

Pneumothorax: Florida Jury Rejects Stress Induced Recurrence of Cancer

The plaintiff, a 46 year old female with a history of leukemia, sustained a left pneumothorax following an intercostal nerve block for post-herpetic neuralgia. Plaintiff alleged her injury resulted from the anesthesiologist's negligence in puncturing her lung and the subsequent treatment of the pneumothorax. Plaintiff claimed that as a result of the pneumothorax and the placement of chest tubes, she had suffered severe pain and her post-herpetic neuralgia syndrome had become permanent. In addition, plaintiff claimed that the additional stress and pain associated with the pneumothorax and its treatment caused a recurrence of her leukemia, which had been in remission. The plaintiff expired prior to trial and the damage claim was amended to include wrongful death.

Plaintiff's demand prior to and during trial was \$1,000,000. Given a lack of credible scientific evidence to support plaintiff's causation theory that the stress related to the pneumothorax actually caused a recurrence of her cancer, Preferred Physicians decided to take the case to trial. Reasonable settlement efforts were pursued at the policyholder's request, but were rejected by the plaintiff.

Despite a lack of sound scientific evidence to support the theory of stress induced recurrence of cancer, the plaintiff's attorney appeared to have little

difficulty finding expert testimony to support his position. Anesthesiologists Norman Ernst, Jr., M.D. of Garden City, New York and Frederick Ernst, M.D. of Dothan, Alabama along with plaintiff's oncologist, Gerald Sokol, M.D. offered testimony on behalf of plaintiff. Plaintiff's anesthesia experts, in addition to commenting on the relationship between the pneumothorax and the recurrence of cancer, were also critical of the anesthesiologist's technique in placing the block, suggesting that additional steps such as having the patient hold her breath were not taken.

Experts for the defense were Carol Warfield, M.D., an anesthesiologist from Boston, Massachusetts and R. Judith Ratzan, M.D., an oncologist from Miami, Florida. Dr. Warfield testified that the block was performed correctly and that a pneumothorax was a well-recognized complication. Dr. Ratzan testified that there is no medical literature or scientific evidence to support the theory that stress can cause a recurrence of cancer.

In the end, these defense experts proved more credible than plaintiff's experts and a verdict in favor of the anesthesiologist was returned by the jury.

Eugene Ciotoli, West Palm Beach, Florida defended the case for Preferred Physicians. Chris Searcy also of West Palm Beach, Florida represented plaintiff. ♦

Pulmonary Damage: Defense Verdict in West Virginia

A 79 year old male scheduled for gallbladder surgery presented to the operating room with his mouth full of passive regurgitation, green in color. His mouth and bronchi were suctioned out and the anesthesiologist intubated with a rapid sequence induction using Norcuran as the paralytic agent. Following surgery the plaintiff required mechanical ventilation and a tracheostomy due to hypoxemia.

The plaintiff's theory of liability was that the anesthesiologist used a slow-acting paralytic agent and improperly performed the rapid sequence induction resulting in aspiration and pulmonary damage.

Plaintiff's demand prior to trial was \$385,000. Preferred Physicians and its policyholder agreed not to enter into settlement negotiations.

Plaintiff's anesthesia expert, Mervyn Jeffries, M.D. of Bethesda, Maryland testified that Anectine was the only drug of choice in any rapid sequence induction in gallbladder patients and that use of a nasogastric tube to decompress the stomach and bowel is required in all cases of full stomach intubation. In addition, Dr. Jeffries testified that an error in techniques must have been made during intubation because a proper rapid sequence induction with properly applied cricoid pressure is foolproof to prevent aspiration.

Roger Litwiller, M.D., an anesthesiologist from Roanoke, Virginia, testified for the defense. Dr. Litwiller testified that Norcuran was an appropriate paralytic agent for this patient due to his previously demonstrated cardiac abnormalities. In addition,

Dr. Litwiller testified that not using a nasogastric tube was an appropriate judgment call based on his experience and medical literature that indicates the use of a nasogastric tube may actually increase the likelihood of regurgitation.

During cross-examination of the plaintiff's expert, Dr. Jeffries' credibility was undermined by his admission that he had not consulted the medical literature before giving his opinion and that he was overwhelmingly pro-plaintiff in his work as an expert witness. The jury took a mere 18 minutes to return a verdict in favor of the anesthesiologist.

Richard Hayhurst, Parkerburg, West Virginia defended the case for Preferred Physicians. ❖

Cervical Injury: New York Court Grants Motion to Dismiss During Trial

Plaintiff, a 45 year old female, claimed that she sustained a cervical injury as a result of hyperextension of her neck during general endotracheal intubation for a meniscectomy.

Plaintiff's demand prior to trial was \$250,000. Preferred Physicians and its policyholder agreed not to enter into settlement negotiations and the case proceeded to trial.

Plaintiff's witnesses were her chiropractor and her physical therapist. The plaintiff relied solely upon the doctrine of *res ipsa loquitur* and did not produce an

expert witness to testify regarding standard of care or causation. After the plaintiff rested her case the defense made a motion to dismiss for failure of the plaintiff to make a *prima facie* case and the motion was granted.

Expert witnesses for the defense included John O'Leary, M.D., an anesthesiologist, and James Dickson, M.D., an orthopedic surgeon, both from New York.

Charles Lohrfink, Jr. of White Plains, New York served as defense counsel. ❖

L E G A L A N A L Y S I S

Res ipsa loquitur (the thing speaks for itself) is a legal theory under which negligence may be presumed from the injury itself. This theory is rarely applicable in medical malpractice litigation as tort law generally requires the plaintiff to establish negligence through the expert testimony of a properly qualified witness. In medical malpractice litigation, plaintiffs are usually required to retain a physician in the same practice specialty in order to establish both the standard of care and to offer opinions regarding how the standard of care was breached. Cases in which *res ipsa loquitur* may be used successfully would include injuries that result when a patient is dropped during transfer to a gurney or when additional surgery is required to remove a retained surgical sponge. In these types of cases, the court may find that negligence can be determined by a jury's common knowledge without resort to expert testimony. In the above referenced case, the court determined that as a matter of law, expert testimony was necessary to establish negligence.

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