MAMMOGRAPHY AND MALPRACTICE

Mammographers and Malpractice

Breast cancer claims are the largest group of malpractice suits in the United States.

44% of all claims lead to payment
5 million largest published award

Attorney’s “Truths”

- Advocates in an adversarial system
- Represents clients zealously
- Seek only facts that support their clients or positions
- Ignore or discard facts that do not

Attorney’s Perspective

- Count on Emotionalism to sell case to jury
- Must be able to prove malpractice as jury believes expert witness

- May not take case that is obviously malpractice but patient wasn’t injured that much
- Expensive to take on contingency as case could take as long as 3-5 years to reach jury and cost 35,000-200,000 to pursue. So why take it.

Juried Trials

- Difficult to convince jury that doctor should be excused for failing to find disease.
- Nothing unreasonable or overtaken
- Jury follows own beliefs not instructions for reasonable and average.
- Believes early detection would change prognosis
- Jury looks retrospectively as to what could/should have been done
- No association between negligence and payment.
- Severity of disability, not negligence = payment

Attorney Advertisements

- In cases of error, whether negligence, mammography error, or improper interpretation, the radiologist responsible, should be held accountable, and the best way to achieve this is to seek the services of . . . Medical Malpractice Lawyers.
- Contact us at ____ for a free consultation to not only receive the settlement you deserve but to also reduce the chance of others in your position from receiving a misdiagnosis.
What Drives Breast Cancer Suits?

- One theory is the public misconception about mammography and its effectiveness.
- We sell early detection saves lives and potentially prevents breast cancer.
- The public believes even a short delay in breast cancer diagnosis can be detrimental.
- More aggressive treatment and perhaps death.

Selling Early Detection

- American Cancer Society-Finding cancers in women
  - No Symptoms
  - Have not metastasized
  - Easier to treat
  - Better quality of life

Negative Media

- US Preventive Task Force Guidelines
  - Mammograms done on women between 50 and 75.
- November 2012-New England Journal of Medicine
- Danish study of 1300 patients

Breast Cancer= Physical Injury

- Patient believes in early detection thru mammography
- Prior Negative yearly exam
- Found Mass on self exam
- Abnormality diagnosed on mammogram at another site

SCOPE OF PRACTICE

RADIOLOGIC TECHNOLOGIST DEFINED BY:
AMERICAN REGISTRY OF R. T.'S
AMERICAN SOCIETY OF R. T.'S

ROLES AND RESPONSIBILITIES

Scope of practice defines what is considered to be within the competency of the profession.

Job Descriptions (employee’s wish list) are listings of what an employer expects an employee to perform. It does not have a binding effect or force on a profession or scope of practice.
Standard of Care

- Defined for the practice of mammography by MQSA
- “Reasonable” Mammographer

Standard of Care

- What a reasonable, prudent care giver knew or should have known (and done) under the same or similar circumstances.

What Is Quality?

Quality is planned and systematic actions that provide the optimum achievable care.

Or

“Getting people to do better all the worthwhile things they ought to be doing anyway.”

STANDARD OF CARE

DEGREE OF SKILL, PROFICIENCY, AND CARE ORDINARILY POSSESSED AND EMPLOYED BY MEMBERS IN GOOD STANDING WITHIN THE PROFESSION

Standards

- Peers
- Hospital policies and procedures
- Medical staff bylaws, rules and regulations
- Professional organizations
- Medical literature
- State board regulations
- JCAHO
- Community and national

Standards of Practice

- The policies, procedures and protocols established for the care of patients.
- Hospital policies and procedures
- Nursing policies and procedures
- Medical staff bylaws, rules and regulations
Standards of Performance
• What the care provider does (job description, delineation of privileges, etc.) in the care of patients.

A professional who injures a client by providing care that is below the standard for that profession commits the tort of malpractice. The law requires a professional to act based on the skill and knowledge necessary for his or her profession, rather than the typical reasonable and prudent standard applied in general negligence cases.

Four Causes of Action
• LEGAL DUTY – to keep the patient free from harm or injury.
• Breach of duty
• Proximate or direct cause
• Injury or harm occurs

Who Is Accountable
• Board of directors
• Administration
• Staff
• Volunteers

Tort – A term usually describing a group of civil wrongs.
• Torts use the “reasonable person concept”
• Torts may or may not include a criminal act

Contract –
• An agreement or promise that meets certain legal requirements
• The agreement includes competence of both or all parties
• Mutual agreement or obligation
• Giving of something of value in payment for the obligation undertaken
Medical Negligence
• Conduct that falls below established standards for the protection of others against unreasonable risk of harm
• Main theory used in medical litigation

Malpractice denotes medical negligence and liability producing acts or omissions from professional care.

Litigation & Mammography

Physician
• Houston, Texas
• Physician fined $12,000 for failure to supervise a mammographer
• Tech did not perform QC testing
• Physician prohibited from performing mammography for five years

Technologist
• August 1999 – Macon, Georgia
• Tech convicted of healthcare & Medicare fraud
• Falsified QC records
• Admitted falsifying records
• Three years probation and $1000 fine
• Can no longer work in the medical profession

Litigation & Mammography: Technologist
• September 1998 – St. Louis, Missouri
• Certified technologist convicted of a felony
• False statements in an application for re-accreditation of her facilities mammography equipment
• Imaging company she worked for was indicated but charges were dropped
• Technologist was sentenced to two years probation and fined $1000 in a plea bargained agreement

Mammography Facility is Fined $125,000
A Chicago mammography facility and its owner have been punished by the Food and Drug Administration (FDA) for violation of the Mammography Quality Standards Act (MQSA). The incident marked the first time that a mammography facility was fined under MQSA. According to the FDA, the facility performed mammograms examinations without proper certification and produced images of poor quality. As part of its settlement with the FDA, Civil and the facility’s president were fined $25,000, while the supervising radiologist was fined $5,000. Also, Civil and the facility’s president have agreed not to operate a mammography facility for five years.
2011-Ohio Supreme Court
- Woman sought compensation for damages related to emotional distress
- Radiologist allegedly failed to detect breast cancer that was visible on a mammogram
- Plaintiff stated she had undergone mammography every year starting in 1997. In 2003 a radiologist failed to detect cancerous mass that had been there for years.
- Plaintiff was in remission and still sought damages because of the mental anguish she suffered from invasive surgery, chemotherapy, and radiation.

Ohio Supreme Court
- Plaintiff discovered lump on self examination. She would not have undergone the trauma had the mass been found earlier on mammography
- Case originally dismissed on grounds that existing cancer had never before been considered physical injury
- Ohio’s 9th District Court of Appeals reversed the ruling stating that the spread of cancer was indeed a physical injury and the plaintiff’s fear of recurrence constituted emotional injury.

Ohio Supreme Court
- This case was the first in which emotional turmoil related to cancer was considered an injury.
- The ruling also clarified that the growth of breast cancer—meaning the destruction of healthy cells and increased growth of cancerous cells—is considered a physical injury not just a physical change.

4.5 Million Settlement
- Settlement for plaintiff and a charge of medical malpractice against the interpreting radiologist
- 45 year old woman underwent screening mammography which was interpreted by the radiologist as normal
- Eleven months later the woman returned to the same facility for follow up
- At this time a lesion in her right breast suggestive of carcinoma was found.

Settlement
- Surgery confirmed invasive ductal carcinoma and the patient underwent mastectomy and chemotherapy
- Two years later, she filed a medical malpractice lawsuit against her physician, the radiologist and the radiology facility
- The woman claimed that the defendants caused an 11 month delay in her diagnosis, during which the cancer metastasized and gravely impaired her chance of survival

Settlement
- An expert radiology witness for the plaintiff testified that the defendant radiologist breached the standard of care by missing a suspicious lesion on screening mammography; however, cross examination found the witness for the plaintiff was no longer practicing radiology and had not actively interpreted mammograms for approximately 11 years.
- Conversely, a witness for the defense—a nationally recognized researcher and teacher whose practice actively performed mammography—supported the defendant’s interpretation of the mammograms stating that like the defendant, he also was unable to see the abnormality in the initial mammograms.
Settlement

- Even with that comparison, the jury ruled in favor of the plaintiff.
- Possibly because she was by that time terminally ill.
- The jury awarded her $4.5 million and found the radiologist guilty of medical malpractice.

Georgia 2014

- Small 45 bed hospital. Technologist felt overworked and overwhelmed.
- At least 10 patients had breast cancer diagnosis and or other breast abnormalities.
- The case has led to 33 civil cases.
- At least two women have died.
- A third woman has filed a wrong death lawsuit in relationship to the case.

Public Perception of Mammography

- Public perception is that even a short delay in breast cancer detection is detrimental.
- Luminaries blame government agencies, judicial systems, and the media.
- Public health initiatives urge women to get screened early to detect breast cancer at its earliest stages.
- Media has sensationalized mammography’s purpose and ability to save lives.
- Medical and medical societies have added to the awareness and perception of early screening.

Three Personal Stories

- Mammography technologist in mid Missouri.
- Pam as an expert witness.
- Technologist friend sued as part of the lawsuit.
- Recommendations for known QC issues-MQSA.

Georgia 2014

- Radiologic technologist in Georgia was found guilty and sentenced to at least 5 months in jail and 10 years probation.
- Found guilty of 1 count of felony computer forgery and 10 counts of misdemeanor reckless conduct.
- Technologist had processed hundreds of mammograms without them being read by a radiologist.
- Technologist accused of entering a negative result for 1289 mammograms.

Roles and Responsibilities

- Proof of Professional/Medical Negligence:
  - Expert proof of Standard of Care
  - Non Expert proof of Standard of Care
  - Res Ipsa Loquitar: “The thing speaks for itself”
Components Required to Prove Medical Negligence

- Duty
- Breach of duty
- Proximate cause
- Damages

Clearly, women have an unrealistic attitude about the efficacy of the mammogram as a diagnostic tool for detecting breast cancer.

Patients are less likely to sue if they are treated well and perceive their care as professional.

Most Common Claim Categories

- Failure to diagnose: 81%
- Failure to properly treat: 10%
- Failure to communicate: 7%
- Other claims: 28%

Failure to Diagnose

- Failure to read mammogram correctly: 18%
- Failure to refer for 2nd opinion: 10%
- Failure to read path slides correctly: 5%

Legal Cases Involving Mammography

Radiologist

- Most prevalent & 2nd most expensive condition resulting in claims against physician is malignant neoplasm of the breast
- 80% of lawsuits filed in radiography involve some aspect of mammography
Litigation & Mammography
Roles and Responsibilities

Failure to Communicate

50% of claims regarding communication were failure to communicate abnormal results to the referring physician or patient.

Significant factors in changes incorporated in MQSA final rules

Communication of results is the responsibility of the facility

For the radiographer’s involvement in lawsuits that focus on the radiographic services provided, when all is said and done, it is the radiographs that are irrefutable evidence.

Litigation & Mammography
Summary of Results

- Radiologists have significant liability
- Increased involvement in breast cancer litigation
- Upward trend in the number of cases of failure to interpret correctly
- Radiologists pay greater compensation amounts than other physicians
- Data indicates radiologists fare better in settlement than going to a jury trial

The quality of imaging is ultimately produced by the mammographer, not the ACR, the state, the federal government, or the radiologist. A mammographer’s attention to continuing education, detail, and attitude will make a critical difference in the detection of pathology.

Chronology of A Law Suit

- Complaint filed in Clerk of Courts Office.
- Answer file in Clerk of Courts Office.
- Counter claim
- Cross claim
Discovery
• Interrogatories
• Depositions
• Subpoena
• Physical evidence
• Documentary evidence; nursing policy and procedure manual; medical staff bylaws, rules and regulations.
• Pretrial

Samples of Lawsuits
• A radiologist faces malpractice suit after allegedly misreading mammograms and x-rays
• Breast cancer delayed diagnosis, cost mother her life, millions of dollars settlement
• Court order of 4.2 million dollar compensation for breast cancer missed diagnosis
• Erroneous pathology tests lead to malpractice suit
• Gay woman sues hospital for partner’s misdiagnosis of breast cancer
• Negligent general physician sued over breast cancer diagnosis

Trial
• Jury selection
• Opening statements
• Plaintiff’s case in chief
• Defendant’s case in chief
• Motions
• Closing statement
• Jury instructions
• Verdict
• Appeals

Samples of Lawsuits
• Woman dies after she was told she was too young to have breast cancer
• Woman dies from cancer after advice from an alternative medicine practitioner
• Woman to receive compensation after gross misdiagnosis leads to unnecessary surgery

Legal Issues in Documentation
Misdiagnosis of breast cancer is the number one reason why radiologists are sued for malpractice. And, though the overall rate for malpractice suits is holding steady, the severity of the awards is increasing.
Documentation: Detrimental Aspects

- On of the most detrimental aspects to the defense of a malpractice case is when the charting is inadequate. This often occurs in the context of the following:
  - Failure to record observations and follow through steps particularly when patient vitals signs are abnormal.

Documentation; Do’s and Don'ts

- Do
  - Be accurate; all entries should be neat, legible and in ink.
  - Remember the medical record is a LEGAL RECORD.
  - Remember that people believe what they see in writing; therefore, good documentation will bolster your defense.

- Don’t
  - EVER obliterate anything in a medical record. Cross over words with a single line so that they are still readable. Initial the error and make the correction in the next available space on the record.
  - Use cuteness or humor. The jury will not understand your emotional involvement; but will see a lack of professionalism and lack of care and concern.

Do’s continued

- Remember that the patient’s case is based on the record – So, how does the record look?
  - Remember that the medical record is your way of proving you met the STANDARD OF CARE.
  - Remember that good record keeping helps prevent lawsuits.

Don’t continued

- Leave blank spaces or skip lines. Draw a line through the empty space at the end of an entry.
- Squeeze extra words in a margin or on a line.
- Remove anything or insert anything after the fact in the medical record UNLESS it is being done to aid the patient’s medical history.
Take-Aways

• Diligent record keeping
  o Quality control
  o History sheets
  o Patient records
• Positioning-If you don’t get it on the detector, the radiologist can’t read it
• Relationship with radiologist-Interaction
• Relationship with physicist
• You are more than “just” a mammography technologist

Thank you
Peggy Hoosier
AHEC
For your help with this presentation