



The Insurance  
Institute of London  
Chartered Insurance Institute

# The Insurance Institute of London

***CII CPD accredited - demonstrates the quality of an event and that it meets CII/PFS member CPD scheme requirements.***

***This webinar will count as 1 hour of CPD and can be included as part of your CPD requirement should you consider it relevant to your professional development needs. It is recommended that you keep any evidence of the CPD activity you have completed and upload copies to the recording tool as the CII may ask to see this if your record is selected for review.***



# Learning Objectives:

- Provide background on U.S. medical malpractice claims, with a focus on claims-handling considerations from the Underwriters' representative and coverage counsel perspective
- Helping London Market claims handlers and underwriters manage and understand healthcare claims



# Presenters



Sara Nau  
Counsel - Houston  
[sara.nau@phelps.com](mailto:sara.nau@phelps.com)



George Morris  
Partner - Birmingham  
[george.morris@phelps.com](mailto:george.morris@phelps.com)

# Friendly reminders

- The webinar will be recorded, and slides will be available on the CII website after the presentation
- We will address questions at the end of the presentation
  - if you have any questions, please enter them into the chat



# The Claims Cure: U.S. Medical Malpractice Insights for the London Market

Presented by

George Morris and Sara Nau

# Overview of Medical Malpractice Claims



## **Types of Insureds:**

- Hospitals
- Other care facilities
- Physicians and individual practitioners

**Damages Caps:** vary by state

## **Common Types of Claims:**

- Diagnostic errors
- Surgical and treatment-related errors
- Medication errors
- Negligence in aftercare
- SML

# Medical Malpractice Basics

## Medical Malpractice Law in the United States

- a. Almost exclusively governed by state law – no generally applicable federal malpractice scheme.
- b. Each state has different laws on medical malpractice, civil procedure, and damages.
- c. Plaintiff's burden of proof – Standard of care, breach, causation, and damages
- d. Expert requirements.
- e. Discovery rules.
- f. Damages.
- g. Damages Caps vary from state to state.
- h. Civil Procedure – how litigation and trial is conducted – varies from state to state.

# Claims Handling Challenges and Best Practices – Standards of Care

- What does standard of care mean?
- Generally established by expert testimony
- Different standards for different providers
- Hospital protocols and policies
- Training logs
- Literature and guidance from professional organizations

STANDARD  
OF CARE





# Causation

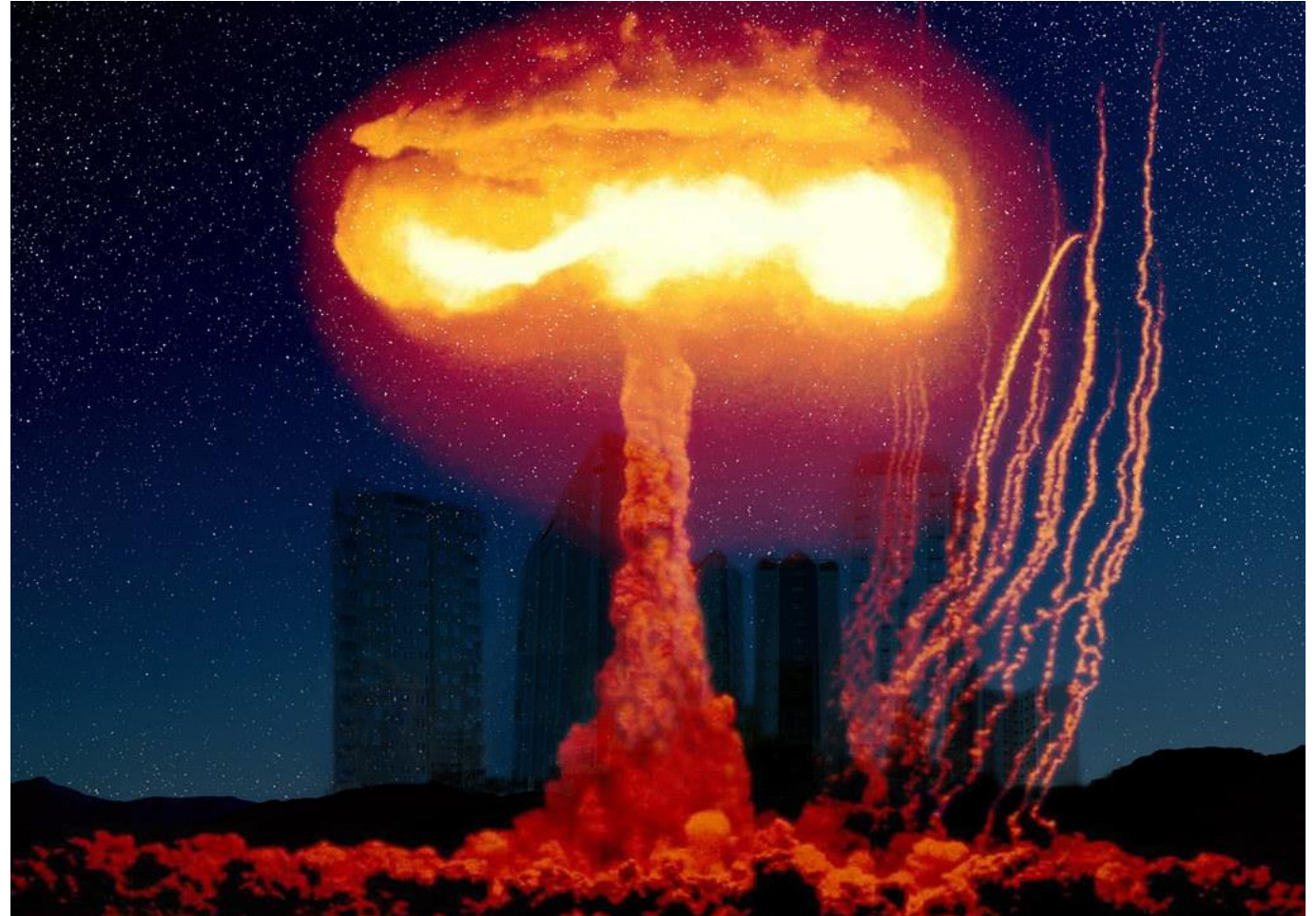
- Plaintiff must causally link alleged injury/death to the alleged breach of standard of care.
- Generally, expert testimony is required.
- Bad injury or bad outcome does not equate to causal link.
- Practically, sympathy can play a part, and a bad injury can override causation.
- All subsequent care must be casually linked.

# Damages

- Life care plans
  - Assessment and attack of plaintiff's life care plan
  - Defense life care plan
- Economic v. non-economic damages
- Damages caps
- Attorney's fees/fee-shifting
- Damages Evaluation

# Recent Trends

- Nuclear verdicts
  - Top Five Med Mal Verdicts:
    - 2023 - \$121M to \$31.5M
    - 2024 - \$412M to \$54M
- No safe venues or juries
- No Specialty is safe
- SML continues to be an immense risk
- Large Non-Economic and Punitive Awards
- “Nuclear” Settlements



[This Photo](#) by Unknown Author is licensed under [CC BY](#)

# Claims Handling Challenges and Best Practices – Role of Underwriter Rep

UW rep is the eyes and ears for London. Role may vary by program, but Underwriter Rep tasks can include the following:

- Avoid surprises – early warning system
- Establish rapport and collaborative relationship with insured – Claims cooperation.
- Receives initial notice of any PCEs, claims or suits, as well as loss runs.
- Flag potential coverage issues
- Regularly communicates with insured (and potentially defense counsel) on any claims with the potential to impact underwriters' layer.
- Monitor underlying layer erosion and identify and report on high-value claims.
- Quarterly claims calls.
- Annual claims review and annual claims review report.

# Claims Handling Challenges and Best Practices – Working with Defense Counsel and Experts

- UW rep collaborates with insured and defense counsel.
- Open and frequent communications on any claims of significance.
- Encourage at least quarterly check-ins.
- Encourage witness preparation and experts who can teach the jury.
- Use technology and AI to better prepare for trial.
- Mock juries and focus groups.





# Claims Handling Challenges and Best Practices – Reserving

- Concerns with “stair-step” reserving
- Ensure Underwriter rep knows that higher exposure claims may require more frequent, individual reporting to ensure reserves are appropriate
- Dealing with differences in opinion between insurers on same tower and/or defense counsel evaluation
- Know and understand insured reserving process and methodology
- Ensure reserves are to full claim value – not capped at SIR



[This Photo](#) by Unknown Author is licensed under [CC BY-SA](#)

# Claims Handling Challenges and Best Practices – Resolution Strategy

- Early identification and investigation of unexpected outcomes and other potentially compensable events (“PCEs”).
- Defense counsel may be engaged before claim is asserted if it is complicated or dangerous.
- Will the case get better or worse in discovery? If the answer is it will get worse, then resolve as quickly as possible.
  - If the answers it will get better, then get prepared to defend aggressively.
- Aggressive motion practice to limit issues and educate the court.
- Personalize the defendant.
- Prepare for reptile theory and other plaintiff’s tactics.

# Claims Handling Challenges and Best Practices – Coverage Issues

While Underwriter rep can help identify coverage issues, coverage counsel should be retained to assist with difficult coverage issues, which may include:

- Confirming duty to defend, particularly if you are the primary carrier and have a low SIR or a deductible
- Batching/determining number of retentions and whether each and every or aggregate limit is implicated
- Insured status for doctors/impact of Other Insurance
- Consent to settle
- Prior knowledge/prior notice issues
- Sexual Misconduct/Physical Abuse claims (Excluded? Sublimit?)
- Control of defense issues (if independent counsel is required or insured has control of defense, usually within SIR)
- HPL v. GL
- If an excess policy – follow form on policies below?
- If a reinsurance contract – follow the fortunes on captive?



# Claims Handling Challenges and Best Practices – Coverage Issues

## Ways coverage counsel can assist

- Confirming law that will apply to duties under the policy
- Preparing reservation of rights letters to preserve coverage defenses
- Assisting with responses to limits demands (particularly if there are coverage issues)
- Ensuring uniformity in policy interpretation
- Initiating declaratory judgment coverage actions or arbitrations if warranted
- Wordings advice



# Claims Handling Challenges and Best Practices – Policy Towers

- Large insurance towers may have several layers and require exhaustion of retentions, buffer layers, captive policies, and possibly multiple layers of insurance
- On insurance towers from non-London market insurers, there may be differences in opinion on how to handle claims, particularly with respect to settlement and defense strategy
- “Hammering” concerns



# Claims Handling Challenges and Best Practices – Claims-Handling Best Practices

---

Ensure defense counsel and/or Underwriter Rep are keeping you up to date on claim developments, for example via quarterly reports, with a focus on claims that could implicate your layer

---

Use these reports to help appropriately reserve – do not be afraid to ask Underwriter rep if there are questions on recommended reserving strategy

---

Keep an eye out for coverage issues, particularly if your attachment point is lower/the duty to defend “baton” may pass to you (while UW rep may identify coverage issues, it is important to be familiar with key coverage features of policies in order to ascertain when to refer to cov counsel)

---

Related to point above, maintaining communication between underwriters and claims team can help immensely with maintaining baseline understanding of UW intent

---

Once high exposure claims are identified, ensure routine check-ins with Underwriter rep and coverage counsel as needed

# What we have covered:

- Types of med mal claims
- Standard of care
- Causation
- Damages
- Recent trends in med mal cases
- Claims handling challenges and best practices – including on resolution strategy, coverage issues, policy towers, and best practices



# Q&A



The Insurance  
Institute of London  
Chartered Insurance Institute

Standards. Professionalism. Trust.

# Questions after the presentation? Please reach out



Sara Nau  
Counsel - Houston  
[sara.nau@phelps.com](mailto:sara.nau@phelps.com)



George Morris  
Partner - Birmingham  
[george.morris@phelps.com](mailto:george.morris@phelps.com)



The Insurance  
Institute of London  
Chartered Insurance Institute

## Feedback

Many thanks for attending this session.

Please take a moment to complete this Feedback Form by scanning the QR code below. Your comments will enable us to ensure that future CPD activities satisfy the needs of our members.

You will be able to download a CPD Certificate for this event upon completion of the survey.

