



**Gallagher**

Insurance | Risk Management | Consulting

# MEDICAL MALPRACTICE IN THE HEALTHCARE INDUSTRY



Healthcare





## Introduction

Medical Malpractice is the cornerstone of any healthcare provider's insurance portfolio. It's likely the largest spend any hospital system has for a single insurance product, and no other coverage has so many external factors impacting its cost, such as legal environment, exposure and claims history. This exposure is also associated with significant level of distress for all parties involved. Not only for the patients and their families who have experienced an unanticipated, devastating outcome but also the providers who are often dealing with the anxiety and depression related to an allegation or a high level of burnout due to the rigors of their job.

The significance of medical malpractice in the healthcare industry is multifaceted. Firstly, it directly impacts patient safety and quality of care. When medical professionals make errors or fail to meet the standard of care, patients can suffer physical, emotional, and financial harm. Medical malpractice cases highlight the need for accountability and improvement in healthcare practices.

Secondly, medical malpractice has financial implications for both patients and healthcare providers. Patients who experience harm may incur additional medical expenses, loss of income, and other financial burdens. Healthcare providers and organizations may face costly legal battles, increased insurance premiums, and damage to their reputation.

Furthermore, medical malpractice cases contribute to the overall healthcare system by identifying areas of improvement and promoting patient safety. By analyzing allegations and trends in medical malpractice, healthcare professionals and organizations can implement strategies to prevent future errors and enhance the quality of care.

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## Emerging Exposures in Medical Malpractice

Healthcare professionals face new and evolving risks due to changes in medical practices, patient expectations, and legal standards. These risks can include emerging medical treatments, procedures, and therapies that may have unforeseen complications or associated risks. Additionally, evolving societal expectations and increased patient empowerment can lead to higher scrutiny and potential liability for healthcare professionals.

### **TECHNOLOGICAL ADVANCEMENTS AND THEIR IMPACT ON MEDICAL MALPRACTICE**

Technological advancements involving artificial intelligence or AI have significantly impacted the healthcare industry through optimizing patient and resource scheduling, improved identification of high-risk patients and clinicians, image interpretation and improvements in diagnosis, patient monitoring and treatment planning.

However, these advancements also introduce new risks and potential sources of medical malpractice claims. Allegations of medical negligence are increasingly relevant as AI technologies are integrated into healthcare. These allegations can arise from various scenarios, including:

1. **Misdiagnosis:** AI systems used for diagnostic purposes may misinterpret medical data, leading to incorrect diagnoses. If a patient suffers as a result of relying on an AI diagnosis, this could lead to malpractice claims against healthcare providers or other types of claims against the developers of the AI.
2. **Treatment Recommendations:** AI-driven treatment plans might suggest inappropriate or harmful interventions. If a healthcare provider follows AI recommendations without adequate oversight and a patient is harmed, this could be grounds for malpractice.
3. **Data Privacy Violations:** AI systems often require access to sensitive patient data. If a breach occurs, leading to unauthorized access or misuse of patient information, this could result in legal action against the healthcare provider or AI vendor.
4. **Informed Consent:** Patients may not fully understand how AI is being used in their care. If they are not properly informed about the role of AI in their treatment, this could raise ethical and legal questions about informed consent.
5. **Liability Issues:** Determining liability in cases involving AI can be complex. Questions arise about whether the responsibility lies with the healthcare provider, the AI developer, or both. Clear guidelines and regulations are still evolving in this area.
6. **Algorithmic Bias:** AI systems can inherit biases from the data they are trained on, leading to unequal treatment outcomes for different demographic groups. If a patient experiences harm due to biased algorithms, this could lead to malpractice allegations.

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As AI continues to evolve in the medical field, addressing these concerns will be crucial for ensuring patient safety and maintaining trust in healthcare systems. Legal frameworks and ethical standards will need to adapt to the unique challenges posed by AI technologies. Many of our clients have created new senior executive-level leadership positions for AI to ensure compliance with many of the issues raised here.

#### **TELEMEDICINE AND ITS POTENTIAL FOR INCREASED EXPOSURE TO MALPRACTICE CLAIMS**

Telemedicine, the remote provision of healthcare services through technology, has gained significant popularity, especially in recent years. While telemedicine offers numerous benefits, it also presents unique challenges and potential exposure to malpractice claims. Challenges include issues related to misdiagnosis or delayed diagnosis due to limited physical examination, technical glitches, privacy concerns, and communication barriers. Healthcare professionals practicing telemedicine must adhere to the same standard of care as in-person consultations and take appropriate measures to mitigate risks.

#### **CYBERSECURITY RISKS AND PATIENT DATA BREACHES**

The healthcare industry increasingly relies on electronic health records and interconnected systems, making it vulnerable to cybersecurity risks. Patient data breaches can have severe consequences, including potential medical malpractice claims. Breaches can lead to compromised patient information, identity theft, and unauthorized access to sensitive medical records. Healthcare professionals and organizations must prioritize cybersecurity measures, including robust data encryption, employee training, and regular security audits, to protect patient data and minimize the risk of malpractice claims.

It is crucial for healthcare professionals, insurers, and policymakers to stay informed about these evolving risks and take appropriate measures to mitigate them, ensuring patient safety and the integrity of the healthcare system.

## Types of Allegations in Medical Malpractice

Medical malpractice allegations can vary widely, encompassing a range of errors, omissions, or negligence by healthcare professionals. Common types of allegations include misdiagnosis or delayed diagnosis, surgical errors, medication errors, birth injuries, anesthesia-related malpractice, and failure to obtain informed consent. Each type of allegation carries its own set of risks and potential consequences for both patients and healthcare providers.



## Claims Trends: High Verdicts Being Awarded

In recent years, there has been a trend of high verdicts being awarded in medical malpractice cases including a sharp rise in the number of verdicts exceeding \$10 million and \$25 million. A September 2023, paper authored by Rich Henderson who leads TransRe's medical malpractice claims group, illustrated the history and recent trajectory of the number of verdicts in these award ranges. We know that these cases often go on to settle well below the verdict award, but as pointed out in the TransRe paper, higher verdicts ultimately lead to larger settlements, which may then lead to a domino effect for our industry in future years.<sup>1</sup>

Factors contributing to this trend include increased public awareness, changing attitudes towards healthcare providers, and the influence of social media on public perception. High-profile cases and large verdicts can impact the insurance industry, leading to higher premium, reductions in limit capacity and the potential of more insurers exiting this segment.

This increase in jury verdicts may also have a significant influence on the public's trust in the healthcare community, leading to increased public scrutiny of a hospital's practices and safety protocols. The likely negative media coverage can further amplify concerns about the quality of care. Other contributing factors affecting patient trust can include the following:

- **Awareness of Risks:** When verdicts are reported, they often highlight specific instances of negligence or malpractice. This increased awareness can make patients more cautious and skeptical about the care they receive, leading to diminished trust in hospital staff and systems.
- **Fear of Negligence:** Patients may worry about the potential for errors or harm, especially if they are aware of previous verdicts against a hospital. This fear can create anxiety around seeking medical care, impacting their willingness to pursue necessary treatment.
- **Impact on Relationships:** Trust is fundamental in the patient-provider relationship. If patients feel that a hospital has a history of malpractice, they may be less likely to communicate openly with their healthcare providers, which can hinder effective treatment.

Ultimately, the influence of jury verdicts on patient trust depends on various factors, including how hospitals respond to verdicts, the transparency of their practices and the overall healthcare environment in the community. On the positive side, significant jury verdicts can prompt hospitals to reevaluate their procedures, training, and safety measures. If patients see hospitals actively working to improve care and prevent future incidents, it may help restore trust over time.



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## SEXUAL ABUSE AND MOLESTATION

Sexual abuse and molestation (SAM) allegations within the healthcare industry have become a significant concern for medical malpractice insurance carriers. The severity and frequency of these claims have led to a reevaluation of coverage and potential changes in insurance policies. As a result, carriers may consider excluding, sub-limiting, or subjecting SAM claims to co-insurance.

Recent case analysis conducted by a risk management consulting firm, revealed alarming statistics. Between 2002 and 2021, 94 public lawsuits involving SAM claims specific to the healthcare industry were filed, with an average payment of \$108 million. What is particularly concerning is that in 58 percent of these cases, the healthcare facility was aware of the allegations, indicating a failure to address and prevent such misconduct.<sup>2</sup>

Allegations of SAM in hospitals are serious issues that can have profound implications for patients, healthcare providers, and the broader medical community. Here are some key points regarding this sensitive topic:

1. **Nature of Allegations:** Allegations can involve various scenarios, including inappropriate behavior by healthcare staff towards patients, especially vulnerable populations such as minors, the elderly, or those with disabilities. Within our behavioral health units, we have experienced a significant increase in situations involving patient on patient abuse. Allegations may also extend to medical professionals abusing their authority or trust.
2. **Impact on Victims:** Victims of sexual abuse in hospitals may experience significant emotional and psychological trauma. This can lead to long-term effects on mental health, trust in healthcare systems, and willingness to seek medical care in the future.
3. **Reporting and Accountability:** Hospitals typically have protocols for reporting misconduct, but the effectiveness of these processes can vary. It is crucial for institutions to foster an environment where patients feel safe to report incidents without fear of retaliation or disbelief.
4. **Legal and Ethical Implications:** Hospitals may face legal action if they are found negligent in preventing or addressing allegations of sexual abuse. This can lead to lawsuits, financial penalties, and damage to the institution's reputation. Ethical considerations also come into play regarding how allegations are handled and how support is provided to victims.
5. **Preventive Measures:** To mitigate the risk of abuse, hospitals should implement robust training programs for staff on appropriate conduct, consent, and recognizing signs of abuse. Background checks and ongoing evaluations of staff behavior can also be effective.
6. **Support for Victims:** Healthcare institutions should provide resources and support for victims of sexual abuse, including counseling services, legal assistance, and advocacy. Ensuring that victims have access to compassionate care is essential for their recovery.

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Rising costs of claims, including legal fees and settlements, **can impact the profitability of insurance carriers and result in higher premiums for healthcare providers.**

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7. **Cultural Change:** Addressing the issue of sexual abuse in hospitals requires a cultural shift within healthcare organizations to prioritize patient safety and promote transparency. Encouraging open discussions about misconduct can help in creating a safer environment.

These developments highlight the urgent need for healthcare facilities and professionals to prioritize the prevention of SAM, as well as the implementation of robust risk management strategies. It is crucial for healthcare providers to create a safe environment for patients and take proactive measures to address and prevent such misconduct. Insurers, in turn, will continue to assess and adapt their coverage offerings to mitigate the risks associated with these claims.

## Challenges Faced by Insurance Carriers in the Medical Malpractice Sector

Availability and affordability of coverage can be a concern, particularly in certain specialties or regions where the risk of malpractice claims is higher. Insurance carriers must carefully assess risks, underwrite policies, and adapt to changing trends in the medical malpractice insurance market.

Medical malpractice insurance carriers face various challenges in the healthcare industry. Rising costs of claims, including legal fees and settlements, can impact the profitability of insurance carriers and result in higher premiums for healthcare providers. During hard market cycles, insurance carriers often respond by restricting coverage or introducing sub-limits for certain exposures.

## Expectations of the Underwriting Community

Healthcare systems can expect that given the issues raised within this discussion, underwriters will take a more disciplined approach to underwriting hospital professional liability risks. While rates, limit capacity and retention levels will continue to be a factor for most insureds, carriers will likely begin suggesting exclusionary language associated with sexual misconduct and punitive damages, and even demand increased underlying limits in order to schedule auto liability.



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There likely won't be consistency among how our underwriters respond, but with respect to sexual abuse and molestation, we are confident you can expect change. Most insurers will likely stop short of a complete exclusion, but many may only offer a defense only option or seek to sub limit coverage for SAM risk or apply a co-insurance provision forcing the insured to participate more actively in their own risk, or limit the carrier's exposure by applying a retro date inception (RDI) arrangement. While some of these would cut back coverage, the worst-case scenario for our clients would be the global reinsurance market electing to eliminate this coverage altogether.

Along with this uncertainty as to how SAM exposures will be addressed, we do expect underwriters to move to an even more disciplined approach to evaluating hospital professional liability risk than exists now. You can be sure that the insurers supporting this market segment are reviewing their internal policies and procedures for underwriting. We expect that clients and brokers will need to be prepared to answer more questions in detail about protocols for SAM and AI. In addition, we will want to show insurers how our clients are utilizing telehealth, setting policy on transgender reassignments, and using telemetric data including the risk mitigation guidelines supporting each of these topics.

## Strategies for Mitigating the Risk of Medical Malpractice Claims

Healthcare professionals and organizations can take proactive steps to prepare for medical malpractice claims. This includes implementing risk management strategies such as:

- Effective communication and documentation practices
- Quality assurance programs
- Continuous education and training for healthcare professionals
- Utilizing technology to improve patient safety and reduce errors
- Aligning risk, legal and human resources department in evaluating policy, sharing data and conducting investigations

By focusing on patient safety, improving processes, and staying up-to-date with best practices, healthcare providers can reduce the likelihood of malpractice claims and mitigate potential damages.

In the current environment of increasing medical malpractice verdict values, the importance of a robust risk mitigation strategy cannot be overstated. At Gallagher, we are committed to supporting our clients by providing comprehensive risk assessments, tools, and solutions to help mitigate their risks.

Our focused assessments are tailored to address key areas such as policy review, training, supervision, and root cause analysis, all aimed at preventing incidents before they occur. We have also made significant investments in data analytics and claim benchmark information, enabling us to provide valuable insights and guidance.



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As one of the world's leading insurance brokers, Gallagher offers a wide range of insurance, risk management, self-insurance, claims management, and employee benefits products and services. We understand the need to continually deliver exceptional results to our clients, which is why we continuously expand and evolve our services.

Our team consists of highly experienced professionals in both the healthcare industry and specialized product areas. We combine our expertise with market knowledge and strength, as well as our growing analytics and claims services, to provide comprehensive support to our clients.

Contact us today to learn more about how Gallagher can help you navigate the challenges of the healthcare industry and develop effective risk management strategies.





## About the Author

**Steven Kahl** oversees the strategy of Gallagher's global healthcare team and he is responsible for existing healthcare clients across the country. He specializes in creating alternative risk financing structures for large integrated healthcare systems, and for supporting the development of tailored clinical and enterprise risk management service plans. Steve has been a regular speaker on issues related to captive insurance programs and privacy liability.

Steve began his career in 1989 and joined Gallagher in 2011 through a merger with Kahl & Associates. His career has been primarily focused on healthcare professional liability placements, privacy liability and supporting ancillary lines of coverage. Before joining Gallagher, Steve was owner of Kahl & Associates, a national healthcare insurance brokerage. He began his career as an account executive for a national insurance brokerage specializing in medical malpractice placements for hospitals and health systems. Steve then joined a mono-line medical malpractice insurance company and served as director of sales in the western United States.

Steve received a bachelor's degree from the University of Southern California.

### Steve Kahl

Senior Managing Director,  
Healthcare Practice

T: (303) 889 2624

E: [steve\\_kahl@ajg.com](mailto:steve_kahl@ajg.com)

#### SOURCES

<sup>1</sup> Rising Verdict Severity Ripples Through Casualty Lines; <https://www.theinsurer.com/reinsurancemonth/rising-verdict-severity-ripples-through-casualty-lines/>

<sup>2</sup> Praesidium Report; <https://heyzine.com/flip-book/PraesidiumReport2024#page/1>

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