



Original article

Breast cancer medical malpractice litigation in New York: The past 10 years

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ABSTRACT

Medical error is a leading cause of preventable death in the U.S., with diagnostic errors comprising the majority of errors. Delay in diagnosing breast cancer is a unique multidisciplinary phenomenon involving primary care physicians, gynecologists, radiologists, pathologists, and general surgeons. The New York medical malpractice court system remains among the most active court systems in the country. The purpose of this study is to analyze the characteristics of medical malpractice litigation involving breast cancer in New York for the past 10 years. Jury verdicts and settlements from 2007 to 2017 were obtained from a computerized legal database and were analyzed. Data pertaining to defendants, plaintiffs, case outcomes, allegations, and verdicts were collected. The study identified 48 cases of litigation pertaining to breast cancer. Overall, 14 of the verdicts were won by defendants (46.7%). Among the plaintiffs' verdicts and settlements, the median payout was \$1.8 million (mean \$2.9) overall, \$2.6 million (mean \$4.3) for verdicts alone, and \$1.68 million (mean \$1.9) for settlements. The most commonly named specialty among the defendants was radiology (32) and the second was surgery (15). Inappropriate workup of mammography findings was alleged in 18 cases. The average delay to diagnosis was 13.4 months (sd 7.1). Fourteen cases involved diagnosis at stage 4, nine cases at stage 3, and fifteen at stage 2. The average verdict payout was more than two times higher than the average settlement payout. Errors leading to malpractice claims may be attributable in part to lapses in communication among medical providers involved in the workup of suspicious breast lesions.

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Introduction

Medical error is a leading cause of preventable death in the U.S., with diagnostic errors comprising the majority of errors [1]. It is estimated that approximately 252,710 cases of female breast cancer were diagnosed and approximately 40,610 women died from the disease in the U.S. in 2017, making breast cancer the second leading cause of cancer deaths in women [2]. The primary prevention of breast cancer is still not available except by measures such as prophylactic mastectomy for women who are genetically at high risk. The focus in fighting breast cancer remains early detection. Prognosis is more favorable for women with early stage disease than for those with more advanced disease. Since early detection is associated with decreased mortality, delays in detection, diagnosis, and treatment are of prognostic concern [3].

Prior studies have explored nationwide trends in medical

malpractice litigation [4–8]. However, litigation environments vary tremendously among U.S. states as a result of differing legislation and other state specific factors. A study such as the present one which focuses on an individual litigation environment will help elucidate differences in the characteristics of claims brought in various legislative environments. New York remains the most active medical malpractice court system in the country, having the highest total payout out of any state at \$711.7 million [9]. Analyzing New York medical malpractice cases presents the advantage of better access to defendants' specialties through state websites, such as New York Doctor Profile.

Malpractice claim characteristics differ greatly among various medical specialties [5]. Breast cancer is unique in that its diagnosis often relies on many specialists, including primary care physicians, gynecologists, radiologists, pathologists, and general surgeons. Finally, it is important to periodically re-examine litigation trends as technology in medicine advances and may influence the characteristics of the legal actions which are brought. The present study aims to discover the characteristics of breast surgery malpractice claims which were reported in New York in the last 10 years.

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Materials and methods

The Westlaw legal research database (Thomson Reuters, New York, NY) was queried for all publicly available state and federal court reports regarding breast cancer litigation. The Westlaw database is an online legal research service for lawyers and legal professionals which can provide information regarding state and federal cases. Jury verdicts and settlement reports were obtained using the search terms “breast cancer” and “malpractice” for a time period between 2007 and 2017. Exclusion criteria included duplicate cases, unrelated topics, and lack of reported data. Data was collected pertaining to geographic area (County), year filed, year of verdict or settlement, year of occurrence, settlement versus verdict, age of plaintiff, specialties of defendants, payout amount if any, alleged delay, and stage of cancer. Specialties of the defendants were identified using New York’s physician database. Data analysis was carried out using Excel and statistical significance was calculated using a two-tailed Student’s *t*-test.

Results

Our search of the Westlaw database from 2007 to 2017 yielded 722 results. Of these verdict and settlement reports, 48 met the inclusion criteria and were included for analysis. In this set of cases, 16 resulted in verdicts for the plaintiff (33%), 14 resulted in verdicts for defendant (29.2%), and 18 resulted in settlement (37.5%). Among those cases that resulted in verdicts for plaintiff, the mean award was \$4.3 million (range, \$15,000 - \$15,000, 000; median = \$2.6 million). Of those cases that resulted in settlement, the mean award was \$1.9 million (range, \$450,000 - \$4,750,000; median = \$1.68 million). The difference between the awards for verdicts versus settlements was statistically significant ($p = 0.034$). The most commonly named defendant specialty was radiology (32 [49.2%]), second was surgery (15 [23.1%]), then gynecology (11 [16.9%]), primary care (3 [4.6%]), and pathology (2 [3.1%]). Eighteen of the cases involved only one specialty while the rest involved two or more. The average age of the plaintiffs was 45.4. Ten cases did not specify the age of plaintiff. In cases that resulted in verdicts for the plaintiff, the average age of the plaintiffs was 44.3. In cases that resulted in verdicts for the defendants, the average age of the plaintiffs was 45.4. In cases that resulted in settlement, the average age of plaintiff was 46.2. (Fig. 1)

Thirty two cases specified a delay in diagnosis. In those cases, the average delay was 13.4 months with a standard deviation of 7.1. In cases that resulted in verdicts for the plaintiff, the average delay in diagnosis was 13.2 months (9/15 cases specified delay in diagnosis). In cases that resulted in verdicts for the defendants, the average delay in diagnosis was 10.7 months (6/14 cases specified delay in diagnosis). In cases that resulted in settlement, the average delay in diagnosis was 14.2 months (17/18 cases specified delay in diagnosis). The difference in the period of delay in diagnosis between the plaintiffs’ verdicts, defendants’ verdicts, and settlements

was not found to be statistically significant.

Inappropriate workup of mammographic findings were involved in 24 cases; inappropriate workup of lumps were involved in 20 cases; inappropriate workup of biopsies were involved in 2 cases; and inappropriate workup of an inverted nipple was involved in 1 case. Fourteen cases involved diagnosis at stage 4 (29.2%), nine cases at stage 3 (18.8%), fifteen at stage 2 (31.3%), and ten did not mention the stage (20.8%).

Discussion

Our case analysis demonstrates that most of the reported case outcomes involving breast cancer in New York for the 10 year period between 2007 and 2017 were in favor of plaintiffs (34/48 [71%]). More than a third of the cases were settlements (18 [37.5%]). Interestingly, 46.7% of the verdicts were won by defendants (14/30). These numbers are consistent with prior data available from national reports, although it appears that the verdict percentages in favor of plaintiffs at trial in New York were slightly higher than they are nationally [4]. U.S. Department of Justice data reveal that medical malpractice is the second-toughest type of tort case for plaintiffs to win at trial, with defendant physicians prevailing in 63.3% of verdicts [10].

Among the cases in our study which involved a delay in diagnosis, the average delay was quite long (13.4 months). This delay is slightly shorter than the one reported nationally in a study conducted by Kern et al. Said authors analyzed 338 jury verdict reports pertaining to delayed diagnosis of cancer leading to litigation from 42 states in a 15 year period and found that the average diagnostic delay was 17 months. At 1–3 months of diagnostic delay, jury verdicts largely favored the defense (seven of 11 [65%] defense verdicts); after 6 months of delay, jury verdicts were almost evenly divided between defense verdicts, plaintiff verdicts, and out-of-court settlements [4].

Among the plaintiffs’ verdicts and settlements, median payout was \$1.8 million (mean \$2.9) overall, \$2.6 million (mean \$4.3) for verdicts alone, and \$1.68 million (mean \$1.9) for settlements.

Schaffer et al. used the National Practitioner Data Bank (NPDB) to study medical malpractice verdicts and settlements and found that the overall rate of claims paid on behalf of all physicians dropped by 55.7% from 1992 to 2014 across the country. After adjusting for inflation, researchers found that the amount of the payment was dependent on specialty. The authors report that the most common type of allegation was an error in diagnosis (31.8% of all paid claims), followed by errors related to surgery (26.9%) and errors related to medication or treatment (24.5%). However, the average payout for successful malpractice claims rose about 23% to \$353,000 in 2009–2014, up from \$287,000 during the 1992–1996 period [5]. Murphy et al. reviewed 264 cases from 2000 to 2017 pertaining to breast cancer care across the country. They found the most common reason for litigation (59.1%) was delay in diagnosis, followed by improper surgical treatment (9.8%). The medical

	Mean	Median	Min	Max
Plaintiffs' Payouts	\$2,905,405.00	\$1,800,000.00	\$15,000.00	\$15,000,000.00
Plaintiffs' Verdict Payouts	\$4,264,140.00	\$2,612,500.00	\$15,000.00	\$15,000,000.00
Settlement Payouts	\$1,848,611.11	\$1,675,000.00	\$450,000.00	\$4,750,000.00
All Verdicts and Settlements	\$2,021,151.30	\$1,387,500.00	\$0.00	\$15,000,000.00
All Verdicts	\$2,058,550.34	\$0.00	\$0.00	\$15,000,000.00

Fig. 1. Mean, median, and range of payouts.

specialties most frequently named in lawsuits as defendants were radiology (28.8%) and general surgery (28%), followed by primary care (19.7%). They found settlement was reached in 22.3% of the cases, a plaintiffs' verdict was reached in 22.7% of the cases, and a defense verdict was reached in 54.9% of the cases. The median verdict amounts were greater than the median settlement payouts (\$1.49 million versus 0.86 million) [6].

Kern et al. reviewed 45 cases from 1971 to 1990 in the U.S. which involved delay in diagnosis. They found that the majority of cases commenced following patients' discovery of a painless mass by self-examination of the breast, with only 49% undergoing further workup, mostly by mammography (44%), and the results of 80% of the mammograms were read as normal. In contrast to Murphy et al., they found that the greatest number of cases involved obstetricians and gynecologists (50%), followed by family practitioners and internists (41%), general surgeons (28%), and radiologists (10%) [7]. Mitnick et al. reviewed 118 cases involving breast cancer in the U.S. and found that gynecologists were accounted for 47% of physicians involved in lawsuits, and radiologists accounted for 13%. The average delay in diagnosis was found to be 14 months and the average award to plaintiffs was \$691,449 [8].

In the present study, the most commonly named defendant specialty was radiology (32), second was surgery (15), then gynecology (11), primary care (3), and pathology (2). The plaintiffs' average age was 45. Inappropriate workup of mammographic findings were involved in 18 cases. In cases involving delay in diagnosis, the average delay was 13.4 months (sd 7.1). Fourteen cases involved diagnosis at stage 4, nine cases at stage 3, fifteen at stage 2, and ten did not mention the stage. The results from the present study appear to be consistent with the findings by Murphy et al. with regards to the most common defendant specialty and dissimilar from Mitnick et al. and Kern et al. Differences may be attributed to the methodology employed by the researchers. More specifically, the methods section of the above mentioned studies do not mention whether each individually named defendant's specialty was determined. This constitutes an additional and time consuming step which was taken in the present study. Further studies are necessary to determine whether it is more likely that more defendants will be named in New York State compared to the rest of the country. Another reason for why New York may have different results from the national studies is that New York does not require physicians to sign affidavits of merit with regards to each individual defendant, which may allow plaintiffs to be more inclusive of additional defendants. This is in contrast to jurisdictions such as New Jersey which require pre-action affidavits of merit. In addition, because less information may be available to attorneys in the pre-discovery phase, such inclusion of more defendants may result in a higher likelihood of payouts and perhaps larger payouts. Finally, given our results are more current, we may be seeing an effect of the newer guidelines which recommend more frequent screenings which would increase the involvement of radiologists in these actions.

As cognizance of preventable errors and litigation plays a larger role in the practice of medicine, study of the causes and effects of

medical errors continues to be important. It is the authors' opinion that differing litigation environments affect the characteristics of outcomes and allegations in medical malpractice lawsuits and continuing to study such difference in the various medical specialties will prove useful to physicians and patients alike. More broadly, the review of medical negligence cases may offer deep insights into potential lapses in medical care that are not available in hospital review committees. It is the authors' opinion that the type of review which is often more useful for drawing conclusions regarding care involves a full medical legal review of a case, which would include reviewing medical records, depositions, and trial transcripts. The present study does reinforce the widely known and accepted principle that early diagnosis of breast cancer is the most important prognostic factor. Future research which would allow making clinical recommendations based on medical legal cases would need to delve into individual cases using medical records and deposition transcripts. Such research may prove very useful in an era where preventable errors are becoming more widely studied and observed.

Conflicts of interest

None.

Ethical consent

Public Database.

Funding source

None.

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