Washington State Derm Meeting 2015:
Medicolegal Issues in Dermatology & Dermpath

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Lake Chelan, WA

Derm and Dermpath in USA?
Good News! NEJM 2011
- Examined claims:
  - 40,000 doctors
  - 6 year period
  - Overall 7.4%/year were sued
  - Medical specialty - 55% sued by 65 y/o
  - Surgical specialty - 74% sued by 45 y/o
N=23,371 cases asserted* 2009-2013
Cases were clinically coded by specialty
Just 272 (1.2%) identified with a responsible service of “dermatology”
Total incurred amount of $20M
Represented just 0.5% of all incurred costs among all specialties ($4.1B)

### Allegation Category

<table>
<thead>
<tr>
<th>Allegation Category</th>
<th># cases</th>
<th>Total Incurred Amt</th>
<th>% of cases</th>
<th>% of total incurred</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medical Tx</td>
<td>122</td>
<td>$5,992,279</td>
<td>45%</td>
<td>30%</td>
</tr>
<tr>
<td>Diagnosis-Related</td>
<td>66</td>
<td>$9,377,865</td>
<td>24%</td>
<td>47%</td>
</tr>
<tr>
<td>Medication-Related</td>
<td>37</td>
<td>$3,047,116</td>
<td>14%</td>
<td>15%</td>
</tr>
<tr>
<td>Surgical Tx</td>
<td>21</td>
<td>$729,496</td>
<td>8%</td>
<td>4%</td>
</tr>
<tr>
<td>Communication</td>
<td>13</td>
<td>$239,521</td>
<td>5%</td>
<td>1%</td>
</tr>
<tr>
<td>Safety &amp; Security</td>
<td>5</td>
<td>$271,239</td>
<td>2%</td>
<td>1%</td>
</tr>
<tr>
<td>Discrimination</td>
<td>3</td>
<td>$449,447</td>
<td>1%</td>
<td>0%</td>
</tr>
<tr>
<td>PT Monitoring</td>
<td>2</td>
<td>$62,335</td>
<td>1%</td>
<td>0%</td>
</tr>
<tr>
<td>Anesthesia-Related T x</td>
<td>1</td>
<td>$129,290</td>
<td>0%</td>
<td>1%</td>
</tr>
<tr>
<td>Hosp Policy &amp; Proc</td>
<td>1</td>
<td>$78,480</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Provider Behavior</td>
<td>1</td>
<td>$10,375</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Sum:</td>
<td>272</td>
<td>$19,987,444</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

### N=272 CBS MPL cases asserted 09-13 with a primary responsible service of Dermatology

<table>
<thead>
<tr>
<th>Category of Case</th>
<th># Cases</th>
<th>Sum of Total Incurred Amt</th>
<th>% Cases</th>
<th>% of Total Incurred</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complications</td>
<td>47</td>
<td>$2,369,778</td>
<td>17%</td>
<td>12%</td>
</tr>
<tr>
<td>Cancer of skin</td>
<td>46</td>
<td>$4,665,782</td>
<td>17%</td>
<td>23%</td>
</tr>
<tr>
<td>Poisoning</td>
<td>36</td>
<td>$2,930,922</td>
<td>13%</td>
<td>15%</td>
</tr>
<tr>
<td>Burns</td>
<td>32</td>
<td>$1,177,033</td>
<td>12%</td>
<td>6%</td>
</tr>
<tr>
<td>Anxiety disorders</td>
<td>29</td>
<td>$679,219</td>
<td>11%</td>
<td>3%</td>
</tr>
<tr>
<td>Other skin disorders</td>
<td>22</td>
<td>$368,378</td>
<td>8%</td>
<td>2%</td>
</tr>
<tr>
<td>Cancer, other primary</td>
<td>8</td>
<td>$5,810,260</td>
<td>3%</td>
<td>29%</td>
</tr>
</tbody>
</table>

### Severity Category

<table>
<thead>
<tr>
<th>Severity Category</th>
<th># cases</th>
<th>Total Incurred Amt</th>
<th>% of cases</th>
<th>% of total incurred</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low</td>
<td>50</td>
<td>$787,929</td>
<td>18%</td>
<td>4%</td>
</tr>
<tr>
<td>Medium</td>
<td>176</td>
<td>$7,008,445</td>
<td>66%</td>
<td>35%</td>
</tr>
<tr>
<td>High</td>
<td>43</td>
<td>$12,191,069</td>
<td>16%</td>
<td>61%</td>
</tr>
<tr>
<td>Death</td>
<td>20</td>
<td>$4,956,576</td>
<td>7%</td>
<td>25%</td>
</tr>
<tr>
<td>Permanent significant</td>
<td>16</td>
<td>$4,486,482</td>
<td>6%</td>
<td>27%</td>
</tr>
<tr>
<td>Permanent major</td>
<td>4</td>
<td>$1,738,277</td>
<td>1%</td>
<td>9%</td>
</tr>
<tr>
<td>Permanent grave</td>
<td>3</td>
<td>$9,735</td>
<td>1%</td>
<td>0%</td>
</tr>
<tr>
<td>Sum:</td>
<td>272</td>
<td>$19,987,444</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

### Top Contributing Factors

<table>
<thead>
<tr>
<th>Contributing Factor Code</th>
<th># cases</th>
<th>% of cases (N=272)</th>
</tr>
</thead>
<tbody>
<tr>
<td>CJ - clinical judgment</td>
<td>102</td>
<td>38%</td>
</tr>
<tr>
<td>TS - technical skill</td>
<td>101</td>
<td>37%</td>
</tr>
<tr>
<td>BR - behavior</td>
<td>97</td>
<td>36%</td>
</tr>
<tr>
<td>CO - communication</td>
<td>73</td>
<td>27%</td>
</tr>
<tr>
<td>DO - documentation</td>
<td>52</td>
<td>19%</td>
</tr>
<tr>
<td>CS - clinical systems</td>
<td>25</td>
<td>9%</td>
</tr>
</tbody>
</table>

### Top Clinical Judgment Factors

<table>
<thead>
<tr>
<th>Clinical Judgment Factor Code</th>
<th># cases</th>
<th>% of cases (N=272)</th>
</tr>
</thead>
<tbody>
<tr>
<td>CL1021 pt assess—failure/delay in ordering diagnostic test</td>
<td>30</td>
<td>11%</td>
</tr>
<tr>
<td>CL1004 pt assessment—narrow dx focus—failure to establish differential diagnosis</td>
<td>19</td>
<td>7%</td>
</tr>
</tbody>
</table>

### Top Technical Skill Factors

<table>
<thead>
<tr>
<th>Technical Skill Factor Code</th>
<th># cases</th>
<th>% of cases (N=272)</th>
</tr>
</thead>
<tbody>
<tr>
<td>TS4008 technical performance—possible technical problem</td>
<td>56</td>
<td>21%</td>
</tr>
<tr>
<td>TS4009 technical performance—poor technique, other</td>
<td>22</td>
<td>8%</td>
</tr>
<tr>
<td>TS3001 improper sterilization equipment (user error)</td>
<td>8</td>
<td>3%</td>
</tr>
</tbody>
</table>

### Category of Case

- Laser “accidents” 2
- Cosmetic filler 1
- Isotretinoin complications 3
- **Missed melanoma** 6
- Chloroquine 1
- TEN/SJS 1
- NMSC 1
- Potent steroids 2
- Light therapy 1
- Connective tissue disease 1
- Cryosurgery 1
- Merkel cell 1
- Balanitis obliterans with SCC 1
Litigation Within Dermatology & Dermatopathology

- Misdiagnosis of melanoma is a key problem
- The Doctors Company (1990-2001)
  - “skin cancer” and/or “melanoma”
  - 8.6% of all claims against pathologists
  - 14.2% of all claims against dermatologists

Too much litigation versus too many errors?

- Harvard Medical Practice Study (1990)
  - 31,000 medical records examined
  - “Negligence” only by consensus
  - 1 out of 25 harmed by medical error
  - Only 4% of injured actually made claims

- Litigation fees ~ $52,000
- Time to resolution ~ 5 years

Half Full or Half Empty

- 1452 claims
  - 90% with medical injury
  - 60% due to wrongdoing by MD
  - 72% without error → no compensation
  - 73% with error → compensation
  - Litigation fees ~ $52,000
  - Time to resolution ~ 5 years

  - 90% of suits involved actual medical injury
  - Courts “right” ~ 75%
  - Only 0.4% of claims “frivolous”

  - 10% of claims without injury
  - 75% is a “C”
  - ~ $52,000 & 5 yrs to adjudicate

Purpose of Malpractice Law

“To identify a party injured because of substandard care and compensate the party, so as to make them whole.”

- Malpractice is tort law
- It is a civil action
  - “Preponderance of the evidence” (>50%)

Elements of Malpractice

Six elements of a prima facie case
1. Duty
2. Standard of Care
3. Breach of Duty
4. Cause in Fact
5. Proximate Cause (Legal Cause)
6. Damages

(Causation)

(failure to prove a single element is fatal)
Duty To Act

Negligent Action or Inaction

Damages from Negligent Action/Inaction

**Simple Pyramidal Structure**

**Duty**
- "Contractual" agreement to provide care with proper professional skill
- Opposed to "curbside," "hallway," or "sidewalk" consultations
- Courts traditionally reluctant to assign duty to those with only tangential relationship
- Use of "images" (telederm) or actual patient materials (slides) may make one liable

Baker KD, The Federation of Defense & Corporate Counsel
http://www.thefederation.org/documents/baker-sp02.htm

**Varying Standards of Care**

- Some states:
  - "reasonably prudent physician" of same background, training, experience
- Other states:
  - knowledge and skill common to members in good standing
  (conformity to "customary practice" but also with consideration of a "respectable minority")

**Notes**

- The outcome does **NOT** have to be favorable!
- You do **NOT** have to be "correct!"

**Causation**

- Concept of contributory negligence
- Cause in Fact ("But for," causation)
  - Determined by jury
  - Did that actions actually lead to the result?
- Proximate Cause (legal causation)
  - Determined by the judge
  - Was the result foreseeable?
  - Is it "reasonable" to hold the party accountable?

**Standard of Care is ALWAYS Established de novo**

- Expert testimony (difficult to secure & expensive)
- P’s costs often fronted by the attorney
  - in exchange for a ~1/3 interest in any award
- Trial expenses ~ $50,000 - $100,000
- ~ 500 hours of prep = $75,000 - $100,000

"Investment" in jeopardy - $125,00 to $250,000

**Show Me the Money!**

- Special damages
  - medical bills (past, present, future)
  - lost wages (past, present, future)
- General damages
  - pain & suffering (per diem vs. lump sum)
  - loss of enjoyment/consortium

RARELY PUNITIVE DAMAGES!
US Attorneys Not Really Interested in “Close Calls”

- Average cost of lawsuit
  - Plaintiff’s Atty. = $125-250k

- “Where’s Waldo” cases
  - some pigmented lesions are difficult for ALL experts

- Farmer, et al. (1996)
  - 37 “classic” melanomas & 11 “expert” dermpaths
  - unanimity for “melanoma” in just 11 cases (30%)

"Chilling not only to physicians, but to patients, and sobering to lawyers for plaintiffs."
- A.B. Ackerman, 1996

"The first thing we do, let's kill all the lawyers".
- Henry VI (Act IV, Scene II) by William Shakespeare - 1588-90

Do we really want to eliminate lawyers?

The Doctor’s Defense

- Attack validity of the required elements
  - “there was no breach the standard of care”

- Assert an "affirmative defense"
  1. Conflicting legal duty (psychiatrists)
  2. Consent (most often employed defense for procedures)
  3. Statute of Limitations (variable length)

Statute of Limitations

- Time period when a suit must be filed
- Varies from state-to-state
- Tolled in children until a certain age
  - age of “majority,” simply a specified age
- Point of argument in many situations:
  - begins when one is “reasonably” alerted to an injury and not simply “date of service”
Anonymous Pt v. Anonymous Derm  
Virginia 1997

- Plaintiff sought care for mole upon leg
- Derm biopsied → interpreted as benign
- Two years later → pt. visited a surgeon
- Surgeon requested medical records
- Derm then re-assessed slide and amended the path report → "melanoma"

**Was suit timely?**

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**Court Decision**

- SOL **did not** begin at misdiagnosis
- RULING: SOL began 2 years from when the melanoma "moved from epidermis into the dermis"

(When the heck was that?)

**Important point:**

The SOL may begin when an injured party should have been reasonably aware that an injury had transpired.

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**What are the issues discussed with damage caps…**

- are such caps ethical?
- are such caps legal?

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**Do Caps Save Money**

- Both economic and non-economic damage caps exist
- Conflicting evidence over whether:
  - non-economic damage caps save money
  - economic damage caps are ethical

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"Defensive" medicine costs continue to increase.
Oregon's Unique Situation

- Clarke v OHSU
  - $12M+ damages
  - state was substituted for MDs/RNs
  - result - $200k remedy
  - law was unconstitutional "as applied" to case

"That $250,000 wouldn't pay for my medication for the rest of my life," [the patient] responded. "$250,000 for my kind of injury, it's nothing. It's a pittance."

Structure of US Court System

United States Supreme Court

State Supreme Court

Federal Circuit Court

State Appellate Court

Federal District Court

State District Court

Apology Laws

- Now exist in 29 states
- Protect doctor against use of certain statements in situation of:
  - "perceived" medical error
  - negative outcome
- Vary from state to state

Colorado Apology Law

- Broadest in the nation
- C.R.S. 1-25-13
  - protects "any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence..."
- Doctor can apologize, describe in detail any mistakes and the information is inadmissible

Texas Apology Law

- Narrower than Colorado's apology law
- TCP&R Code Sec 18.061(a)(1):
  - protects statements that "expresses sympathy or a general sense of benevolence relating to the pain, suffering, or death of an individual involved in an accident."
- However, unlike Colorado's law, it does not bar a doctor's admission of liability or fault
How might this work…

• Imagine after a procedure the following statement is made:

  "I am sorry for your pain. I mistakenly failed to close your wound properly and that failure caused your pain and suffering."

• Colorado – entire statement protected
• Texas – only "I am sorry…" is protected.

Dermatology & Dermatopathology Litigation

• The Doctors Company
  – 1998 to 2001: 144 pathology claims
  – 23 (16%) were misdiagnosis of melanoma
    (second only to breast cancer for litigation potential)

"Breakdown" of 42 False Negative Claims

• Erroneous “diagnoses” involved:

  Spitz nevus: 3 cases
  Dysplastic nevus: 3 cases
  Spindle cell SCC: 3 cases
  Atypical fibroxanthoma: 1 case
  Missed desmoplastic melanoma: 2 cases

No explanation for the other 30 cases.
No case details or information regarding financial outcomes.
“It’s unlikely you will ever be sued…”

I. Beware of “Low-Power” Imitators

Histology of Nevoid Melanoma

Cellular Atypia & Mitoses Deep

II. Beware of Partial Biopsy
Alas, this product does not exist…

Cutis, Nov. 2005

• Number of shaves increased 1988-2005
• Volume of shaves decreased 1988-2005
• This impacts the accuracy of diagnosis

4 mm Punch Biopsy by Volume
- Assume 4 mm cylinder
  Volume of punch is = 50.3 mm³
- Assume is two 3.5 um ‘silhouettes’ on slide
  “Volume” inspected is = 0.112 mm³

The dermatopathologist is inspecting 1/450th of the overall volume of the sampling!!!!

If the problem is truly the sample itself, eventually the error will be discovered….
III. Beware of Inflamed Lesions (which could be hiding melanoma)

Case
- 79 year-old man
- Pigmented lesion on chest
- "r/o NUB"

Old Adage:
Lymphocytes recognize melanoma better than do pathologists!

Histology

Case
- 79 year-old man
- Pigmented lesion on chest
- "r/o NUB"

Old Adage:
Lymphocytes recognize melanoma better than do pathologists!

IV. Beware of Spitz nevi
Heightened Suspicion
Melanoma v Spitz Nevus
(“All or Nothing”)

Signs indicating strong possibility of melanoma:
- Age > 20 years
- Predominantly epithelioid cells
- Larger lesions (> 0.6 to 1.0 cm)
- Lesions on sun-damaged skin
- Broadly transected lesions
- Lesion with multiple populations of melanocytes


Spitzoid Melanoma

Case
- June 2004
- Sent by barber for lesion upon scalp
- Biopsy performed → interpreted by dermatologist as “blue nevus”

“Better the Devil you know than the Devil you don’t know.”
- Old English Proverb
VI. Beware of Desmoplastic Melanoma and Spindle-Cell Imitators

“You just ain’t gonna think of it, if it doesn’t enter your mind.”

– Yogi Berra

VII. Beware of confusion with dysplastic nevi (Clark’s nevi)
Always Look at All the Sections

VIII. Work as a Team

Pre-Analytical Error

- Crap in = Crap out
  - “r/o melanoma” on everything
  - “r/o cancer”
  - “rash”
  - “238.2” for everything
- Multiple specimens in the same bottle
- Curetting of a pigmented lesion
- Mismarking shaves, punches, excisions
When a error leads to a lawsuit...

Everyone involved is a target...

"throw them all against the wall, see who sticks!"

I might even promote doing biopsies in "3D":
- Description (or what was Done)
- Diameter (size or extent)
- Diagnosis

<table>
<thead>
<tr>
<th>Patient's Name</th>
<th>Age</th>
<th>Sex</th>
<th>Race</th>
</tr>
</thead>
<tbody>
<tr>
<td>Residence</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Birth Place</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Diagnosis</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other Details</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Sample submitter form for cutaneous biopsy specimens.

IX. Do no harm!

"Don’t cost someone else their skin just to save your own."

The Phenomenon

• As a response to medicolegal pressure two responses:
  – Becoming “malignant”
  – “Fence sitting” or "hedging"
• Neither improves patient care
• Both contribute to increased costs

How to Submit a Specimen for Cutaneous Pathology Analysis
Using the 5 D’s to Get the Most From Biopsies

A Massachusetts jury found an oncologist was negligent when he failed to provide pertinent clinical information to a hematopathologist that may have prevented an erroneous diagnosis of non-Hodgkin lymphoma in a patient who subsequently died from treatment complications.
Over-Call

• Excessively malignant diagnosis
• Being excessively “malignant” may yield damages

Humility Is Not Just Good for Your Character…

• Acknowledge differences in opinion:
  – “We understand full-well the conundrum…”
  – “This is a difficult case…”
• “Consensus Conference”
• Document the names and opinions involved

X. Acknowledge Difficult Cases

“It was pride that changed angels into devils; it is humility that makes men as angels.”

- Saint Augustine