LESSONS LEARNED FROM MALPRACTICE CLAIMS

Daniel J. Briceland, MD
OMIC Board Member
5 May 2016
Dr. Briceland has no financial disclosures.
Risk Management Discount

Ophthalmology State Soc. members will receive a 10% risk management premium discount.

Complete the sign-in sheets.
Course Objectives

**Review** OMIC closed claims.

**Identify** procedures/treatment that result in malpractice claims.

**Describe** strategies that help prevent malpractice claims and/or minimize its adverse impact.
OMIC Closed Claim Statistics
It is not a matter of “if”, just “when”...

Probability of a Claim in 35 years

- 0 claims: 5%
- 1 claim: 16%
- 2 claims: 25%
- 3 claims: 23%
- >3 claims: 31%

Assumes probability of a claim in a given year is 8%
Assumes probability of an indemnity payment in a given year is 2%
Overview of Claims and Lawsuits

OMIC insures over 4,600 ophthalmologists nationwide

Since 1987 over 4,200 closed claims and lawsuits in our database

– “claim” = demand for money (lawsuit, letter from patient or attorney)

Another 3,500+ incidents, etc. handled by Claims department
Overview of Claims and Lawsuits

• Only 20% of OMIC claims close with an indemnity payment

• Average indemnity payment = $165,000

• Highest indemnity payment = $3,375,000 (ROP)
<table>
<thead>
<tr>
<th>Amount</th>
<th>Description</th>
<th>Specialty</th>
<th>Year Closed</th>
</tr>
</thead>
<tbody>
<tr>
<td>$3,375,000</td>
<td>Failure to diagnose ROP</td>
<td>Medical Retina</td>
<td>2007</td>
</tr>
<tr>
<td>$2,000,000</td>
<td>Failure to diagnose bilateral glioma in 10 mo old baby</td>
<td>Pediatric</td>
<td>2009</td>
</tr>
<tr>
<td>$1,800,000</td>
<td>Failure to diagnose glaucoma in 8 yr old</td>
<td>Pediatric</td>
<td>2001</td>
</tr>
<tr>
<td>$1,500,000</td>
<td>Failure to diagnose ROP</td>
<td>Pediatric</td>
<td>2012</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Failure to treat corneal ulcer in 2yr old</td>
<td>Comprehensive</td>
<td>1999</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Misdiagnosis sarcoidosis/prednisone overdose</td>
<td>Oculofacial</td>
<td>2002</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Failure to diagnose ROP</td>
<td>Pediatric</td>
<td>2009</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Failure to diagnose ROP</td>
<td>Pediatric</td>
<td>2010</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Acute glaucoma post phakic implant</td>
<td>Comprehensive</td>
<td>2011</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Failure to diagnose foreign body</td>
<td>Oculofacial</td>
<td>2012</td>
</tr>
<tr>
<td>$1,000,000</td>
<td>Failure to diagnose Trigeminal Schwannoma</td>
<td>Pedi/Adult Strabismus.</td>
<td>2014</td>
</tr>
</tbody>
</table>
Closed Claim Study

Cataract Surgery

“He said. She said.”
Claims Study

- 3/30/12 - Pt. 78 year old male examined for cat. evaluation c/o near vision problems and glare at night driving; VA blurry OS > OD
- OD VA 20/30 and OS VA 20/50+1 –
- Pt. scheduled for OS sx. with Restor lens
- OS scheduled 5/7 and OD 5/16
- Medical clearance obtained from primary care physician
Claims Study

- 5/7/12 - 78 y.o. male OS LenSX cat. sx.
- 5/8/12 – PO exam OS VA improving @ 20/25
- Pt. driving on own next day
- Given “placeholder” appt.; was called and denied any problems and appt. cancelled
- 5/16/12 – OD LenSx cat. Sx.
- Day of surgery pt. denies any problems with first eye sx. (both nurses and doc ask)
Claims Study

• 5/17/12 – First day post op exam for OD; finds CRVO OS (8 days postop) – referred to retina, treated

• 5/21/12 – Post op exam finds CRVO, OD – referred to retina; probably high BP or blood clots; referred to retina MRI and blood tests

• 5/21/12 – Pt. NLP, OU
Claims Study

• MRI reveals no acute findings
• Later dx. protein S deficiency/Factor V Leiden found on blood tests – both cause blood to be “hyper-coagulable”
Lawsuit

- September 2012 patient sues insured and his entity (staff)
Claim and Allegations

HE SAID:

• Plaintiff alleges told staff and doctor about decreasing vision OS immediately post cat. sx. Should not have done OD.

SHE SAID:

• Physician and staff deny being informed of OS vision loss post cat.
Claim and Allegations

HE SAID:
• Plaintiff alleges doctor never examined the left eye on day of right eye surgery.

SHE SAID:
• Physician is certain he examined but no record in the patient’s chart.
Question:

• Assume the patient has no complaints and denies any problems regarding the first eye (OS) surgery.

• Should the insured have done an examination of the first eye anyway prior to doing the second eye i.e. was exam Standard of Care?
Causation

HE SAID (plaintiff’s expert)

• LenSx requires docking that increases IOP for several minutes, this increases chance of clot formation in central retinal vein

SHE SAID

• Less pressure than a conventional LASIK procedure – pure coincidence
Personal Stuff (makes a difference)

- Worked for church earning $30,000 year (no longer able)
- Assistive devices installed in house
- Needs cane for walking
- Medical specials $100,000

- Wife now has to take on more of household duties, etc.
More “personal stuff”

- Patient had paid for procedures using credit card
- Patients refused to pay because of poor outcomes
- Insured’s billing department pressed forward with enforcing bill
- Not brought to insured’s attention
- Makes surgery center look unsympathetic
Venue, etc.

- Very plaintiff friendly venue
- Estimated jury verdict range $1 million to $1.75 million

- Verdict against insured: 10% - 20%
- Verdict against surgery center: 65% - 75%
  - Credibility and sympathy factors
“Settlement”

- Settlement: $900,000 (entity)
- Defense costs: $123,000
What Have We Learned?
What Predicts Outcomes

The severity of the patient’s disability, not the occurrence of an adverse event or an adverse event due to negligence, was predictive of payment.

Closed Claim Surveys

What risk management issues have been brought to your attention by this claim?

What steps have you taken in your practice to reduce your exposure to this type of claim in the future?
“Documentation cannot be overstated”
“Greater need to document all phone calls”
“Session with staff to impress upon them the importance of charting no shows”
“Charts are started with ER call. Patients contacted if they fail to show.”
“Importance of integrity of the medical records – maintain absolute integrity of medical records”
DOCUMENTATION

Single best defense if a claim is filed is a good medical record
- If you wrote it you probably did it
- The trial may be years later, but records were written at the time
- Jury may remember little, but records may be taken into jury room
Litigation and Stress

“The mental stress was terrible. I had done nothing wrong from a medical standpoint but felt helpless.”

“Hours and hours of aggravation.”

“The main cost of this case was worry and self-doubt. I felt that OMIC and my attorney were excellent and as supportive as possible, but being sued is a direct assault upon one’s being.”
Resolution

“I had often thought I would not survive a lawsuit. I did. I am even more committed to my job as an ophthalmologist than before.

“I am humbled at the experience that I have gone through during the 4 years process. I am grateful to be insured by OMIC and to have had the representation that I had to help resolve the case prior to trial. I hope to be able to share my experience with others in the future so that they understand that while frustrating, the process works.
OMIC Resources on the Web
Closed Claim Study
Cataract Surgery

“Of course, there is hardly anything we can’t fix”
Patient Pre-op History


• Nov. 2004 – seen by ophthalmologist and 2+ cataract in right eye. V/A 20/200 w/out correction (pt. states unable to see from right eye)

• Pt. wants to referral to ophthalmologist with privileges at specific hospital
OMIC Insured Pre-op Exam and Consent

• Exam notes 2+ cataract right eye
• Consent discussion:
  • Pt. version: Insured said - “Of course, there is hardly anything we can’t fix”
  • Physician version: “One in hundred chance of complication. One in thousand chance lose sight”
• Pt. signs two page informed consent document in office. Physician signs.
Surgery

• Complicated
  • Iris “misbehaving”
  • Posterior capsule rupture
• Operative report does not mention problem with iris during surgery (pt. on Flomax)
• Letter to referring optom does not mention capsule rupture or iris problem
Surgery

- From November 2004 – 2011 seen by 11 ophthalmologists in 5 states (MA, OH, PA, RI, CA) and 4 optoms in 2 states (MA and OH)

- Floaters/RD surgery Reposition IOL
- Lid surgery Pupilloplasty

- 2/12/2010 20/30 minus 3 sc
Lawsuit (filed 3 years after surgery)

• Complaint filed:
  • Misrepresentation
  • Lack of informed consent
  • Negligence

• Alleges complications from cataract sx.:
  • Ruptured capsule; detached retina; “pupil stuck open”; cystoid macula edema; droopy eyelid;

• Filed “pro se” (did not have lawyer)
Jury Trial (7 years after surgery!)

• Plaintiff testimony:
  • Was “talked into surgery”
  • Never told of iris complication
  • Changed life completely; weeping on the stand

• Cross-examination of plaintiff
  • Plaintiff had tried a cataract surgery case just prior to his own cataract surgery (very conversant with risks of surgery)
  • Impeached with numerous letters and faxes to various treaters prior to sx. outlining blurry vision, difficulty with contact lenses … “just have to live with these things”
Jury Trial (continued)

• Plaintiff expert (MD/JD) – his testimony was “like a circus”
  • Critical of everything: consent; performance of surgery; management of complication; operative report; letter to OD;

• Cross-examination of expert
  • Impeached: used depositions from past cases; Judge reprimanded for being evasive
  • Loss of privileges at place he trained
    – “because of willingness to testify in this case”
Closing Argument

• Plaintiff
  • Never wanted surgery
  • “hardly anything we cannot fix”
  • “treadmill of surgery”

• Defense
  • Plaintiff knew risks; signed consent
  • Journal entries show knew of complications
  • Plaintiff expert lost privileges in 2005 (retained in 2011)
Defense verdict!

(50 minutes deliberations)
Aftermath

- Plaintiff filed medical board complaint against insured – dismissed
- Costs of defense - $225,000
- OMIC sued plaintiff for costs - $2,147
Plaintiff Expert Witness Issue

• Defense attorney re plaintiff expert:
  • “I am concerned that Dr. X. could render such baseless opinions without repercussion – I suspect he will continue to do so if left unchallenged.”
The Ethical Consequences of Unprofessional Testimony

Rule 16 of the AAO Code of Ethics
Why Do We Need Rule 16?

Incentives to allow bias, greed, ego to influence testimony on stand

**EWT can be lucrative**

Being an “expert” is good for the ego

Some doctors have an “axe to grind” with the legal system

Some well-intentioned get in over their heads
Industry-Wide Trend

Recognition that EWT constitutes practice of medicine
Organized medicine in best position to monitor and uphold ethical principles
Landmark case: Austin v AANS
AMA, ACS, AAP, ASA, ACOG, ACR, ACC
Detractors

Plaintiffs’ trial bar
Patient advocacy groups
Claim intimidation to protect doctors and curtail plaintiff testimony
“Circling the Wagons”
Rule 16 Due Process

Submission against AAO member(s)
Review by Ethics Committee
  – Optional outside “expert” review
Final determination
Formal Hearing
Alternative Disposition
  – Public reprimand, suspension, expulsion, report to National Practitioner Data Bank
Recommendation to Board of Trustees
Plaintiff Expert Witness Issue

- Insured consulted with defense counsel regarding medical board complaint and also a Rule 16 complaint at the AAO.
- Insured decided not to pursue due to time commitment and wanting to put lawsuit behind him.
Closed Claim Surveys

What risk management issues have been brought to your attention by this claim?

What steps have you taken in your practice to reduce your exposure to this type of claim in the future?
Frivolous Claims

“Price of doing business”

“It is a travesty that this case proceeded as far as it did. What a splendid reason for tort reform.”

“Patient would have sued regardless of any steps I, or anyone, could have taken.”

“It was, pure and simple, a grab for money, undeserved in any way, by the plaintiff’s daughter.”
Patient Selection

“We now have an office policy for me: I will not see any patients from the psychiatric section of the hospital”

“Avoid having drug addicts as patients”

“Stop accepting inmates from the state prison system as patients”

“Don’t take attorneys as patients to surgery”
Pre-Claim Assistance
Reports to Claims Department

Report Categories

- Lawsuit
- Claim (demand for money in writing)
- Miscellaneous
- Incident
  - Medical Board reports
  - Deposition Assistance
  - “Informal meeting”
  - Legal advice
  - Medical Records Request
Ophthalmologists face more than just litigation….

- Reports to OMIC “Confidential” Risk Management Hotline
  - General liability/risk question
  - Incidents
  - Difficult Patients
  - Document Review
  - Problems with other healthcare providers
Compounding Pharmacy Case

• March 6 – 8, 2013: 4 AMD patients post Avastin injection dx. with acute endophthalmitis

• All 4 patients received Avastin on March 4-6th from same lot repackaged at compounding pharmacy (CP) on February 13, 2013

• OMIC Insured had injected 42 patients from this lot March 4 – 6. Not sure who else may have been exposed

• All 4 patients tapped and injected; 3 taken to surgery for vitrectomy

• Sequesters all remaining syringes of Avastin from CP
Compounding Pharmacy Case

• One other (5th) case of endophthalmitis from Avastin repackaged from CP on same date; occurred in another state; organism similar to 4 other cases

• CP had no prior hx. of problems but not certified by Pharmacy Compounding Accreditation Board (PCAB)

• Insured recently started using this in-state CP due to restrictions by state pharmacy board post New England Compounding Center disaster

• Prior to state pharmacy board restriction had been using out of state PCAB certified pharmacy
Compounding Pharmacy Case

- Insured contacted:
  - CP Pharmacist (Thursday)
  - OMIC (Thursday)
  - State Department of Health (Friday)
  - Centers for Disease Control (Friday)
  - FDA (Friday)
- Contacted retina colleagues at 2 large university settings regarding – consensus to prophylactically inject Vancomycin; 35 patients injected (a few deferred)
- Closed office to regularly scheduled non-emergent patients to bring back 42 patients to examine and inject
Compounding Pharmacy Case

• March 7<sup>th</sup> OMIC assigns attorney
• OMIC and attorney contact insurance carrier for pharmacy
• Hospitals sending vitreous specimens to ARUP (national reference laboratory) in Utah
• Per instruction of state DPH, insured sends Avastin syringes to FDA lab in New York to test
Compounding Pharmacy Case

- March 13th – inspection of insured’s office by DPH
  - Review patient medical records to identify risk factors for infection
  - Evaluate office infection prevention practices
  - DPH finds no deficiencies in injection technique or medication storage and handling

- Multiple deficiencies identified by DPH at CP regarding sterility during repackaging
Compounding Pharmacy Case

Public Notices

- March 15 – American Society of Retina Surgeons (ASRS) sends alerts – Therapeutic Surveillance Committee
- March 18 – FDA issues a MedWatch Alert announcing voluntary recall
- March 19 – Medscape (online) article
- March 20 – AAO gives notice in Academy Express
- March 20 – ABC (online) article (quotes pharmacist)
Compounding Pharmacy Case

- April 2 – Medical records request from attorney representing three patients
  - Products liability plaintiff attorney
- OMIC defense counsel contacts attorney for CP
- Insured continues to care for the patients
Compounding Pharmacy Case

• February 2014 – attorney for patients calls insured’s office to set up “informal” meeting

• Insured contacts OMIC and defense counsel

• Generally do not let insured’s meet with patient’s attorney, but exception based on:
  • Excellent review by DPH of insured’s office
  • Continued to treat patients
  • Makes an excellent impression (well-spoken, good credentials, etc.)

• Conference call with patients’ attorney proceeds uneventfully
Compounding Pharmacy Case

- Benefits of calling OMIC
  - Ongoing feedback while handling situation
  - Contact with Academy and ASRS
  - Assign counsel (privilege communications)
  - Deal with other insurance carrier
  - Deal with patients’ attorney

**NO CLAIM AGAINST INSURED!**
Thank you!
2014 Paid Closed Claims by Treatment

Total Paid Indemnity = $9,936,725 (44 claims)
2014 Closed Paid Claims by Subspecialty
“Frequency” – Probability of a Claim

OMIC needs to estimate the percent of insureds that will be sued in a given year.

This estimate is used to set rates (premiums charged) and also to set reserves to pay claims.

The fewer claims the lower the premiums.
“Severity” – How much a claim will cost

OMIC needs to estimate the amount of indemnity (and expenses) the company will pay on a claim.

This estimate is used to set rates (premiums charged) and also to set reserves to pay claims.

The lower the indemnity payments, the lower the premiums.