



Damages from Birth and the Logic of Compensation: Scientific Findings and Legal Suggestions

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Abstract

The doctors' work in gynecology is the source of peculiar technical and medical problems. Surgery can cause unforeseen damage to both the mother and the child. Partum injuries can be defined as any physical traumas inflicted on the mother or child during the process of childbirth. Whilst it is true that most of perinatal injuries are suffered by the infant, whose body is usually very fragile, it is not uncommon for the pregnant mother to suffer traumas of various kinds too. A small portion of perinatal damage suffered by the mother may result from the censurable behaviour of the health care providers who assist during the delivery. Maternal childhood injuries vary in severity, and often have serious consequences on both a physical and an emotional level. If these severe injuries are a consequence of medical negligence, the mother has the right to claim damages. This paper aims to deepen the issue of childbirth; emphasizing the various pathologies related to the negligent behaviour of gynaecologists and obstetricians, with reference to the problem of damages.

Introduction

Partum injuries can be defined as any physical traumas inflicted on the mother or child during the process of childbirth. Whilst it is true that most of perinatal injuries are suffered by the infant, whose body is usually very fragile, it is not uncommon for the pregnant mother to suffer traumas of various kinds too. A small portion of perinatal damage suffered by the mother may result from the censurable behaviour of the health care providers who assist during the delivery. Maternal childhood injuries vary in severity and often have serious consequences on both a physical and an emotional level [1]. If these severe injuries are a consequence of medical negligence, the mother has the right to claim damages.

Discussion

There are several types of trauma or injury that a mother may suffer during or after labour, and these can be aggravated by negligent medical treatment [2]. As a result of child birth injury and therefore of the suffering associated with childbirth, the woman often becomes reluctant to go through with any further pregnancies. The most common types of injuries that the pregnant woman can undergo during childbirth are [3]:

Injuries caused by the use of forceps and suction cups

When necessary, forceps are tightened around the baby's head to guide it into the birth canal. If the baby is not properly oriented, forceps may also be used to rotate it.

Episiotomies and second or third degree tearing

During difficult births, you can choose to have an episiotomy to prevent the mother from tearing, and/or to give birth quickly to a distressed foetus. On some rare occasions, a physician may omit to perform an episiotomy that is needed, resulting in second or third degree lacerations. In such cases, if the health care provider fails to assess the extent of the injury correctly, or performs a treatment for an injury severity that is lower than the one actually suffered by the woman, the latter may suffer serious disabling consequences [4]. If the healthcare provider fails to perform a necessary episiotomy, or performs episiotomies incorrectly, you may be entitled to compensation for the damage you suffer as a result.

Medical instruments used to suture maternal injuries (the wrong sutures)

In some cases, after an episiotomy or peri-anal tearing, the injury is repaired by healthcare workers using a number of suture points [5]. Such treatment often has a favourable outcome for the patient [6]. Suture errors can also occur during Caesarean sections or internal lacerations [7].

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Retention of the placenta

Post-partum placenta is a very serious complication that occurs when it is separated from the uterus prematurely [8]. Such events can be extremely dangerous for both the mother and the baby, because it prevents the nutrients and oxygen contained in the placenta from reaching the baby. Mothers are at risk of severe bleeding, organ damage, and the risk of having to undergo hysterectomy.

Pre-eclampsia

Pre-eclampsia occurs in about 10% of pregnancies. It can be adequately diagnosed by measuring blood pressure and urine examinations. A gynaecologist is in fact required to ensure that such examinations are performed regularly during pregnancy. Pre-eclampsia is an extremely serious condition that prevents the unborn baby from receiving vital nutrients and oxygen. Pre-eclampsia remains a significant cause of maternal and perinatal death and complications. Once the diagnosis of preeclampsia has been made, treatment options are limited. For this reason, much attention has recently been focused on preeclampsia prevention. Despite an extensive research effort, no single strategy has yet been shown to be beneficial in preventing the development of preeclampsia in either low- or high-risk populations [9,10]; if doctors fail to treat this condition in its early stages, it can be fatal for the mother and the baby.

On the other hand, the main cause of functional deficiencies (and mortality) is related to the occurrence of hypoxic-ischemic encephalopathy, which is characterised by clinical and laboratory examinations that indicate acute or sub-acute brain injuries caused by asphyxiation. The main causes of this condition are systemic hypoxia and/or a reduction in cerebral blood flow [11].

Lack of oxygen and the resulting cell death (brain damage) can cause physical and mental disturbances. The wider the duration of the lowered or absent oxygen flow, the more severe and lasting the injury will be. Lack of oxygen in the foetus can have varying degrees of severity. Three main groups of asphyxia are used to classify and describe the severity of hypoxic-ischemic lesions [12]:

1. Deep acute asphyxiation is the most severe form of lesions and hypoxia-ischaemia. It is commonly referred to as nearly total asphyxiation.
2. Extended partial asphyxiation is an extended oxygen deprivation lasting for about 30 minutes.
3. Asphyxia with mixed lesions: occurs when the neonate experiences oxygen deficiency due to severe acute asphyxiation or prolonged partial asphyxiation. The asphyxiation pattern in mixed lesions may occur before, during or after delivery.
4. The incidence of hypoxic-ischemic encephalopathy [13] is about 1-2 children per 1000 births at full term, and up to 60% in premature babies weighing less than 1,500 grams. A percentage of between 20%- 50% of asymptomatic babies who develop hypoxic-ischemic encephalopathy die during the neonatal period; about 25% of survivors have major neurological disabilities.

During labour and the delivery, several situations may arise that can cause neonatal asphyxiation and, consequently, hypoxic-ischemic encephalopathy [14]: problems relating to the umbilical cord; problems relating to the placenta or uterus; tachy-systole in the uterus; high blood pressure; complications deriving from the size or position of the child; delayed childbirth; missed or incorrect diagnosis of the mother's risk factors, such as high blood pressure

(pre-eclampsia). If they do not receive an adequate supply of oxygen, the cells that make up the brain rapidly die [15,16]. The extent and severity of the damage depend on the duration of the period for which the child was deprived of oxygen and the condition of the child before the oxygen deprivation. In the situations described above, the injury can only be attributed to medical responsibility in the presence of precise assumptions that can be identified by a careful medico-legal analysis of the case. The *legesartis* of medicine applicable to managing labour and delivery, and managing the neonate demands that doctors, nurses, midwives and all of the healthcare providers who attend the pregnant woman and the infant diagnose and promptly and correctly document any potential causes of and risk factors for hypoxic ischemic encephalopathy.

However, due to hospital disorganisation and excessive workloads, along with lack of skill and/or negligence of a minority of healthcare workers, there may be cases of malevolence at the origin of a neonate's hypoxic-ischemic encephalopathy [17,18]. These are genuine cases of medical malpractice. On the medical side, hypoxic-ischemic encephalopathy is confirmed by imaging diagnostics, such as CT, PET and MRI scans, arterial blood gas analysis, electroencephalography, and ultrasounds. In order to perform such examinations, the doctors must first suspect that a child could be affected by hypoxic-ischemic encephalopathy. Such suspicion may arise if the delivery was traumatic or if the neonate shows one of the symptoms indicated above. Hypoxic-ischemic encephalopathy is, in most cases, a preventable childbirth injury. Oxygen deficiencies in the foetus and hypoxic-ischemic encephalopathy are generally the result of medical errors at the birth or around the time of delivery.

Prevention of hypoxic-ischemic encephalopathy thus translates into providing obstetrics treatment that respects the *legesartis* of medicine. Since the permanent lesions and disabilities caused by hypoxic-ischemic encephalopathy are so significant, it is crucial for healthcare professionals monitoring the baby to follow the rules of medical practice that are applicable to the concrete case in order to avoid dangerous deficiencies in oxygen supplies to the foetus.

Conclusion

According to established case law, all of the assisting a pregnant woman during labour and delivery are responsible for preventing pre-partum injuries to the infant, including hypoxic-ischemic encephalopathy.

This means that healthcare providers (anaesthetists, nurses, obstetricians, gynaecologists, resuscitators, neonatologists and all other professional doctors who interact with the pregnant woman and the foetus must [19]:

1. Prevent hypoxic-ischemic encephalopathy and one of its causes or risk factors to the best of their ability;
2. Correctly manage all of the causes or risk factors for hypoxic-ischemic encephalopathy;
3. Treat possible causes or risk factors for hypoxic-ischemic encephalopathy;
4. Detect and diagnose hypoxic-ischemic encephalopathy, if present;
5. Unless contraindicated, undertake the treatment of hypothermia (brain cooling) for children affected by hypoxic-ischemic encephalopathy;

6. Perform all of the other medical tasks needed to prevent and/or manage hypoxic-ischemic encephalopathy.

The damages [20] are payable in cases of hypoxic-ischemic encephalopathy due to medical negligence are as follows:

Damage to the child's health: In view of the fact that children with hypoxic-ischemic encephalopathy or associated disorders have very high degree of disability and that these conditions are permanent, the damages will often have an amount equal to the maximum payable on the basis of injury indemnity tables. In “wrongful conception” actions, parents seek damages from clinicians on the basis that they would not have conceived the child (healthy or disabled) but for the negligence. According to jurisprudence, “wrongful birth” claims generally only involve the birth of a disabled child.

Typically the negligence at issue includes failures in genetic counselling or diagnosis, which leaves parents under the false impression that the child is healthy. The crux of the claim is that, but for the negligence, the parents would have elected to terminate the foetus under the Abortion Act 1967, s1(1)(d). Note that wrongful life claims are different, though they arise out of the same circumstances as wrongful birth claims. In these suits, the action is instituted by the impaired child (or its representative) who claims that but for the negligence, his/her parents would have aborted the pregnancy [21];

Damage caused to the health of the parents: Damage to parental health includes psycho-physical and relationship damage, career damage, damage in the sexual domain (psychological rejection of procreation) According to Kaplan's reconstruction noting that the disability rights movement “can claim primary political responsibility for the ADA - Americans with Disabilities Act (1990)” describing how disability advocates' attempts to frame their struggle as one for civil rights were responsible for and reflected in the ADA [22]. While for Rovner it is necessary to describe the attempts of disability defenders to frame their fight as civil rights according to ADA's forecasts [23];

Economic damage caused to the child (loss of income-generating capacity): This is loss of the ability to earn an income by the subject suffering from a deficient condition. The amount of such damages would be equal to the remuneration that the person would have been able to earn during his/her working life if they had not been suffering from hypoxic-ischemic encephalopathy;

Parents' economic damages (future costs for child care and assistance): these are the costs for support and care that the family will have to sustain throughout the child's life [24]. Such damages are often higher than the sum of health and economic damages awarded to the child.

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