



BALANCING THE SCALES
OF JUSTICE

Professional Negligence Section

Volume 10, Number 1, Fall 2002

Call for Articles

The Professional Negligence Section is always looking for ideas and submissions for this newsletter. You are invited to submit case notes, analysis of particular areas of developing law, checklists and timetables for trial preparation, or helpful anecdotes from your own practice. Please contact Brian J. McKeen, McKeen & Associates, P.C., 645 Griswold St. #4200, Detroit, MI 4826-4404; Tel: 313/961-4400; Fax: 313/961-5985 E-mail: bjmckeen@mckeenassociates.com, if you would like to contribute an article for national publication.

Don't keep your good ideas to yourself. Share your expertise and practical advice with your colleagues—share your article today!

Highlights . . .

- Page 2** 2002-2003 Section Officers
- Page 5** Cross Examination of a Radiologist in a Failure to Diagnose Breast Cancer Case and Defending the Defense Argument that Screening Mammograms Do Not Save Lives
- Page 7** Contacting ATLA

Editor's Note: I would like to take this opportunity to thank our members for allowing me the privilege to serve as Newsletter Editor of the ATLA - Professional Negligence Section for the 2002-2003 year. This issue features three articles from our membership.

The first article is by Tracy Kenyon Lischer, entitled "Kernicterus: A Preventable Disorder on the Rise due to Early Hospital Discharge". This article addresses a problem which is once again becoming a frequent subject of medical malpractice litigation.

The second article is by Gary R. Hillerich and Irwin M. Ellerin, entitled "Cross Examination of the Radiologist in the Failure to Diagnose

Breast Cancer Case and Addressing the Defense Argument that Screening Mammograms Does Not Save Lives".

As Editor, I would like to extend an invitation to our membership to put "pen to paper" and submit articles for publication regarding our shared interests. Please contact me with your thoughts for future publications and any suggestions you may have to improve upon member needs. I can be reached at (313)-961-4400 or at bjmckeen@mckeenassociates.com. Submissions for the December 2002 ATLA/BTLG Newsletter should be sent to my attention no later than November 1, 2002.

Brian J. McKeen

Kernicterus:

A Preventable Disorder on the Rise Due to Early Hospital Discharge

By Tracy Kenyon Lischer, Durham, North Carolina

Introduction

Two young parents come in with their first child. Her diagnosis includes cerebral palsy. The child is now 15 months old and had her first MRI at six months. The parents are puzzled because the pregnancy was uneventful, there was no fetal distress and the Apgars, whose import they now know, were 8 and 9. Although the baby came a few weeks early (35 weeks), she weighed over 6 lbs. The mother breast fed the baby to give her the best possible start; it was difficult waking her to feed. After a discharge at 48 hours, the infant was readmitted five days after birth with severe jaun-

dice. Following a period of phototherapy, the doctors sent the baby home. Her developmental milestones have been slow. Yet the child has never had seizures. Nor does she have the characteristic spasticity of most people with cerebral palsy. She seems "floppy," and the term athetotic cerebral palsy has been used by the medical personnel. The doctors are worried about her loss of upward gaze and seem concerned about her hearing as well. When she got her first teeth, they appeared yellow and weakened and broke off.

continued on 2

2002-2003 Section Officers

Chair

Thomas D. Masterson
Masterson Rogers Masterson &
Gustafson, P.A.
699 First Ave. North
Saint Petersburg, FL 33701-360
P: 727/896-3641
F: 727/895-3559
tmasterson@mastersonlaw.com

Chair Elect

James P. Frickleton
Bartimus Frickleton
Roberston & Obetz
11150 Overbrook Road, #200
Leawood, KS 66211-2235
P: 816/842-2300
F: 816/421-2111
jimf@bflawfirm.com

Vice Chair

Jim M. Perdue, Jr.
The Perdue Law Firm, L.L.P.
2727 Allen Pkwy., Ste. 800
Houston, TX 77019-2100
P: 713/520-2500
F: 713/520-2525
jperduejr@perduelaw.com

Secretary

James W. Gustafson
Searcy Denney Scarola Barnhart
& Shipley, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
P: 561/686-6300
jwg@searcylaw.com

Newsletter Editor

Brian J. McKeen
McKeen and Associates, P.C.
645 Griswold St. #4200
Detroit, MI 48226-4210
P: 313/961-4400
F: 313/961-5985
bjmckeem@mckeenassociates.com

Immediate Past Chair

Linda Miller Atkinson
Philo Atkinson Stephens et al
805 Railroad Ave.
P.O. Box 241
Channing, MI 49815-0241
P: 906/542-8775
F: 906/542-7117
lmatkinson@uplogon.com

The Endower, KRAMER DILLOF
TESSELL DUFFY & MOORE, has
no control over the placement of
information or the editorial con-
tent of this Section Newsletter.

continued from Page 1

The family's expenses for special equipment have been mounting: a wheelchair, special collars and neck supports; there is talk of a feeding tube if nutrition cannot be maintained. The child does not crawl or walk or sit unaided. She isn't talking yet. But her intelligence seems normal, superior even. She is alert and interested in everything; her eyes sparkle. She works incredibly hard during her therapies. She wants to learn. She is a busy baby.

This child may or may not be seeing the same pediatrician who treated her at birth. She may or may not have been diagnosed with kernicterus. The parents may or may not know that kernicterus was virtually eradicated decades ago with the advent of phototherapy and exchange transfusion. They probably do not know that slightly premature breast fed babies are most at risk for developing kernicterus. Unless the child has been diagnosed and the parents are activists, they almost certainly do not know that: early discharge (48 hrs for a pre-term baby) has given rise to unprecedented numbers of children with kernicterus; a Kernicterus Registry is maintained at the University of Pennsylvania School of Medicine by Dr. Lois Johnson and colleagues; a parents' group has formed called *Parents of Infants and Children with Kernicterus (PICK)*; and the *Joint Commission on Accreditation of Health-care Organizations (JCAHO)* has issued a SENTINEL EVENT ALERT regarding kernicterus.

The Syndrome

Kernicterus is a preventable life-long neurologic syndrome caused by severe and untreated hyperbilirubinemia during the neonatal period. High levels of bilirubin are toxic to the developing newborn. In full-term infants, hyperbilirubinemia symptoms include severe jaundice, lethargy, and poor feeding. There is hardly a parent or grandparent who has not seen or given birth to a baby who became jaundiced. The characteristic color of the

condition gives rise to the term "yellow jaundice." In a term, healthy baby bilirubin is transported into the bile and excreted in the stool. The jaundice does not become severe, nor is it usually dangerous to the baby. However, in pre-term and some term infants, bilirubin is not as successfully eliminated. The levels of bilirubin become elevated. This bilirubin can cross the blood /brain barrier and cause brain damage. The constellation of symptoms that result from this neurotoxicity is called kernicterus. Features of kernicterus may include choreoathetoid cerebral palsy, sensorineural hearing loss, dental dysplasia and gaze paresis. They may or may not include mental retardation. Many children with kernicterus have intelligence that is normal or above. Kernicterus is not a reportable condition in the United States, and its true prevalence is unknown. However, prior to managed care and the early discharge of mothers and babies, it was as rare as polio. As one author has noted, "The problem was solved a generation ago." Tragically, this is no longer the case.

As the medical literature makes clear, the key to the prevention of kernicterus is to control bilirubin levels. The key is, therefore, adequate perinatal care.

The Problem

Managed care is implicated because jaundice peaks in the term infant between 48-72 hours, in the pre-term infant even later (4th -5th day). A baby who has been discharged early under an aggressive managed care cost containment policy will not be where its bilirubin can be measured or treated. The opportunities for negligent care increase exponentially once the baby who is at risk is discharged prematurely. Bilirubin is measured by a heel stick (non-invasive methods are being developed as well). It cannot be measured at home. Neither the parents' nor the doctor's visual assessment of jaundice is likely to be accurate. Nor do all pediatricians have the capability to measure bilirubin in their offices. Weight loss and the need for supplemental feedings—which aid the metabolism of