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Medical Malpractice in the Covid Era CLE Materials

Friday, March 19, 2021, Noon to 1:30 pm

Presented by

**Dr. Zaheer A Shah, MD, JD , and Kyle Shelton
of The Dr. Lawyer Law Group**

Medical Malpractice Standards

An action for injury or death against a licensed health care provider based upon such provider's alleged negligence, misconduct, errors or omissions, or breach of contract in the rendering of health care, medical services, nursing services or other health-related services, without express or implied consent, including an action based upon the alleged negligence, misconduct, errors or omissions or breach of contract in the collecting, processing or distributing of whole human blood, blood components, plasma, blood fractions or blood.¹

A "licensed health care" provider is defined as a "person, corporation or institution licensed or certified by the state to provide health care, medical services, nursing services or other health-related services and includes the officers, employees, and agents thereof working under the supervision of such person, corporation or institution in providing such health care, medical services, nursing services or other health-related services."²

Medical malpractice is the failure to comply with the applicable standard of care. To comply with the applicable standard of care, a provider must exercise that degree of care, skill, and learning that would be expected under similar circumstances of a reasonably prudent [health care provider] within this state.³ The Defendants' negligence must be a proximate cause, but not necessarily the only cause, of damage to the Plaintiffs.⁴

Causation is a question of fact for the jury unless reasonable persons cannot conclude that the Plaintiffs had proved this element.⁵ One only needs to present enough evidence for the jury to reasonably infer the negligent conduct was a proximate cause.⁶ Plaintiffs do not need to show what would have happened in the absence of negligence; but

¹ A.R.S. 12-561(2).

² A.R.S. 12-561(1)(a)

³ See RAJI 4th Medical Malpractice #1. See also A.R.S. 12-563(1).

⁴ See A.R.S. 12-563(2). RAJI Medical Malpractice #1

⁵ *Barrett v. Harris*, 207 Ariz. 374, 378, 86 P.3d 954, 958 (App. 2004).

⁶ *Id.*

only need to show what happened with the negligence.⁷ The testimony of a co-defendant that he/she would have done nothing different even if the defendant had acted within the standard of care will not necessarily defeat Plaintiffs' causation theory.⁸

Arizona uses the loss of chance doctrine, in which a plaintiff must only introduce evidence that the defendant's negligence increased the risk of injury or death.⁹ Evidence that there would have been a substantially better chance of recovery is sufficient for causation to go to the jury, such that if the jury finds that defendant's failure to exercise reasonable care increased the risk of the harm he undertook to prevent, it may from this fact find a "probability" that defendant's negligence was the cause of the damage".¹⁰

The Plaintiff must claim that the Defendant(s) fell below the applicable standard of care and that at the time Defendants cared for the Plaintiff they were each negligent and fell below the applicable standard of care regarding the facility, supervision, treatment, management, examination, care, handling and reporting of the conditions and health problems of the Plaintiff. The Plaintiff must prove that the Defendants' negligence regarding the treatment and handling of the Plaintiff's care was the direct and proximate cause of the severe and permanent injuries suffered by the Plaintiff and that as a direct and proximate result of Defendants' negligence the Plaintiff suffered permanent injuries.

⁷ *Tennen v. Lane*, 762 P.2d 1031 (App. 1995).

⁸ *Estate of Reinen v N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 9 P.3d 314 (2000).

⁹ *Thompson v. Sun City Community Hosp., Inc.*, 141 Ariz. 597, 688 P.2d 605 (1984).

¹⁰ *Id.* at 608.

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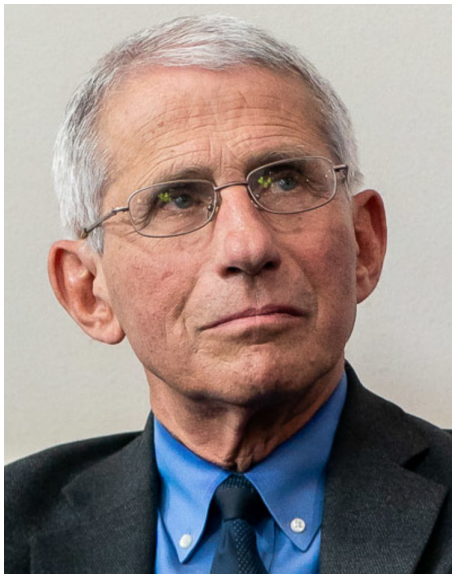
JURIES

How will the 'Anthony Fauci effect' influence jurors?

BY DEBRA CASSENS WEISS ([HTTPS://WWW.ABAJOURNAL.COM/AUTHORS/4/](https://www.abajournal.com/authors/4/))

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Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, in 2020. Photo from Wikimedia Commons

(https://commons.wikimedia.org/wiki/File:Anthony_Fauci_2020.jpg).

Lawyers and jury consultants are considering whether the COVID-19 pandemic will influence juror attitudes in what Law.com is dubbing the “Anthony Fauci effect.”

Among the issues are whether jury awards will be higher or lower, whether juries are showing increased sympathy for plaintiffs, and whether medical malpractice cases will be more difficult for plaintiffs.

Litigation consultants conducted surveys early in the pandemic that show a change in attitudes.

DecisionQuest, a trial consulting firm, surveyed nearly 900 people eligible for jury service in six major metropolitan areas in March 2020. The survey, available here (<https://www.decisionquest.com/research/juror-attitudes-in-the-age-of-the-coronavirus/>), found that those who expressed significant concern about contracting COVID-19 were more pro-plaintiff. The more that the respondents said their lives had been disrupted by the virus, the higher the damages they would award.

DecisionQuest conducted two later surveys, in May and October, and found that life disruption caused by the pandemic decreased by about 10% since March.

Courtroom Sciences, a deposition services and litigation consulting firm, conducted a May 2020 survey, available here (<https://www.courtroomsciences.com/blog/the-csi-blog-1/post/survey-juror-attitudes-decisions-in-the-wake-of-covid-19-140>), of 359 people eligible for juries in seven metropolitan cities. The survey found that attitudes toward corporations and nursing homes have become more negative, while views of health workers and first responders have become more positive. The potential jurors also indicated that they are more emotional, more anxious, more cautious and stronger in their political beliefs.

How do the findings translate to jury trials? And what do lawyers think? Law.com

(<https://www.law.com/2021/02/02/whats-the-anthony-fauci-effect-and-why-should-lawyers-pay-attention-to-it/>) spoke with lawyers in Connecticut for their take on the jury impact from COVID-19.

Others considering the impact include lawyers with Bullivant Houser Bailey

(<http://www.bullivant.com/Pandemics-Impact-on-Case-Evaluations>) and Morrison Mahoney

(<https://www.morrisonmahoney.com/blog/505-covid-19-are-more-conservative-verdicts-a-possible-consequence-of-the-coronavirus-pandemic>)

and a litigation psychology expert from Courtroom Sciences (here (<https://www.courtroomsciences.com/blog/the-csi-blog-1/post/impact-of-the-covid-19-crisis-on-jurors-attitudes-decisions-135>), here (<https://www.courtroomsciences.com/blog/the-csi-blog-1/post/impact-of-the-covid-19-crisis-on-jurors-attitudes-decisions-134>), here (<https://www.courtroomsciences.com/blog/the-csi-blog-1/post/impact-of-the-covid-19-crisis-on-jurors-attitudes-decisions-133>) and here (<https://www.courtroomsciences.com/blog/the-csi-blog-1/post/impact-of-the-covid-19-crisis-on-jurors-attitudes-decisions-132>)).

Here are their conclusions:

- Medical-malpractice cases could become more difficult, especially cases against emergency room and critical care doctors because they are considered COVID-19 heroes. “I think it’s the Dr. [Anthony] Fauci effect,” lawyer Francis Morrison told Law.com. “He’s very straightforward and almost grandfatherly. He sticks to the science and he is not trying to BS you. That all goes back to people having a good feeling about the health care profession.” (Lawyers speaking with Law.com)
- Jurors could have more sympathy for plaintiffs in personal injury cases because they have dealt with problems stemming from the pandemic. (Lawyers speaking with Law.com) On the other hand, jurors could see a plaintiff’s suffering as small potatoes compared to the uncompensated harm caused by COVID-19. And jurors could have reduced sympathy for economic loss because of their own economic hardships during the pandemic. (Bullivant Houser Bailey, Morrison Mahoney)
- People who feel stress are more likely to rely on intuition and emotion. This would make jurors more susceptible to pro-plaintiff narratives and more likely to make up their minds early. (Courtroom Sciences)
- Rules, traditions and social norms become more important to people who fear contagion. People also tend to show more deference to authority figures in tough times. As a result, jurors may be more inclined to punish a corporate defendant for breaking the company’s stated rules. In response, a defendant can emphasize rules that a plaintiff should have followed. (Courtroom Sciences)
- When people become anxious about death, they tend to cling more strongly to their existing attitudes and beliefs in an attempt to feel more in control. That means that jurors who are anti-corporate are likely to become even more so and vice versa. (Courtroom Sciences)
- There could be increased bias against people of Asian descent because the coronavirus was thought to have originated in China. There could also be increased prejudice against other minority or outsider groups because people tend to defend their worldview in a crisis. That means that blue-collar jurors would be more suspect of white-collar professions, and Christian jurors could be more judgmental of a Jewish or Muslim witness. (Courtroom Sciences)

Updated Feb. 5 at 2:10 p.m. to report on additional DecisionQuest surveys.

Give us feedback, share a story tip or update, or report an error.



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Medical Malpractice in the COVID Era



**PRESENTED BY
DR. ZAHEER SHAH
KYLE SHELTON**

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DIAGNOSIS

The process of weighing the probability of one disease versus that of other diseases possibly accounting for a patient's illness.

Causes of runny nose include:

- Acute sinusitis
- Allergies
- Chronic sinusitis
- Churg-strauss syndrome
- COVID-19
- Common cold
- Decongestant nasal spray overuse
- Deviated septum
- Drug addiction
- Dry air
- Granulomatosis with polyangiitis (Wegener's granulomatosis)
- Hormonal changes
- Influenza (flu)
- Lodged object
- Medications
- Nasal polyps
- Nonallergic rhinitis
- Occupational asthma
- Pregnancy
- Respiratory syncytial virus (RSV)
- Spinal fluid leak
- Tobacco smoke

Differential Must Rank From Most Severe to Least Severe:

- Spinal fluid leak
- Churg-strauss syndrome
- Respiratory syncytial virus (RSV)
- Deviated septum
- COVID-19
- Influenza
- Common Cold
- Dry Air

OCCAM'S RAZOR

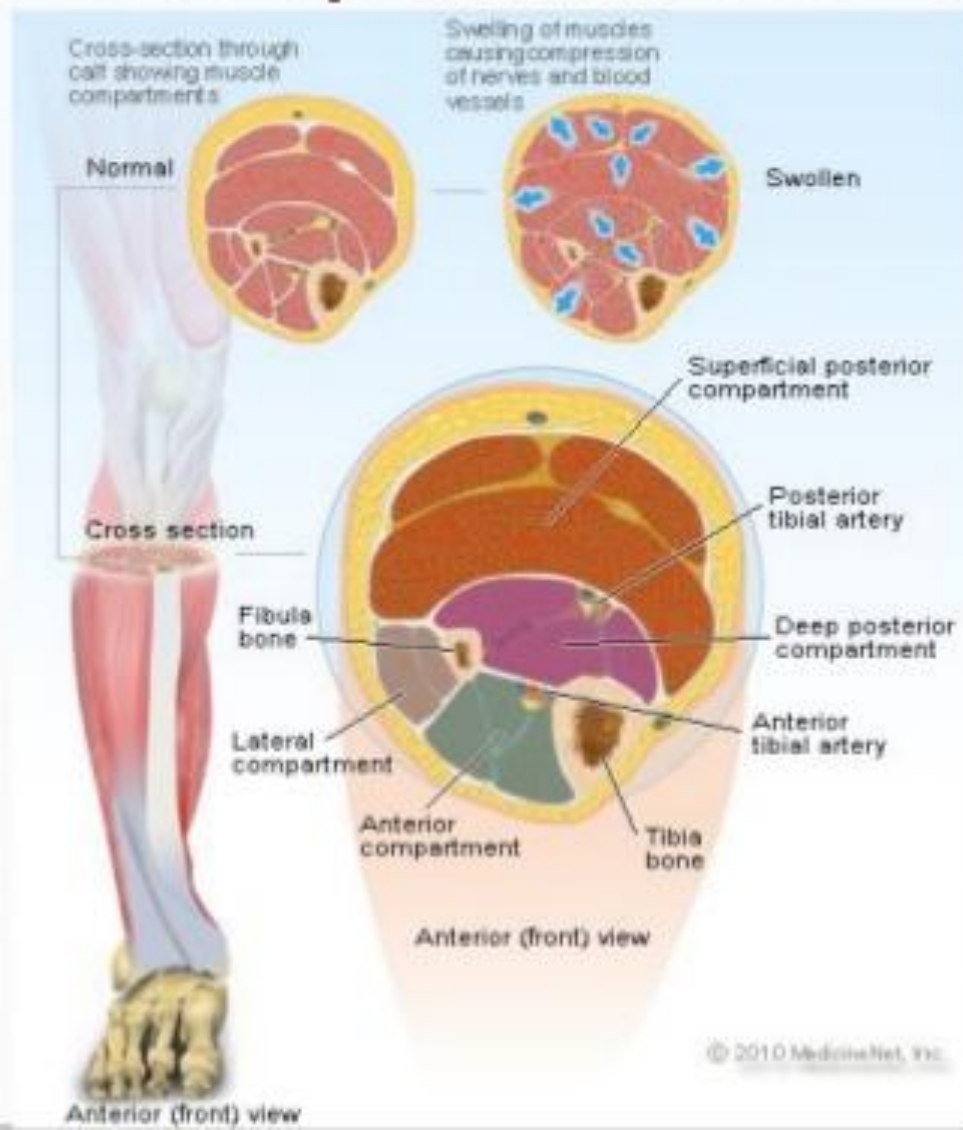
When discussing Occam's razor in contemporary medicine, doctors utilize diagnostic parsimony. Diagnostic parsimony advocates that when diagnosing a given injury, ailment, illness, or disease a doctor should strive to look for the fewest possible causes that account for all the symptoms. "When you hear hoofbeats behind you, think horses, not zebras".

COMPARTMENT SYNDROME

Compartment syndrome occurs when excessive pressure builds up inside an enclosed muscle space in the body.

Compartment syndrome usually results from bleeding or swelling after an injury. The dangerously high pressure in compartment syndrome impedes the flow of blood to and from the affected tissues. It can be an emergency, requiring surgery to prevent permanent injury.

4 Compartments of leg



1. Anterior

: Tibialis anterior, EDL, EHL
Peroneus

2. Posterior-Superficial

: Gastrocnemius, soleus,
plantaris

3. Posterior-Deep

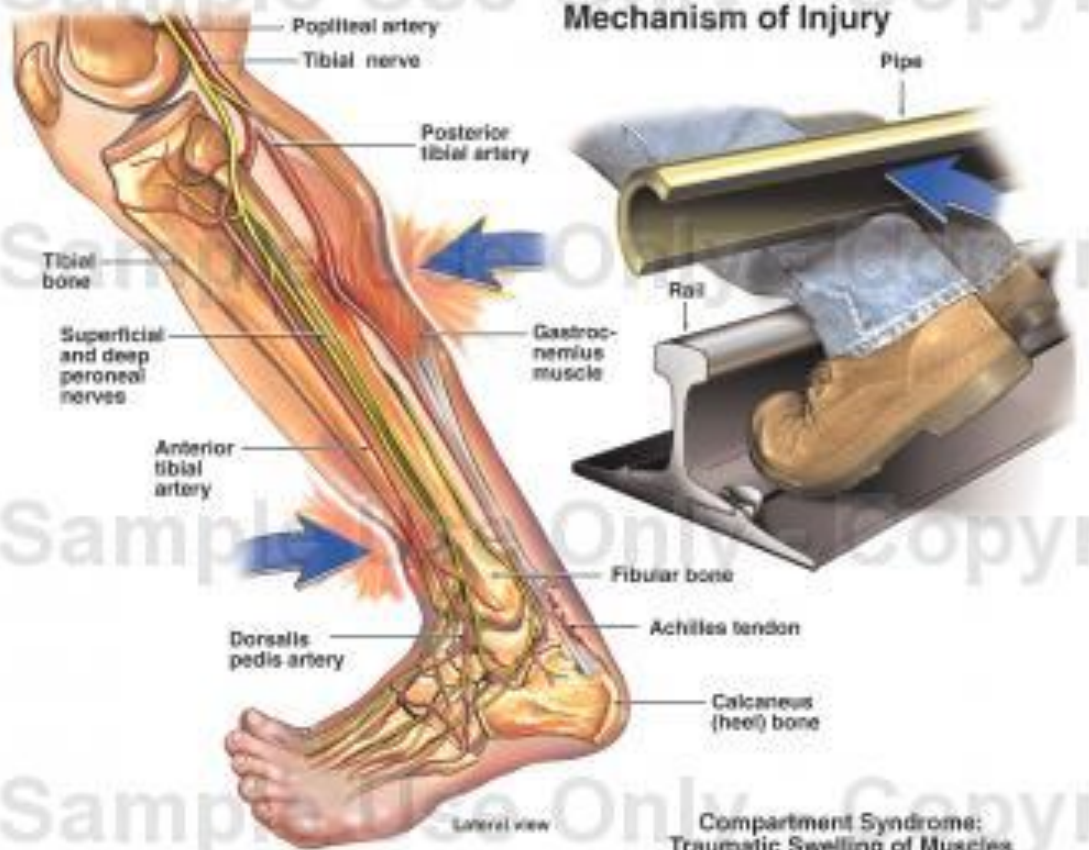
: FDL, FHL, Popliteus,
Tibialis posterior, Tibial a, v, n.

4. Lateral

: Peroneus longus and
brevis, peroneal n

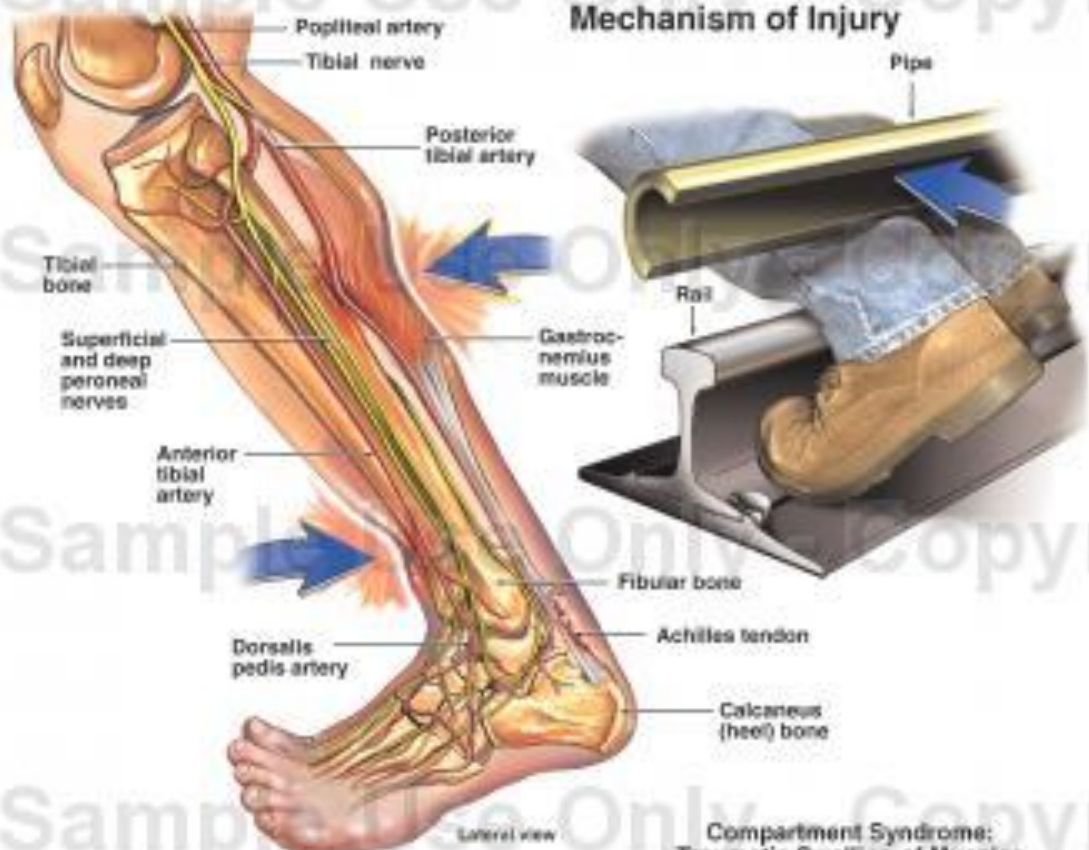
Compartment Syndrome of the Lower Legs

Mechanism of Injury



Compartment Syndrome of the Lower Legs

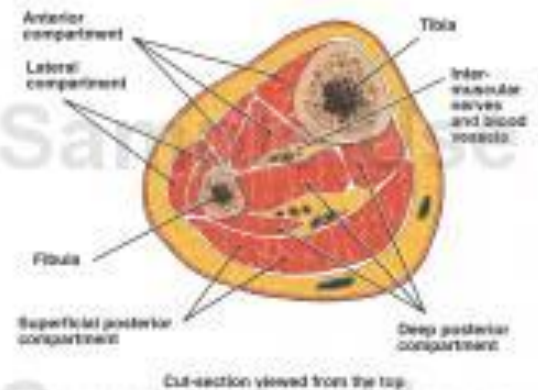
Mechanism of Injury



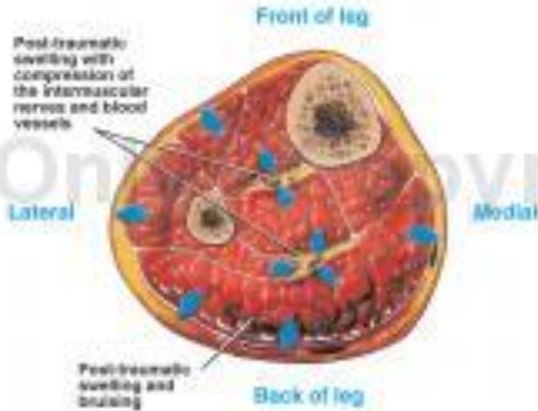
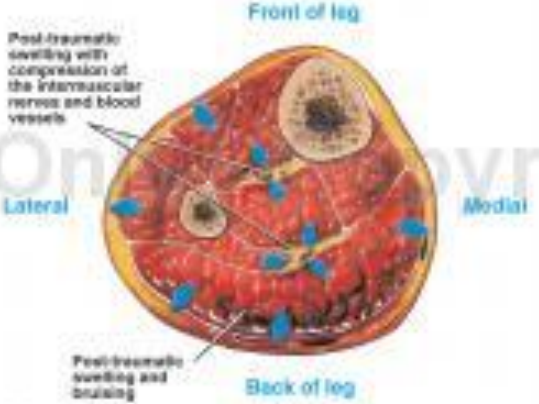
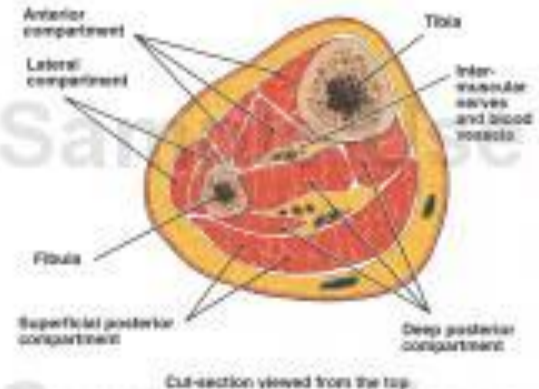
Compartment Syndrome: Traumatic Swelling of Muscles Causing Compression of Nerves and Blood Vessels

Compartment Syndrome: Traumatic Swelling of Muscles Causing Compression of Nerves and Blood Vessels

Cross-section Through Normal Calf Showing Muscle Compartments

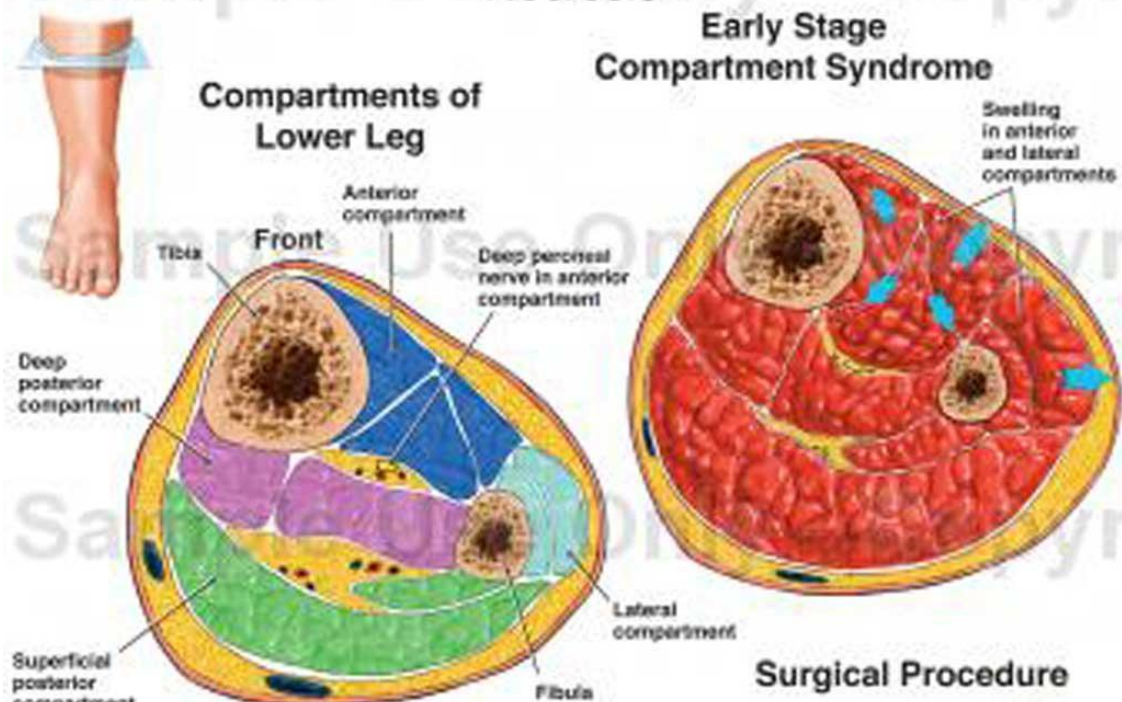


Cross-section Through Normal Calf Showing Muscle Compartments



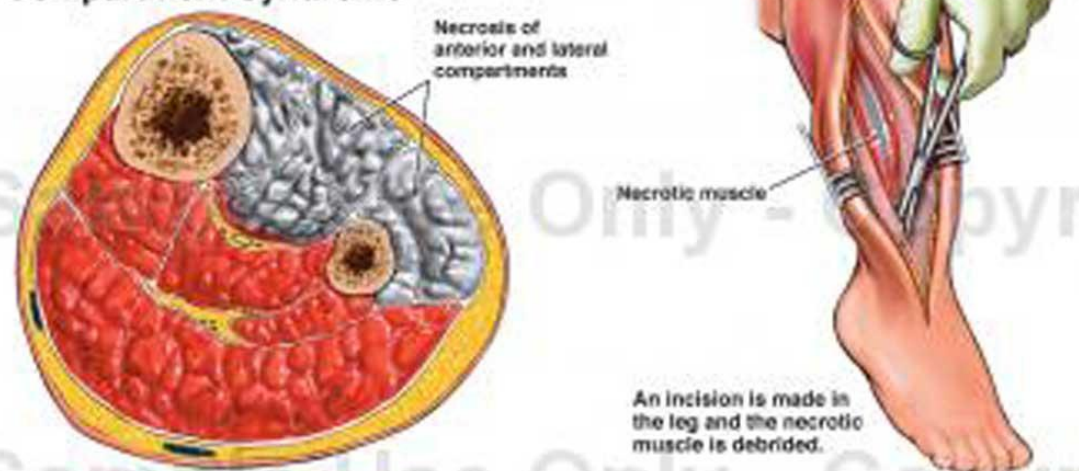
Compartment Syndrome of Lower Leg with Muscle Necrosis

Early Stage Compartment Syndrome



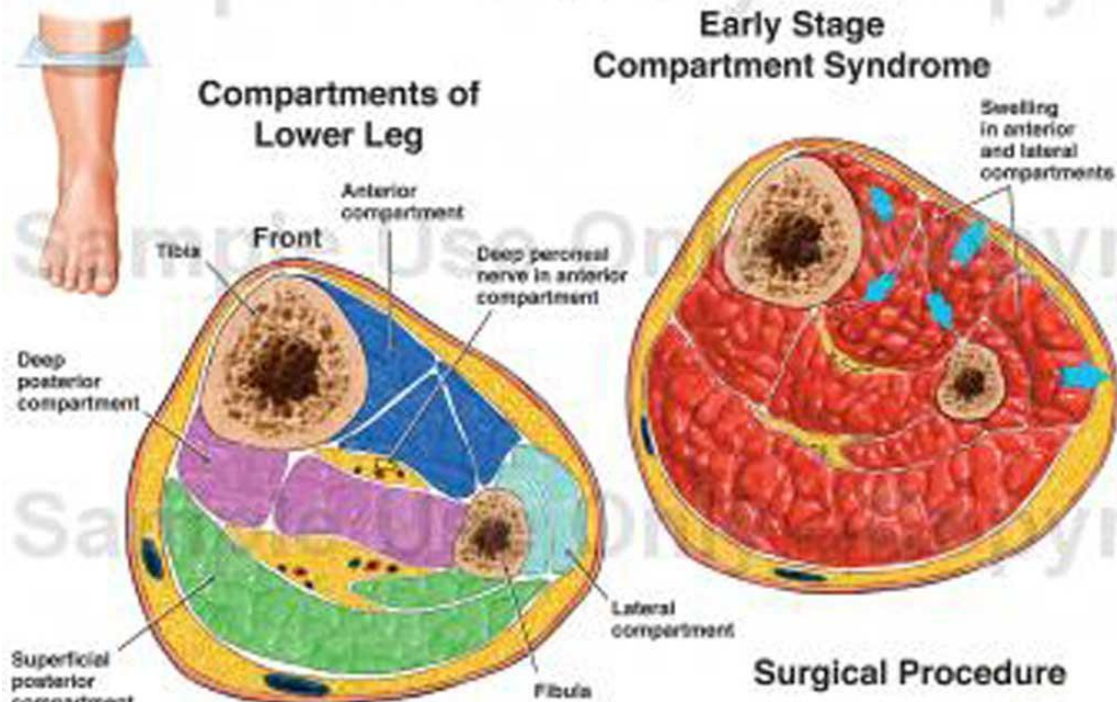
Surgical Procedure

Late Stage Compartment Syndrome



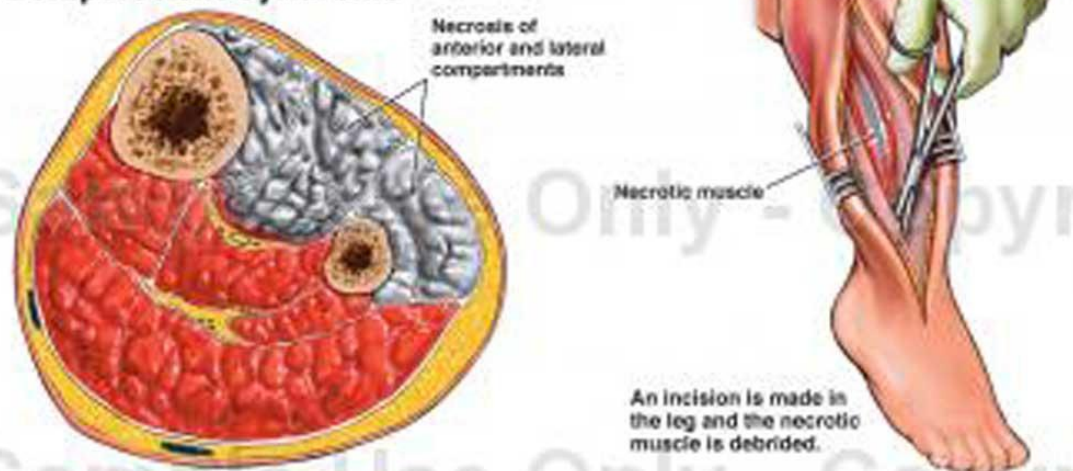
Compartment Syndrome of Lower Leg with Muscle Necrosis

Early Stage Compartment Syndrome



Surgical Procedure

Late Stage Compartment Syndrome



STANDARD OF CARE

A.R.S. 12-563. Necessary Elements of Proof

Both of the following shall be necessary elements of proof that injury resulted from the failure of a health care provider to follow the accepted standard of care:

1. The health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances.
2. Such failure was a proximate cause of the injury.

CAUSATION = FAULT

Fault is medical negligence that was a cause of injury to Plaintiff. Before you can find Defendant at fault, you must find that Defendant's negligence was a cause of injury to Plaintiff. Negligence causes an injury if it helps produce the injury, and if the injury would not have happened without the negligence.

CAUSATION

Expert medical evidence is required to establish causation.

See, e.g., Barrett v. Harris

207 Ariz. 374, 378, 86, P.3d 954, 958 (App. 2004);

Peacock v. Samaritan Health Services

159 Ariz. 123, 126, 765, P.2d 525, 528 (App. 1988);

Gregg v. Nat'l Med. Health Care Servs., Inc.,

145 Ariz. 51, 54, 699, P.2d 925, 928 (App. 1985);

Estate of Reinen v. Northern Arizona Orthopedics, Ltd., 198

Ariz. 283, 9, P.3d 314 (2000); Ariz.R.Evid. 702.

“LOSS OF CHANCE” DOCTRINE

Arizona uses the loss of chance doctrine, in which a plaintiff must only introduce evidence that the defendant’s negligence increased the risk of injury or death. Evidence that there would have been a substantial better chance of recovery is sufficient for causation to go to the jury, such that if the jury finds that defendant’s failure to exercise reasonable care increased the risk of the harm he undertook to prevent, it may from this fact find a “probability” that defendant’s negligence was the cause of the damage”.

Thompson v. Sun City Community Hosp., Inc., 141 Ariz. 597, 688 P.2d 605 (1984).

CAUSATION WITH MULTIPLE DEFENDANTS

“Under such circumstances [where there are multiple defendants], a plaintiff is required to prove only that each defendant's conduct was a ‘substantial factor’ ” in causing the injury...The plaintiff does not need ‘to introduce evidence to establish that the negligence resulted in the injury or the death, but simply that the negligence increased the risk of injury or death.’”

Salica v. Tucson Heart Hospital, 224 Ariz. 414,
231 P.3d 946 (Ct.App. 2010, Div. 2)

SCENARIO ONE

Plaintiff:

Casey Ryback

Ex-Navy Seal

Presents with ankle injury
from leaping out of a
moving train. Comes to small
community hospital ER
with lower leg and ankle pain



Emergency Dept. Dr. McClane

9:00am - Day One

Symptoms: Pain is severe. Riggs can't stand touching his ankle. Pain is over the outside aspect of the ankle. Riggs feels numbness, tingling on the outside and front of the ankle and foot.





Emergency Dept. Dr. Dutch

9:00pm - Day One

Symptoms: Extreme pain, 10/10. Significant swelling on the outside of ankle. Leg more “woody.” Loss of sensation to the touch over the lateral and anterior of the foot.

Labs: CPK - <200, Riggs is 7000.

Orthopedic Surgeon Dr. Plissken

12:00am - Day Two

Refuses to come in, instead had Dr. Dutch measure compartment pressures via a Stryker Kit. Pressures for compartment syndrome should be over 30 mmHg, Rigg's 2 compartments come in at 17. Dr. Plissken says to admit him for observation.



Hospitalist Dr. Ripley

3:00am - Day Two

Dr. Ripley looks at Dr. Dutch's work and simply agrees with it. Puts Riggs on Heparin and Pain Meds.





Hospitalist Dr. Rambo

7:00am - Day Two

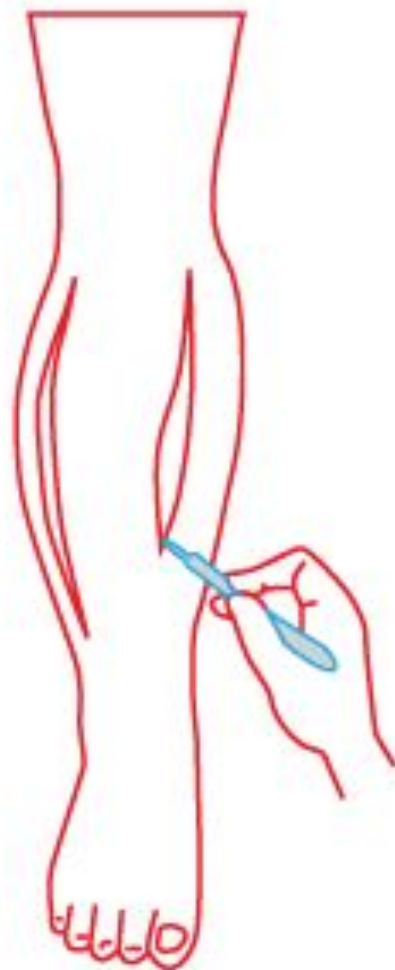
Does not see Riggs for 2 hours and eventually sends Riggs to a Level I Trauma Center.

Compartment Syndrome with Fasciotomy Procedure

COMPARTMENT SYNDROME



A



B

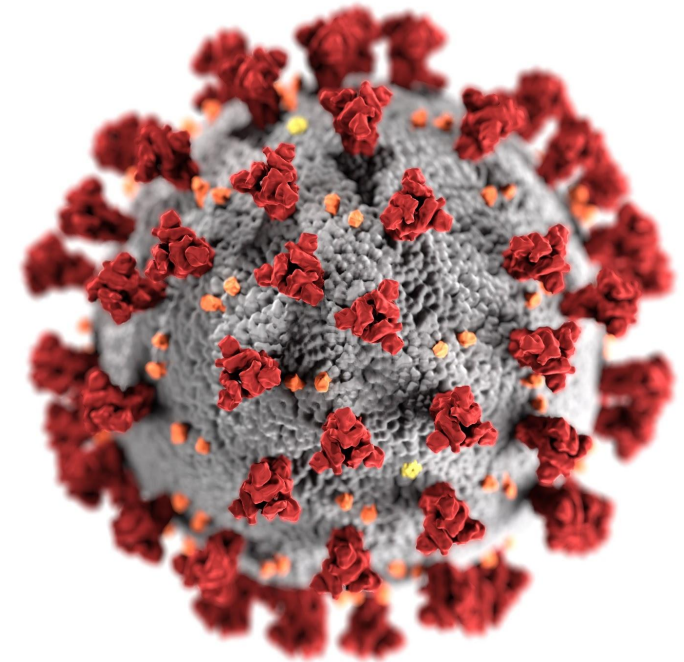


C



Day Five

Plaintiff is still at the hospital, recovering, but tests positive for COVID.

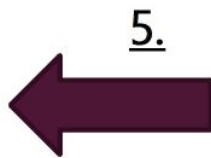
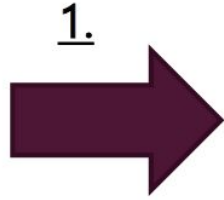


Day Nineteen

Patient is finally discharged after a bad bout with COVID. He was put on supplemental oxygen for much of his stay and now has residual lung damage due to COVID infection.

Six Months After Discharge

- Plaintiff has total loss of musculature in that compartment of his leg, which has significantly decreased his mobility.
- Unable to run, jump, or climb, and walks slowly with a significant limp.
- Due to COVID now has persistent shortness of breath with expected long-term lung disability.



SCENARIO TWO



Plaintiff:
Cruella

Cruella presents to the ER at 5:30am with abdominal pain in her lower abdomen that has lasted three hours.

Emergency Dept. Dr. Belle

Dr. Belle orders a CT scan
of Cruella's abdomen.
6:30am





Radiologist Dr. Ariel

**Dr. Ariel reads the CT
and fails to see a perforated
sigmoid colon.**

Emergency Dept. Dr. Belle


Dr. Belle discharges Cruella home at around 9:30 a.m. with a drug for irritable bowel syndrome.



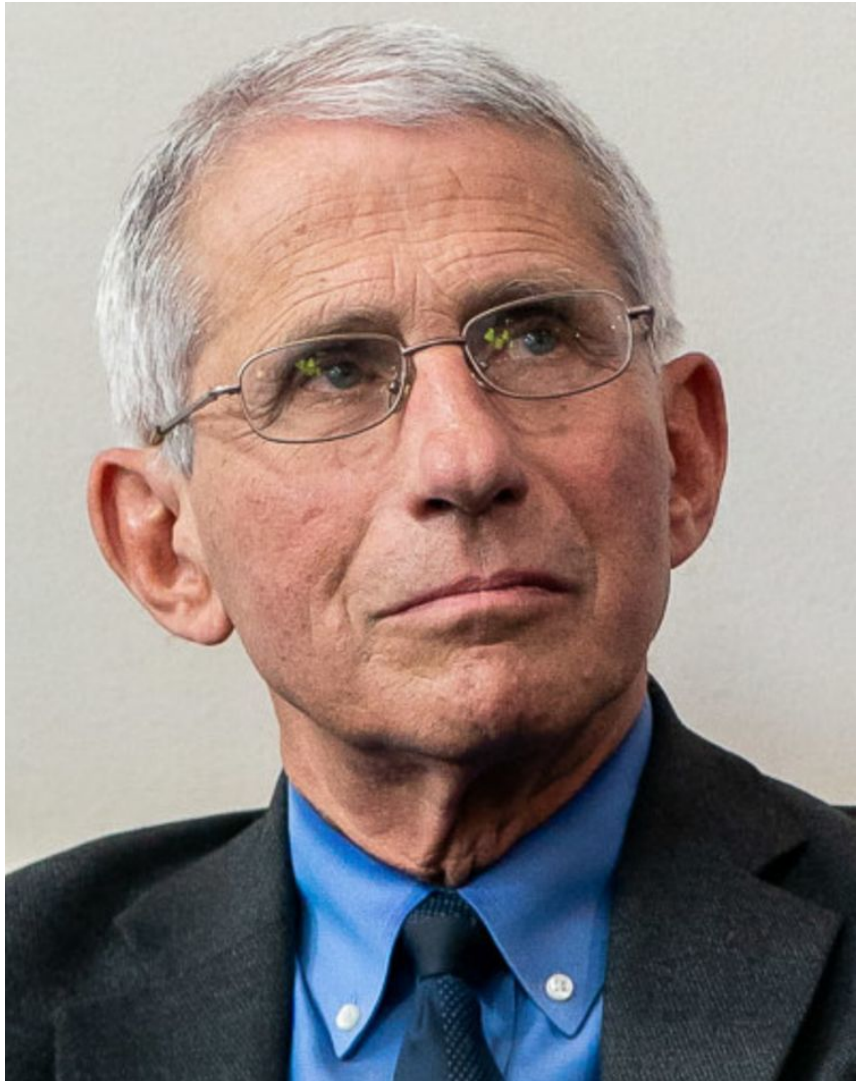
At around noon, Cruella starts to vomit up a dark, black liquid (likely blood).

Calls Dr. Belle who recommends taking tums for an upset stomach and pain medication. Does not ask her to come back to ER.





Cruella takes the pain medication, goes to sleep, and dies around 6:00pm of a perforated sigmoid colon.



The 'Fauci' Effect