



LAW & ANESTHESIA

Myths & Reality

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- Free and informed consent
- Legal representative
- Fault - Responsibility
- Damage

Won't be addressed :

- Waiver of medical secrecy
- Consent for research





Evolution

The law evolves with the times

How ?

- New laws
- Jurisprudence
 - Not mandatory in Belgium
 - Cassation > Appeal > 1st Instance



Act w/out consent

- Injury to physical integrity
 - Effect of a drug
 - Invasive procedure
 - Stopping a treatment
- To be exempted, you need :
 - A consent
 - A purpose (curative or preventive)
 - Proportionality between purpose and risk
 - Know-how: best practices



How ?

- Tacit
 - Unambiguous, conscious and appropriate behaviour
 - OK for routine acts
- Express Oral: absolute majority of cases :
 - If risk > other ordinary treatment
 - If alternative exist
- Express Written:
 - When requested by the patient or physician

How ?

- Free : no external pressure
- Apt : no medication (Xanax, ..), alcohol, ...
- Timely: time for second opinion
- Individualized: clear language for the patient
- In the language of the area of the hospital :
French/Dutch/German ...





What ?

- Nature, length, objectives
- Conséquences (scars)
- *Relevant risks for patients*
- Risk of abstention
- Level of emergency
- Possible alternative
- Controversy of a technique
- Assurability, Visa, ...
- Financial informations

NOTE : new laws will be coming...



What ? Cass. 26/6/2009

Relevant Risk

- Frequent : > 1%
- Rare but sequels
- Rare but mortal
- Without exaggerating ou minimizing.
- Adapted to stress and psychological conditions.



Who?

A DOCTOR

- (ok if physician in training)
- NEVER a nurse



Who has to prove the consent

Until now, the patient has to prove that he didn't received the info.

ALWAYS NOTE in Medical Record :

“the patient has received full oral information and has freely consented »

Written info form ? Usefull but not perfect...

Legal representative

Decides for the patient if the patient is not (or no longer) capable

The representative **MUST** act "in the best interest of the children"

At what age a child is “capable” ?



Notions

At what age a child is “capable” ? (Art 12 – Law of 22/8/2002)

Age of discernment = age when one becomes capable of understanding the consequences of one's actions.

Varies from 7 to 12 years depending on maturity => is to be evaluated individually.

at this age, the child's consent ~~can~~ **MUST** be obtained.

parental consent not necessary or even sometimes forbidden (eg abortion)! ...
except to pay



Not capable :

Consent of the father OR the mother

(or a legal representative)

If divorced :

- *Exclusive parental authority (right of information)*
- *Non-exclusive authority: "by mutual agreement but... one is enough..." (law 14/4/95)*

Best practice = informed both



Exception

Emergency :

If the treatment is urgent and vital => consent is not mandatory.

Note in the EMR the justification.



Fault & Responsibility (Art 1382 Civ)

- Fault
- Proof of the fault
- Damage
- Causal link between fault and damage





Fault

- mistake = wrong judgment that any pro could make.
- Fault / Negligence / Malpractice = care provided fell below what is expected of a “normal” “medical professional”.

Types of Fault

- Excessive misconduct
- Lack of precaution
- Lack of foresight
- Informed consent (lack of information)
- Negligence
- Delegated responsibility (excessive delegation)
- Lack of organization.



Fault

- mistake = wrong judgment that any pro could make.
- Fault = care provided fell below what is expected of a “normal” “medical professional”.

=> Research of the national “norm”



- Fault = evidence of carelessness, recklessness or thoughtlessness
- Which « medical pro » ?
 - A specialist of the specialty of the act of the region.
 - = Not an hyperspecialist => Regular anesthésiologist
~~Pediatric anesthesiologist~~
 - diligent, competent & cautious (**bonus pater familias**)
 - Who is based on the latest state of science that can be known through normal continuing education
 - = **National Guidelines (KCE Report 26)**
~~Latest articles~~
 - Put in the **same situation** (emergency, night, ...)
 - Seeing the possibilities that the doctor had to do otherwise (call another colleague,..)






We always have "at least" an obligation of means
...

But sometimes “performance obligation” !

- If result guaranteed at the time of consent
- Failure to assist a person in danger
- Respect for professional secrecy
- Simple acts
- “Never Event” : wrong side (LocoRegional)



Proof of fault = legal evidence

Scientific evidence: an element that makes it possible to affirm a fact with absolute certainty

Legal evidence: element that allows a judge to be convinced of a fact.

- Almost never absolute certainty
- The doubt will be retained to the detriment of the one who has the burden of proof...



Damage

- Material or moral
- Present or future
- Certainty that without the fault, the patient would not have been in the same situation
- and not hypothetical
- May be a "loss of chance"

- Recognize the damage
- Evaluate its importance + convert it in €.

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Causal Link / causation in medical negligence

Certainty that without the fault, the damage would not have occurred anyway.



incidence

The Washington Post
Democracy Dies in Darkness

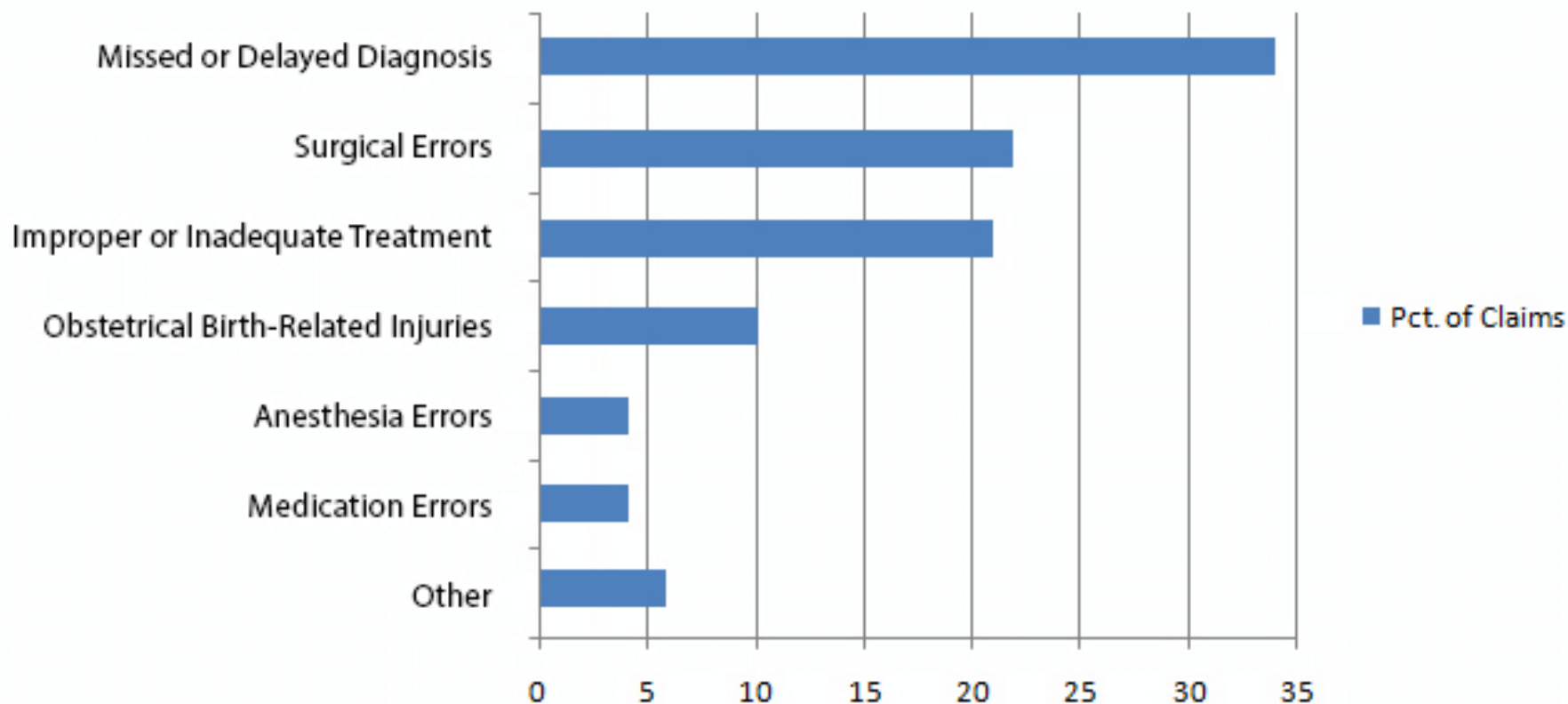
Health Health Care Medical Mysteries Science Well+Being

Researchers: Medical errors now third leading cause of death in United States



What Are the Most Common Types of Medical Malpractice?

Based on 2020 medical malpractice payouts in 2020:



SPECIAL ARTICLE

Prevalence and Characteristics of Physicians Prone to Malpractice Claims

David M. Studdert, L.L.B., Sc.D., Marie M. Bismark, M.B., Ch.B., L.L.B.,
with the assistance of the Center for Health Systems Research and Analysis

1% of physician = 32% of paid claims



Incidence : 3d Speciality

Procedures : Civil (burgerlijke) FRANCE 2022

Number of (France) :

- Anesth : 12 000
 - GP : 100 000
- => 5,5 times more risk

Condamnation rate (FR) :

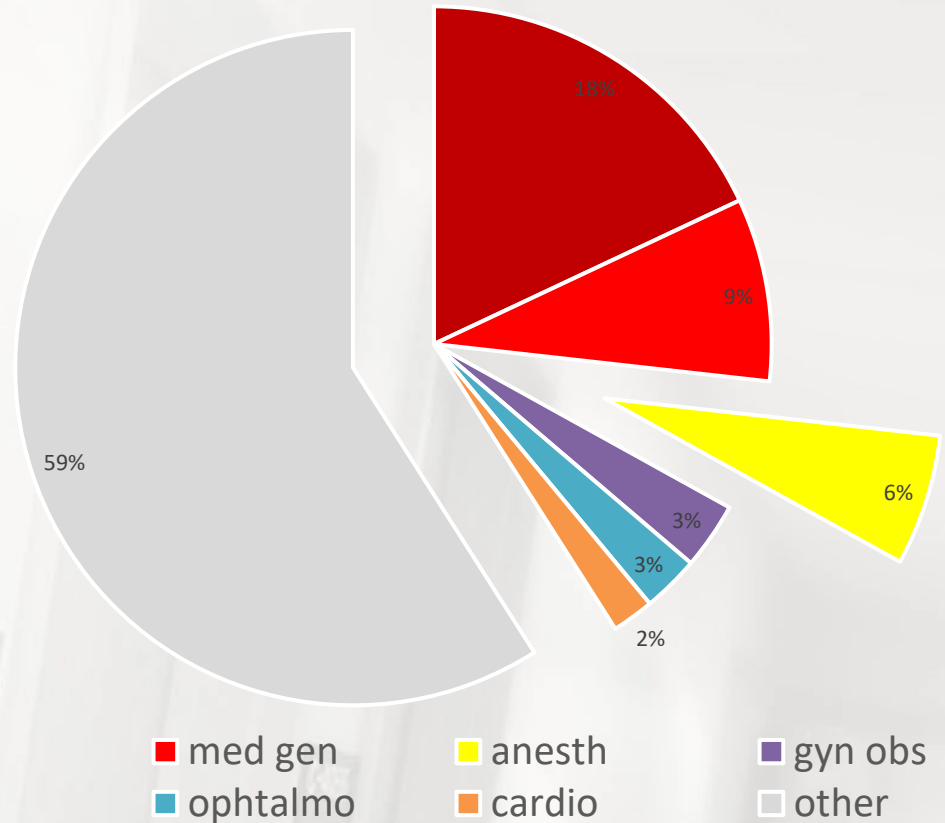
- Global : 50%
- Anesth : 22%

Mean indemnisation (FR) = 100K €

2 indemn > 3 M€

1 Obst

1 MG (child Meningoc)



Incidence in Belgium

Secret of Insurance company ...

Difficult to obtain infos ...

