



Healthcare Risk Management™

Specialized
Information Publishers
Association Winner

November 2007

Acute pain emerging as new area of liability

Liability from pain management is not a new idea for risk managers, but much of the effort in this area has focused on end-of-life issues and elder care, in which providers have faced major lawsuits alleging a failure to provide adequate pain relief.

Now malpractice defense attorneys and anesthesiology professionals are warning about an increase in malpractice claims related to acute pain management, particularly in the postoperative period. Unlike end-of-life care, these claims do not usually allege failure to provide pain relief. Instead, they are more likely to involve death and injury from overdose or improper delivery of anesthesia, says **Mariko Bird, MD**, an anesthesiologist at the University of Washington in Seattle.

Bird has studied the liability risk from acute pain management and says information from the American Society of Anesthesiologists (ASA) indicates there has been an increase in chronic pain management claims over the decades. They formed 8% of anesthesia malpractice claims in the 1990s, she says. The increased risk comes partly because acute pain management is becoming a more common part of the anesthesiologist's practice, Bird says. With more acute pain management comes more opportunity for error and malpractice, she says.

The growing risk from acute pain management is a direct outgrowth of successful claims involving end-of-life care, says **Stuart Hochran, JD, MD**, a practicing physician and an attorney with Garfunkel Wild in Great Neck, NY. "That kind of liability raised the issue of pain management as an issue that can be measured and for which a patient can claim compensation," he says. "The end-of-life issues sometimes were more clearly defined in a way, easier to determine whether the standard of care was met, whereas these acute pain cases can be more complex."

Doctors fear scrutiny on pain meds

Physicians are facing a variety of pressures regarding pain management, Hochran says. On one side, they are being pressured to provide more effective and long-lasting pain relief. On the other side, regulators and legal authorities are scrutinizing their prescribing patterns for signs of abuse.

"Everyone is watching them, and sometimes they feel they're going to be in trouble no matter which way they go," Hochran says. Unfortunately, now they have a growing concern about malpractice liability to add to their worries, he says. "It's kind of a steamrolling, slowly boiling issue," he adds.

Physicians often worry that they will be scrutinized for having a patient on a narcotic painkiller for more than seven days, and so they think they have to refer that patient to a pain management specialist or another type of specialist for further care, he says. That often interferes with the patient's care and can itself result in liability risks, Hochran says.

"The tendency is for primary care doctors and orthopedists, who typically would care for patients for several weeks, to refer patients on to someone else as soon as the patient asks for another prescription or shows any signs of a risk of addiction," he says. "That can be a reasonable response, but you have to have a system in place that allows that patient to see a specialist without any interruption in care."

The referring physician is not automatically absolved of liability once the patient moves on, says **Ira Fox, MD, DABPM, FIPP**, founder of Anesthesia Pain Care Consultants in Tamarac, FL, and a pain management specialist. If the resulting care is substandard, there is a significant likelihood that the referring physician will be named in the lawsuit.

"Ten years ago, I was one of 150 pain management specialists in the country providing this kind of service; now I'm more like one of 150 in my area," he says. "But are all of them providing the same level of care? I don't think so, and so any physician referring a patient on for pain management needs to know that they will receive quality care."

PCA riskier than many think

Reducing the liability risk from acute pain management will require improving patient-controlled analgesia (PCA), neuraxial opioid administration, and monitoring for respiratory depression, Bird says. She notes that nerve injury associated with regional blocks has long been a significant source of liability for anesthesiologists, and that is where many acute pain management claims will materialize.

The Indianapolis-based Anesthesia Patient Safety Foundation (APSF) recently warned about a significant and underappreciated risk of serious injury from PCA in the postoperative period, Bird says. Her own review of the ASA closed claims found poor outcomes, such as death and brain damage, were common in the PCA group.¹

"Interestingly, obesity was a factor noted in a number of our respiratory depression claims, consistent with an increased risk of opioid-induced respiratory depression in the obese patient with obstructive sleep apnea," Bird says. "Our review found that the majority of claims in the PCA/other group involved possible or probable respiratory depression. Our results also suggested that better use of monitoring devices may have prevented the complication."

EXECUTIVE SUMMARY

Acute pain management is emerging as a new and growing liability risk. Risk managers may be more familiar with pain management as a liability risk related to end-of-life issues.

- Cases related to acute pain management often involve overdoses, not inadequate pain relief.
- Physicians might feel pressured to refer patients to specialists, but that referral does not release them from liability.
- Acute pain management cases can be more complex than end-of-life cases.

Policy changes could reduce risk

Bird suggests that risk managers take note of the increased risk and urge anesthesiologists to adopt recent recommendations by the APSF for improving postoperative respiratory monitoring in patients receiving PCA as well as intravenous opioids. APSF has urged additional clinician training in the prevention, diagnosis, and management of opioid-induced respiratory depression as well as appropriate patient selection for PCA and neuraxial opioids.

"APSF also recommended routine use of continuous postoperative respiratory monitoring — pulse oximetry and monitoring of ventilation — in patients receiving neuraxial opioids, PCA, or serial doses of parenteral opioids," Bird says.

Bird says opioid infusion and PCA pumps also can be a risky part of postoperative anesthesia. The APSF has criticized current technology for these pumps; it says users find them too complex and that lethal overdoses are common. Bird does not disagree with that assessment but says her study data could not confirm that assertion.

Hochran suggests that risk managers urge anesthesiology departments and medical directors to formalize policies that permit the use of short-term narcotics after the initial therapy with non-narcotic medications fail. "Much of this comes down to good clinical decision making, but the risk manager can step in and provide support that makes that possible," he says.

Reference

1. Bird M. Acute pain management: A new area of liability for anesthesiologists. *ASA Newsletter* 2007; 8:71. ■

SOURCES

For more information about liability risks from acute pain management, contact:

- **Mariko Bird, MD**, Department of Anesthesiology, University of Washington, 325 Ninth Ave., Seattle, WA 98104-2499. Telephone: (206) 744-3000.
- **Ira Fox, MD, DABPM, FIPP**, Anesthesia Pain Care Consultants, 7171 N. University Drive, Tamarac, FL 33321. Telephone: (954) 720-3188. E-mail: info@apccfl.com.
- **Stuart Hochran, MD, JD**, Garfunkel, Wild & Travis, 111 Great Neck Road, Suite 503, Great Neck, NY 11021. Telephone: (516) 393-2200.