Summer 2005 Volume 15 Number 3 OPHTHALMIC MUTUAL INSURANCE COMPANY

Ophthalmic Risk Management Digest
OMIC DIGEST

ROP Case Defines Legal Duty of Care to Patients

By Anne M. Menke, RN, PhD, and Paul Weber, JD

Anne Menke is OMIC's Risk Manager. Paul Weber is OMIC's Vice President of Risk Management/Legal.

"When does a physician's duty to a patient end?" It is a question frequently asked by the medical profession and debated by the legal profession. In a retinopathy of prematurity case involving blind twins that initially resulted in a $15 million plaintiff verdict against an OMIC-insured pediatric ophthalmologist, two pediatricians, and one of the pediatricians' practice group, OMIC learned just how difficult it can be to answer that question. This article provides an overview of the facts of this case and the many legal hurdles faced by the OMIC defense team before an appellate court reversed the plaintiff verdict and made a final determination that the ophthalmologist had no duty to the patient.

In December 1996, twins were born at 30 weeks gestational age in a hospital with a well-established protocol for screening and treating retinopathy of prematurity (ROP). In early February 1997, the hospital's neonatal intensive care unit (NICU) nurse met with the twins' mother and told her to schedule an outpatient ophthalmic appointment for both babies. A few days later, before the babies' discharge, the neonatologist determined that Twin B met the in-hospital screening criteria and asked the OMIC-insured pediatric ophthalmologist to examine the baby. The insured determined that the baby's retinas were not fully vascularized and noted the presence of Stage I ROP, for which no treatment was indicated. He wrote a follow-up order for a repeat evaluation by a screening ophthalmologist in two weeks to monitor for the development of threshold ROP. The NICU nurse and neonatologist met with the mother at different times to inform her of the results of the ROP examination and to explain the importance of follow-up evaluations; the mother was given a copy of the hospital's letter to parents explaining ROP ("Dear Parent" letter).

As part of the hospital's discharge process, the neonatologist contacted the twins' pediatrician and told him he was referring two premature infants for outpatient care. At the time of the

continued on page 4

MESSAGE FROM THE CHAIRMAN

Seldom does a lawsuit come along that so clearly illustrates the OMIC advantage of Ophthalmologists Insuring Ophthalmologists as the case described in the lead article of this quarter's *Digest*. Several points deserve special mention. The venue was in Texas, at a time when Texas was listed by the American Medical Association as a "state in crisis." The patients were blind twin children, who made very sympathetic plaintiffs. The lawsuit alleged negligence in the treatment of retinopathy of prematurity, which in other cases has resulted in damage awards in the millions. Despite these facts, the OMIC Claims Committee believed strongly that the care delivered by our insured pediatric ophthalmologist met the standard of care. Being able to obtain a quick expert review from an ophthalmologist in the same subspecialty as the insured provided a distinct advantage in this case as it does in all OMIC cases. We gained additional support from our defense experts, who were recognized leaders in the field of ROP. Like

continued on page 2

IN THIS ISSUE

ROP Case Defines Legal Duty of Care to Patients

continued from page 1

pediatrician's first outpatient visit with the mother and infants, he addressed the babies' numerous medical problems and reviewed the neonatologist's referral letter with the mother. This letter indicated that the mother had made an appointment with an ophthalmologist.

Soon thereafter, on February 16, 1997, the day before the ophthalmic appointment, the mother contacted the pediatrician's office and requested insurance authorizations for a circumcision, hernia repair, and tongue clipping. When she came to pick up the authorizations the next day, she asked, for the first time, for an insurance authorization for the ophthalmologist. The pediatrician's office staff informed her that they could not process her request that day. The authorization form was never sent to the OMIC-insured ophthalmologist. In any event, the mother did not bring the children to the appointment; in her deposition, she claimed that she was told by the insured's staff that the twins could not be seen without an authorization. The insured denied this.

The mother scheduled another appointment with the insured ophthalmologist for February 28, 1997 but again did not show up, this time because the babies were hospitalized for other health problems under the care of another physician. The twins were scheduled to return to the pediatrician for follow-up after discharge, but were never brought in. Instead, the mother sought treatment from a second pediatrician and told this doctor that there were no concerns about the babies' eyes. When this pediatrician reviewed the first pediatrician's records, she noted the concern about ROP and the absence of ophthalmic follow-up; she referred the twins to a different ophthalmologist, not the insured. By that time, June 1997, both babies were blind.

Gaps in the Process of Care

The insured ophthalmologist had only seen Twin B once in the hospital. He had never been asked to see Twin B again in the hospital or in his office and was initially bewildered when he was served with a lawsuit in March 1999 alleging negligent care of twins with ROP whose name he did not recognize. Only after reviewing the complaint did he realize that the plaintiff was the mother of Twin B and that she had scheduled an outpatient appointment with him for both twins in mid-February *under a different last name*. He checked his appointment records and found that his office had placed a reminder call before the appointment but that the mother did not bring the twins to that appointment or to one that she rescheduled for the end of February. Per office policy, his staff did not follow-up with new, self-referred patients who did not keep appointments, assuming they had decided to seek care elsewhere. The first pediatrician noted that appointments had been made for follow-up of the ROP during the initial visit, but he did not have a system in place to ensure that he received consultant reports. The second pediatrician was given falsely reassuring information by the parents and only later learned of the ROP after asking for and reading the medical records of the first pediatrician.

The Trial and Verdict

Efforts to dismiss the OMIC insured from the case were successful for Twin A since the insured had never examined that infant. OMIC's Claims Committee and expert witnesses believed the insured had met the standard of care in his treatment of Twin B, and they challenged the existence of an ongoing physician-patient relationship. OMIC and the insured ophthalmologist accordingly decided to take the case to trial. After a five-week trial, the jury awarded the plaintiffs $15 million (plus prejudgment interest) according to the breakdown of fault in the chart on page 5.

TIMELINE

Twin babies born	Dec. 26, '96
Twin B seen by OMIC-insured ophthalmologist in hospital	Feb. 8, '97
Insured ophthalmologist served with summons and complaint	Mar. 3, '99
Jury verdict of $15 million against three defendants (pediatrician 1 settles before verdict entered)	Feb. 26, '01
Three-justice court of appeals overturns verdict against ophthalmologist and pediatrician 2	Feb. 26, '04
Eight-justice court of appeals denies rehearing	Sept. 2, '04
State supreme court denies review	July 1, '05

The jury assumed that the insured's relationship with Twin B did not end after his consult in the hospital but followed him after Twin B was discharged. The percentage of fault the jury assigned to the parents ignored the undisputed evidence and the following facts:

- The mother played a significant role in the delay in diagnosis and treatment of ROP by not informing the ophthalmologist of the twins' name change, not keeping the outpatient appointments with him, and not providing accurate information to the second pediatrician when asked about the condition of the babies' eyes.
- Her noncompliance occurred despite conscientious efforts to educate her: she was counseled about ROP by the neonatologist

JURY VERDICT AGAINST	FAULT IN TWIN A'S INJURIES	FAULT IN TWIN B'S INJURIES	JUDGMENT*
Ophthalmologist	0%	15%	$1.2 million
Pediatrician 1	60%	50%	Settled with plaintiffs before verdict for $7.5 million
Pediatrician 2 *(also sued pediatrician's group under respondeat superior)*	35%	30%	$6.3 million
Parents	5%	5%	$0

*Approximate dollar amounts not including prejudgment interest.

and NICU nurse; she received a letter from the hospital about ROP; and she spoke to the first pediatrician about the babies' health problems. During her testimony, however, she denied understanding the significance of the problem, and her lawsuit blamed the care providers for inadequate follow-up.

Both OMIC and the trial counsel for the insured strongly believed that there was no *legally sufficient evidence* to support the jury's finding that an ongoing physician-patient relationship existed between the insured and Twin B. Additionally, when polled after the verdict, the jury cited concern for the infants as the primary factor in its decision-making process. This presented a very compelling case to appeal.

Standard of Review for Appealing a Case

Typically, under a "no evidence" review, the court of appeals (or supreme court) must adhere to what the jury found unless there is *no more than a scintilla of proof* to establish a particular issue, "scintilla" being shorthand for that virtually indefinable quantum of proof that makes the reviewing court comfortable enough to say, "there is sufficient evidence to support the jury's verdict."

In the OMIC insured's case, the defense argued primarily that there was no legally sufficient evidence – no more than a scintilla – to establish that the insured had an ongoing physician-patient relationship with Twin B. If no physician-patient relationship existed, there could be no duty, and therefore no malpractice, regardless of how badly the patient may have suffered.

Specifically, the insured argued, and the state court of appeals accepted, that the various pieces of evidence – the "Dear Parent" letter, the missed appointments, the participation in the twin's health plan, the alleged referral from the first pediatrician – did not constitute legally sufficient evidence that the insured had an ongoing physician-patient relationship with Twin B. The plaintiffs argued the opposite interpretation of that same evidence.

Rendered in February 2004, the opinion of the majority of the state court of appeals explained: "We believe, however, that none of these facts, either individually or combined, are evidence of the actual continuation of the physician-patient relationship." The appellate court was concerned about expanding the duty of continued care and stated: "If we were to expand the duty of continued care to all patients who are seen at hospitals by consulting physicians beyond the hospital setting based solely upon the fact that they were seen by the physician in the hospital, there would be no end to the physician-patient relationship."

Supreme Court's Final Review

The case was by no means over after the appellate court's opinion. Over the following eighteen months, the plaintiffs petitioned for an *en banc* rehearing, in which the full eight members of the court of appeals would review the case, but their petition was denied. They appealed the rehearing denial to the state supreme court, arguing that the court of appeals did not apply the appropriate standard of review in a "no evidence or legal sufficiency" case. The state supreme court denied a rehearing. OMIC was delighted with this decision in the ophthalmologist's favor and felt that the $730,000 it cost to defend this insured's care was money well spent.

This case illustrates both the complexity of providing medical care to premature infants and the intricacies of the legal process. The appellate court's decision was based on the particular facts of this case and may not apply generally to ophthalmology consultants. Additionally, this case was state specific and may or may not be used as precedent for other states. The detailed risk management recommendations for hospital- and outpatient-based ROP care that OMIC developed in response to this case, however, have proved generally useful to pediatric ophthalmologists and retina specialists. This sample protocol better protects physicians and premature infants by standardizing the nonclinical aspects of care and assigning responsibility for all steps in the treatment process. This document, "ROP: Creating a Safety Net," can be found in the **Risk Management Recommendations** section of **www.omic.com**.