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Claiming damages for psychiatric injury during childbirth

Andrew Symon BJM legal column, March 2019

A previous article in this series recounted a court case in which a mother successfully sued for damages because she had suffered a recognised psychiatric illness following a midwife's negligence (*RE v Calderdale* – see Symon 2017). It is important to note that such claims are only valid if it is established that negligence has occurred. A similar case was heard in London at the end of 2018 (*YAH v Medway NHS Foundation Trust* 2018). Once again, the defendants admitted that they had been negligent – in this case, by delaying a caesarean section long after it ought to have been carried out. The result was that the baby – referred to as XAS - was severely asphyxiated at birth, and subsequently developed cerebral palsy.

As in the case of *RE v Calderdale*, there was a dispute over whether the mother was a primary or a secondary victim. This is an important distinction:

“A primary victim is one who suffers a recognised psychiatric illness after being directly involved in the incident in question, although (s)he is not physically injured. Secondary victims are those whose psychiatric injury results from witnessing the death or injury of others; there are additional requirements to establish this, making it harder to secure compensation.” (Symon 2017: 402)

This distinction stems from the ruling given in the Hillsborough football disaster, in which 96 football fans died. Some fans who claimed to have suffered ‘nervous shock’ as a result of witnessing this sued the police, claiming their mishandling of the tragedy had caused this (*Alcock v Chief Constable of South Yorkshire* 1992).

As in *RE v Calderdale*, the mother in *YAH v Medway* said she was a primary victim because she and her baby were not separate legal entities when the negligence occurred, which was during the labour. A baby is not considered a ‘legal person’ in the UK until fully expelled from the uterus. In *YAH v Medway*, the mother claimed that the initial psychiatric injury occurred before the birth as a result of the mismanaged labour. It was then made worse by the shock of seeing her very ill baby in the neonatal unit the following day, and subsequently by having to look after a child with cerebral palsy.

Again, as in the *RE* case, the defendants claimed that the mother could not be a primary victim. The judge noted that “The two categories of claim are governed by different rules” (per Whipple J @ 17), and stated:

"It is important to be clear that the Claimant did not cease to be a primary victim at the moment XAS was born. The fact that the Claimant's psychiatric damage became manifest later in time, after XAS was born, does not change the Claimant's status. She was and is a primary victim, in so far as she suffered personal injury caused by negligence which occurred before XAS was born." (per Whipple J @ 24).

There was some discussion as to how psychiatric injury came to be caused in events such as these. It was held that there did not have to be a single distinctive 'shock' (which might then result in a post-traumatic stress disorder [PTSD]); rather it could arise from the accumulation of several assaults on the nervous system over time. The defendants claimed that the psychiatric injury was only caused later, once it became clear to the mother that her child was severely disabled. If the psychiatric damage occurred days, weeks or months after the birth, then the mother would be considered a secondary and not a primary victim. Addressing an Action for Victims of Medical Accidents conference, a senior barrister noted that "it is almost impossible to win a secondary victim claim" (de Bono 2016).

It was clear that the mother had suffered a severe reaction to the events and the whole experience. She was reported by her husband to have taken to running away for hours at a time, switching her mobile 'phone off so she could not be contacted. Her sister said she was "in a mess"; she rarely wanted to leave the house, had no hobbies and had lost her independence.

Both the claimants and the defendants nominated psychiatrists to examine YAH, and as is common in clinical negligence cases, these experts produced a single report for the court. This stated:

"We agreed that a number of factors had contributed to [the Claimant] having suffered a mental disorder, including the experience of a difficult labour; the worry of knowing whether or not [XAS] would survive and, importantly, the strain of looking after a child with significant disability." (Court transcript @ 73)

However, in court the defendants' psychiatric expert appeared to draw back from the first and second factors. Following cross-examination, the judge noted that her "evidence was not only confusing but becoming circular" (@ 78). It transpired that she had been instructed

"on the basis that this was a claim for nervous shock to a secondary victim. For that reason, her reports focussed on the 'shock' or lack of it at the time of XAS's birth. This was, of course, the wrong target." (per Whipple J @ 72)

There are many types of anxiety disorder, and a complex array of symptoms will not always follow a recognised pattern. In the event the judge was persuaded by the evidence of the claimant's psychiatric expert, even while acknowledging that he had been trying "to fit the

round peg of clinically significant symptoms into the square hole of classification" (@ 67). Having concluded that the claim would succeed, the judge moved to the issue of damages.

While just 10% of new claims reported in 2017/18 were childbirth-related, their potential value in terms of compensation was 48% of all new claims - a significant financial liability (NHS Resolution 2018). Such amounts usually reflect the very expensive on-going care of a child with severe disabilities. While presumably that route is open to YAH since the defendants had admitted clinical negligence, this case concerned the psychiatric injuries which she had herself suffered, and the sums are much more modest.

In total YAH was awarded £76,183. This main bulk of the award comprised general damages of £35,605, which included £6,000 for the repeat caesarean YAH had two years later. An additional sum of £20,000 was awarded for YAH's inability to work due to her mental health problems. Special damages came to £17,338, mainly comprising lost earnings. Future losses (i.e. expenditure) amounted to £3,240, to cover cognitive behavioural therapy sessions, and treatment for depression.

Although some court cases are noteworthy because of the amount of damages awarded, it is important to stress that compensation sums are not plucked out of the air. Judges must follow guidelines which stipulate appropriate sums for each head of the claim. This case is striking because of the comparatively low total when compared with many other childbirth-related compensation awards. There is also the anomaly of the amount recoverable for lost earnings. This was quite low because the mother had not had a high-earning job. Had that been the case, the amount recoverable would have been proportionately higher.

The important message for midwives from this case is to be aware of the potential for mothers (and indeed other family members) to be severely affected when things go wrong. While midwives may have little control over how a mother reacts emotionally when things have gone catastrophically wrong, a sympathetic and caring manner is always required.

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