CHOICE

# **Medical Professional Liability**

PEACE OF MIND

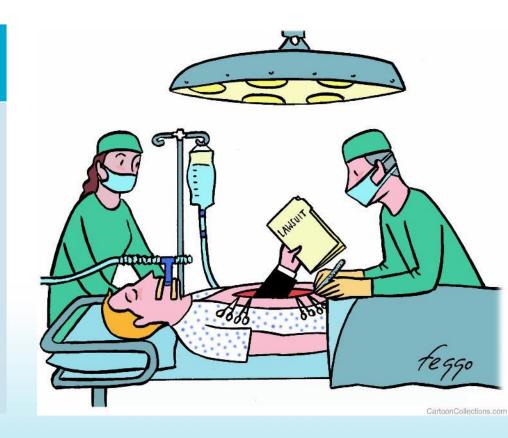
Yesterday, Today, and Tomorrow

Graham Billingham, MD, FACEP, FAAEM Chief Medical Officer, MedPro Group

# Objectives

### This program will discuss:

- The origins of medical professional liability (MPL)
- The components of the MPL system
- Malpractice claims trends and analysis
- Emerging trends and future challenges
- Strategies for managing risks





# MPL through the ages

A riveting trip from ancient Babylonia to modern times

# **○** "An eye for an eye" — Hammurabi's Code



The Babylonian code consists of 282 laws and was developed during the reign of Hammurabi (1792-1750 B.C.).

Principle of *Lex Talionis* — the law of retaliation.

One section mentions repercussions for medical mistakes, saying the doctor should be punished if harm is done to the patient.



If the doctor has treated a gentlemen with a lancet of bronze and has caused the gentleman to die, or has opened an abscess of the eye for a gentleman with a bronze lancet, and has caused the loss of the gentleman's eye, one shall cut off his hands."

Hammurabi's Code

# Hippocrates

○ The father of western medicine (460-370 B.C.).

• The original Hippocratic Oath was written in Ionic Greek, between the fifth and third centuries B.C.

 Includes ethical concepts of medical confidentiality and non-maleficence

• "I will abstain from all intentional wrong-doing and harm . . ."

• In ancient times, the punishment for breaking the Hippocratic Oath could range from a penalty to losing the right to practice medicine.



"First, do no harm. After that, go nuts."

### Stratton v. Swanlond

The case, which occurred in 1374, is referred to as the "fourteenth-century ancestor" of medical malpractice law.

Chief Justice John Cavendish presided over the case.

Agnes of Stratton and her husband sued surgeon John Swanlond for breach of contract.

Swanlond had guaranteed to repair Agnes of Stratton's severely mangled hand.

The case established law for setting certain standards of medical care.

Cavendish ruled that a physician could be held liable if and when he harmed a patient as a result of negligence. "However, if the physician diligently applied himself, liability would not ensue even if he did not succeed in effectuating a cure."

The case ultimately was dismissed due to an error in the writ of complaint.



# The precursor to expert testimony

Under the reign of Holy Roman Emperor Charles V, a law was passed in 1532 requiring the opinion of medical men to be taken in cases of violent death.

This law helped establish the concept of an expert witness testifying in relation to the standard of care.



# • Everad v. Hopkins

The case occurred in 1615, and is one of the earliest documented malpractice cases.

The case took place in the Court of British Common Law.

Sir Edward Coke decided an action against a physician for negligence.

Physician was hired to treat an ill servant whose conditioned worsened.

The contract was between the employer and the physician.

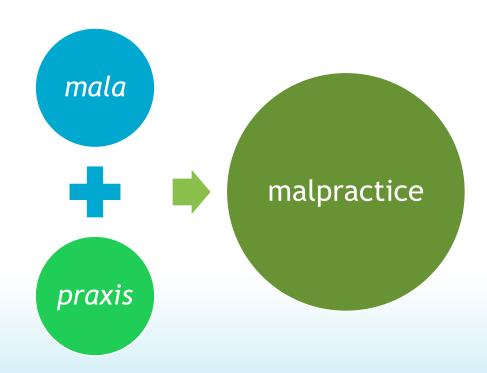
The patient had no contract with the physician.

However the court allowed both the servant and the employer to collect damages against the physician for practicing "unwholesome medicine."



# Mala praxis

- In 1768, Sir William
  Blackstone used the Latin
  term *mala praxis* to describe
  the concept of professional
  negligence (i.e., tort).
- Blackstone noted that mala praxis "breaks the trust which the party had placed in his physician, and tends to the patient's destruction."



## • Cross v. Guthery

The first recorded malpractice case in the United States; it occurred in 1794.

The plaintiff claimed a doctor promised to do an operation skillfully and safely.

The plaintiff's wife died as a result of the operation.

The case centered around a breach of contract and not failure to adhere to a standard of care.

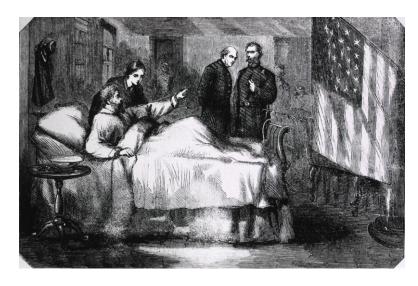
The defendant physician made some sort of express promise to skillfully render care and obtain a good result.

Failure to do so was grounds for the suit.

This breach of contract case resulted in a plaintiff verdict and an award of £40.

# Malpractice surge

- Large number of malpractice lawsuits filed against physicians from 1840 through 1860.
- The surge in malpractice claims spread from state to state (Western New York, Pennsylvania, Ohio, Vermont, New Hampshire, and Massachusetts).
- Appellate court decisions increased 950% during the time period.



- Civil War era documents reference instances of surgeons refusing to perform certain procedures because of lawsuit concerns.
- The American Medical Association (AMA) was founded in 1847. AMA set uniform standards for medical education and training, as well as the world's first national code for ethical medical practice.

### State medical societies



Injury or death caused by the mistake, inadvertence or error of a physician, is, so far as concerns the patient, an accident, and a policy issued to physicians insuring them against loss from common law or statutory liability for damage on account of bodily injuries, fatal or non-fatal, suffered by any person or persons in consequence of any alleged error or mistake made by the physician to whom such policy is issued, is insurance against loss or damage on account of 'bodily injury or death by accident' with the meaning of clause 5 of St. 1894, c. 522, § 29, and therefore is legal.

— Hosea M. Knowlton, Attorney-General of Massachusetts, July 10, 1901



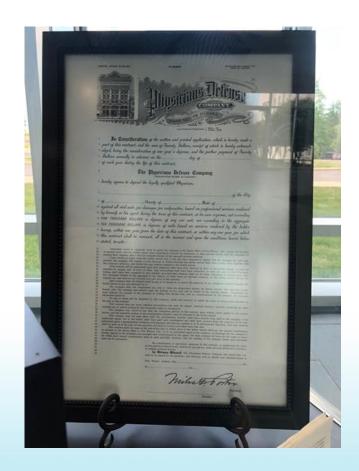
# MedPro Group history

Drs. Alpheus Buchman and Miles Porter formed the Physicians' Guarantee Company in 1899, which later becomes the Physicians' Defense Company (PDC).

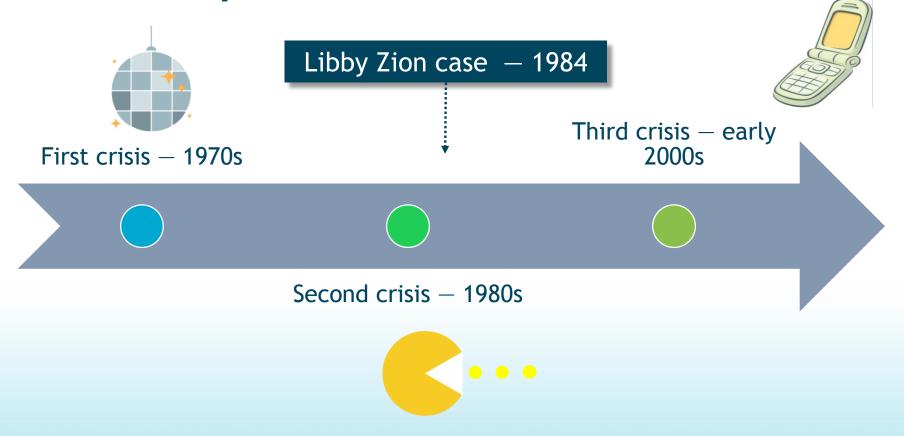
The company offers prepaid legal defense-only services for medical malpractice lawsuits.

Byron Somers and Charles Niezer leave PDC and form The Medical Protective Company in 1907.

Medical Protective expands coverage to include indemnity coverage in 1910, and offers medical professional liability insurance policies with limits of \$5,000/\$15,000 for \$15 a year.

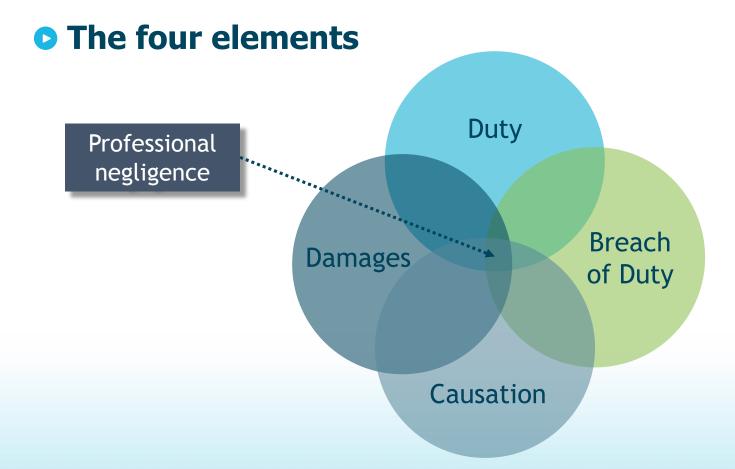


# Medical malpractice crises





Components of medical malpractice



# The four questions



### **Duty**

Did you establish a professional relationship with the patient?



# Breach of duty

Did you violate the standard of care?



#### **Causation**

Did your actions, or failure to act, cause an injury?



### **Damages**

Were there damages as a result of the injury?

Would a reasonably prudent physician confronting similar circumstances act in a similar fashion?

Damages can be both economic loss and noneconomic loss, such as pain and suffering.

# Litigation concepts

Summons and complaint

Period of discovery

Privilege

**Plaintiffs** 

**Defendants** 

Negligence



Burden of proof

**Expert witness** 

**Arbitration** 

Mediation

Statute of limitations

### Jurisdiction

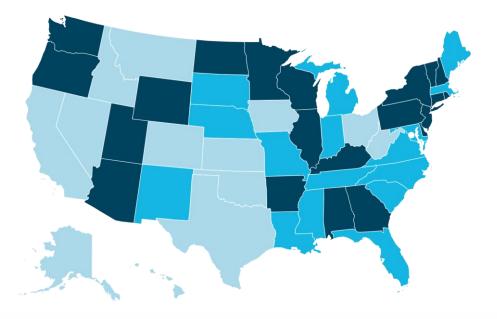
#### **Problematic Areas**

- California
- Florida
- New York City
- St. Louis, Missouri
- Louisiana
- Philadelphia Court of Common Pleas
- New Jersey Legislature
- Madison and St. Clair Counties, Illinois
- Twin Cities, Minnesota



### Tort reform

- Limits on noneconomic damages
- Evidence of collateral source payments permitted
- Limits on attorney contingency fees
- Advance notice of a claim
- Statute of limitations
- Periodic payments of future damages
- Alternative dispute resolutions
- Good Samaritan provision
- Limitations on joint and several liability
- Expert affidavits



- No damages caps
- Damages caps \$500,000+
- Damages caps less than \$500,00

### Tort reform: costs vs. claims

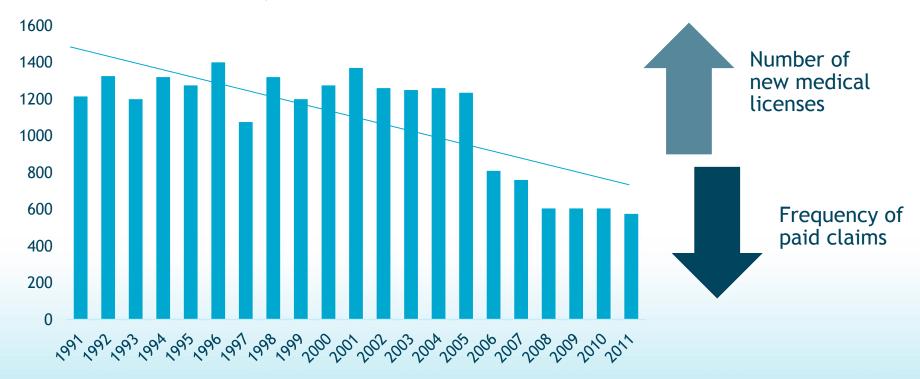


States with robust damage caps were slightly more likely to have lower percapita medical malpractice costs, but roughly one-third still had above average costs.

Tort reform laws had no real effect on the likelihood of a doctor being sued. In some cases, states with the most robust tort reform laws had the most paid medical malpractice claims.

# Texas effect: impact of tort reform

Total Number of Paid Claims by Year

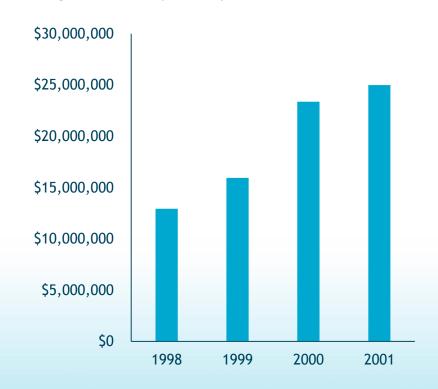


# Oregon effect: loss of tort reform

Oregon: National Practitioner Databank Closed Claims by Year



#### Oregon: Indemnity Paid by Year



# Nontraditional approaches to liability reform

Communication and resolution programs (CRPs)

Mandatory pre-suit notification laws

Apology laws

State-facilitated dispute resolution laws

Safe harbors for adherence to practice guidelines

Judge-directed compensation

Administrative compensation (Sweden and New Zealand created health courts with a no-fault system)

### Apology laws vs. communication and resolution programs

#### Apology Laws

- Legal statutes that encourage healthcare providers to acknowledge and disclose medical errors openly
- Intended to protect certain statements, expressions of sympathy, and other evidence from being admissible in malpractice litigation
- Differ from state to state in the types of information and statements covered

**CRPs** 

- Encourage open communication and transparency with patients and their families
- Facilitate restitution for injured parties when appropriate
- Support physicians in disclosure conversations with patients



" Do you have a card that stops short of saying ' I'm sorry ' yet vaguely hints at some wrongdoing?"

## Apology laws vs. communication and resolution programs



Apology laws could lead to either increases or decreases in overall medical malpractice liability risk. Despite apology laws' status as one of the most widespread tort reforms in the country, there is little evidence that they achieve their goal of reducing litigation."

Why apologies might not reduce liability risk, but CRPs could be successful:

• "The answer almost certainly lies in training. When physicians receive training on how and when to apologize, and when that apology happens in the context of other disclosure programs, and in a setting where other services are being provided to injured plaintiffs, it is understandable why that would work better."

### Defensive medicine is the norm

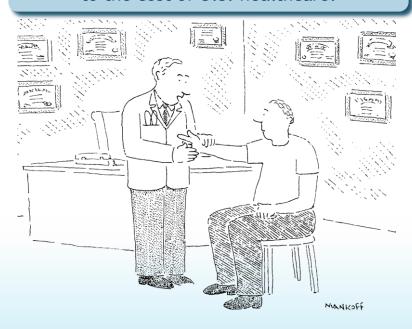
73% of all physicians practice defensively.

93% of high-risk specialist physicians reported practicing defensive medicine.

Defensive practices (assurance and avoidance behaviors)

- Order more tests
- Admit more frequently
- Refer to consultants
- Perform unneeded procedures
- Prescribe unnecessary medications
- Avoid high-risk patients and procedures
- Restrict practice

Defensive medicine adds about \$45 billion to the cost of U.S. healthcare.



"Well, Bob, it looks like a paper cut, but just to be sure let's do lots of tests."

# ▶ Largest malpractice verdict in U.S. history — 2019

#### The case

"When a pregnant Erica Byrom arrived at Johns Hopkins Bayview Medical Center nearly five years ago, doctors had alarming news. The 16-year-old mother had dangerously high blood pressure from preeclampsia and said doctors told her that her baby would die or suffer brain damage. Facing that prognosis — which Byrom's attorneys would later call mistaken — the teen decided to forgo a cesarean section, resulting in lasting brain injuries to her daughter."

Settlement

- \$229.6 million
- State laws to cap malpractice verdicts will likely reduce the amount to just over \$200 million

# Celebrity malpractice in the media

Michael Julie Dana Carvey Tiger Woods Joan Rivers Jackson **Andrews** Geraldo Andy Warhol Ed McMahon Elvis Presley **Dennis Quaid** Rivera Hulk Hogan John Ritter

# The worse things about being sued

- Feeling helpless while being lied to
- Implication of incompetence
- Practice disruption
- Being judged by non-peers
- Jurors ignorant about medicine
- Self-doubt
- Exposure and humiliation
- Loneliness and isolation
- Negative effect on marriage and family
- Don't trust patients anymore

- Higher rates of suicide, burnout, divorce and substance abuse
- "I was mentally prepared for a guilty verdict, but when they said it, it was like someone had sucked the soul out of my heart," Dr. Melton said.
- Surviving a lawsuit is akin to overcoming a death, said Dr. Firestone, the California psychiatrist and attorney. Doctors go through phases of denial, grief and acceptance. "[The impact] varies from individual from individual, but it could last a lifetime," he said.



# Malpractice trends

# In the classifieds: buy a poodle and find an attorney

### THE UNION D5

#### Pets For Sale 6160



Bullmastiff puppies, champ bloodline, ckc, big & wrinkly, 5males, 3femready to go 8/8/2007-\$800 530-852-2076 or 530-265-6257



#### Pets For Sale 6160



Mini Rat Terriers 5 girls, first shots, papered, mom in home. \$400 530-292-3065

### **POODLES**

Toy puppies, black females, real cute. \$500. 530-589-9743

Queensland Healers Blue & Red. \$250 530-268-2786 evenings

# Merchandise

#### Misc. Wanted 7000

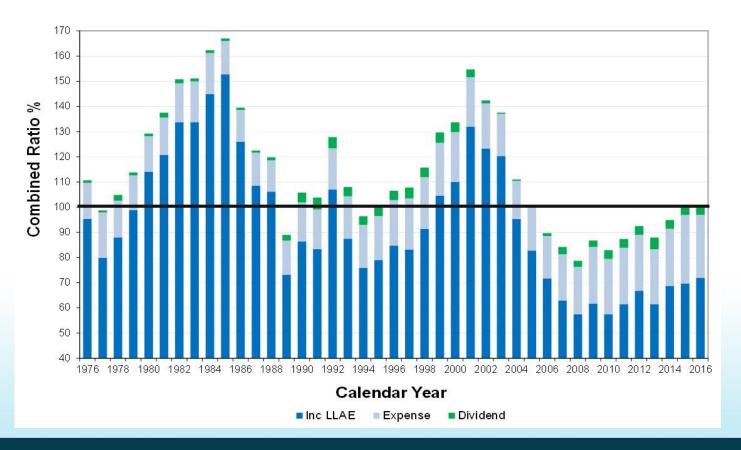
#### **BUYING COINS**

& Currency Collections. Gold-Silver Dollars. Rare Coins. Appraisals. Beryl Robinson - Nevada City 530-477-2255

### WANTED

Aggressive attorney to take a case on a contingency basis against a local health care provider for excessive pain & suffering due to negligent treatment. 263-1615

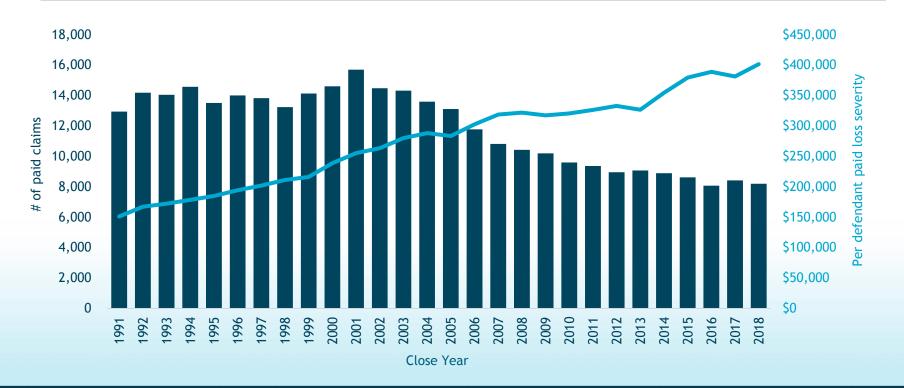
# U.S. healthcare liability industry





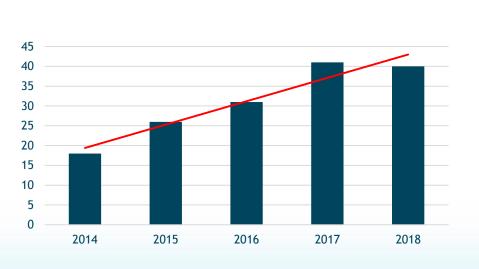
### Number of claims vs. loss severity

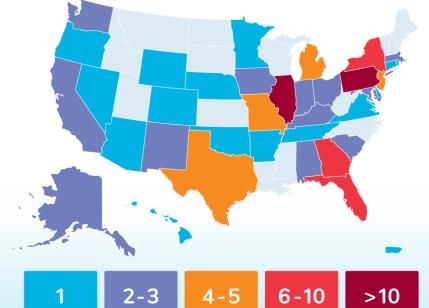
#### Will declining frequency come to end while increasing severity continues?



### An increasing number of "shock verdicts" (down slightly in 2018)

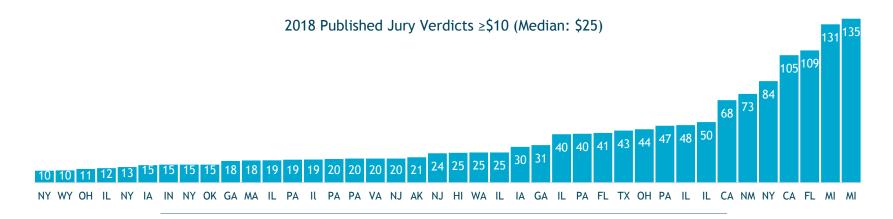
### **Number of verdicts >\$10 million**

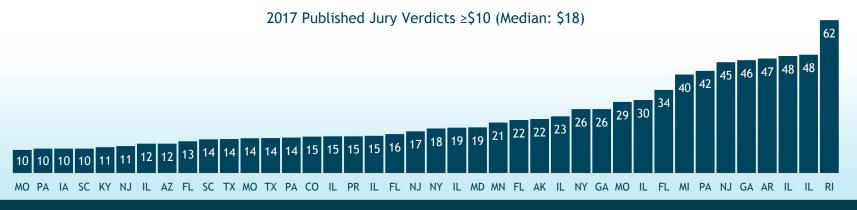




VERDICTS

# Verdicts across multiple jurisdictions



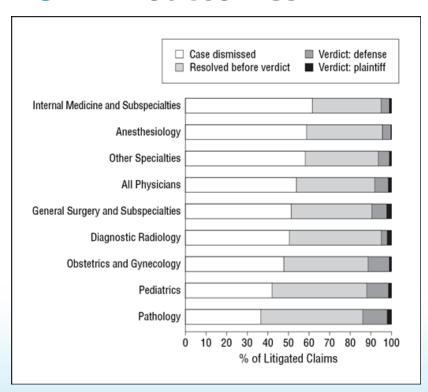


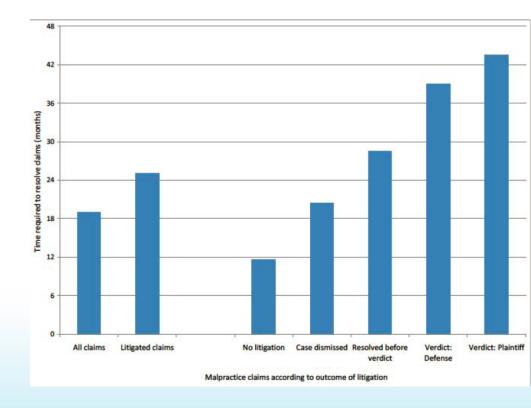
## Top 15 specialties by average indemnity 2006-2015

#### **AVERAGE INDEMNITY BY SPECIALTY (2006-2015)** Neurosurgery Neurosurgery \$454,989 \$443,956 Neurology - nonsurgical \$437,781 Ob/Gyn Surgery Neurology Pediatrics \$399.929 Anesthesiology \$370,199 Radiology \$364.106 Radiation Therapy \$357,731 Internal Medicine \$354.831 Pathology \$345,521 Cardiovascular and Thoracic Surgery \$340,386 **Pediatrics Emergency Medicine** \$336,413 Gastroenterology \$336,182 All Heathcare Specialties \$335,578 Urologic Surgery \$334,299 Other Nonsurgical Specialties \$332,884 General Surgery \$330,264



### MPL outcomes





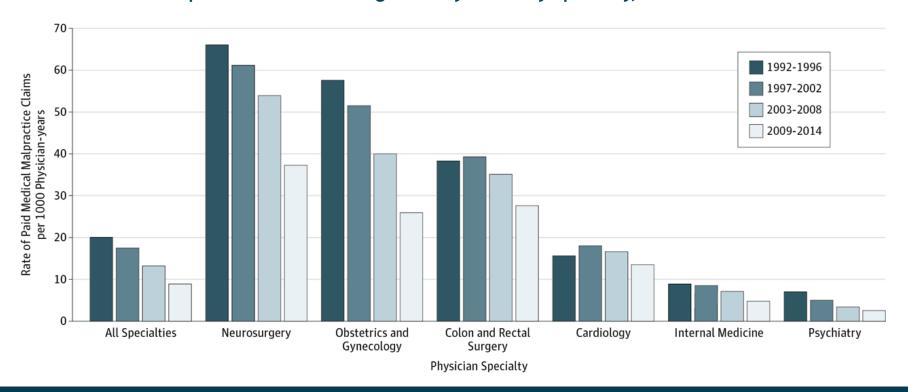
### 2019 Medical Malpractice Payout Report

- Payouts increased by 2.91%
- o Total: \$4,031,987,700
- Total amount of payouts decreased from 16,500 to 11,584 (2004-18)
- Ave. payout \$348,065
- Oklahoma ranked 29th
  - Total 148
  - \$33,137,750 paid out
  - Decreased 1%
  - Ave payout \$223,904
  - \$8.04 per capita

- 96.5% settled; 3.5% verdict
- Cause: 34% diagnosis, 21% surgery, 21% treatment, 10% OB
- Outcome: 30% death, 19% major permanent, 18% significant permanent
- Location: 40% outpatient, 44% inpt.
- Gender: 56% female, 46% male
- Age: peak 50-59

## Specialty-specific frequency

Rates of Paid Malpractice Claims Among U.S. Physicians by Specialty, 1992-2014



### The new math

The rate of paid claims for all physicians decreased by 55.7% (lowest decrease = cardiology; highest decrease = pediatrics).

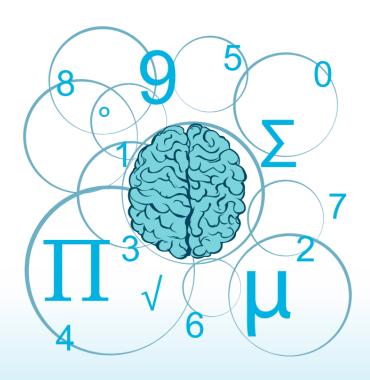
The mean compensation payment was \$329,565.

The mean payment increased by 23.3%.

7.6% of paid claims exceeded \$1 million.

32.1% of paid claims involved a patient death.

Diagnostic error was the most common type of allegation, present in 31.8% of paid claims. This allegation was lowest in anesthesiology claims (3.5%) and highest in pathology claims (87.0%).



## CRICO 2019 benchmarking report: key findings

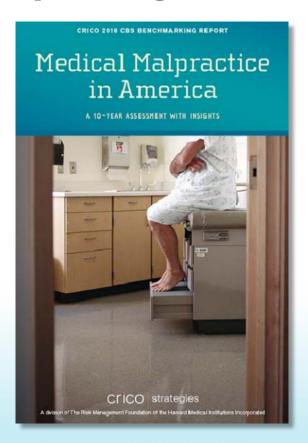
A 27% drop in the frequency of malpractice claims.

For OB/GYN, the risk of a claim or suit has dropped 44%.

Average expenses increased 3.5% annually to \$46,000 per case by 2016, outpacing both consumer and legal inflation indices.

The volume of high-indemnity payments of (\$3M-11M) increased 7% annually.

A medical malpractice case challenging a clinician's judgment is 2.8 times more likely to close with payment than a case without clinical judgment issues.



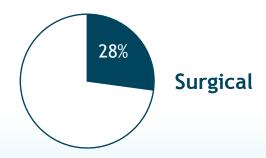
## CRICO 2019 benchmarking report: key findings

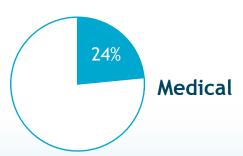
Surgical cases are most prevalent.

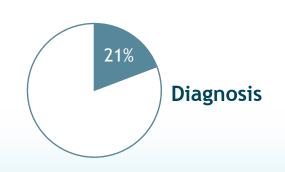
Diagnosis cases are most costly.

Medical treatment allegations are becoming more common.

Clinical judgment is the key risk factor during patient assessment and follow-up.

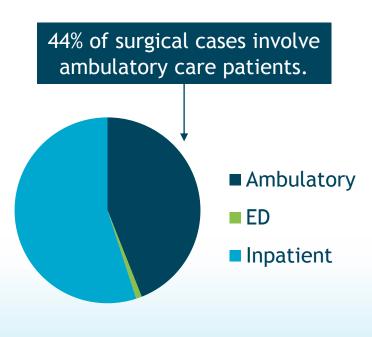


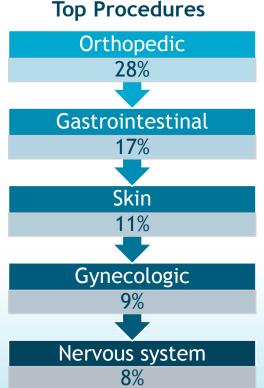


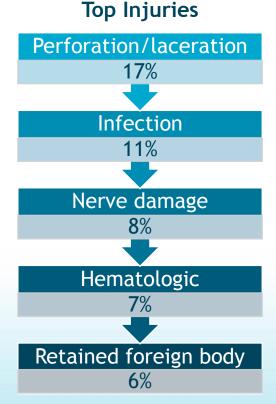


73% of all allegations

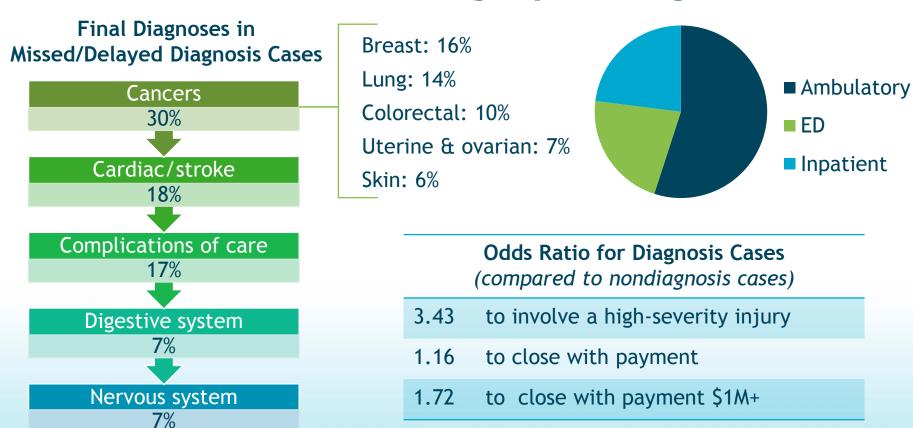
### CRICO 2019 benchmarking report: surgical cases







# CRICO 2019 benchmarking report: diagnosis cases



## CRICO 2019 benchmarking report: clinical judgment

#### PHASE 1

### INITIAL DIAGNOSTIC ASSESSMENT

68% OF CASES, 79% OF LOSSES

#### PHASE 2

### TESTING AND RESULTS PROCESSING

32% OF CASES, 38% OF LOSSES

#### PHASE 3

### FOLLOW UP AND COORDINATION

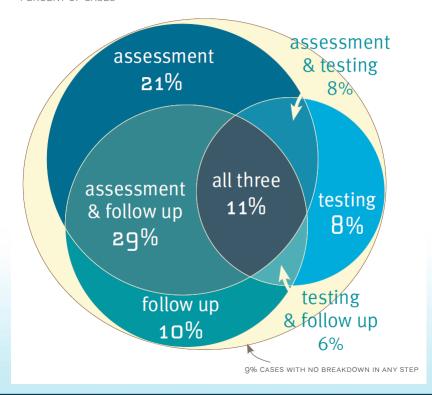
54% OF CASES, 61% OF LOSSES

### BREAKDOWNS IN ALL THREE PHASES

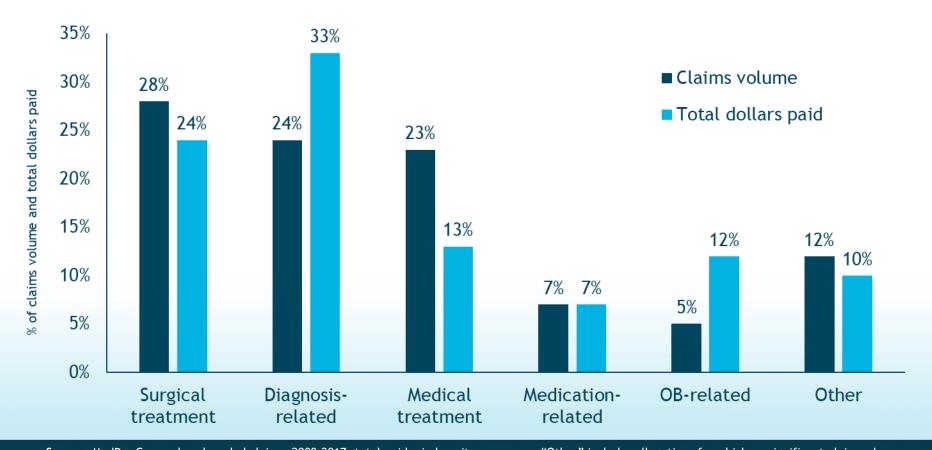
ODDS RATIOS compared to no phase failures	HIGH-SEVERITY INJURY <sup>4</sup>	CLOSING WITH PAYMENT <sup>5</sup>
breakdown in one phase	1.99	4.32
breakdown in any two phases	3.42	7.26
breakdown in all three phases	5.13	9.33

#### OVERLAP OF ERRORS IN INDIVIDUAL CASES

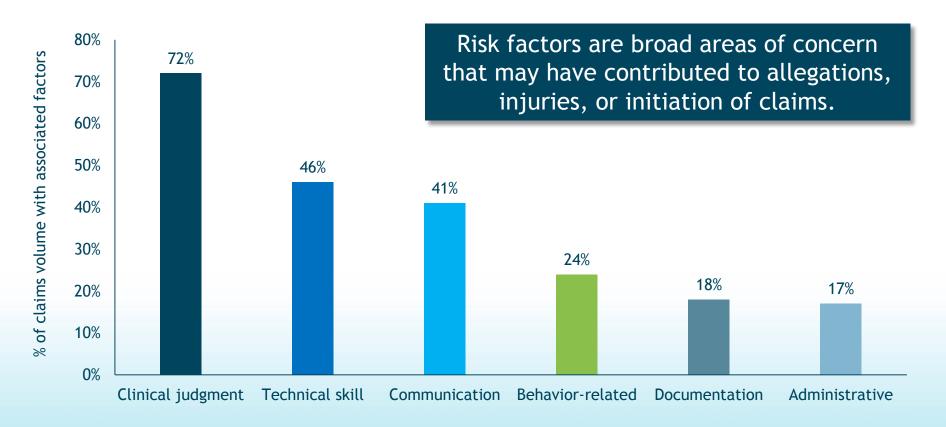
PERCENT OF CASES\*



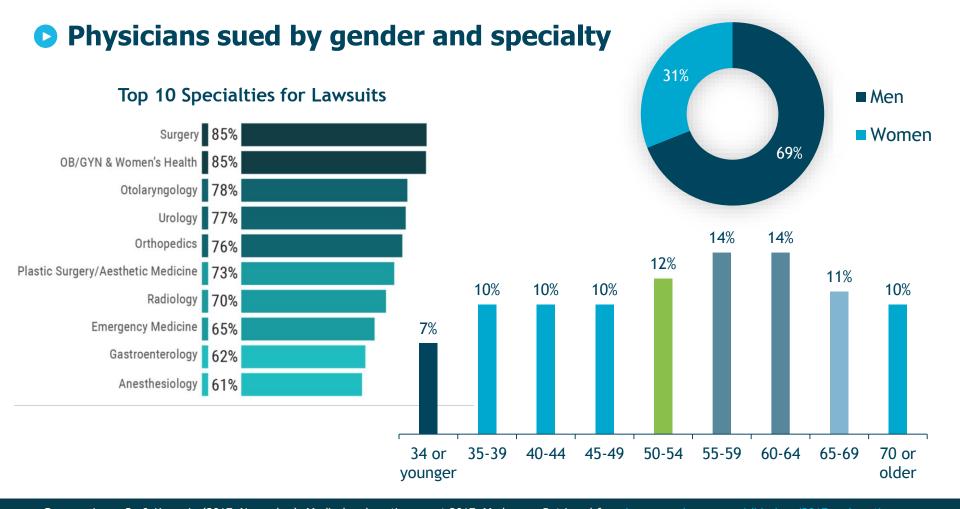
# All claims data by allegation category



### Top contributing risk factors



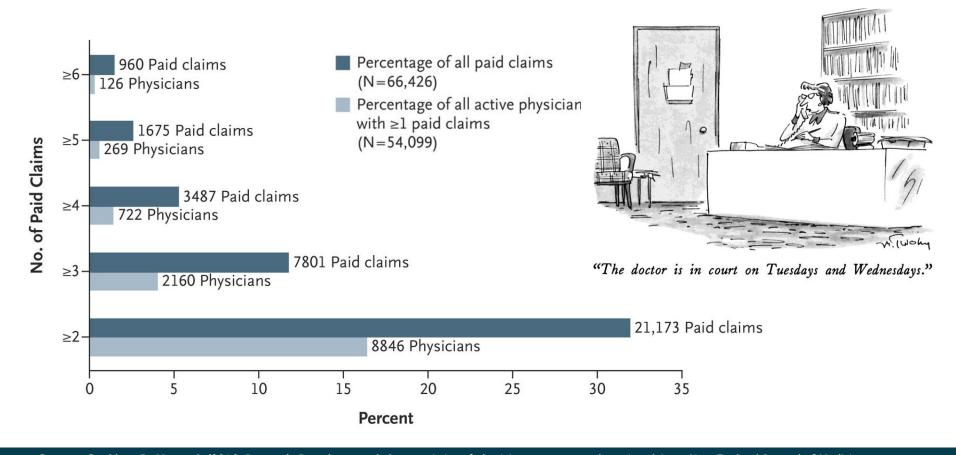




### Claim volume and total indemnity paid (NP/PA combined)



### ▶ 1% of physicians account for 32% of paid claims



### Coverage and carrier issues

Vicarious liability

Tail coverage issues

Different limits

Different retentions

NPDB reporting

Separate counsel

Consent to settle

**Product liability** 

Employed vs. nonemployed

Traditional physician business is changing.

Diversification of products and services.

New captives, RRGs, affiliated programs.

Ability to provide different layers of coverage.

U/W — credentialing, new technologies, new risks.

Claims — metadata, class action, manufacturing, advanced practice providers.

Risk — shifts to enterprise risk management.

Reinsurance — very soft, lots of capital.

Must have flexibility but be selective.

There is a cost to sitting still.

### Healthcare liability industry shifts

### Carrier Insolvencies/Run-Offs/Rehabilitation

 Capson Physicians Ins Co; CareConcepts RRG; Doctors and Surgeons National RRG; Fairway Physicians RRG; Galen Ins Co; HPIX; Lancet RRG; MO Professionals Mutual; Mountain States RRG; Oceanus RRG

### A.M Best Rating/Outlook Downgrades

• CT Medical Ins Co; MedMal Direct Inc Co; GuideOne Ins Co; KaMMCO; Mountain States RRG; Triple-S Propiedad; WV Mutual Ins Co

### Market Exits/Pullbacks

 At least 15 carriers have announced they have withdrawn from HCL or restricted their appetite for certain HCL segment





# The future

# Challenges facing healthcare



Changing delivery platform



Changing reimbursement



Changing workforce



Continued advances in technology, genetics, etc.



Greater focus on consumerism



Continued consolidation

## Emerging risks

Artificial intelligence

Quadruple aim

**Opioids** 

Virtual care

Nano-technology

Aging physicians

Remote monitoring

Genomics

Aging population

Telemedicine

Cyber liability

Robotic surgery

**Human factors** 

Big data

Precision medicine

Retail medicine

Disclosure

**Burnout** 



# New plaintiff focus

Late career practitioners

Credentialing

Allied health professionals

Product liability

Batch/class action

Institutional risk

Large claims

Technology

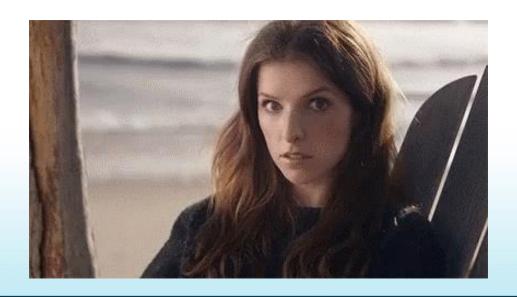
Cyber liability

Telemedicine

Forensic audits

Reptile theory

**Opiates** 



### Funding malpractice lawsuits

- Lawyers are not required to tell clients that they have borrowed money.
- Interest rates on lawsuit loans generally exceed 15-18% a year.
- Law Finance Group: "Since 1994 we have provided over \$450 million to attorneys and plaintiffs immersed in litigation . . . We do what banks won't."
- Counsel Financial: "We are the most established lender in the industry providing financing for 19 years with more than \$1.5 billion loaned exclusively to plaintiffs' firms nationwide."
- LawCash: "LawCash provides the best lawsuit funding services and lowest rates for the injured."

Presettlement loan companies

Large banks

Hedge funds



## Ode to the death of the physical exam

here ye here ye on this day we take the time to remember the loss of a fond friend, the physical exam

gone are the days
of the bedside JVP
absent a waves, dominant v waves,
now we just lasix them all

There is no-one to appreciate the subtle art of trousseau sign or even the grade 1 diastolic murmur (that probably doesn't exist) What need are there for speculums When you can just consult gyne Or the need for reflex hammer When you can give neuro a call?

I look fondly on the days as a young med scholar doing a full respiratory exam does anyone ever do anymore the whispered pectoriloguy?

here we lay to rest, the art of touching the patient now we fast track and roll them through the CT scanner

# Technology

Be aware that patients might be recording appointments.

Print a few high-risk charts every quarter for review.

Get an outside documentation audit once a year.

Get a security audit done for your practice.

Have a bring-your-own-device (BYOD) office policy.

Centralize office administrative permissions.



"You can't list your iPhone as your primary-care physician."

# Technology

Develop a social media policy.

Practice disaster recovery.

Remember you are leaving a digital signature.

You will likely change EHRs several times.

Remember the "duty to preserve" documents.

Technology workarounds can be dangerous.

Manage patient expectations about electronic communication and secure appropriate consent.



"I have to tell you, I got a totally different diagnosis from someone named PookyPoo on medi-answer.com."

### IBM Watson

Healthcare data will double every 73 days by 2020.



## Human factors engineering

Wrong Dose, Wrong Medication





# Human factors engineering

### **Design Flaws and Remedy**





## EHRs in malpractice allegations

More than half (53%) of the MPL insurance companies that participated in a PIAA survey on EHRs had seen EHR-related claims by 2012.

### Top trends:

- Cut-and-paste practices
- Failure to review additional electronic records
- Failure to interface with other systems
- Allegations of HIPAA violations

### Other issues:

- Spoliation of evidence
- Breach of the system
- Insufficient provider training
- Failure to adhere to guidelines
- EHRs as the "standard of care"



"Somehow our new EMR system accidentally sent your test results to a veterinarian. He recommends a chewable de-wormer."

### **DESCRIPTION** EHRs in malpractice allegations

**Risk Factors Involved** Nearly three-quarters of claims involving EHR issues are associated with outpatient settings, most notably physician offices or 25% emergency departments. User-related Top User-Related Risk Factors ■ Technology/design **75**% 40% 35% of claims volume with 30% associated factor 24% **19**% 20% 11% 10% 0% Incorrect information Hybrid health Copy/paste **Training** record/conversion in the EHR



### Telemedicine has been a surprise

Of the 94,228 total claims in the PIAA data sharing project (DSP) during the period from 2004-2013, a total of only 196 claims were linked with telephone treatment.

Of those 196 reported claims, 56 resulted in some form of claim payment.

The total indemnity loss related to telephone treatment was \$17M compared with \$8B for the total of all MPL losses in the DSP.

Telephone treatment claims thus represented only about 0.21% of all MPL losses.

The average indemnity loss was also lower for telephone treatment — \$303,691 compared with \$328,815 for all MPL claims within the DSP.



### **○** The Interstate Medical Licensure Compact

Voluntary agreement between states

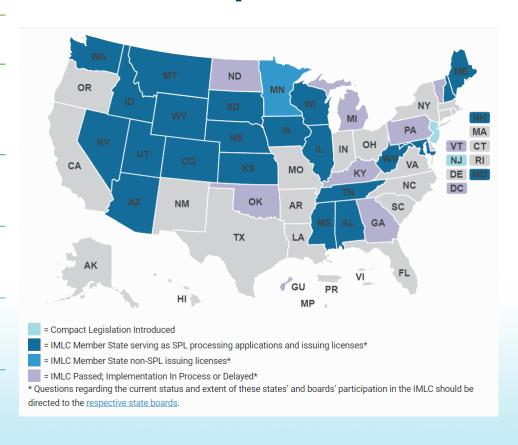
To promote access to healthcare and telemedicine in underserved and rural areas

29 states, the District of Columbia, and the Territory of Guam

43 different medical and osteopathic boards

80% of physicians meet the criteria for licensure

Uses the state of principal licensure (SPL) for verification



### Distractions in the operating room

Pennsylvania Patient Safety Authority Report System, January 2010 to March 2013

 304 operating room (OR) adverse events with distractions/interruptions as contributing factors

Intrinsic distractions

 alarms, noise from surgical devices, shift changes, and necessary communications

**Extrinsic** distractions

 cellphones, beepers, computers and personal electronic devices, calls from outside the OR, nonrelevant communication, and traffic in the OR DALLAS ANESTHESIOLOGIST BEING SUED OVER DEADLY SURGERY ADMITS TO TEXTING, READING IPAD DURING PROCEDURES

"One of the claims the jury will decide is whether the patient was a victim of "distracted doctoring."

Dallas Observer, April 1, 2014

## Surgical black box



During elective laparoscopic operations, frequent intraoperative errors and events, variation in surgeons' technical skills, and a high amount of environmental distractions were identified using the OR Black Box."

Annals of Surgery



The black box will eventually assess everything from how surgeons stitch to how delicately they handle organs and communicate with nurses during high-stress situations."

- CNN

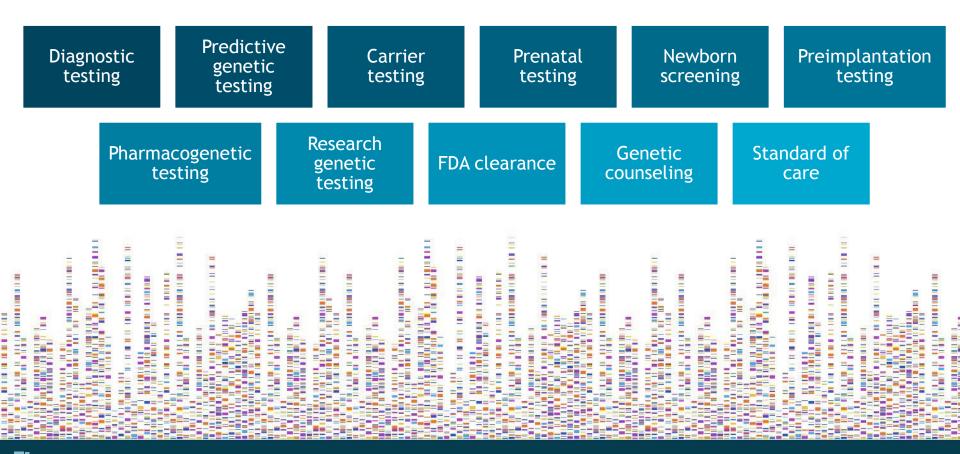


The data in an operating room black box could be used as evidence in medical malpractice suits unless precluded by legislation."

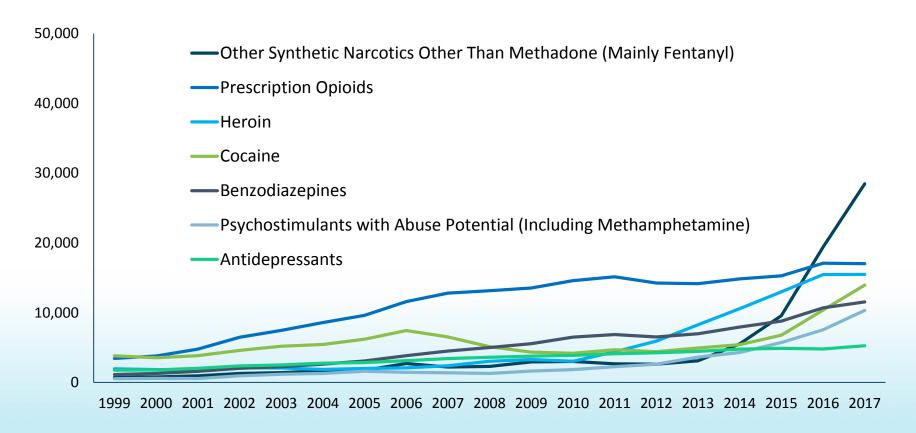
Canadian Medical Association Journal



### Genomics



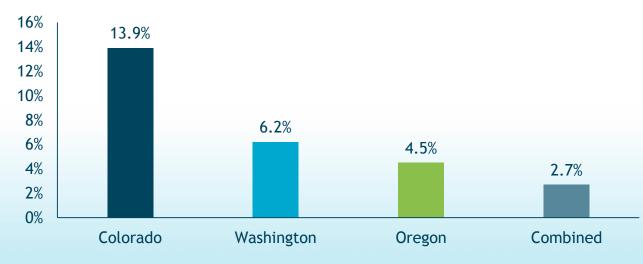
# National drug overdose deaths, all ages, 1999-2017



## Marijuana

Car crashes are up in states that have legalized recreational marijuana, according to the Insurance Institute for Highway Safety and Highway Loss Data Institute.

Estimated Effects of Recreational Marijuana Sales in Three States Change in Claim Frequency for Vehicles up to 33 Years Old, 2012-2016





## Cyber liability claims

#### Healthcare Sector (2014-2016)

- Many of the claims occurred in small or mid-sized healthcare organizations.
- The average number of records exposed in a healthcare breach was 6M.
- The average breach cost in healthcare was \$555K.
- Breaches that exposed protected health information (PHI) were substantially smaller than breaches that exposed personally identifiable information (PII).
- Total average breach cost: PHI \$475K, PII \$1.85M.
- 63% of healthcare breaches were caused by criminal or malicious activity.
- Hacking was the most common cause of loss (20% of cases), with an average cost of \$2.4M.



### Cyber breaches: preparing for the inevitable

Educate employees about cybersecurity risks.

Patch operating systems, software, and firmware on digital devices in a timely manner.

Ensure antivirus and antimalware solutions are set to automatically update and conduct regular scans.

Manage the use of privileged accounts.

Configure access controls, including file, directory, and network share permissions appropriately.

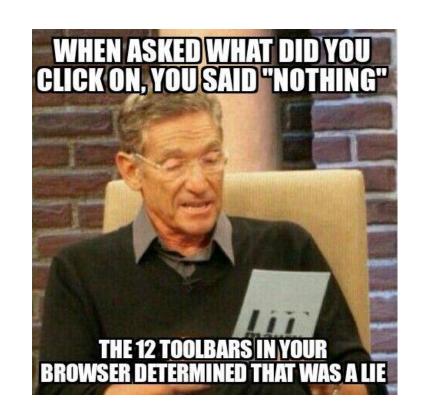
Implement software restriction policies.

Conduct business continuity efforts.

Back up data regularly.

Secure your backups.

Test your system.



#### Millennial jurors

- Favor plaintiff from the outset.
- Will ignore law/judge's instructions.
- Will decide based on sympathy:
  - 45% would decide based on fairness rather than law.
  - 31% would do internet research even if judge forbids it.
- Wants to reward underdogs and punish deep pockets
  - 44% would award more money if defendant is a large corporation.
  - 69% would pay medical bills even if no fault.
  - Would give largest awards to single parent or baby plaintiffs.
- Surprisingly benevolent views about healthcare.



"Has the jury tweeted a verdict?"



Managing risk
Solutions vs. countermost

**Solutions vs. countermeasures** 

#### Positive outlook

Malpractice is predictable, repetitive, and preventable.

A mindset of prevention is critical.

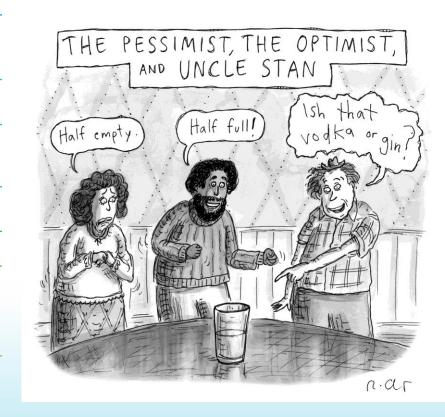
A suboptimal outcome is not synonymous with malpractice.

Operational risks can be mitigated.

You have more leverage than you think.

Be proactive: develop policies and procedures, education providers and staff, audit processes, identify opportunities for improvement.

Preparing for potential disasters (e.g., cyberattacks) can increase resiliency.



## Litigation lunacy

Lawyer	"Doctor, before you performed the autopsy, did you check for a pulse?"	(o) O (o)
Witness	"No."	
Lawyer	"Did you check for blood pressure?"	000
Witness	"No."	
Lawyer	"Did you check for breathing?"	
Witness	"No."	
Lawyer	"So, then, it is possible that the patient was alive when you began the autopsy?"	
Witness	"No."	
Lawyer	"How can you be so sure, Doctor?"	
Witness	"Because his brain was sitting on my desk in a jar."	
Lawyer	"I see, but could the patient have still been alive, nevertheless?"	
Witness	"Yes, it is possible that he could have been alive and practicing law."	



### High-level risk tips

We seem to excel at pissing people off - "what's the great emergency today?" What pushes your buttons? Why do we run for the AMA form? Do you suffer from "seagull management"? Are you a BOGSATLGW enterprise? Are you still doing death and donuts? Risk management and patient safety aren't sexy Readmission walls are dangerous

### High-level risk tips

Address abnormal vital signs.

Provide specific, clear discharge instructions.

Reduce the number of handoffs between providers.

Follow up on critical lab results, X-rays, and cultures.

Understand that informed consent is a process, not a piece of paper.

Be aware of common cognitive biases that lead to errors.

Don't delay consultations, studies, or procedures.



### High-level risk tips

Don't talk yourself out of doing what is right.

Ensure adequate and timely documentation.

Be careful of transfers, holding, and observation patients.

Be mindful of psychiatric diagnoses and behavioral health issues.

Regard complaints as learning opportunities and not nuisances.

Consider special issues related to geriatric and pediatric patients.



#### Communication strategies

Knock before entering exam rooms.

Greet patients and introduce yourself (if needed).

Sit when you can, and maintain eye contact when talking to the patient.

Be aware of nonverbal communication and cues.

Ask patients about their goals for the visit.

Don't interrupt while patients are talking.

Ask open-ended questions.



I've got a patient who needs to chat to someone...Have you got anyone who's completed the 'verbal communication with patients in a personal, supportive but not disempowering' course?

#### Communication strategies

Use layman's language and visual aids to ensure comprehension.

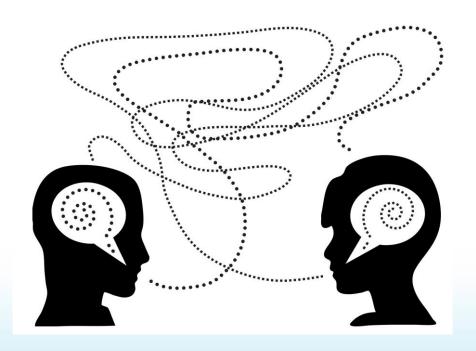
Provide plain-language follow-up instructions and educational materials.

Use the teach-back technique to ensure comprehension.

Encourage patients to voice questions and concerns.

Consider patients' personal and cultural preferences and values.

Use satisfaction surveys to gauge patient perceptions.



#### Documentation risks and strategies: red flags

- Abnormal vital signs
- Changes in patient's condition
- Response to treatment
- Additions/deletions
- Late entries
- Omissions/incomplete records
- Inconsistent/contradictory entries
- Subjective remarks/finger-pointing
- Medical decision making

- Changes in treatment plans
- Patient response to a course of treatment
- Conversations with the patient
- Follow-up care provided
- Patient compliance, including missed/cancelled appointments
- After hours contact
- Consults



#### Common "auto-text" mistakes

- "PERRL" when the patient has a glass eye (or only one eye).
- Oriented X 3" in babies
- "Extremities WNL" in patients with amputations
- "Gait WNL" when patient is non-ambulatory (esp. with femur fx)
- "Alert" in a unconscious patient

#### Solutions for the future

Emphasize team training and simulation.

Improve communication for everyone.

Standardize care transitions among providers.

Address physician and nurse burnout.

#### Focus risk prevention on:

- Common risks: e.g., communication, handoffs, documentation
- Specialty-specific risks: e.g., robotic and bariatric surgery
- Emerging risks: e.g., genomics and drug resistance
- Human factors design and engineering
- High-risk complaints and high-risk clinicians

#### Hope

- If your only concern is the welfare of the patient, it is unlikely you will be sued
- and if you are sued, it is unlikely that you will lose
- Plaintiffs only win 3% of trials
- You can change your risk profile
- If you are sued, go and talk to someone, you are not alone
- If you know someone who has been sued, go and talk to them
- "Ohana" means extended family; never leave anyone behind
- Understand the risk, don't fear it.
- I still go fishing





# Thank You