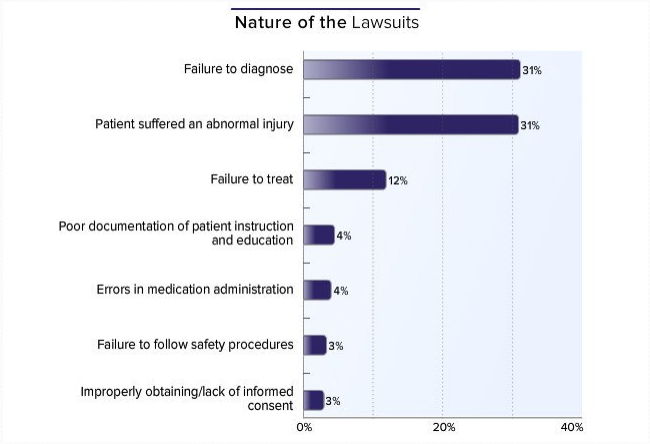
MISDIAGNOSIS – A Form of Malpractice



https://www.medscape.com/features/slideshow/public/malpractice-report-2015#page=3

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MISDIAGNOSIS – A Form of Malpractice

A. **Medical Misdiagnosis** - a form of inaccurate, late, and/or delayed diagnosis. An accurate initial diagnosis is the foundation upon which all subsequent healthcare decisions are based. An error in diagnosis can cause a flow of negative events to occur – notably, a medical malpractice lawsuit against the physician(s) involved.

B. **Malpractice** is professional misconduct or demonstration of an unreasonable lack of skill with the result of injury, loss, or damage to the patient.

C. Most medical malpractice lawsuits are based on the theory of the unintentional tort of negligence.

D. In order to obtain a judgment for negligence against a physician (defendant), the patient (plaintiff) must be able to show all elements of cause of action, which in this realm, is medical malpractice.

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MISDIAGNOSIS – A Form of Malpractice

D. Also known as the **Four Ds of Negligence**:

1. **Duty** – is the responsibility established by the physician-patient relationship. It is the standard of care owed by the physician to the patient. Patient must prove that the relationship has been established.
2. **Dereliction of Duty** – or neglect, is a physician's failure to act as any ordinary and prudent physician would act in similar circumstances. To prove dereliction, the patient would have to prove that the physician's treatment did not comply with the **acceptable standard of care**.
3. **Direct or Proximate Cause** – is the continuous sequence of events, unbroken by any intervening cause, that produces an injury and without which the injury would not have occurred. The injury was proximately or closely related to the physician's negligence. The patient must prove that the physician's dereliction of duty (Misdiagnosis) was the direct cause for the injury that resulted.
4. **Damages** – any injuries caused by the defendant. Patients can seek compensation for a variety of damages:

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MISDIAGNOSIS – A Form of Malpractice

4. **Damages** – any injuries caused by the defendant. Patients can seek compensation for a variety of damages:
   d. **Compensatory** – for actual loss of income, emotional pain & suffering, or injury suffered by patient. These losses are past, current, and future. Also, noneconomic reasons, e.g., disfigurement, disability, and loss of consortium.
   e. **Punitive** – awarded to person who has been harmed in especially malicious or willful manner. Not always related to the actual cost of harm suffered, but is meant to serve as punishment to the offender and a warning to others.
   f. **Wrongful-Death Statutes** – if patient's death has been caused by physician's negligence, the deceased's dependents and heirs may sue for wrongful death. State-specific as to damages permitted and caps thereof. In PA, a surviving spouse and children can sue for compensatory damages for pain and suffering they experienced upon the death of their loved one.
   g. Other subcategories of damages seen – Permanent physical disability, Permanent mental disability, Loss of enjoyment of life, personal injuries, past and future loss of earnings, medical and hospital expenses, pain and suffering.

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MISDIAGNOSIS – A Form of Malpractice

E. Standard of Care – (usually a variant of the locality rule) Can vary slightly from state to state:

Examples:

1. The physician or surgeon must use a "reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices… *NY Court of Appeals.*
2. The standard of care is the generally accepted medical practices used by similarly trained physicians in the same geographic area for patients suffering from a similar or the same disorder or illness… *PA*.
3. ***Prevailing professional standard of care***, which is defined as "that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers." FL

- The "Standard" can change depending on a number of factors: such as patient's age and prior medical history.

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MISDIAGNOSIS – Costs & Causes

A. **Overview of Frequency of Misdiagnosis**:

1. In U.S., most patients will experience a diagnostic error at least once their lifetime.
2. Annually, approximately 12 million people in the U.S. that seek outpatient care experience some form of diagnostic error. About ½ of these errors had the potential to lead to worse outcomes for the patient.
3. Diagnostic errors and related inefficiencies cost the U.S. economy $750 billion each year.
4. Analyzing medical death rate data over an eight-year period, Johns Hopkins patient safety experts have calculated that more than 250,000 deaths per year are due to medical error in the U.S. This makes medical error the third leading cause of death—respiratory disease, which kills close to 150,000 people per year. Heart disease (611k) and Cancer (585k) are first and second, respectively.
5. From 1986 to 2010, about 40% of the malpractice claims filed involved a misdiagnosis lawsuit. Nearly $39 billion in compensation was paid out.
6. Florida Med. Malp. Caps: $500k and $1 million (death & vegetative state) limits on noneconomic damages overturned by FL Supreme Court in 2017.

http://www.nap.edu/21794

http://qualitysafey.bmj.com/content/early/2013/03/27/bmjqs-2012-001550

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MISDIAGNOSIS – Costs & Causes

A. **Variance Across Diseases – Most misdiagnosed conditions** (<u>that tend to lead to malpractice</u>):

1. **Cancer** misdiagnoses occur as much as 28 percent of the time, and up to 44 percent for some types of cancer (e.g., lymphoma, breast cancer, sarcomas and melanoma).
2. **Coronary Artery Disease** – up to a third of all CA disease may go undetected. False negatives are common w/ chest pain symptoms. Shortness of breath may be due to age, obesity, fitness level, or a vice like smoking.
3. **Multiple Sclerosis** – other diseases can look like MS, but the treatments are not the same. MS-like symptoms may be identified w/ patients with: Autoimmune Diseases, Infectious Diseases, Vascular Diseases and other conditions (e.g., Fibromyalgia, Lou Gehrig's, Hypertension).
4. **Rheumatoid Arthritis** – in one study of 583 doctor-reported errors*, diagnostic errors during the testing phase led doctors to fail to follow up on lab results 44% of the time. Difficult to diagnose because of symptom overlap with other conditions the often slow and gradual development of the disease.
5. **Parkinson's Disease** – Michael J. Fox Foundation reports that up to 25% of PD are incorrect. Blood and urine tests can be inconclusive. A systematic neurological exam (strength, coordination, reflexes & gait) is necessary in diagnosing the disease. Mistaken for stroke, Alzheimer's, Lou Gehrig's, head trauma.

http://medstak.com/medical-malpractice/5-most-misdiagnosed-diseases/

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MISDIAGNOSIS – Costs & Causes

B. Most misdiagnosed conditions (according to the number of people diagnosed):

1. **Toxoplasmosis** – 60 million affected, most undiagnosed and no symptoms.
2. **Sleep Disorders** –40 million affected, most undiagnosed.
3. **Otosclerosis** – 28 million affected, up to 10% of Caucasian pop have condition.
4. **Extra Nipple** –28 million affected, 1 in 10 of total population.
5. **Osteoporosis** –18 million affected, 1 in 15 of total pop have low bone mass.

- However, there is very little litigation involving these misdiagnosed or undiagnosed conditions.
- Malpractice lawsuits from misdiagnosis or delayed diagnosis occur mostly, in terms of dollar value, from conditions such as heart attack, breast cancer, appendicitis, lung cancer, and colon cancer.
- Heart attack and appendicitis tend to present in Emergency Rooms, while the other litigation prone cancers are more common in general physician work.

https://qualitysafety.bmj.com/content/22/8/672.abstract
http://rightdiangosis.com/intro

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MISDIAGNOSIS – Costs & Causes

B. Why Does Misdiagnosis Occur: For myriad of reasons, and often, involving contributing factors from any of the parties (patient, physician, specialist, tests – lab or path).

1. **Patient**: While usually not intentional, can contribute to a wrong diagnosis.

- **Self-diagnosing** themselves w/out professional medical advice.
- **Not Reporting Symptoms** – Sometimes they are embarrassed, maybe they thought not worth mentioning. Maybe the patient won't mention a symptom unless the physician asks.
- **Failing to Complete Ordered Tests** – Patients often don't get diagnostic tests due to oversight, complacency, laziness, or embarrassment, e.g. delayed diagnosis for colon cancer often due to patient's perceived embarrassment over tests such as colonoscopy and sigmoidoscopy.
- **Difficult Patients** – Physician must analyze the signs in behavior, appearance, and movement. Blood, urine and feces sample/tests are inconvenient and unpleasant – even more so the younger the child.

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MISDIAGNOSIS – Costs & Causes

B. Why Does Misdiagnosis Occur: (cont'd)

2. **Physician or Specialist**: There are many ways this can occur…

- **Knowledge Limited to Common Diseases** – Greater than 20,000 diseases exist.
- **Over-Publicized Diseases** – Publicity tends to lead to over-diagnosis.
- **Different Doctor Skills** – Physicians are human too, and humans have biases. We tend to go with is familiar and this is also seen in treatments – Surgeons tend to recommend surgery more often and an endocrinologist tends to be more conservative.
- **Saving Money** – If test for very rare condition (1-in-200), physician may avoid test.
- **Choice not to Analyze deeply** – Physician may consider it adequate to get overall disease and less important to confirm subtype.
- **Lack of Time** – More often than not, Physicians would like to spend more than 15 minutes with an appointment, ask questions, answer questions, order tests, double-check their books, consult with specialists and consult the latest research…
- **Behavioral/Mental Symptoms hard to analyze** – Emotional or mental well-being are difficult to understand.
- **System or Organizational Failure** – Physicians, specialists, staff and the communication (or lack of) between them are all distinct opportunities for error.

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MISDIAGNOSIS – Costs & Causes

B. Why Does Misdiagnosis Occur: (cont'd)

3. **Laboratory and Pathology Tests**: There are useful, but not perfect.

- **Human Errors**– Possibility exists in any of the various tests ordered (contamination, improper procedure, human judgement of person viewing/interpreting results).
- **Error Margins: False positives, False negatives** – All lab tests have known conditions under which they fail. With either result, you're are getting the wrong diagnosis which leads to inadequate/below standard of care treatment.

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MISDIAGNOSIS – Standard of Care

C. Does Misdiagnosis or Delayed Diagnosis indicate evidence of negligence?

1. Accomplished physicians can and do make diagnostic errors despite demonstrating reasonable care. As for whether the physician acted competently in arriving at the diagnosis in question, experts will always examine the differential diagnosis method utilized by the physician in making his/her treatment determinations.
2. After a preliminary evaluation of the patient, the physician will make a list of diagnoses in order of probability. These diagnoses will be pared down via observation, patient questioning about symptoms and medical history, ordering more tests, or specialist referral.
3. Ideally, this process leads to ruling out all diagnoses but one. However, medicine is not a perfect science…

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MISDIAGNOSIS – Standard of Care

C. Does Misdiagnosis or Delayed Diagnosis indicate evidence of negligence?

4. What must the plaintiff prove? A breach of the standard of care, or:

- *A competent physician in a similar specialty, under similar circumstances, would not have misdiagnosed the patient's illness or condition.*

5. Or, stated in "clinical terms," given this realm or subcategory cause of action for Medical Malpractice (i.e., Misdiagnosis) the plaintiff must prove:

- *The defendant's differential diagnosis list did not include the correct diagnosis and a competent physician under similar circumstances would have; or,*
- *The defendant's differential diagnosis list did include the correct diagnosis but failed to perform correct tests or seek consultations from specialists to investigate and confirm the possibility of the diagnosis.*

6. Added to the uncertainty of negligence is the fact that human and/or technological error led to inaccurate lab results which directly influenced defendant's diagnosis.

- If proven, Physician would not be liable for misdiagnosis, but someone still is…

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MISDIAGNOSIS – The Litigation Process

C. Three Phases of the Litigation Process

1. **Initiation Phase:** Lawsuit begins when the Plaintiff (allegedly injured patient) files (with the court) a summons, claim form or complaint.
   - A ***affidavit of merit**** from another "appropriately licensed professional" that care below the acceptable standard of care occurred… is presented to the court.
     - Certifications are required in many jurisdictions for a claim of medical malpractice to proceed in court – they are used to prevent frivolous lawsuits.
     - Required in PA, NY, FL, etc.. Certifies the belief that there are reasonable grounds to believe that the physician was negligent in treating the claimant, and that that negligence caused harm to the claimant.
   - In the *complaint*, the plaintiff presents the facts or Pleadings which set forth the alleged wrongs committed by the defendant physician with a demand for relief.
   - If you are served a notice/complaint (et.al)…. Call your malpractice carrier!
   - The defendant is required to *file an answer* (written response) with the court, and to also provide the plaintiff with a copy within a specified period of time. Note, FL has slightly different process (see slide 17).

*http://www. Ncsl.org for a complete listing of jurisdictions

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MISDIAGNOSIS – The Litigation Process

C. Three Phases of the Litigation Process

1. **Initiation Phase:** Lawsuit begins when the Plaintiff (allegedly injured patient) files (with the court) a summons, claim form or complaint.
   - Some insurers allow physicians to choose their representation from a list of preapproved attorneys. If given a list, research them on the internet and ask around for recommendations.
   - The right lawyer will: help you through the process, help you stay calm, take time to properly work with you and for you in your defense, and be honest with you about the good and bad issues regarding your case.
   - Don't communicate w/ opposing counsel – ever – that is the job of your attorney.
   - Per a fellow physician, "State the facts clearly and have them straight from the beginning. Make sure you are prepared and reviewed all records carefully and be prepared for any questions. Review [them] with your attorney and malpractice insurance prior to any deposition." Another warned, "Don't underestimate the intent of the plaintiff attorney to win the case. Don't underprepare for the trial!"*

https://www.medscape.com/features/slideshow/public/malpractice-report-2015#page=16

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MISDIAGNOSIS – The Litigation Process

C. Three Phases of the Litigation Process

1. **Initiation Phase: Sidebar on FLORIDA Medical Malpractice Lawsuits….**
   - Under **FL Stat. 766.106**, prior to filing MM lawsuit, claimant must notify each defendant of the intent to file lawsuit. Notice must contain:
     - A list of all health care providers that treated claimant for harm stemming from the alleged malpractice;
     - A list of all h.c. providers seen by claimant in the two years prior to the alleged malpractice; and,
     - Copies of medical records relied on by claimant's expert in signing "affidavit of merit"
   - **90-Day Wait Period** – During which (this tolls Statute of Limitations clock), prospective defendant(s) are to conduct a "pre-suit investigation" about claims. At end of 90-day period, defendants must either:
     - Reject the claim outright
     - Make a settlement offer, or
     - Admit liability and make an offer to arbitrate the issue of claimant's damages

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MISDIAGNOSIS – The Litigation Process

C. Three Phases of the Litigation Process

2. **Pre-Trial Phase:** After filing a lawsuit and before a trial, plaintiff and defendant gather information using various methods known as ***Discovery***. Discovery methods may include:
   - *Interrogatories* are written questions that the opposing side must answer under oath. Goal is to gather preliminary and demographic information about the party.
   - *Requests for Production* require opposing side to provide documents to the other side (medical records, hospital billing, clinic notes, etc.).
   - *Depositions* are formal proceedings in which a litigant or party to the litigation is questioned by counsel, under oath, and a record of the proceedings is made for later use in court.
   - May not occur for months or years after service. Preparation is the best way to ensure a successful deposition. Know the patient's record – your job is be the factual expert for what happened in the matter.
   - Remain calm and knowledgeable during the deposition. Medical experts on both sides will your deposition testimony to help them determine whether you met the standard of care in the plaintiff's medical treatment.

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MISDIAGNOSIS – The Litigation Process

C. Three Phases of the Litigation Process

2. **Pre-Trial Phase:** con't

- Depositions are usually attended by attorneys for both parties and a representative from the insurance company who issued the malpractice coverage. Direct examination is the questioning of the deponent (physician) by the attorney who ordered the deposition (patient's attorney). After direct, other attorneys may cross-examine the testifying physician. Cross may be followed by Redirect, which may be followed by Recross, until all parties have exhausted their questions.
- Two kinds objections raised in Depositions are *assertion of a privilege*[1] or to the *form of the question* asked. Admissibility objections related to the admissibility of evidence are generally preserved for trial.
- Rationale for the lengthy pre-trial process is that by requiring disputing parties to exchange facts and the underlying information, such as respective **expert testimony,** the parties can reach a mutual understanding and settle the case.
- Some cases are resolved by *summary judgment*, in which the court decides in favor of one party based on the information derived during the discovery process.
- *Arbitration or Mediation*, is mandatory in a few states before going to trial. See FL 766.107 (Nonbinding Arbitration) and FL 766.108 (Mandatory mediation).

[1] *United States v. Ehrlich*, 1998 U.S. Dist. LEXIS 8240 (E.D. Pa. May 27, 1998).

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MISDIAGNOSIS – The Litigation Process

C. Three Phases of the Litigation Process

3. **Trial & Post Trial Phase:**

- Cases involving misdiagnosis litigation (or any injuries in health care) are typically decided by a trial by jury.
- At Trial, plaintiff's attorney has the burden of proving every element of the case to the jury that it was more likely than not that the physician was negligent. This standard of legal proof is also called the ***"preponderance of evidence"*** standard – which means that an impartial jury, after hearing and considering all the information discovered by both parties will a great than 50% probability that the professional negligence occurred , in order to return a verdict against the physician.
- ***Defenses*** are any assertions by the physician's lawyer are intended to negate the evidence presented by the plaintiff.
- ***Stages of a Trial***: Jury selection; Opening statements by both parties; plaintiff's trial testimony; defendant's trial testimony; closing arguments; jury instruction; jury deliberation; and, verdict.

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MISDIAGNOSIS – The Litigation Process

D. Role of the Expert Witness

1. **Knowledge & Expertise:**
   - Judge & Jury do not possess the requisite knowledge and expertise.
   - Per statute, witness must be a health care provider who holds an active and valid license and has conducted a complete review of the pertinent medical records in a case.
     - The judge per the applicable statute makes the decision as to competency of expert witness. *
2. The Expert provides the **answer/opinion** to 2 questions that are decisive to the outcome of the case:
   - Did the physician provide the same standard of care that other physicians would have provided in a similar situation?
   - Did the physician's negligent actions cause the patient's injuries?
3. E.g., if a doctor misdiagnoses cancer in early stages, an expert witness would need to give his opinion that more likely than not, the patient would have survived with proper early treatment which would have resulted from a correct diagnosis.

*FL. Stat 766.102; Pa. Stat tit. 40. Section 1303.512; and see also N.Y. Civil Practice & Rules Law Section 3012-a

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MISDIAGNOSIS – The Litigation Process

E. Affirmative Defenses to Misdiagnosis:

- This still a case of negligence, and there are a number of possible defenses available to all negligence claims (**many** of which we will not cover):

1. **Dispute any/all of the Four Elements of Medical Malpractice:** (burden of Plaintiff to prove)
   - Lack of Doc/Patient Relationship
   - Standard of Care
   - Proximate Cause
   - Plaintiff's injuries resulted in compensable damages
2. **No Standard of Care:** Usually most effective of above defenses/arguments
   - Defendant calls on other medical experts to prove that their choices/decisions of diagnosis (or treatment) were acceptable.
   - Where evidence appears equal on both sides of the argument, defendant generally prevails.
3. **Substantial/Respectable Minority Defense:**
   - Pursuing new or different (though not in clinical majority) treatment(s) is supported by a significant % of respected physicians.

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MISDIAGNOSIS – The Litigation Process

E. Affirmative Defenses to Misdiagnosis: (con't)

4. **Assumed Risk:** Rarely used anymore in medical malpractice suits, impossible to assert in a misdiagnosis – patient can't authorize consent to treatment for misdiagnosis.

5. **Good Samaritan Laws:** All states (including PA & FL) have these limited immunity laws to encourage physicians to render medical care in emergency situations.

- Where no formal doctor-patient relationship exists, shields physicians from negligence actions – not gross or deliberate negligence.
  - In N.Y. (N.Y. Educ. Law § 6527)
  - In P.A. (42 Pa.C.S.A. § 8331)
  - In F.L. (FL Stat 768.13)

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MISDIAGNOSIS – The Litigation Process

E. Affirmative Defenses to Misdiagnosis: (con't)

6. **No Causal Relationship:** Between a plaintiff's injury and physician's negligence is one of the most frequently disputed elements of a malpractice lawsuit

- **Especially in cases of cancer misdiagnosis** , where defendants argue that a plaintiff's pain and suffering, or death were caused by the disease, not a mistake in diagnosis or treatment.
- **Traditionally,** courts held that a plaintiff could only recover damages if the patient could prove that their chances of survival would have been significantly higher if diagnosis (& treatment) had come earlier.
- In recent years, many jurisdictions have relaxed their standards for causation, and allow plaintiff to pursue their malpractice claim on the theory that the misdiagnosis blocked their access to *better chance of survival or recovery*.
- Defendant must counter this with an argument that minimizes the effect their delayed diagnosis or misdiagnosis had on a patient's survival.

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MISDIAGNOSIS – The Litigation Process

E. Affirmative Defenses to Misdiagnosis: (con't)

7. **Contributory & Comparative Negligence:** If patient contributes to own injuries, depending on jurisdiction, and physician can show that patient's injuries would not have occurred but for patient's own negligent act(s),

- **Pure Contributory Negligence Rule**/Defense which says that a damaged party cannot recover any damages if it is even 1% at fault (only 4 states and D.C, see e.g., *John Cowley & Bros., Inc. v. Brown*, 569 So.2d 375 (Ala. 1990)
- **Pure Comparative Fault Rule** allows a damaged party to recover even if it is 99% at fault, although the recovery is reduced by the damaged party's degree of fault. (12 states, see e.g. N.Y. C.P.L.R. § 1411 and **FL F.S.A. § 768.81(2)**)
- **Modified Comparative Fault Rule (51%)** holds each party responsible for damages in proportion to their own percentage of fault, unless plaintiff's negligence reaches a certain percentage (10 states, see e.g. Idaho Code Section 6-801)
- **Modified Comparative Fault Rule (50%)** a damaged party cannot recover if it is 51% or more at fault, but can recover if it is 50% or less at fault, and recovery reduced by degree of fault (23 states, see e.g. Ohio Rev. Code Ann. Section 2315.33 and PA P.S. Section 7102)

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MISDIAGNOSIS – The Litigation Process

E. Affirmative Defenses to Misdiagnosis: (con't)

7. **Contributory & Comparative Negligence:** Is committed by a plaintiff if you can show that they:

- Failed to fully disclose medical history, including previous surgical procedures and any known allergies
- Lied about their personal or family medical history
- Engaged in activities that aggravated the injury or medical condition
- Failed to follow the medical professional's treatment or post-operative instructions

8. **Statute of Limitations:** Every jurisdiction places time limits on when a lawsuit can be filed. In general, the statute of limitations for negligence is from 1 to 3 years depending on the jurisdiction and exceptions.

- PA is 2 years, NY is 2.5 years, **FL is 2 or 4 (even if undiscovered later) years**, OH 1 year from act 4 years from discovery
- http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-statutes-of-limitation.aspx

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MISDIAGNOSIS – The Litigation Process

E. Affirmative Defenses to Misdiagnosis: (con't)

8. **Statute of Limitations:**

- Exceptions:
  - **Rule of Discovery**: The S of L does not begin to "run" until the injury is discovered or should have reasonably been discovered – but no more than 4 years in State of Florida – except:
  - **Medical malpractice involving a minor under the age of eight**. Children might not show the symptoms of malpractice for an extended period. For this reason, a family may file an action from two years of discovery for any medical malpractice that occurred to their child while he or she is under the age of eight.
  - **Medical malpractice involving intentional fraud or concealment.** If the information given by a practice was intentionally concealed or fraudulent, a Florida medical malpractice lawsuit may be filed as long as it is before seven years from the initial date of occurrence.

http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-statutes-of-limitation.aspx

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MISDIAGNOSIS – Impact & Costs

F. Occurrence & Costs of Misdiagnosis and Medical Malpractice

- A 2010 study revealed that the cost of medical malpractice in the United States was running at about $55.6 billion a year – with an estimated $45.6 billion spent on defensive medicine practiced by physicians seeking to stay clear of lawsuits.*
- Whether a delayed diagnosis or misdiagnosis is settled or proceeds to litigation, the investment of time (years), money, and resources – by both parties – can be enormous.
- For OB/GYN, the median indemnity payment is $150,000, and the mean is $375,000.
- For psychiatry, the median indemnity payment is $60,000, and the mean is $185,000.
- Family practice, the median indemnity payment is $130,000, and the mean is $255,000.
- In Pediatrics, the median indemnity payment is $160,000, and the mean is $520,923.
- Internal medicine, the median indemnity payment is $292,000, and the mean is $311,524.
- Across specialties, an estimated 7.4 percent of physicians have a claim annually, and 1.6 percent make an indemnity payment. The mean indemnity payment is $274,887, and the median is $111,749.
- Most likely to be sued: OB/GYN (85%), Gen Surgery (83%), Ortho (79%), Radiology (72%), Anesthesiology (58%), FM/IM (46%), Oncology (34%)

*https://www.healthaffairs.org/doi/10.1377/hlthaff.2009.0807
**https://www.medscape.com/features/slideshow/public/malpractice-report-2015#page=3

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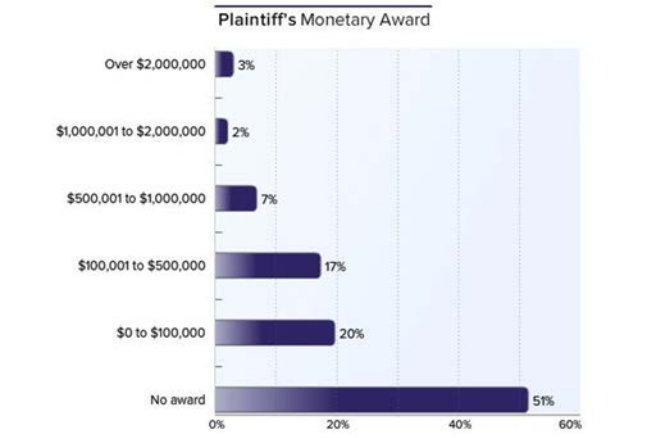
MISDIAGNOSIS – Impact & Costs

F. Occurrence & Costs of Misdiagnosis and Medical Malpractice



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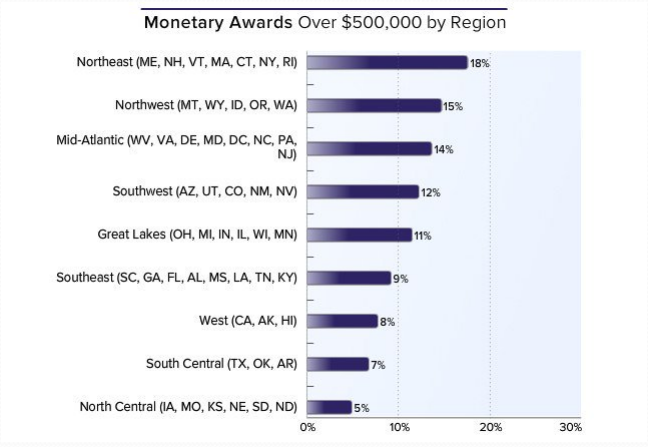
MISDIAGNOSIS – Impact & Costs

F. Occurrence & Costs of Misdiagnosis and Medical Malpractice



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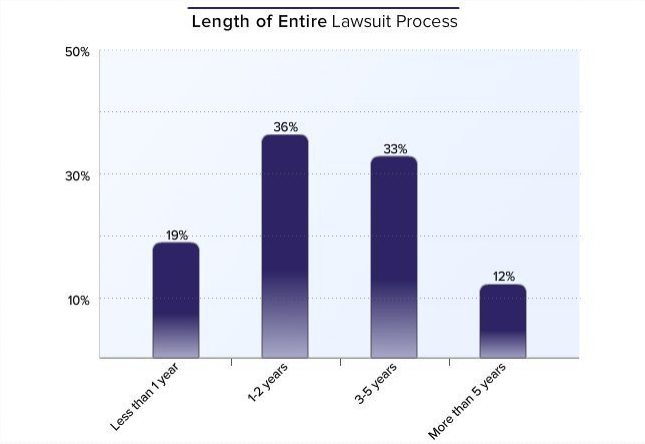
MISDIAGNOSIS – Impact & Costs

F. Occurrence & Costs of Misdiagnosis and Medical Malpractice



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MISDIAGNOSIS – Best Practices

G. "Best" Practices for Minimizing Misdiagnosis Exposure

1. Allocate sufficient time for effective communication with patients
   - A healthy physician-patient relationship is the #1 element for avoiding malpractice claims. Be courteous and ask your patients questions and listen, more so when you suspect you may be in the early stages of a misdiagnosis or difficult diagnosis.

2. Work closely with lab personnel and radiologist to interpret complex results or a difficult diagnosis.
   - Document these communications explicitly, they will assist you in refining your initial diagnosis and justify what occurred in order to defend your actions.

3. Clarify whose responsibility it is to follow up on abnormal test results
   - Having a clear assigning of duties in this area is an important factor in reducing the possibility of malpractice claims. Develop protocols that ensure participation and notification of all specialists or additional physicians involved in the patient's and to ensure all are on the same page regarding test results and effectiveness of the current diagnosis and treatment.

Becker Hospital Review, 5 Misdiagnosis Prevention Strategies for Physicians.
https://emedcert.com/blog/tip-to-avoid-malpractice-claims
http://www.discoveriesinhealthpolicy.com/2015/09/iom-report-diagnosis-misdiagnosis-are.html

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MISDIAGNOSIS – Best Practices

G. "Best" Practices for Minimizing Misdiagnosis Exposure

4. Encourage patients to engage in the diagnostic process and look at their own medical notes for inconsistencies
   - This process serves multiple fronts:
     - It helps minimize the possibility of the patient not initially offering critical information or a more accurate description of symptoms or medical history
     - Patient follow up can only improve their understanding of their medical situation which will help manage their expectations throughout the entire process and reinforce their sense that you are truly devoted to their health.

5. Keep an Open Mind – employ a strategy of Reflection. Create your own checklist for your specialty, use it. E.g., ***SAFER****:
   - *Serious diagnosis*: Have you considered all serious diagnosis?
   - *Alternative diagnosis*: Have you considered any alternatives?
   - *Feelings affect thinking*: How does the way this patient make me feel affect my thinking?
   - *Extraneous data*: Is the information you set aside/rejected/ruled out, really extraneous?
   - *Reasons*: Why did this happen?

https://www.mdedge.com/familymedicine/article/64030/sued-misdiagnosis-it-could-happen-you
*https://www.beckershospitalreview.com/quality/5-misdiagnosis-prevention-strategies-for-physicians.html

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MISDIAGNOSIS – Representative Cases

H. Representative Cases

1. **CASE 1, Missed Breast Cancer**

- 32 year old woman sought care for "sore breasts" 4 months postpartum. PC found "bilateral lumpy and tender breasts," diagnosed fibrocystic breast disease, prescribed nonsteroidal anti-inflammatory. No documented follow-up plan.
- Returned 4 months later with improvements but still soreness in left breast. PC did not perform examination, but changed her medication to different anti-inflammatory. Follow up was indicated to "return to clinic PRN".
- Next visit, restated complaint of left breast, examination revealed "spongy irregular 2 cm lump" in upper outer quadrant, diagnosed as a fibrocystic legion. Again PRN.
- Several months later, patient saw another physician for back pain and painful and enlarging breast lump. Physician suspected fibrocystic disease but was unable to obtain fluid by fine needle aspiration. Referred to surgeon, who performed needle biopsy and an excisional biopsy, which revealed breast cancer.
- Sued for failure to diagnose breast cancer.

https://www.mdedge.com/familymedicine/article/64030/sued-misdiagnosis-it-could-happen-you

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MISDIAGNOSIS – Representative Cases

H. Representative Cases

1. **CASE 1, Missed Breast Cancer (Issues & Outcome)**

- While initial diagnosis may be reasonable, a series of mistakes did occur:
- Failure to take a family history (patient's aunt and maternal grandmother had breast cancero
- Failure to document a follow-up plan (below standard of care action)
- Failure to examine breast on second visit and for another nonspecific follow up plan.

Note, failure to diagnose breast cancer is one of the leading causes of misdiagnosed lawsuits. The above list of mistakes combined with a sympathetic and young plaintiff led to settlement for a very large undisclosed amount.

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MISDIAGNOSIS – Representative Cases

H. Representative Cases

2. **CASE 2, Cardiac Arrest 2 Hours After Doctor Visit**

- Patient visited his internist and complained of mid-chest discomfort, cough and some sweating. All of his vital signs were normal, however, and he reported his discomfort was relieved by belching. Previous history of heart disease, with angioplasties and stenting, so the doctor ordered an EKG. Results of the EKG appeared normal and similar to an EKG performed the year before.
- Internist considered bronchitis, but in light of a prior diagnosis of GERD, he proscribed Prilosec and ordered a chemical stress test to be done within a month. He also called for a chest x-ray if the symptoms did not improve. Patient was sent home.
- Two hours later paramedics we called by patient, he told them he had been experiencing chest pain for one hour. While being lowered into the ambulance by the paramedics experienced severe cardiac arrhythmia and went into ventricular fibrillation arrest. He became unresponsive, lost blood pressure and stopped breathing. Transported to hospital. Additional efforts to resuscitate were unsuccessful, and pronounced dead 3.5 hours after leaving the internist's office. Later, his widow found the bottle of Prilosec with one pill missing. It was sitting next to a wrapper from a White Castle outlet.
- Survived by wife and three adult children. Estate sued for misdiagnosis. Issues???

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MISDIAGNOSIS – Representative Cases

H. Representative Cases

2. **CASE 2, Cardiac Arrest 2 Hours After Doctor Visit (Issues & Outcomes)**

- Given patient's history, standard of care required internist to refer patient to the emergency room to rule out a cardiac cause of his chest pain. Also, plaintiff's argued that patient's opportunity for survival was high as he would have been able to go to the cardiac catheterization lab before the fatal arrhythmia.
- Trial by Jury, case took approximately 5 years.
- Found in favor of the plaintiff and awarded $1.5 million, including:
  - $50k for survival pain and suffering
  - $800k to family for pain and suffering
  - $100k to son for loss of society
  - $100k to each of his daughters for loss of society

William Herring v. Wayne Blake, M.D., 09 L 249 (Cook County, Illinois), 2012.

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