PREFERRED PHYSICIANS MEDICAL
Risk Retention Group, Inc.

Anesthesia & the LAW

A Professional Liability Newsletter for Anesthesiologists — *Fall 1996*

Median Nerve Damage: West Virginia Defense Verdict Entered

Plaintiff, a 35 year old male, claimed median nerve damage after hip replacement surgery. Plaintiff, who was unemployed at the time of surgery due to a pre-existing disability, claimed that the additional disability to his arm further limited his ability to find work and caused diminished sexual relations with his wife. Plaintiff filed suit against the anesthesiologist, the surgeon and the hospital.

Plaintiff's demand before trial was $1,250,000. No settlement offers were made in response to this demand.

Plaintiff's anesthesia expert was Gerald Weinberger, M.D. of Columbia Presbyterian in New York. Dr. Weinberger testified that the mere fact of the injury supported a finding of negligence related to improper padding and positioning.

Defendant's anesthesia expert Paul Allen, M.D. cited medical literature to support his opinion that nerve damage can occur in spite of the best efforts of medical personnel to safeguard the patient through proper padding and positioning.

The defense of the case was bolstered by an investigation that demonstrated that in spite of the alleged injury, plaintiff was an avid and unimpaired golfer.

Following a five hour deliberation, the jury returned a verdict in favor of all the health care providers.

Rick Wolfe served as defense counsel and Helen Rice managed the file on behalf of Preferred Physicians Medical.❖

Nerve Damage Claims are the Third Most Frequent Injury

Nerve damage is the third most frequent malpractice injury reported by anesthesiologists according to a recent review of 917 claims investigated by Preferred Physicians Medical.

Ulnar nerve damage is the most common nerve damage claim reported. Ulnar nerve damage claims typically involve general anesthesia and focus on padding and positioning. In such cases the anesthesiologist is the primary target, however, surgeons and nurses are often included based on a shared responsibility for positioning. Many of these claims are pursued under *res ipsa locquitor*, a legal theory that does not require a showing of specific negligence, but rather assumes that the injury does not occur in the absence of negligence. Despite the existence of medical literature suggesting that a significant number of patients will experience ulnar nerve damage regardless of proper padding and positioning, plaintiffs have no difficulty recruiting anesthesia experts willing to testify that the mere existence of the injury demonstrates negligent care. Although the outcome of any malpractice case is dependent upon its individual facts, Preferred Physicians Medical has obtained defense verdicts in all three ulnar nerve damage cases tried during the last year. The majority of cases not submitted to jury trial have been resolved by settlements in the range of $10,000-25,000.

Top Ten Anesthesia Claims

1.	Dental 159	6.	Infection 25
2.	Death 157	7.	Eye Injury..... 18
3.	Nerve Damage 145	8.	Awareness 17
4.	Brain Damage 54	9.	Retained Instruments.... 14
5.	Burns 26	10.	Pneumothorax..... 12

Brachial plexus injury is the second most frequently reported nerve damage claim. Brachial plexus cases also typically arise after general anesthesia. Unlike ulnar nerve damage, brachial plexus claims typically focus on positioning not padding, and more often involve surgical as well as anesthesia issues. In these cases, the

responsibility for proper positioning is more clearly shared with or dictated by the surgeon. In addition, these cases may include alternative theories for the injury, usually surgical trauma to the nerve. For example, a high percentage of brachial plexus claims arise from cardiovascular or other open chest procedures that can cause either direct trauma or stretching of the brachial plexus nerve. The focus on anesthesia and the outcome of the claim is frequently influenced by the availability of tests to pinpoint the location of a nerve lesion. Preferred Physicians Medical successfully defended two brachial plexus claims in jury trials last year. In a significant number of other cases handled by Preferred Physicians Medical the anesthesiologist was dismissed prior to trial based on the evidence suggesting the injury was caused by the surgeon.

Other upper extremity nerve damage cases, such as injury to the median nerve, are less common. See above article regarding a recent West Virginia verdict.

Lower extremity nerve damage claims are far more likely to be associated with regional anesthesia. The most significant claims from a financial standpoint have involved cauda equina syndrome allegedly resulting from spinal or epidural anesthesia or after pain management treatment. Such claims, while defensible as a known complication, remain difficult to submit to a jury because of the damage potential and sympathy associated with the injury. Cauda equina nerve damage cases also frequently include issues regarding proper diagnosis and treatment. Failures to perform adequate post operative neurological checks, to recognize significant neurological changes or to timely intervene to decompress an epidural hematoma are common allegations. A handful of cases have also involved allegations that the anesthesiologist failed to review medical records or ascertain during the pre-anesthesia assessment that the patient was on anti-coagulation therapy.

Other less frequent lower extremity claims include damage to the sciatic or femoral nerve. These claims more typically implicate surgical positioning or surgical trauma. Inclusion of the anesthesiologist in such cases is, therefore, most typically based on a theory of shared responsibility for positioning. The majority of these nerve damage cases ended with the dismissal of the anesthesia providers.

Additional nerve damage claims reported have included injury to facial nerves from positioning, laryngeal nerve damage from intubation and hypoglossal nerve damage allegedly associated with placement of a Swan-Ganz catheter.❖

Risk Management Analysis

Informed consent remains an important element for reducing the likelihood of claims or litigation. Patients who are made aware in advance that such injuries are a known, and often unavoidable complication, are less likely to conclude that the injury resulted from negligence.

Pre-anesthesia assessment should include discussion of factors which may place the patient at increased risk of injury. Examples: Patients with a body habitus at either extreme appear to be at increased risk for nerve damage especially during lengthy procedures. Patients on anticoagulation therapy may not be appropriate candidates for epidural or spinal anesthesia unless the anticoagulation has been discontinued and/or testing reveals appropriate PT and PTT levels.

Documentation of padding and position not only improves the defensibility of malpractice claims, but also may help call attention to what is an otherwise routine event. This documentation, as well as post operative notes regarding the absence of complaints, the use of the extremities for feeding, hygiene or ambulating, is often key to an effective and credible defense. Documentation can also help bring a higher level of attention to a patient's complaints and result in more timely referrals and treatment. Prompt recognition may also minimize the likelihood of a claim. Preferred Physicians Medical has investigated several claims where the patient filed suit in part out of frustration with health care providers who ignored or minimized the patient's complaints. To the extent complaints are treated properly and expectations managed, litigation may be avoided.

Communication among health care providers is important both in recognizing and treating injuries and in managing the patient's expectations after an injury. A number of cauda equina claims may have been prevented with a higher level of communication between the anesthesiologist and recovery room personnel with respect to the need to be alert for any neurological symptoms in patients receiving epidurals or spinals.

Newsletter Editor
Steve Sanford, J.D.
Vice President, Preferred Physicians Medical

Medical Editor
Gerald F. Tuohy, M.D.
Chairman, Preferred Physicians Medical

Anesthesia & the Law *is published by Preferred Physicians Medical Risk Retention Group, Inc. at 7000 Squibb Road, Mission, KS 66202-3233*
Telephone: 800-562-5589 Fax: 913-262-3633

Note: The purpose of this newsletter is to provide information to policyholders and legal counsel regarding professional liability issues. Risk management analysis is offered for general guidance and is not intended to establish a standard of care or to provide legal advice.