



Case of the Month

Court Finds Non-MICRA 'Battery' During Surgery

by Gordon Ownby

In upholding a \$9 million award for noneconomic damages, the Court of Appeal has found that a jury was justified in finding that a surgeon went beyond the patient's consent in a case alleging medical battery.

The 41-year-old patient sought medical care after discovering a small lump in his scrotum. Though the area was somewhat painful, he had no complaints about pain, deformity, or dysfunction of the penis. He reported being sexually active. After some examinations and tests, the patient agreed to a "local excision of a scrotal mass" and that the mass would be sent for testing. According to the facts relied on by the Court of Appeal, the patient's surgeon explained that the outpatient procedure would involve a small incision, removal of the mass, and closure of the incision. While common risks included bleeding, infection, and possible injury to surrounding tissue, the patient was told he should expect to be "back on [his] feet" the next day. The patient designated his ex-wife as his proxy for any medical decisions required while under general anesthesia.

During surgery, Dr. Gary Baker discovered a mass that was larger than expected: Instead of a one centimeter mass in the scrotum, Dr. Baker found what appeared to be a vascularized mass invading nerves, blood vessels, and erectile chambers of the patient's penis. From what he observed, he thought the mass was malignant,

though (in the facts relied on by the Court of Appeal) Dr. Baker understood that even a benign tumor could be harmful.

Though he considered removing only a portion of the mass for biopsy, the surgeon decided to remove the entire tumor, excising tissue not only from the scrotum, but also the penis, described as a resection of the proximal corpora. The removed 8x5x2.5 cm mass was later identified as a benign cystic lymphangioma.

According to the facts as recited in *Keith Burchell v. Faculty Physicians and Surgeons of the Loma Linda University School of Medicine*, Dr. Baker knew that his more extensive surgery would render the patient impotent from loss of the erectile chambers and nerve and blood-supply damage to the penis. With the patient under general anesthesia, the surgeon did not contact the patient's ex-wife, who was on-site. The patient stayed hospitalized for several days for observation and pain control.

The patient filed a lawsuit alleging medical negligence and alleging battery. In addition to some deformity, he claimed that he has difficulty voiding from a standing position, has pain at the base of his penis, and has no feeling at all in his penis. After two reconstructive surgeries, the pain was reduced, but he remains

“uncomfortable” at best, and when his penis is touched or moved, his pain level “goes up.” An inability to achieve an erection following the mass’ excision was only partially and unsatisfactorily resolved through the two reconstructive surgeries, according to the Court of Appeal opinion. At the time of trial, the patient was not willing to undergo a proposed third surgery.

At trial, the jury found in favor of the patient on both the medical negligence action and the medical battery actions and awarded \$9.25 million in economic damages against the employer of Dr. Baker, Faculty Physicians and Surgeons of the Loma Linda School of Medicine (FPS). (The parties stipulated to economic damages of \$22,346, which were added to the total.)

Following the verdict, FPS argued that the \$9.25 million noneconomic damages must be reduced to the MICRA limit on such damages of \$250,000. The trial court refused to make the reduction.

That decision was affirmed by the Court of Appeal, which explained its decision by first quoting from MICRA’s Civil Code Section 3333.2, which provides: “(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damages. (b) In no action shall the amount of damages for noneconomic losses exceed . . . (250,000).”

The Court of Appeal relied on California case law distinguishing “two qualitatively different types” of medical battery. “The first, an intentional tort, occurs when a physician obtains a patient’s consent to perform one type of treatment, but performs a substantially different treatment for which the patient gave no consent. MICRA’s limitation on noneconomic damages does not apply to such claims,” the court wrote.

“The second type occurs when a physician performs the treatment for which the consent was obtained and an infrequent complication occurs that the physician failed to disclose when obtaining the patient’s consent,” the court explained.

“In that circumstance, the claim is based on professional negligence, not intentional misconduct, because the physician did not deliberately deviate from the consent, but merely failed to disclose all known potential complications. MICRA’s limitation on noneconomic damages applies to this sort of battery, which amounts to a claim that the doctor failed to meet the applicable standard of care in rendering his services.”

The San Bernardino-based Court of Appeal held that Mr. Burchell’s medical battery claim “falls squarely” into the first category of medical battery and not subject to MICRA. “Although, like a ‘local excision of a scrotal mass,’ the surgery [Dr.] Baker performed involved the removal of a concerning bit of tissue, it was nonetheless a substantially different treatment than the one to which [Mr.] Burchell consented.”

The Court of Appeal noted that the jury was instructed that a physician may act beyond the patient’s express authorization in “life- or health-threatening situations” but concluded that there was substantial evidence for the jury to find that there was no such emergency. ➦

Gordon Ownby is CAP’s General Counsel. Questions or comments related to “Case of the Month” should be directed to gownby@CAPphysicians.com.

Update Your Membership Information to Help with Your Year-End Planning



If you are contemplating a change in your practice, please notify CAP as soon as possible so our Membership Services Department can review your options with you and make your coverage transition a smooth one. Changes include, but are not limited to:

- Retirement from practice at age 55+
- Part-time practice (e.g., 20 or fewer hours per week or 16 hours for anesthesiologists)
- Reduction or any change in the scope of your practice
- Employment with a government agency or non-private practice setting
- Employment with an HMO or other self-insured organization
- Joining a practice insured by another carrier
- Moving out of state
- Termination of membership

The Board of Trustees of the Mutual Protection Trust will levy an assessment in November 2020. To allow ample processing time, we recommend that members advise us in writing no later than October 31, 2020, of any of the above changes to be considered eligible for waiver or proration of the next assessment.

The online Membership Information Update form will be available soon in the Members' Area of the CAP website at www.CAPphysicians.com. Members will be notified via email when the form goes live, so keep an eye on your inbox.

If you have not yet registered for the Member's Area, please register for an account at <https://member.CAPphysicians.com/register>. You will need your member number and last four digits of your Social Security number. ➔

October 2020



Limited Time Enrollment Physician-Specific Insurance Benefits

Please see the enclosed insert for information about available coverages, including our new hospital indemnity insurance. To enroll, please register for an account using our new secure portal at <https://compass.empyreanbenefits.com/CAP>. You will need your CAP member number to register for an account. **Note:** This portal is separate from the members-only section of CAP's website.

Contact CAP Agency at **800-819-0061** Monday through Friday 9:00 a.m. to 5:00 p.m. to learn more or request a free consultation.

Risk Management — and — Patient Safety News



“You Didn’t Tell Me That.” Informed Refusal as a Defense

by Deborah Kichler

This article has been previously published but the information remains of relevant importance to members.

The age-old discussion of “informed consent” and “the consent form” never ceases. A procedure or treatment is scheduled and there is an order to obtain the patient’s consent. The nurse takes the consent form to the patient for signature and the patient inquires, “What am I signing? I have not spoken to the doctor yet.” A common allegation in malpractice lawsuits is the failure to obtain the patient’s consent for treatment. It goes beyond just getting the patient to sign a piece of paper.

The cornerstone of the informed consent process is the discussion between the physician and the patient. A patient has the right to consent (or not) to any recommended medical procedure or treatment. The patient also has the right to enough information to give an informed and meaningful consent. Before proceeding, the patient should be informed about the proposed procedure or treatment; the risks, benefits, and alternatives; and the risks and benefits of any alternative treatments. This informed consent discussion, as well as any written materials and videos, must be provided in a language that the patient understands. The discussion should include enough information so that the patient has a clear understanding and can make an informed decision whether or not to undergo the proposed procedure or treatment. Include a copy of the written materials, drawings, photographs, and names of videos reviewed with the patient in the medical record as part of your informed consent discussion documentation.

The patient also has the right to refuse the proposed procedure or treatment. In this case, the physician should ensure that the patient understands the risks and consequences that may result from the decision to refuse, or failure to pursue, a recommended medical procedure. This documentation must be thoroughly noted in the medical record, as above.

Patient refusal and documentation also applies to a physician’s recommendation that a patient see a specialist. The patient should be informed of the reasons for the recommendation and the possible consequences if the patient fails to obtain a specialist’s advice.

Another example of refusal occurs when there is a patient emergency in the office that triggers a need for EMS transport. If the patient refuses to utilize the EMS transport, the healthcare provider should explain to the patient and family, regardless of the distance, that the ambulance service is the safest vehicle transportation. If the patient opts to go by private vehicle, document the informed refusal discussion in the medical record.

In litigated cases, jury instructions related to informed refusal include: “A (physician) must explain the risks of refusing a procedure in language that the patient can understand and give the patient as much information as (he or she) needs to make an informed decision, including any risk that a reasonable person would consider important in deciding not to have the said procedure/treatment. The patient must be told about

October 2020

any risk of death or serious injury or significant potential complications that may occur if the procedure/treatment is refused. A physician is not required to explain minor risks that are not likely to occur.” (CACI No. 534)

Tips for Patient Discussion

1. Provide enough information so the patient can make an educated decision whether, or not, to agree to the proposed procedure or treatment.
2. Provide the information in the language the patient understands. Provide written materials, drawings, videos to assist in discussion.
3. Evaluate the patient’s understanding through teach-back methods; ask open-ended questions; allow time for patient questions.
4. Identify an alternative treatment plan.
5. Obtain the patient’s signature, if possible, if the patient refuses the procedure or treatment.

(Perhaps have a witness present when a patient refuses treatment.)

6. Document your discussion: diagnosis, proposed procedure/treatment, prognosis, risks and benefits of treatment and alternative treatments, and the consequences of refusing treatment. Whether your patient is refusing a surgical procedure, a medical treatment, referral for follow up, or other situation, document the discussion (risks, benefits, alternatives, and consequences) in the medical record. ➦

Deborah Kichler is a Senior Risk Management and Patient Safety Specialist for CAP. Questions or comments related to this article should be directed to dkichler@CAPphysicians.com.



Election 2020: California Voter Information

by Gabriela Villanueva

As California elections officials prepare to mail ballots to the state's registered voters this fall, there is the expectation that some portion of the electorate will still choose to participate in person during the pandemic, requiring a delicate balance between voting rights and public health.

With the multiple changes by state and voting officials from the current health emergency, following is an overview of useful resources and information to facilitate whichever voting option is selected.

To begin, it is important to confirm voter registration status. That can be done here: <https://registertovote.ca.gov/>

Important Dates:

- Election Day is Tuesday, November 3.
- The deadline to register to vote is Monday, October 19.
- The deadline for registering by mail to vote is (postmarked by) Monday, October 19.
- You can also register to vote on Election Day, Tuesday, November 3. Conditional voter registration is a safety net for voters who miss the deadline to register or update their voter registration information. Voters can use the conditional voter registration process from the day after the deadline, October 20, all the way through Election Day. Eligible citizens can go to their county election office, polling place, or vote center to register and vote conditionally. These ballots will be processed once the county elections office has completed the voter registration verification process.

In-person Voting

- While all registered voters will automatically be mailed a vote-by-mail ballot for the November 3, 2020, General Election, voters can always opt to vote in person. The ballot can be completed and mailed or dropped off at a conveniently located polling place. In-person voters should expect COVID-related safety protocols of social distancing and face coverings. To account for long lines and wait time, it is highly advised that if voting in-person, one should arrive during the window of time allocated for early voting. State officials have encouraged counties to offer four days of in-person voting, from Saturday,

October 31, through Election Day.

- In some counties, the early voting period can start as soon as Monday, October 5, but dates and hours may vary based on where you live. Check here to locate polling locations in your area
<https://www.sos.ca.gov/elections/polling-place/>

Vote by Mail


- California law secures that a ballot will be counted if it's postmarked on or before Election Day. So long as the United States Postal Service has it by November 3, California law gives the mail service 17 days to get it to your county registrar's office. With recent challenges being experienced within the U.S. Postal Service, it is highly advised that if voting my mail, drop your ballot in the mail as early as possible. Due to the likelihood that this election will generate a massive increase in workload for the county registrar's employees, it will be more favorable to spread out the influx on mailed ballots.
- To help bring ease to voters that their mail-in ballot was delivered and counted. California's election administrators have rolled out a statewide ballot tracking service. If you wish, this service will notify you by email, text, or phone in one of 10 languages when your ballot is sent out, received, and counted. To register for this notification, go to <https://california.ballottrax.net/voter/>

Additional Information

The office of the California Secretary of State has populated its website with all pertinent links and easy to find information on all voting and election resources. For greater accuracy, begin by visiting the website to your county registrar's office at <https://www.sos.ca.gov/elections/voting-resources/county-elections-offices/>

Link to California State Budget 2020-2021:

<http://www.ebudget.ca.gov/2020-21/pdf/>

BudgetSummary/FullBudgetSummary.pdf 

Gabriela Villanueva is CAP's Government and External Affairs Specialist. Questions or comments related to this article should be directed to gvillanueva@CAPphysicians.com.



Fulfill California's Sexual Harassment Avoidance Training Requirements with Free Online Courses

California employers with five or more employees are required to provide sexual harassment prevention training to all employees by January 1, 2021. CAP recommends that your practice train your employees now and not wait until the end of 2020.

CAP offers free courses for both supervisory and non-supervisory employees through Kantola Training Solutions. Receive access to these courses by completing the form on CAPphysicians.com/hrtraining.

As these courses are being offered free as a benefit of CAP membership, we request that you do not share the link with any individuals outside of your member practice.

For questions regarding any HR issues, contact **Nancy Brusegaard Johnson**, CAP's Senior Vice President of Human Resources and Operations, at **213-473-8664** during business hours, 8:30 a.m. to 5:30 p.m.

Note: On August 30, 2019, California Governor Gavin Newsom signed SB 778 into law, which extended the training deadline from January 1, 2020 to January 1, 2021. All employees who have been hired or employees who have been promoted to supervisor positions since September 2018 must be trained within six months of hire or promotion. SB 778 does not change this requirement. ➦





COOPERATIVE OF
AMERICAN PHYSICIANS

Cooperative of American Physicians, Inc.

333 S. Hope St., 8th Floor

Los Angeles, CA 90071

October 2020

IN THIS ISSUE

- 1 Case of the Month:
Court Finds Non-MICRA 'Battery' During Surgery
- 3 Update Your Membership Information to Help with Your Year-End Planning
- 3 Limited Time Enrollment Physician-Specific Insurance Benefits
- 4 Risk Management and Patient Safety News:
"You Didn't Tell Me That." Informed Refusal as a Defense
- 6 Public Policy:
Election 2020: California Voter Information
- 7 My Practice:
Fulfill California's Sexual Harassment Avoidance Training Requirements with Free Online Courses

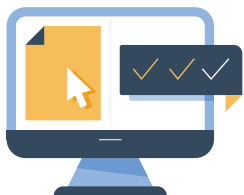
Copyright © 2020 Cooperative of American Physicians, Inc. All rights reserved.
333 S. Hope St., 8th Floor, Los Angeles, CA 90071 | 800-252-7706 | www.CAPphysicians.com.

We welcome your comments! Please submit to communications@CAPphysicians.com.

The information in this publication should not be considered legal or medical advice applicable to a specific situation. Legal guidance for individual matters should be obtained from a retained attorney.

Physician-Specific Insurance Benefits for CAP Members

Enroll Between 10/1 – 11/15 for an Effective Date of 1/1/21



CAP Physicians Insurance Agency, Inc. (CAP Agency), a wholly-owned subsidiary of the Cooperative of American Physicians, Inc. (CAP), is pleased to partner with MetLife to provide CAP members and their families with exclusive access to a wide range of personal insurance products and flexible plan options at competitive large group rates.¹

The following products are available for purchase to you and your family members during this limited enrollment* period with no medical underwriting or health exams required:

- | | |
|---|--|
| Short Term Disability | ▪ A \$1,000 weekly benefit plan that begins to pay after the 14th day of injury or illness |
| Long Term Disability | ▪ Up to \$10,000 monthly benefit available ² and payable up to five years or up to Social Security Normal Retirement Age |
| NEW! Hospital Indemnity⁴ | <ul style="list-style-type: none"> ▪ Choose between a low and high plan ▪ No exclusion for a pre-existing condition ▪ Plan offers payments of up to \$2,000 for admission and up to 15 payments of \$400 per day in the hospital |
| Critical Illness⁴ | <ul style="list-style-type: none"> ▪ Receive a lump sum payment up to \$30,000 when you or your covered dependents are diagnosed with a critical illness ▪ A \$50 health screening benefit is payable once per year for each covered member |
| Accident⁴ | ▪ Benefits between \$50 and \$50,000 are available when you have an accident at work or elsewhere |
| Dental and Vision (purchased individually) | <ul style="list-style-type: none"> ▪ Choose from three different levels of vision coverage through MetLife: Enhanced, Standard, and Basic ▪ Nationwide network of preferred dentists ▪ Flexible plan options available at preferred large group monthly rates³ |

The following product is available for purchase and may require medical underwriting:

- | | |
|-----------------------|--|
| Life Insurance | For members who are currently enrolled in supplemental life coverage and not at the current \$500,000 maximum, you may get an additional \$50,000 of life insurance benefits with no medical underwriting required. Medical underwriting is required for members who have not previously taken advantage of this offer. Grief counseling, will preparation, and other services are included. |
|-----------------------|--|

Enroll now: <https://compass.emyreanbenefits.com/CAP>

For Questions, please contact:

CAP Agency 800-819-0061 (Press 5 to reach Benefits) or Benefits@CAPphysicians.com

You may also contact our preferred broker for these programs, Ashbrook-Clevidence, Inc., at:

Evan Bruski, Ashbrook-Clevidence, Inc. 714-426-1923 or EvanB@aclevidence.com

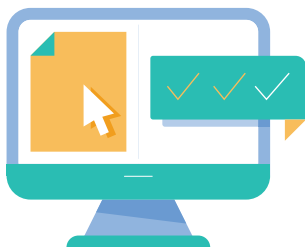
Cristina Burnell, Ashbrook-Clevidence, Inc. 714-426-1926 or CristinaB@aclevidence.com

^{*}Your social security number is required for full access to the secure system. ¹Premium payment required; other conditions and exclusions apply.

²Income from the tax year immediately prior will be used to determine benefit at time of claim. ³Billed quarterly. ⁴See Schedule of Benefits.

Insurance Benefits for Practice Staff

Enroll Between 10/1 – 11/15 for an Effective Date of 1/1/21



Through CAP Agency's and MetLife's partnership, your staff may also take advantage of valuable insurance benefits at competitive rates. For a limited time, your staff members can enroll in these insurance products at competitive rates.

The following products¹ are available to your staff during this limited enrollment* period:

NEW!

Hospital Indemnity³

- Choose between a low and high plan
- No exclusion for a pre-existing condition
- Payments of up to \$2,000 for admission and up to 15 payments of \$400 per day in the hospital

Dental

- Enhanced Dental PPO plan offered by United Concordia Dental
- Vast network of preferred dentists
- Rich plan benefits at preferred large group monthly² rates

UNITED CONCORDIA®
DENTAL

Vision

- Choose from three different levels of vision coverage through MetLife: Enhanced, Standard, and Basic

NEW!

Critical Illness³

- Receive a lump sum payment up to \$30,000 when you or your covered dependents are diagnosed with a critical illness
- A \$50 health screening benefit is payable once per year for you and each covered dependent

NEW!

Accident³

- Benefits between \$50 and \$50,000 are available when you have an accident at work or elsewhere

If you are interested in learning more about these staff benefits, our preferred broker for these programs, Ashbrook-Clevidence, Inc., is here to help. Please reach out to either:

Evan Bruski, Ashbrook-Clevidence, Inc. 714-426-1923 or EvanB@aclevidence.com

Cristina Burnell, Ashbrook-Clevidence, Inc. 714-426-1926 or CristinaB@aclevidence.com

Beverly Lyall, Ashbrook-Clevidence, Inc. at 714-755-2491 or BeverlyL@aclevidence.com

*Your social security number is required for full access to the secure system. ¹Premium payment required; other conditions and exclusions apply.

²Billed quarterly. ³See Schedule of Benefits.