“See You in Court!” Top Reasons Nurses Get Sued

2020 NSO Malpractice and Exposure Report Update

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Today's Speaker

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SVP
NSO

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Objectives

Analyze

Analyze the actions and issues that prompted allegations of negligence or unprofessionalism against nurses, as well as the areas of nursing practice named most frequently in complaints.

Define

Define the average incurred expenses for nurses involved in a malpractice lawsuit or licensing board investigation.

Identify

Identify processes that nurses can implement into their practice to reduce their potential liability.

CNA

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Key Terms

- **Malpractice** - is a type of negligence; it is often called "professional negligence". It occurs when a licensed professional (like a nurse) fails to provide services as per the standards set by the governing body ("standard of care"), subsequently causing harm to the plaintiff.
- **Negligence** - is a failure to exercise the care that a reasonably prudent person would exercise in like circumstances. In tort law, *negligence* applies to harm caused by carelessness, not intentional harm.
- **Plaintiff** - the party who brings suit in a court.
- **Defendant** - the party against whom a claim or charge is brought in a court.
- **Indemnity** - monies paid on behalf on a NSO/CNA insured nurse in the settlement or judgment of a claim.

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NY MedMal Statutes

- **2 ½ years to file a claim from date of medical malpractice**
- **For minors, 2 ½ years after reaching age of 18**
- **If in continuous treatment, 2 ½ years after treatment ends**

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Professional Liability Data as a Risk Management Resource

- Analyzing incidents that led to adverse outcomes is the foundation for identifying vulnerabilities in our healthcare systems and reducing risk.
- Understanding the underlying human and systemic factors that can lead to patient harm helps nurses prevent errors through education, training, and practice improvement approaches.
- Professional liability data:
  - Provides insight into the underlying causes of problems: what failed and why?
  - Can reveal specific missteps, clinical errors, patterns of communication, and judgment failures that contribute to adverse events.
  - Helps nurses learn from peers' experiences and proactively identify areas for improvement.

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Case Study

Home Health RN

Case Study: Home Health RN

- Our insured was a registered nurse (RN) employed by a home healthcare agency.
- She was with a patient when she received a telephone call from a certified nursing assistant (CNA) who was employed at the same agency.
- The CNA was at the home of a mutual patient and reported that her gastrointestinal (GI) tube had come out sometime during the night.
- The insured informed the CNA that the patient would need to go to the emergency department to have the tube re-inserted as it would be several hours before she could see the patient.
- The patient's family didn't want to take the patient to the emergency department, but would instead wait for the insured to see the patient.

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Case Study: Home Health RN

- The CNA informed the insured that she had re-inserted several GI tubes when she was employed at a nursing home, so felt comfortable re-inserting this patient's tube.
- The insured agreed to let the CNA insert the tube, but advised her to not restart the feedings.
- Approximately 45 minutes later, the CNA contacted the insured and affirmed that tube was re-inserted without difficulty and proper placement was confirmed.
- When the nurse arrived at the patient's home several hours later, she noticed that the patient was receiving tube feeding.

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Case Study: Home Health RN

- When questioned, the daughter confirmed that she resumed the tube feedings shortly after the CNA left and denied being told to wait. The insured noted that the patient was complaining of abdominal pain and reported feeling nauseous.
- On physical assessment, the patient's abdomen was distended and positive for pain with abdominal palpation.
- After stopping the feeding, the nurse called 911 and the patient was transferred to the nearest hospital where she was diagnosed with peritonitis due to the GI tube being accidentally placed in the peritoneal space.

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Risk Management Comments

- The family filed a lawsuit against the insured and the home healthcare agency. The allegations against the insured included:
  - Wrongful delegation of patient care to an unlicensed assistive personnel (e.g. CNA);
  - Failure to follow the agency's policies and procedures on proper delegation, GI tube insertion and supervision of unlicensed assistive personnel;
  - Failure to contact the referring provider and obtain an order to reinsert the GI tube; and
  - Failure to assure that the patient and family had received appropriate communication related to re-inserting the GI tube and holding the GI feedings.

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Do you think the nurse was negligent?

Do you believe that the nurse was negligent?

Do you believe that any other practitioners or parties were negligent?

Do you believe that an indemnity and/or expense payment was made on behalf of the nurse?

If yes, how much?

Resolution

A settlement was reached prior to a lawsuit being filed, with payment on behalf of the nurse being 65 percent of the total settlement.

As mandated by state law, the nurse was also reported to the National Practitioner Data Bank (NPDB).

Total Incurred: > $250,000

Figures represent only the payments made on behalf of our registered nurse and do not include any payments that may have been made by the registered nurse's employer on her behalf or payments from any co-defendants. Amounts paid on behalf of the multiple co-defendants named in the case are not available.

Risk Control Recommendations

- ***Know your employer's policies and procedures related to clinical practices and delegation.*** Unfamiliarity to established policies and protocols is not a defense, especially if a clinician has acknowledged receiving education on such policies and protocols.
- ***Prior to delegating tasks, be aware of the knowledge and skills, training, diversity awareness, and experience of the individual*** to whom you are delegating elements of care. Use good clinical judgement, which includes the complexity of the patient, the availability and competence of the unlicensed assistive personnel, prior to delegating patient care.
- ***Monitor implementation of the delegated task***, as appropriate, to the overall patient plan of care.

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Risk Control Recommendations

- ***Evaluate overall condition of the healthcare consumer and the consumer's response to the delegated task.***
- ***Evaluate the unlicensed assistive personnel skills and performance*** of tasks and provide feedback for improvement if needed.
- ***For more information regarding nursing delegation, it is recommended that nursing professionals review the NCSBN and American Nurses Association (ANA) National Guidelines for Nursing Delegation.***
- ***Contact the risk management department, or the legal department of your organization*** regarding patient or practice issues.

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Nurse Claim Metrics

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Claims at a Glance

- The average total incurred of professional liability claims in the 2020 dataset ($210,513) increased over 4% compared to the 2015 dataset ($201,670) and almost 3% compared to the 2011 dataset ($204,594).
- Nurses should be aware of a greater risk of claims settling for higher amounts relative to historic averages. The range of adverse claim outcomes can vary significantly.

Analysis of Claims by Licensure Type

Indemnity and Expenses for Closed Claims with Paid Indemnity ≥ $10,000

Licensure type	Percentage of closed claims	Total paid indemnity	Total paid expense	Average total incurred
Registered Nurse	86.8%	$70,171,018	$11,885,985	$208,636
Licensed practical nurse/vocational nurse	12.8%	$11,091,316	$2,015,567	$219,871
Student nurse	<1%	$590,000	$29,670	$309,835
Overall	100.0%	$81,852,334	$13,931,222	$210,513

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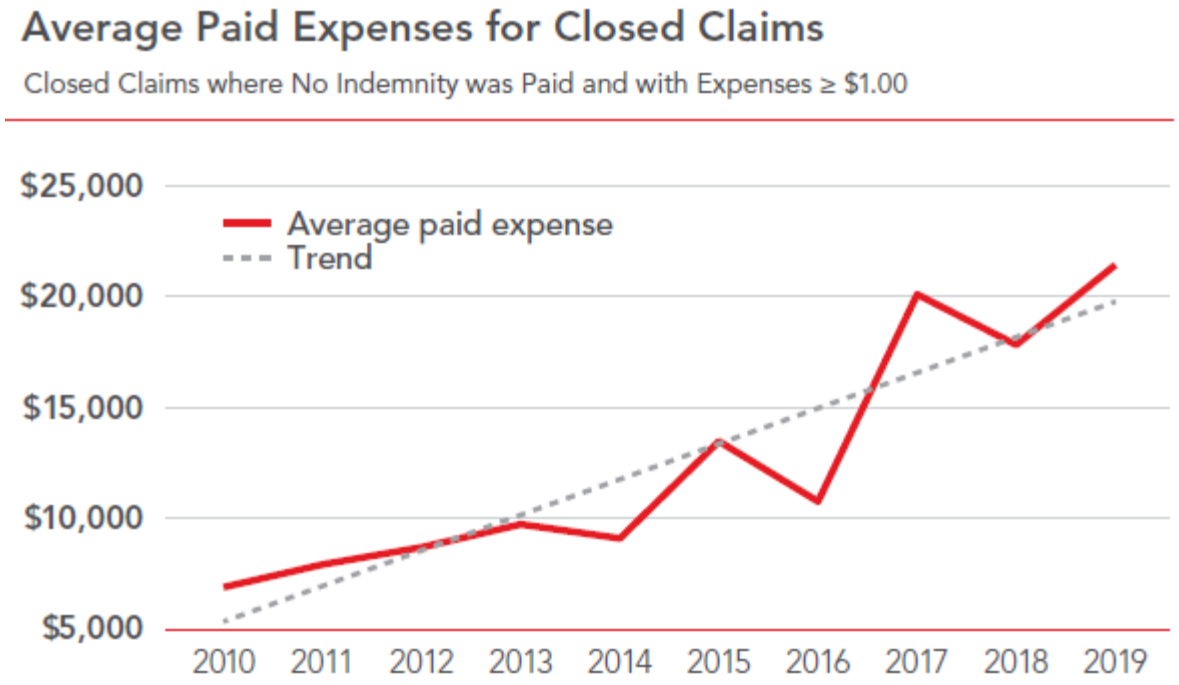
Average Paid Expenses

- The average total expense of professional liability claims that closed without an indemnity payment in the 2020 claim report dataset ($16,711) **increased over 97%** compared to the 2015 dataset ($8,463) and nearly **121%** compared to the 2011 dataset ($7,572).
- This is consistent with other research, which has shown that case management expenses are outpacing consumer and legal inflation indices.



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Nurse Specialty

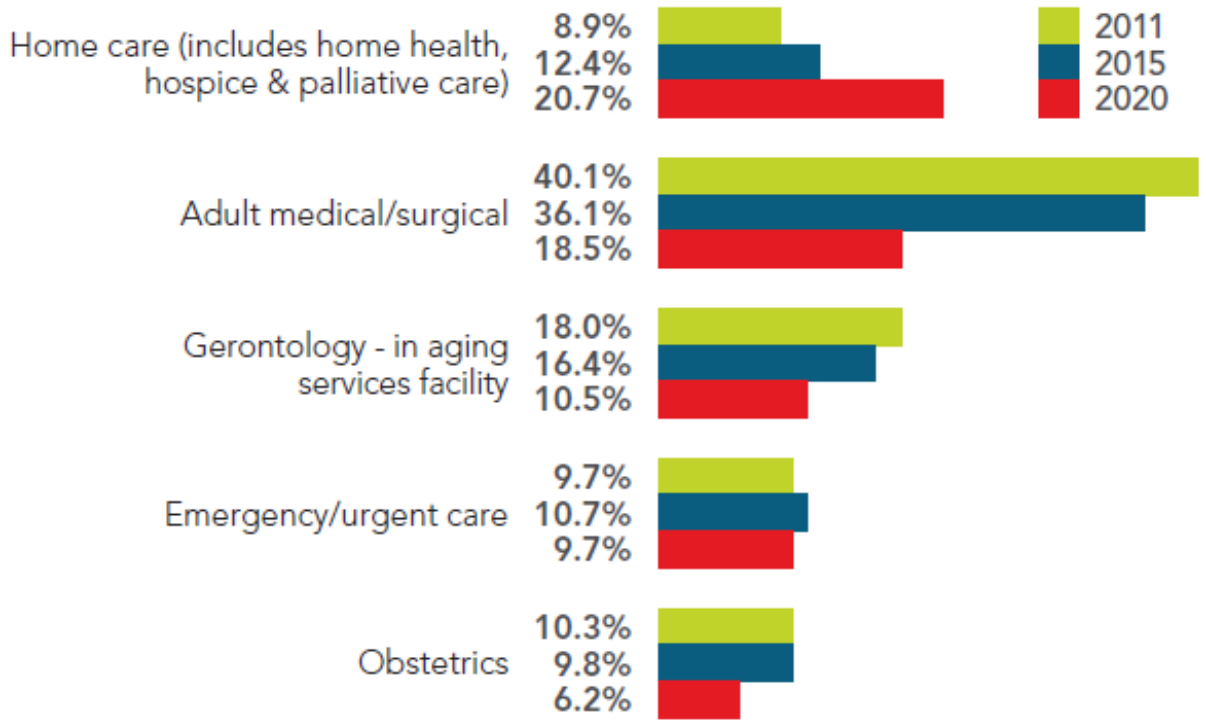
Average Total Incurred of Closed Claims by Specialty

Closed Claims with Paid Indemnity of ≥ $10,000

Nurse specialty	Average Total Incurred
Obstetrics-labor and delivery	$558,007
PACU	$384,912
Behavioral health	$228,518
Correctional health	$219,924
Home care (includes Home health, Hospice, and Palliative care)	$216,051
Critical care- Adult (ICU/SICU)	$215,015
Ambulatory surgery	$214,911
Emergency/urgent care	$174,866
Adult medical/surgical	$146,101
Gerontology - in aging services facility	$145,685
Aesthetic/cosmetic	$104,132
Overall Average Total Incurred	**$210,513**

Comparison of 2011, 2015 and 2020 Closed Claim Count Distributions by Specialty

Closed Claims with Paid Indemnity of ≥ $10,000



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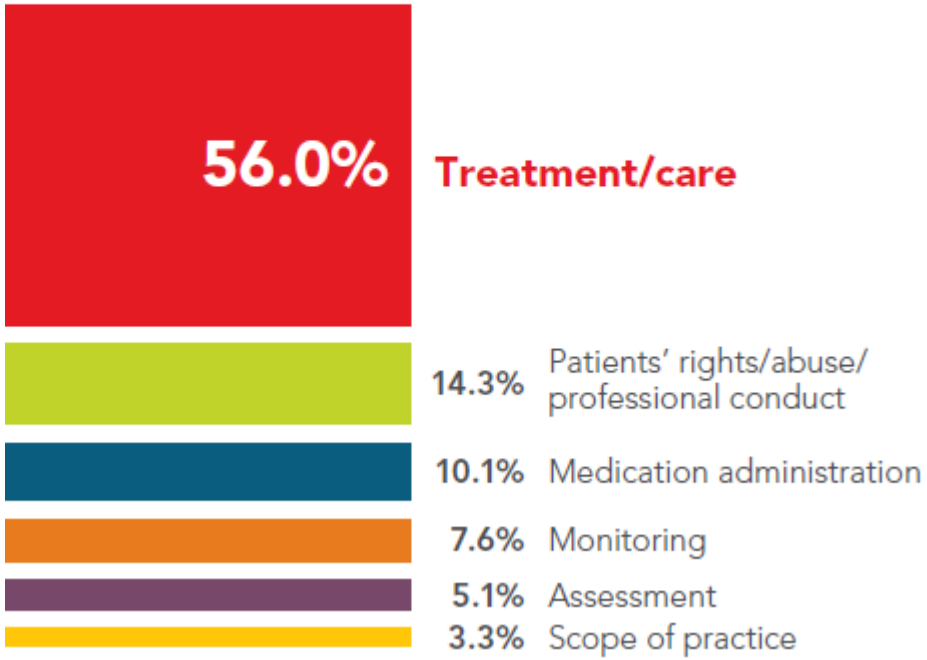
Top Malpractice Allegation Categories

Distribution of Top 6 Closed Claims by Allegation

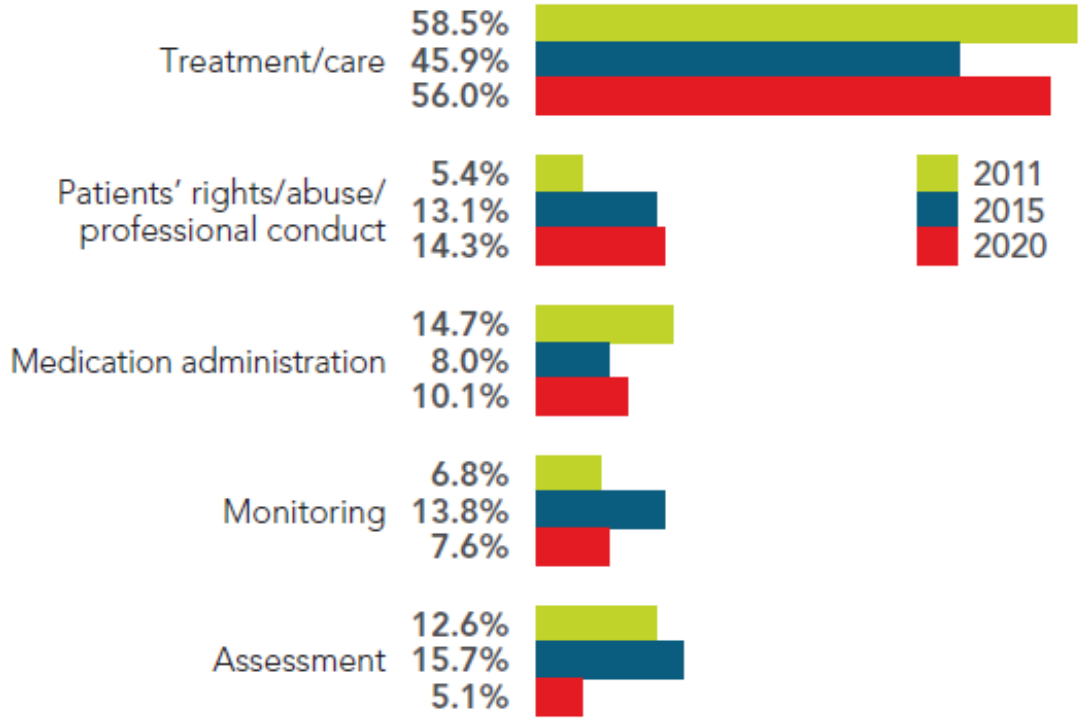
Closed Claims with Paid Indemnity of ≥ $10,000

This figure only highlights those allegations with the highest distribution.



Comparison of 2011, 2015 and 2020 Closed Claim Count Distributions by Allegation

Closed Claims with Paid Indemnity of ≥ $10,000



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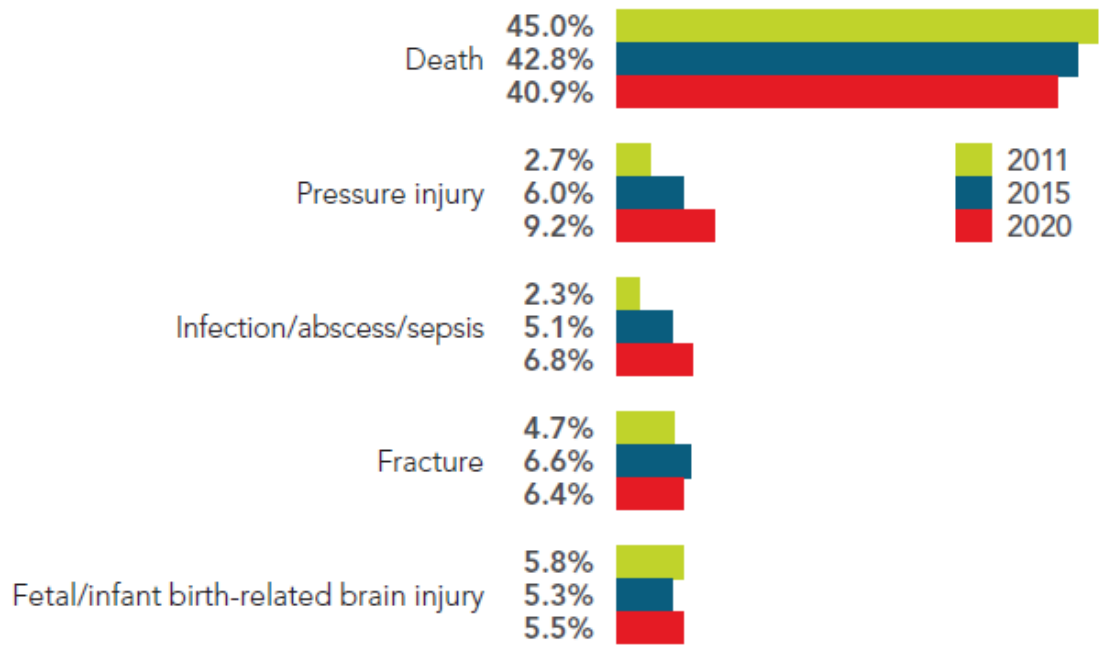
Injuries

Comparison of 2011, 2015 and 2020 Closed Claim Count Distributions by Injury

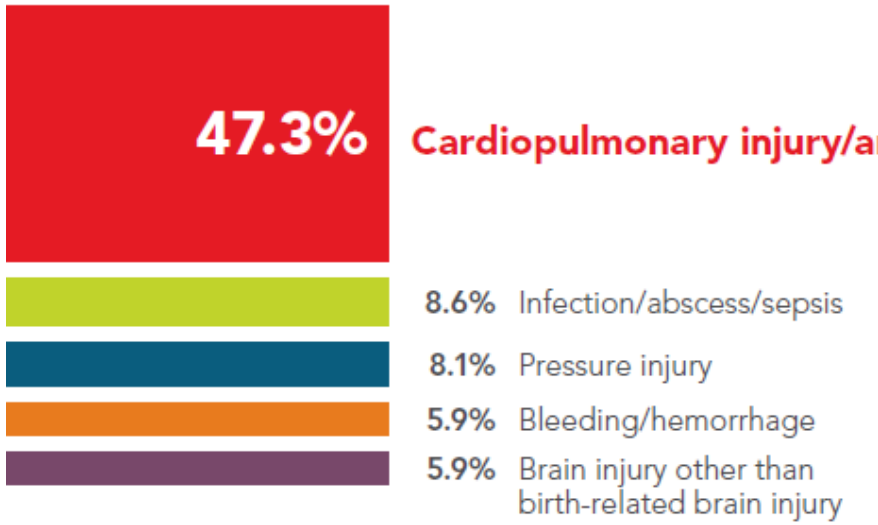
Closed Claims with Paid Indemnity of ≥ $10,000



Distribution of Top 5 Closed Claims by Cause of Death

Closed Claims with Paid Indemnity of ≥ $10,000

This figure only highlights those identified causes of death with the highest distribution.



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Case Study

Failure to assess and monitor

Case Study: Failure to assess and monitor

- A 15-year old male arrived at his pediatrician at 5:11 p.m. with complaints of difficulty breathing.
- He had a long history of asthma, but over the last 24-hours his symptoms worsened. He stayed home from school and admitted to having six nebulizer treatments without much improvement.
- The mother drove the patient to the pediatrician's office because she wanted to get a referral to a pulmonary specialist.
- While at the pediatrician's office, the patient was given albuterol and observed for a few minutes.
- The pediatrician noted:
  - *"The patient is having fair oxygen exchange and needs ED treatment management.*
  - *While he is holding conversations, he needs frequent bronchodilators and IV steroids.*
  - *Will hold oral steroids as patient is going to the ED for treatment and admission.*
  - *Will call the report to the ED so they can anticipate the patient's arrival."*
  - *(There is no record of the provider calling the ED.)*

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Case Study: Failure to assess and monitor

- The patient was transferred to the ED by his mother.
- On arrival (6:10 p.m.) the triage nurse noted his respiratory effort was labored with retractions and bilateral wheezing.
- Vital signs were noted to be BP 115/66, HR 120, RR 22, and PO 96% on room air.
- The patient was taken to a room and was immediately seen by an ED provider (approximately 11 minutes after arrival).
- The ED provider noted:
  - *"Audible wheezing, non-productive cough, and trouble breathing, all other systems negative.*
  - *Give Albuterol Atrovent inhaler and Prednisone PO."*

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Case Study: Failure to assess and monitor

- Our insured registered nurse (RN) took over care of the patient once he arrived in a room (6:38 p.m.).
- The RN provided the patient with the inhaler and Prednisone and documented:
  - *"Patient appears in no apparent distress or uncomfortable. He has a history of asthma and is currently wheezing and difficulty breathing. Airway is patent, respiratory effort is even and unlabored. Respiratory pattern is regular, symmetrical. Breath sounds with wheezes bilaterally in both upper and lower lobes."*
  - *"Patient given Albuterol Atrovent and Prednisone per order. No adverse reaction."*

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Case Study: Failure to assess and monitor

- At 6:59 p.m., the ED provider noted that the *"patient having mild respiratory distress, respirations include accessory muscles, breath sounds are wheezing, moderate and heard diffusely. Cardiovascular indicates that he is tachycardic."*
- The ED provider ordered an IV saline lock and venous blood gases. She diagnosed him with acute asthma and contacted the PICU to send someone to evaluate him. *"Symptoms have continued to worsen despite treatment. We will give epi, mag, Solumedrol and continue nebs."*
- The ED practitioner was scheduled to finish her shift at 7:00 p.m., but because the patient was to be admitted, she kept the patient and never actually turned over care to the on-coming provider.
- At 7:05 p.m., the provider ordered a bolus of normal saline, a dose of magnesium sulfate, a second dose of Solumedrol and a dose of Epinephrine. These were all administered by our insured nurse within 5-10 minutes of the order.

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Case Study: Failure to assess and monitor

- By 7:20 p.m. the patient was noted by the provider to be “in moderate distress”. So the provider ordered terbutaline and by that time the PICU resident arrived the ED provider was attending to the patient.
- At 7:23 p.m. the patient suddenly went into respiratory arrest and resuscitation efforts were started.
- Over the next 30 minutes the records document a frantic effort to save this patient, who was pronounced dead at 8:28 p.m. The final diagnosis was acute asthma, respiratory arrest.
- The results of the blood gases were reviewed at 8:53 p.m. and they were markedly abnormal. The PH was 7.191 and the PO2 was 29.7 (slightly low). The PCO2 was 85.2 (critically high). The oxygen saturation level was 36.7 (very low) and the bicarb was 31.3 (slightly high).

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Risk Management Comments

- The mother filed a lawsuit against the pediatrician, the hospital, ED provider and all nurses that were listed on the patient's chart.
- The plaintiff experts claimed our insured:
  - Failed to start an IV on the patient (on his own initiative) as soon as he received the patient.
  - Failure to perform a peak flow to assess the patient’s pulmonary status.
  - Failure to order and obtain critical laboratory as soon as he received the patient.
  - Failure to monitor the patient’s vital signs more frequently and more closely.
  - Failure to keep ED provider informed of patient’s critical condition.
  - Failure to be a patient advocate and initiate a chain of command.

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Risk Management Comments

- The plaintiff's attorney was very experienced in medical malpractice claims. The attorney had a reputation of being difficult to work with and did not mind taking cases to trial as he had some very large jury verdicts.
- During the deposition of the mother, she testified that a hospital staff member involved in the code told her that her son would be alive if our insured had started an IV.
- Our defense experts were supportive of our nurse's actions. The plaintiffs allegation of not placing an IV line causally being related to the poor outcome is not supported. None of the medications ordered prior to the decompensation required an IV and when an IV line was required it was in place within minutes.
- However, there was concern that a 15 year-old that walked into the ED and died shortly afterwards.
- Verdict was estimated to be $800,000.

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Do you think the nurse was negligent?

Do you believe that the nurse was negligent?

Do you believe that any other practitioners or parties were negligent?

Do you believe that an indemnity and/or expense payment was made on behalf of the nurse?

If yes, how much?

Resolution

The defense filed a motion to dismiss based on our positive experts' testimony and the positive testimony of the other defendants (hospital and ED provider).

The courts granted our motion to dismiss with prejudice.

The hospital and the ED physician settled the claim with the plaintiff prior to trial.

The plaintiff was not pleased with the pediatricians offer so they went to trial against them.

Defense of the claim lasted nearly eight years. Legal fees totaled more than $142,000.

Figures represent only the payments made on behalf of our registered nurse and do not include any payments that may have been made by the registered nurse's employer on her behalf or payments from any co-defendants. Amounts paid on behalf of the multiple co-defendants named in the case are not available.

Risk Control Recommendations

- ***Act as the patient's advocate*** in ensuring patient safety and the quality of care delivered.
- ***Know and comply with your facility's policies***, procedures and protocols.
- ***Invoke the chain of command*** policy to ensure timely attention to the needs of every patient and persist to the point of satisfactory resolution.
- ***Proactively address communication issues between nursing and medical staffs***, and identify instances of intimidation, bullying, retaliation or other deterrents.
- ***If the organization's current culture does not support the chain of command, explain the risks posed to patients***, staff, practitioners and the organization, and initiate discussions regarding the need for a shift in organizational culture.
- ***Contact the risk management department*** or legal department regarding patient or practice safety issues, if necessary.

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License Protection

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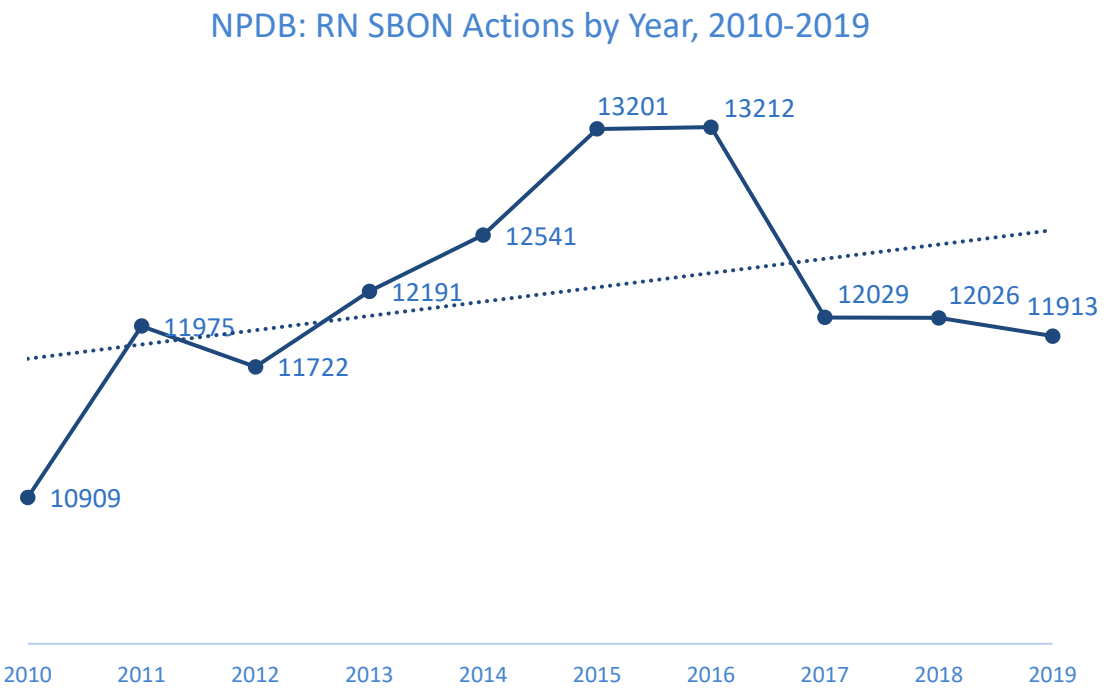
License Protection: Overview

Medical malpractice is only one part of nurses' professional liability risks.
According to the National Practitioner Databank, RNs were about **43 times** more likely to be involved in an adverse licensing action than a medical malpractice claim in 2019. From the NPDB, as of 8/6/2020:



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License Protection Matters: At a Glance

- The average paid expense to defend an RN or LPN/LVN's license during a SBON investigation was **$5,330** in the 2020 report dataset.
- This is an increase of 33.7% compared to the 2015 dataset and 58.9% compared to the 2011 dataset.

License Protection Data Comparison, 2011, 2015 and 2020 Claim Reports

	2011	2015	2020
License protection paid matters	1,127	1,301	1,377
Total paid	$3,779,129	$5,188,984	$7,339,111
Average payments	$3,353	$3,988	$5,330

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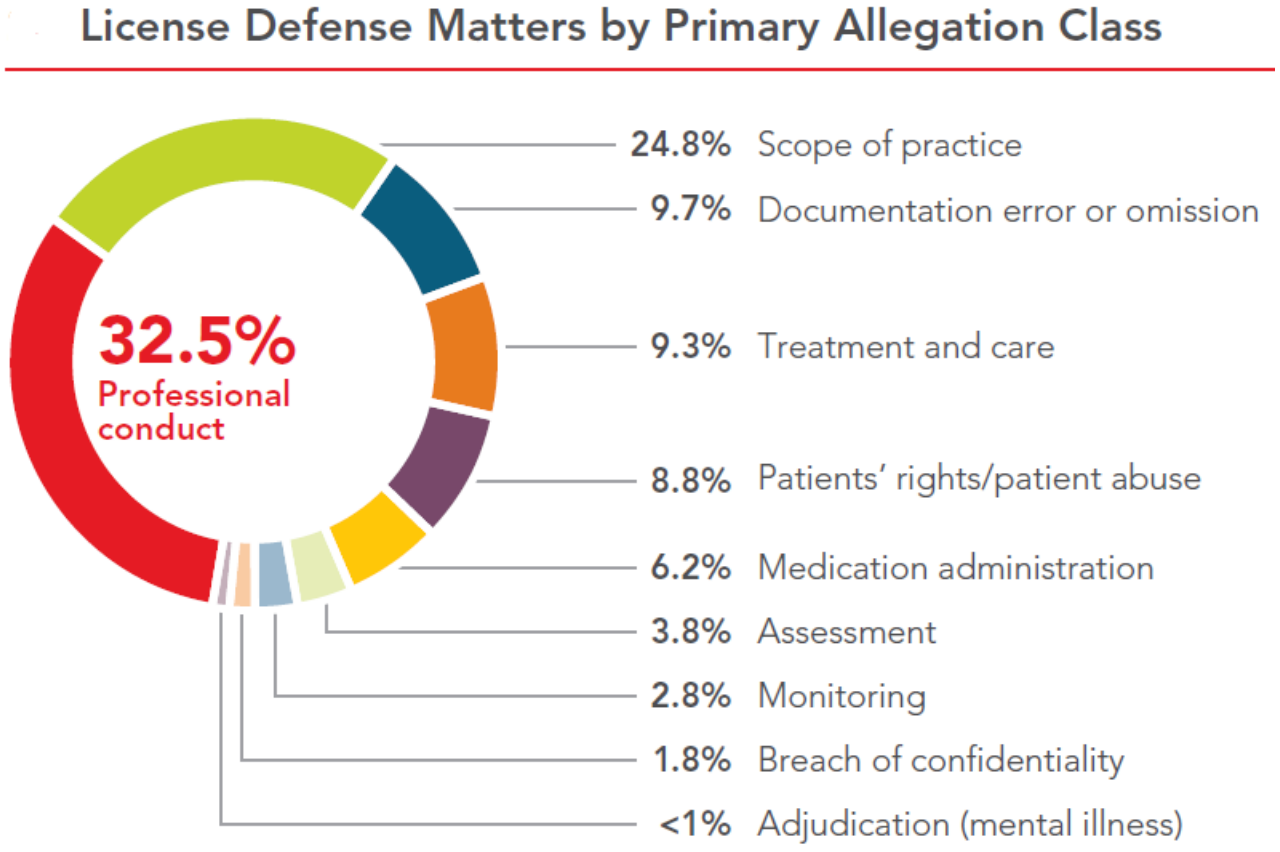
License Protection Allegations

- Drug diversion and/or substance abuse is the most frequent professional conduct allegation, representing 42.3% of professional conduct matters.
- Failure to maintain minimum standard of nursing practice comprised 58.9% of scope of practice license protection matters.
- Nearly half of documentation matters (49.6%) involved an allegation related to fraudulent or falsified patient care or billing records.



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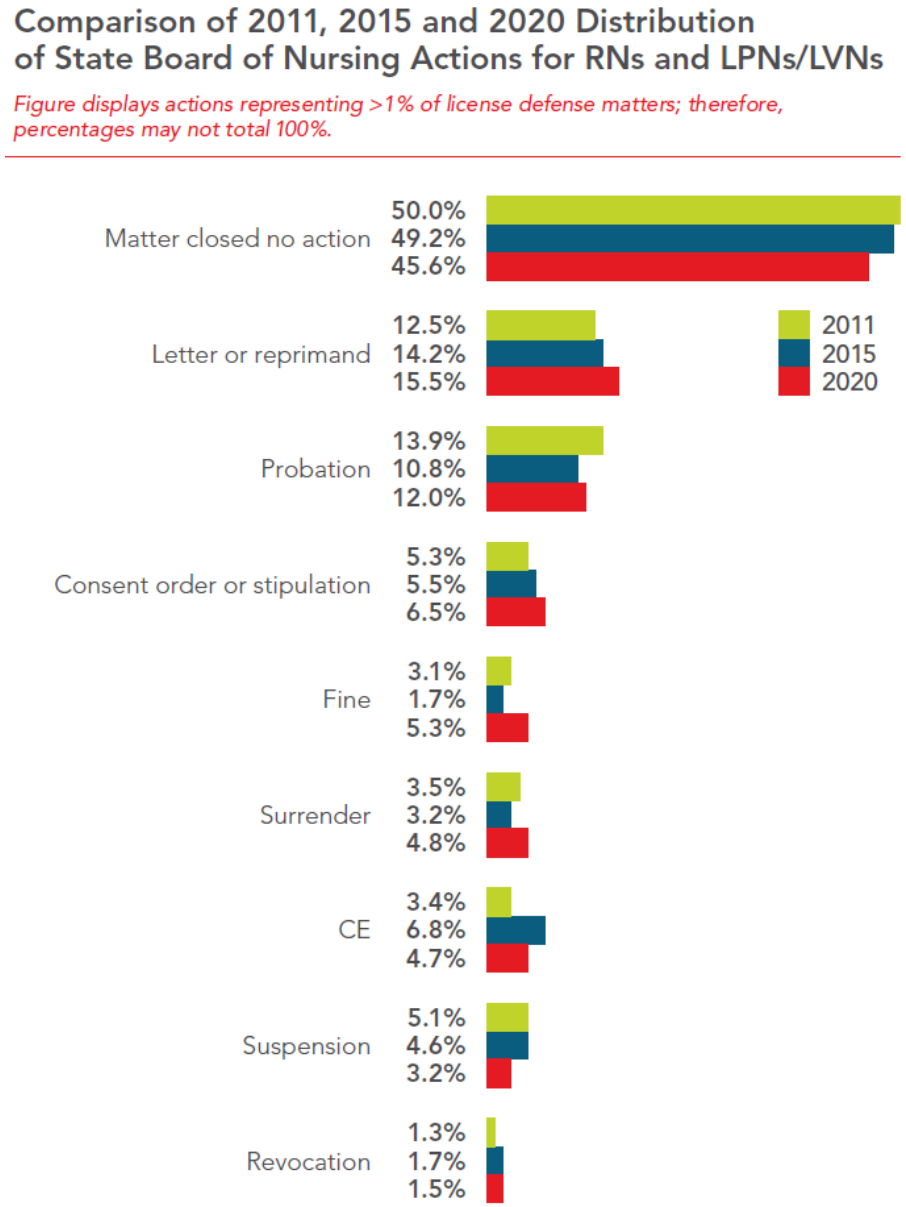
Outcomes

- 45.6% of matters closed with no action taken by the SBON.
- Surrender of license increased to 4.8% of matters in the 2020 report, up from 3.2% of matters in the 2015 report.
- Even complaints resulting in less severe action by the SBON, such as probation, consent agreements, fines, or CE, may pose significant emotional and professional impact on the nurse.



License Defense Case Study

Case Study: License Defense

- An insured nurse with over forty years of experience was convicted of assault against her teenaged granddaughter.
- The facts and circumstances of the offense are that the nurse slapped her 13-year-old granddaughter on the face and on the shoulder.
- Approximately one month prior to the assault incident, the nurse was also involved in an altercation with her 24-year-old granddaughter, during which the nurse slapped the woman across the face.
- The nurse was placed on informal probation for three years, on terms and conditions which included attending a 52-week parenting class and paying fines and fees.
- These offenses and the nurse's conviction raised concerns about her fitness to be a nurse, and the Board of Nursing opened an investigation.

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Risk Management Comments

- The insured nurse and her counsel were able to present evidence that established that the incidents occurred during a period of great family stress.
- The nurse's current and prior employers, coworkers, and patients wrote letters to the Board attesting to the nurse's kind demeanor, professionalism, and care for her patients.
- During her testimony, the Board found the nurse to be remorseful and compliant with probation.
- The nurse stated that she had been attending court mandated parenting classes and explained to the Board that she learned strategies to recognize tension and diffuse stress.

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Risk Management Comments

- Criminal convictions for assault, especially assault of a minor, offered the Board grounds to potentially revoke the nurse's license.
- But, in viewing the circumstances as a whole, the Board concluded that it did not appear that the nurse was likely to re-offend, nor did she appear to pose a threat of harm to patients or co-workers.
- The Board concluded that the nurse presented sufficient evidence of rehabilitation to warrant retaining her license, albeit on a probationary basis.
- Because there was no evidence that the nurse presented a risk of violence to her patients, the Board concluded that any probationary conditions which placed limits on her employment or required that she be supervised, were not warranted to protect the public.

Resolution

The nurse completed the terms of her probation, and she is still practicing with an unencumbered license today.

Total Incurred: Over $12,000

Figures represent only the payments made on behalf of our registered nurse and do not include any payments that may have been made by the registered nurse's employer on her behalf.

Risk Management Recommendations for Everyday Practice

- Practice within the requirements of your state nurse practice act, in compliance with organizational policies and procedures, and within the national standard of care.
- Maintain basic clinical and specialty competencies by proactively obtaining the professional information, education, and training needed to remain current regarding nursing techniques, clinical practice, biologics, and equipment.
- Document your patient care assessments, observations, communications, and actions in an objective, timely, accurate, complete, and appropriate manner.
- If necessary, utilize the chain of command or the risk management or legal department regarding patient care or practice issues.
- Maintain files that can be helpful with respect to your character, such as letters of recommendation, performance evaluations, and continuing education certificates.

Nurse Professional Liability Exposure Claim Report: 4th Edition: *Minimizing Risk, Achieving Excellence*

Visit nso.com/NurseClaimReport to download your free copy of the report and additional risk control resources.

Questions?

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