ANESTHESIA & the LAW
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PPM

No Good Deed Goes Unpunished: Iowa Anesthesiologist Defends Care through Two Trials

In November 2012, a PPM insured anesthesiologist defended his care at trial in a case involving a 48 year-old female who underwent an emergency hysterectomy following a cesarean-section delivery. Following the procedure it was noted that the IV had infiltrated. Numerous consultations were immediately obtained and the infiltration was treated. The patient alleged inadequate monitoring during her surgery resulted in the infiltration and subsequent surgeries, pain, numbness and scarring. The patient's attorney issued a $500,000 settlement demand prior to trial. PPM's insured anesthesiologist strongly believed his care was appropriate and desired to defend his care at trial.

During trial, a juror became light-headed and fainted. The anesthesiologist left the defense table in order to render aid to the ill juror, all in the presence of the other jurors. The ill juror recovered quickly but was dismissed from the jury. The judge questioned the remaining jurors and determined, based on this inquiry, the jurors were not inappropriately influenced by the incident. The patient's attorney, however, made a motion asking the court for a mistrial claiming juror bias in favor of the anesthesiologist due to his interaction with the ill juror. The judge denied the motion and the trial continued.

The jury ultimately returned a defense verdict in favor of the anesthesiologist following an eight-day trial. The plaintiff appealed the defense verdict on the question of juror bias and the appellate court reversed and ordered a new trial.

In February 2016, the case was tried a second time. Following a four-day trial, a second jury returned a unanimous defense verdict after only 45 minutes of deliberation.

PPM's anesthesiologist was represented by Robert Rouwenhorst, Esq. for the first trial. Due to Mr. Rouwenhorst's retirement, Rick Harris, Esq. of the Finley Law Firm, Des Moines, Iowa represented the anesthesiologist for the second trial.

According to Shelley Strome, Senior Claims Specialist, "PPM is very appreciative of our policyholder for having the courage and confidence to defend his care and treatment of this patient through trial not once, but twice." ❖

Risk Management Analysis

PPM has defended anesthesiologists in several trials that have resulted in either a mistrial or a defense verdict being reversed on appeal based on claims of juror bias when a PPM defendant anesthesiologist rendered medical assistance to a juror, plaintiff and others in the courtroom who became ill or fainted. In each of PPM's cases involving these circumstances, the defendant anesthesiologists placed priority on providing medical care rather than evaluating the potential negative impact on the trial. So what should a defendant anesthesiologist do in that situation?

From PPM's perspective, we believe the defendant anesthesiologist is often in the best position to evaluate a medical event and will support a decision to render medical attention. In situations where a potential medical event is anticipated, e.g. parties with ongoing medical issues, a pregnant or ill juror, an anesthesiologist may want to discuss this possibility with their local PPM defense counsel prior to trial. In some cases, the court may be able to quickly dismiss other jurors prior to allowing a defendant to render aid. In other situations, the court may have emergency responders available who can assist the individual, rather than the defendant anesthesiologist. However, as illustrated in the trial summary above, PPM will continue to support and defend PPM policyholders in these circumstances.

Cauda Equina Syndrome: Georgia Defense Verdict

The case involved a 62 year-old female with a significant history of spinal surgery, leg radiculopathy and ongoing lower back pain. As an alternative to surgery, the patient underwent a series of lumbar epidural steroid injections (LESI) for pain relief. The patient experienced pain during the second injection, so the procedure was aborted and the patient was discharged home. The patient ultimately experienced Cauda Equina Syndrome (CES) and required a decompressive laminectomy six days after the second LESI. Although no allegations were made as to the appropriateness of the LESI or the technique used, the facts surrounding the patient's discharge and subsequent course were heavily disputed and gave rise to a lawsuit against PPM's insured anesthesiologist and practice group.

The patient alleged following her second injection she was no longer able to ambulate and required wheelchair assistance to her car. She alleged further she was not properly evaluated prior to discharge and was rushed out of the pain management practice. She claimed upon arriving at her home she was unable to walk inside and proceeded to crawl around on her hands and knees for the next six days. Two days post-discharge, the patient spoke with a nurse at the pain management practice and reported she was "paralyzed," incontinent, immobilized on the couch and in severe pain. PPM's anesthesiologist quickly responded to the patient's phone call, but allegedly disregarded her complaints and provided a prescription for pain medicine and a work excuse.

Despite the patient's alleged condition, her husband continued to go to work and she did not inform her friends or family of her condition because she claimed she did not want to burden them with her problems. Notably, her husband, daughter and son all testified they did not recall the plaintiff resorting to crawling on her hands and knees or reporting immobilization or incontinence. The patient testified it was not until six days post-injection that she sought an evaluation. She first visited her surgeon who testified the patient did not exhibit CES symptoms and that her condition was non-emergent.

The patient testified further she was also evaluated by her primary care physician. Her primary care physician testified the patient's symptoms were "rapidly progressing" and she became incontinent in his office. She was then transported to a nearby hospital where a different orthopedic surgeon performed a decompressive laminectomy and removed a large piece of herniated disc. The operative surgeon testified at trial he believed the disc had herniated within 24-48 hours prior to surgery because the plaintiff had regained bowel and bladder continence after the surgery. The surgeon also testified because there was no history of trauma, the patient's herniation was likely inevitable.

Plaintiff's attorney called several of the nurses from the pain management practice to testify at trial. Each nurse testified in support of the anesthesia record that indicated the patient was fully ambulatory, moving all four extremities and at the same pain level both before and after the procedure. The nurses testified further the patient was not rushed out of the facility and she would not have been discharged if she had become unable to walk or had unfamiliar or increased pain.

PPM's anesthesiologist testified that after the patient's post-injection phone call wherein she complained of paralysis to a nurse, she immediately contacted the patient and evaluated her over the phone and confirmed no CES-type symptoms existed. The anesthesiologist also testified she asked the patient to come to her office for an evaluation, but patient stated she was simply seeking pain medications and a work excuse.

During closing statements, plaintiffs' counsel pleaded to the jury to accept his client's version of the facts and requested a $6,700,000 award, in part, because he felt his client's case was worth "at least half of the recent purchase price of a Vincent van Gogh painting." The jury returned a 12-0 defense verdict in favor of PPM's anesthesiologist and anesthesia group.

Wade Copeland, Esq., with the law firm of Carlock, Copeland & Stair, L.L.P., in Atlanta, Georgia, represented PPM's insured anesthesiologist and group. Arik Worsfold, JD, Claims Attorney, managed the case on behalf of PPM. ❖

Brain Damage: Colorado Defense Verdict

This case involved a 28 year-old female who presented for a laparoscopic da Vinci assisted myomectomy for excision of a uterine fibroid and assessment of abdominal pain. The patient had a history of shoulder surgery, hypotension, hypoglycemia, mood swings, depression, obesity, dysmenorrhea, asthma, back and neck aches, numerous medication and latex allergies and migraines. A PPM insured anesthesiologist and CRNA provided general anesthesia for the procedure. The procedure lasted approximately four hours. The length of the procedure was due in part to the patient gradually slipping cephalad on the operating table when in the steep Trendelenberg position requiring undocking and re-docking of the robot several times.

There were no surgical or anesthetic complications and the patient was taken to PACU in stable condition. She was then transferred to the floor for an overnight stay. The next morning a nurse documented the patient had blisters on her upper back. No physician was notified of the blisters. The patient was discharged that same day and her only complaint was abdominal soreness.

Three days later the patient presented to urgent care with complaints of burns on her back and a bump on her head. She had no complaints of headaches, dizziness or confusion. She was seen five days post-discharge by the surgeon. At that time she complained of urinary incontinence, burns on her back and a bump on her head. She wanted to know what had happened during surgery to cause the burns and bump. The surgeon told her nothing happened during surgery, and although she had slid on the table there was not enough force to cause a bump.

Over the next several months, the patient began complaining she had headaches from the day of the surgery, confusion, and seizures. She saw numerous neurologists who performed EEGs and MRIs that were normal and did not show any seizure activity. Neuropsychological testing was also performed and did not show any brain injury. The patient's condition was diagnosed as psychosomatic.

The patient filed a lawsuit naming the OB GYN surgeon, the hospital, PPM's insured anesthesiologist and CRNA. The patient alleged something must have happened in the operating room causing burns to her neck and a bump on her head resulting in brain trauma. The patient initially alleged she must have been dropped or fell off the table causing brain trauma. She later alleged something must have fallen on her head or she was allowed to hit her head against something when she slid on the table. She alleged further everyone in the operating room was involved in a cover-up about what had occurred.

The hospital was dismissed from the lawsuit prior to plaintiff attorney's initial global settlement demand of $1.45 million. PPM's insureds did not consent to settlement as they believed their care was appropriate and nothing occurred in the operating room to cause the patient's burns or bump. On the eve of trial, plaintiff issued a separate settlement demand of $130,000 to PPM's insured anesthesiologist and CRNA. PPM's insureds were resolved to defend their care and did not consent to settlement. The case proceeded to trial against PPM's insureds and the OB GYN surgeon.

Plaintiff's anesthesiology expert, Dr. Daniel Gainsburg, New York, New York, testified the patient must have hit her head on a piece of equipment attached to the operating table. He maintained a patient should never slide in a robotic surgery while in the steep Trendelenberg position. He conceded, however, the bump on plaintiff's head could have occurred someplace else in the hospital other than the operating room.

The defense anesthesiology expert testified it was highly unlikely the patient sustained any type of injury during surgery by striking her head. He also testified it is not unusual for a patient to have a gradual slide while in the steep Trendelenberg position. The neurology expert for the defense testified the EEGs did not show any epileptic seizure activity, her symptoms were functional in nature and most likely the result of a conversion disorder.

Following a twelve-day trial, the jury deliberated approximately two hours and returned a unanimous verdict in favor of PPM's insured anesthesiologist, CRNA and the OB GYN surgeon.

Mike Jones, Esq., with the law firm of Hall & Evans, LLC, Denver, Colorado tried the case. Shelley Strome, Senior Claims Specialist, managed the case on behalf of PPM. ❖

Surveillance Evidence Helps Secure Unanimous Defense Verdict

The case involved a 48-year-old male patient who was extubated following an exploratory abdominal surgery and later reintubated due to continued shallow breathing. The patient alleged he experienced an episode of hypoxia during the period of time between extubation and reintubation, which he claimed resulted in a hypoxic brain injury. At trial, defense counsel proved there was no evidence the patient experienced hypoxia, and certainly no hypoxic brain injury.

The defense also submitted evidence establishing the patient had worked in the medical field and was fabricating his symptoms in an attempt to obtain Social Security Disability benefits. On cross-examination of the patient's experts, the defense was able to show the jury the patient's claimed symptoms grew worse over time following the initial denials of his Social Security Disability claim. Further, the only evidence the patient suffered a hypoxic brain injury was his self-reporting of an alleged event that was carried through his medical records from one treating physician to the next.

The defense also submitted video surveillance that was devastating to the patient's deposition and trial testimony. Prior to his deposition, he prepared a list of 33 health issues he alleged severely affected him and rendered him unemployable in any capacity. At his deposition and during trial, the patient testified to a laundry list of damages including: myoclonus, sleep apnea, cognitive problems, balance problems, chronic back pain and difficulty reading. The defense then played over one hour of videotaped surveillance that showed the patient engaged in multiple activities that belied his testimony including: driving a car, running errands, reading, walking with a normal gait, bending over and picking up heavy furniture. There was no evidence of myoclonic movement or any of the deficits the patient alleged affected his ability to function or work.

During closing arguments, plaintiff's counsel asked the jury to award damages in the amount of $500,000 - $1,000,000. The jury returned a unanimous defense verdict in favor of the PPM insured anesthesiologist and her practice group in less than thirty minutes.

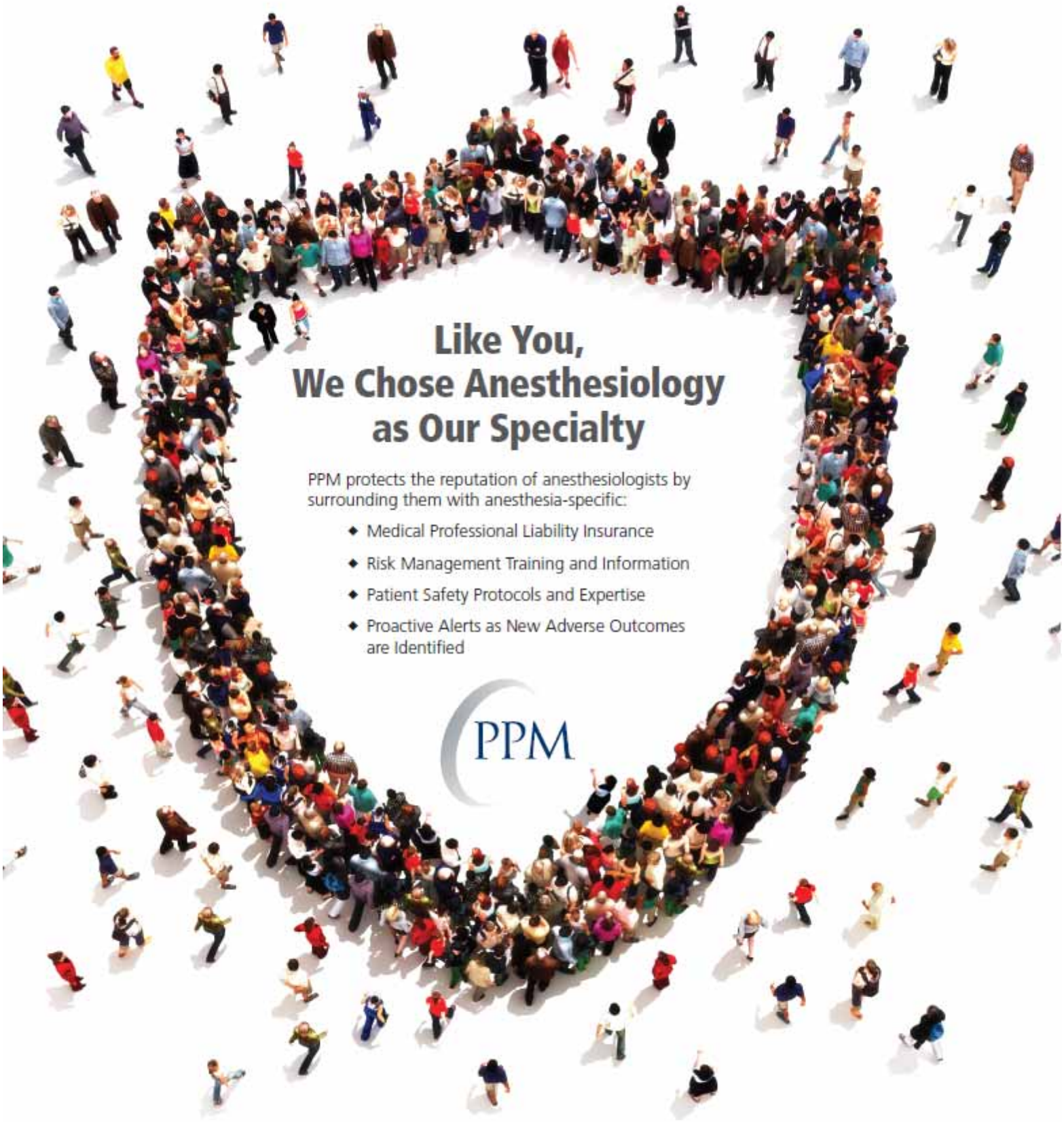
Winn Sammons, Esq. and Mandi Karvis, Esq., with the law firm Sanders & Parks, PC, Phoenix, Arizona, tried the case. Brian Thomas, JD, Vice President – Risk Management, and Shelley Strome, Senior Claims Specialist, managed the case on behalf of PPM. ❖

Risk Management Analysis

Video surveillance and social media postings of plaintiffs is often utilized by the defense to rebut damage claims in medical negligence litigation. While the Rules of Civil Procedure regarding disclosure of video surveillance to plaintiffs during discovery vary from state to state and in federal courts, video surveillance can be very effective at trial because the video surveillance speaks for itself and is typically admissible evidence. As highlighted in the trial summary above, video surveillance can also be extremely effective evidence when used to impeach a plaintiff's credibility as to the extent of his or her injuries. According to Shelley Strome, Senior Claims Specialist, "When defense counsel spoke with the jurors after the defense verdict, they stated the videotaped surveillance left no doubt in their minds the plaintiff was fabricating his injuries."

PPM Earns "A" Rating from A.M. Best

PPM has earned an upgraded rating of A (Excellent) with a stable outlook from A.M. Best, the industry's leading independent insurance rating organization. In its rating announcement, A.M. Best explains that PPM's "underwriting gains have been driven by the company's focused underwriting strategy, extensive risk management program, geographic diversification, low claims frequency and conservative reserving." PPM's CEO, Steve Sanford, notes "this upgraded rating acknowledges PPM's strong financial results and the company's long-term success navigating an evolving health care landscape." According to Brent Hodges, PPM's Vice President of Underwriting, "The upgraded rating is truly a testament to the continued quality of care provided by our policyholders and their willingness to embrace and place significant importance on patient safety and anesthesia specific risk management strategies." ❖



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In This Issue

From our beginning, Preferred Physicians Medical's (PPM) mission has been to provide the highest quality medical malpractice insurance protection for our policyholders. One of the cornerstones of PPM's commitment to our policyholders is to aggressively defend our ASA standard of care clinicians against claims and litigation. In this issue, we highlight some of our recent successes in the courtroom and offer some risk management analysis.

PPM is also very pleased to announce its A.M. Best rating has recently been upgraded to A (Excellent) with a stable outlook.

Thanks for reading,

Brian J. Thomas, Editor