PREFERRED PHYSICIANS MEDICAL
Risk Retention Group, Inc.

Anesthesia & the LAW

A Professional Liability Newsletter for Anesthesiologists *Issue 13*

Radial Nerve Damage: Arizona Defense Verdict

Plaintiff, a 40-year-old female, was undergoing a procedure for laparoscopic tubal transfer under general anesthesia. The procedure lasted approximately one hour and the patient was sent to recovery for two hours.

Seven hours after the procedure, and following discharge, the patient telephoned to complain of pain in her left arm. The patient was referred to a neurosurgeon and the following day was diagnosed with left radial nerve palsy.

A lawsuit was filed and the patient alleged that the radial nerve injury was a result of negligent positioning, or in the alternative, was caused by a negligent intramuscular injection. The case was submitted to jury trial in consultation with the policyholder and defense counsel.

Medical experts offering testimony on behalf of the patient were Stephen Steen, M.D., and Kevin Ladin, M.D. Dr. Steen, an anesthesiologist, testified that "appropriate care, followed by a neuropathy, is converted to inappropriate care." Dr. Ladin, a physical medicine and rehabilitation specialist, indicated that the injured patient would require one stellate ganglion block per year for the rest of her life. This testimony was offered to bolster the patient's damage claim, despite the fact that during the last five years the patient had undergone only three stellate ganglion blocks, the last of which provided no relief. Dr. Ladin, who had treated the patient, also had to concede that he had previously recommended that the patient discontinue this series of injections.

Defense experts included Frederick Cheney, M.D. Dr. Cheney testified that in spite of proper padding, these types of nerve injuries can still occur. Dr. Cheney's testimony referenced data compiled in conjunction with the ASA Closed Claims Project.

The trial lasted for eight days and the jury returned a verdict in favor of the anesthesiologist. Winn Sammons of Phoenix, Arizona defended the case on behalf of the policyholder; Brian Thomas managed the file on behalf of Preferred Physicians Medical. ❖

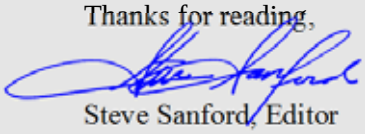
In this Issue

Over the course of the last several years, Preferred Physicians Medical has continued its commitment to defending anesthesiologists. Of particular note is our record in successfully defending upper extremity nerve damage claims, especially those involving ulnar neuropathy. At the end of April 2003, Preferred Physicians Medical had taken 32 cases of upper extremity nerve damage to jury trials. Our record: Thirty-two defense verdicts, zero plaintiff's verdicts.

In addition, we have tried numerous other cases ranging from dental injuries to profound brain damage and death. In this newsletter, we highlight several of our most recent cases.

In other news, expert witnesses have come to the attention of the ASA and Preferred Physicians Medical endorses a proposal for the ASA to police expert testimony.

Thanks for reading,



Steve Sanford, Editor

Editorial: Expert Witnesses

One important development we noticed at the ASA meeting in Orlando, Florida is a proposal to adopt a methodology for peer reviewing expert witnesses and their testimony. The proposal is modeled after one adopted by the American Association of Neurological Surgeons (AANS) which allows the society to discipline members who provide testimony in a manner inconsistent with that society's code of ethics. Expert testimony, according to AANS, "should reflect not only the opinions of the individual but also honestly describe where such opinions vary from common practice." In addition, "the expert should not present his or her own views as the only correct ones if they differ from what might be done by other neurosurgeons." In July 2001, AANS' disciplinary procedures withstood challenge by a sanctioned expert when the 7th U.S. Circuit Court of Appeals affirmed the legality of the AANS' disciplinary procedures. In *Austin v. AANS*, the federal court applauded AANS' effort to police expert testimony, noting:

> *This kind of professional self-regulation furthers, rather than impedes, the cause of justice…There is a great deal of skepticism about expert evidence. It is well known that expert witnesses are often paid very handsome fees, and common sense suggests that a financial stake can influence an expert's testimony, especially when it is technical and esoteric and hence difficult to refute in terms intelligible to judges and jurors. More policing of expert witnessing is required, not less.* 253 F.3d 967, 972-3 (7th Cir. 2001).

At Preferred Physicians Medical, we do see instances of responsible plaintiff expert testimony, however, we also routinely see professional witnesses willing to provide expert testimony that lacks a sound scientific foundation or that is completely inconsistent with medical literature and mainstream opinion regarding the standard of care. Many of these professional witnesses make a lucrative living providing testimony against other physicians.

While the ASA grapples with the efficacy of implementing a peer review program, we suggest that the magnitude of this problem can be gauged by merely reviewing the testimony of some of the most prolific anesthesia experts used by the plaintiff's bar. A library of their testimony is available from several expert witness databases, including Defense Research Institute (www.dri.org) and IDEX (www.idex.com).

Most Prolific Plaintiff's Experts in cases defended by Preferred Physicians Medical*

Name	PPM cases	Total IDEX cases
Mervyn Jeffries, M.D.	26	210
Brian G. McAlary, M.D.	23	162
William Charles Berger, M.D.	15	103
Ronald H. Wender, M.D.	14	79
David J. Cullen, M.D.	12	83
Ronald L. Katz, M.D.	9	98
Robert R. Kirby, M.D.	8	52
Angelo Gagliano, M.D.	7	28
Richard F. Toussaint, M.D.	9	25
Thomas Mitros, M.D.	8	21

*These figures compiled by Preferred Physicians Medical as of 12/1/2002. PPM cases reflect the total number of cases recorded in our electronic database initiated in November 1999. Total IDEX cases reflect the number of medical malpractice cases (plaintiff and defendant) in which the expert has testified as compiled by IDEX, a national clearinghouse for expert witness testimony. The numbers provided are as of 12/3/2002.

Brain Damage and Death: Cook County, Illinois Defense Verdict

Plaintiff, a 35-year-old female with history of severe depression, suicide attempts and multiple psychiatric medications presented for a scheduled C-section. The procedure was performed without complications. Our anesthesiologist administered an epidural, which was left in post operatively for pain management.

On arrival in recovery, the patient's blood pressure was 100/71, Pulse 100, respiration 20 and O_2 SATs 94%. During recovery, the patients O_2 dropped briefly to 91 and oxygen was administered by nasal canula. The patient was transferred to the post-partum floor and was later seen by the anesthesiologist. At that time, the patient was doing very well and was comfortable with her continuous lumbar epidural. Based on a history of dyspnea during pregnancy, the anesthesiologist ordered pulse oximetry monitoring for 24 hours and notice in the event of detailed complications, including any respiratory rate less than 10 per minute, any O_2 SATs of less than 90%, evidence of airway obstruction, or patient drowsiness. None of these conditions were reported to the anesthesiologist.

The records indicated that the patient was alert and oriented when first seen by the nursing staff. Thirty-five minutes later, the patient was found in full arrest. A code was called and the patient was resuscitated and transferred to ICU. The patient never regained consciousness and eventually expired.

The patient's family filed a lawsuit against the anesthesiologist, the hospital and attending physician who prescribed psychotropic medications that were administered while the patient was on the post-partum floor. The allegations against the health care providers included: failure to perform an adequate history and physical; failure to diagnose cause of patient's dyspnea; failure to recognize oxygen desaturation; failure to properly manage and treat patient dyspnea and failing to insure proper management of the patient's post partum analgesia.

The last settlement demand prior to trial was $10,000,000 as to all defendants including a $1,000,000 policy limits demand to our insured. Plaintiffs' counsel also conveyed that he would not accept any settlement offer from our insured, even a policy limits offer, unless the co-defendant hospital offered a settlement at or near $9,000,000. Co-defendant's last settlement offer prior to trial was $2,500,000 in structured payments, which was rejected by plaintiffs.

After several changing settlement scenarios, the hospital eventually settled out of the case during trial for $8,000,000 based on testimony that pulse oximeters were never used on the post-partum floor, even when ordered by a physician. Following 15 days of trial, the jury returned a defense verdict in favor of the PPM anesthesiologist. The jury returned a verdict against the attending psychiatrist of $16,084,660.

Mark L. Karasik of Baker & McKenzie in Chicago, Illinois served as defense counsel for the policyholder, Senior Claims Attorneys, Wade Willard and Brian Thomas managed the file on behalf of Preferred Physicians Medical. ❖

Brain Damaged Baby: Kentucky Defense Verdict

Plaintiff presented for labor and delivery and the anesthesiologist performed a labor epidural with no complications. Approximately four hours later the attending obstetrician asked our insured to provide a "sitting dose," an extra bolus to get the patient through delivery. At that time, the patient was close to delivery and the obstetrician intended to attempt a vaginal delivery. The anesthesiologist bolused the patient and returned to the call room.

At approximately 5:55am the obstetrician ordered a c-section. The neonatologist was contacted at home, but did not arrive until approximately 6:45am. The anesthesiologist was notified at 6:32am and was with the patient by 6:40am. An additional bolus was given at 6:42am. According to the anesthesiologist, neither the obstetrician nor the nurses indicated any sign of fetal distress or the need for an emergency Cesarean. After administering the bolus, the anesthesiologist returned to the call desk to wait for the patient to be taken into the operating room. At this time, a nurse came to the desk and indicated that another patient needed an epidural for an immediate Cesarean.

The anesthesiologist first checked with the obstetrician and was informed that the original patient would be ready in approximately 15 minutes, and that it would be acceptable for him to administer an epidural for the other patient. Another anesthesiologist was called from home to report to the labor floor. While performing the second patient's epidural, the anesthesiologist was informed that the original patient was ready, but stable. Fifteen minutes later, at approximately 7:05am the anesthesiologist returned to start the original Cesarean section.

Another bolus was administered, but relief was incomplete after 15 minutes. At 7:25am, the infant was delivered and diagnosed with profound brain damage.

Plaintiff sued the obstetrician, the hospital and our insured anesthesiologist and his professional association alleging failure to properly monitor the labor and for delaying the cesarean for approximately 90 minutes. The obstetrician and hospital settled for an undisclosed amount prior to trial. Plaintiff's last demand to our insureds before trial was $600,000. Based on favorable defense testimony, and with the insureds' consent to explore settlement, Preferred Physicians Medical offered $50,000 to avoid trial. This offer was rejected and we proceeded to trial.

The plaintiff attorney did not designate an anesthesia expert and proceeded to trial relying on the testimony of Ob/Gyn experts. These experts testified that it was a breach of the standard of care for the anesthesiologist to perform a second case without obtaining the consent of the Ob/Gyn. Given that there was testimony, albeit disputed, that the anesthesiologist had in fact checked with the obstetrician and obtained permission to start the second case, the case presented a fact question that the jury would be required to decide.

The trial lasted seven days. After two hours of deliberation, the jury returned defense verdicts in favor of the anesthesiologist and his group. According to the jury, they did not believe the anesthesiologist was the proximate cause of the infant's brain damage and instead believed that the Ob/Gyn and hospital were responsible for failing to diagnosis fetal distress and promptly performing an emergency Cesarean.

Greg King of Ogden, Newell & Welch in Louisville, Kentucky served as defense counsel. Brian Thomas, Senior Claims Attorney, managed the claim file on behalf of Preferred Physicians Medical. ❖

Risk Management

Given the current medical malpractice insurance crisis that grips many parts of the country, Preferred Physicians Medical has embarked on a more aggressive Risk Management program. In addition to our efforts to address current anesthesia trends in this newsletter, our Claims Department staff has been conducting risk management seminars all across the country. At the present time we are focusing these efforts on those jurisdictions where the litigation climate is most severe as well as introducing our risk management approach to new policyholder groups. In the current climate, risk management efforts provide one additional avenue to help blunt the dramatic escalation in the cost of malpractice insurance.

In addition, Preferred Physicians Medical has been asked to participate in a number of society meetings in order to address both risk management and the current insurance climate. We have recently spoken before the ASA annual meeting in Orlando, Florida, the American Osteopathic College of Anesthesiologists in Rancho Mirage, California and the Society of Pediatric Anesthesia in Ft. Myers, Florida.

Anesthesia & the Law is on the Web

As a convenience to our policyholders, the latest issue of Anesthesia & the Law is also available on the Preferred Physicians Medical website, www.ppmrrg.com. You may also visit the website for a brief overview of our operations or to find useful contact information. ❖

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