

# MAMMOGRAPHY AND MALPRACTICE

## 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

## 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 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.

## 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.**

## Juried Trials

- Difficult to convince jury that doctor should be excused for failing to find disease.
  - ? what is reasonable and average expectation of skill and care.
- 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

## 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

## SCOPE OF PRACTICE

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

## 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

## 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



Roles and Responsibilities

### Theories of Malpractice

**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



## Who Is Accountable

- Board of directors
- Administration
- Staff
- Volunteers



Roles and Responsibilities


### Theories of Malpractice

**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




**R**oles and Responsibilities



**Medical Negligence**

- Conduct that falls below established standards for the protection of others against unreasonable risk of harm
- Main theory used in medical litigation


**R**oles and Responsibilities



**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

**R**oles and Responsibilities



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

**R**oles and Responsibilities



**Litigation & Mammography 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

**Mammography Facility Is Fined \$25,000**


A Chicago mammography facility and its owner have been punished by the Food and Drug Administration (FDA) for violations 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 mammogram examinations without proper certification and produced images of poor quality. As part of its settlement with the FDA, CMI and the facility's president were fined \$25,000 while the supervising radiologist was fined \$5,000.

Also, CMI and the facility's president have agreed not to operate a mammography facility for five years.

- from Advance reports, September 28, 1998

**R**oles and Responsibilities



**Litigation & Mammography: Technologist**


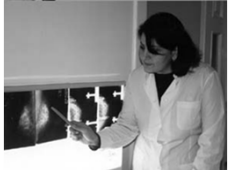
- September 1998 – St. Louis, Missouri
- Certified technologist convicted of a felony
- False statements in an application for re-accreditation of her facilities mammography equipment
- Imaging company she worked for was indicated but charges were dropped
- Technologist was sentenced to two years probation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

## 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

**CONFIDENT**




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




**Roles and Responsibilities**


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**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" 



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

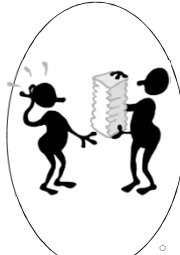



**Roles and Responsibilities**

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**Components Required to Prove Medical Negligence**

- Duty
- Breach of duty
- Proximate cause
- Damages






**Litigation & Mammography**

*Physician Insurance Association of America Report*

Most Common Claim Categories

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

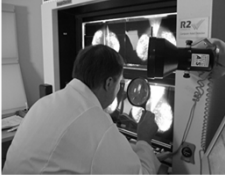


**Litigation & Mammography**  
*Physician Insurance Association of America Report*

**Roles and Responsibilities**

**Failure to Diagnose**

- Failure to read mammogram correctly 18%
- Failure to refer for 2<sup>nd</sup> opinion 10%
- Failure to read path slides correctly 5%



**Litigation & Mammography**

**Roles and Responsibilities**

**Summary of Results**



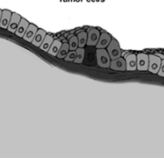
- Radiologists have significant liability
- Increased involvement in breast cancer litigation
- Upward trend in the number of cases of failure to interpret correctly
- Radiologists pay greater compensation amounts than other physicians
- Data indicates radiologists fare better in settlement than going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

**Roles and Responsibilities**

**Litigation & Mammography**

**Legal Cases Involving Mammography Radiologist**

- Most prevalent & 2<sup>nd</sup> 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

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.

**Litigation & Mammography**




**Roles and Responsibilities**

**Failure to Communicate**

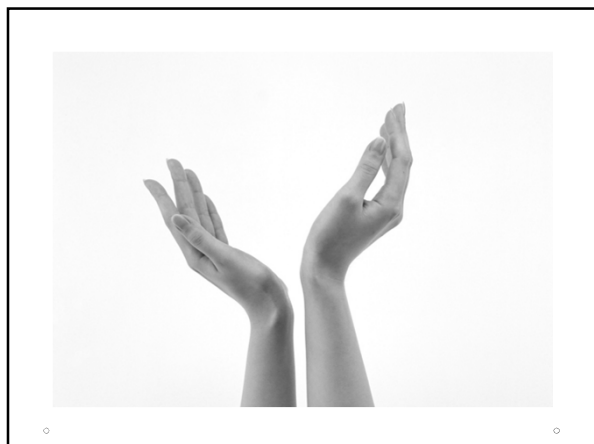
50% of claims regarding communication were failure to communicate abnormal results to the referring physician or patient.

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.



## Trial

- Jury selection
- Opening statements
- Plaintiff's case in chief
- Defendant's case in chief
- Motions
- Closing statement
- Jury instructions
- Verdict
- Appeals



## Chronology of A Law Suit

- Complaint filed in Clerk of Courts Office.
- Answer file in Clerk of Courts Office.  
counter claim
- Cross claim



*"Fetch me the law for the rich, will you?"*

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.

## 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



## 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

## 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.

## Legal Issues in Documentation



Charting "do's and don't"  
Anatomy of a lawsuit  
The cause of legal action

## 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.

## Documentation: Detrimental Aspects

- One 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 vital signs are abnormal.



## Do's continued

- **DATE, TIME AND SIGN** each entry and each page.
- Use supplemental page or an addendum if necessary to record missed notes and indicate it a late entry.



## 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.

## Thank you Peggy Hoosier AHEC

For your help with this presentation

## 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
  - Quality control
  - History sheets
  - 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