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Editorial

# Newborn Cerebral Palsy of Non- Hypoxic Ischaemic Encephalopathy Aetiology and Maternal Pre-Pregnancy Disclosure of Information

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The post-2015 legal attitude towards disclosure of medical information has raised much anxiety and many valid theoretical queries about its clinical implications. Admittedly, the Court's ever increasing championing of patients' autonomy and their active involvement in their own management, has long been coming, as evidenced by many jurisprudential decisions both in the USA and in the UK. The attitude has been both catalysed and crystallised by the UK Supreme Court ruling in *Nadine Montgomery Appellant against Lanarkshire Health Board Respondent* [1].

*Nadine Montgomery's* essential toppling of the Bolam principle in medico-legal cases concerning disclosure of information, has had, and will have, numerous far reaching implications, which are, as yet, impossible to fully plumb, at this early stage. However, here, I briefly analyse two repercussions, as applied to alleged medical liability in cases of new-born Cerebral Palsy.

The first is the fact any medical case in Court, if it falls under a plea of failure to disclose relevant information, will be adjudicated in a UK Court, not along the Bolam principle. One direct implication of this, is that the defendant doctor may not defend his action by quoting accepted peer practice supporting his own management. The case will be judged along the Court's direction, without peer medical reference setting the standard, as, in fact happens, in other cases involving a particular trade or craft e.g. engineering, architecture etc. The doctor can no longer rest his mind that he did would be backed up by the fact that it is what many or most of the other doctors of his speciality would do and would attest to in Court. We remind, that this is so, in cases alleging negligence through failed disclosure of medical information, and not (as yet) involving medical diagnosis or treatment.

The second point of relevance, is the Court's emphasis on patient autonomy and information. One may justifiably argue that in the case of a pregnant woman entering labour, irrespective of what information is disclosed to her, she has no choice but to deliver her child. The mode of delivery may vary between a vaginal delivery (*per vies naturales*) or a caesarean section, but deliver she must. The clinical situation here refers to a birth of a child with Cerebral palsy not associated with Hypoxic Ischaemic Encephalopathy.

However, let us push the picture further backwards, at the point of a woman seeking advice, at a pre-pregnant stage, as to *whether to proceed with a pregnancy or not*. Should the consulted doctor, explain in detail that, even if obstetric and neonatal care is super perfect, and all peri-partum hypoxia avoided, the dreaded Cerebral Palsy may still effect the infant?

At this juncture, one justifiably may ask, so why should we not also inform the patient about potential malformations, congenital dislocation of the hip and a thousand other unfortunate afflictions? In fact, maybe, we should. But, the point made here, in choosing Cerebral Palsy is that it 60–70% of the total yearly malpractice sum paid by the NHS Litigation Authority [2]. Massive Court settlements are frequently encountered where liability is proven – up to 200,000,000$. This is hardly surprising if we look at the USA's 2003 collective expenditure for children born with Cerebral Palsy which comes to $11.5 billion [3].

It is now known that not more than 10 - 20% of neonatal Cerebral Palsy are due to birth asphyxia. These are the cases where Hypoxic Ischaemic Encephalopathy (HIE) will be the underlying cerebral pathology present and where liability due to alleged negligence concern-

ing peri-partum hypoxia may be alleged or at least queried. The presence of birth asphyxia is not automatically synonymous with medical negligence. Although medical liability may still be responsible in the rest of the 80% of cases e.g. a mismanaged ascending chorioamnionitis, aetiology will remain unknown in most of them.

The theoretical question of whether or not to discuss the possibility of occurrence of non-HIE Cerebral Palsy with a woman enquiring about a planned pregnancy, is not a falsely alarmist one. Some may quote population-based studies from around the world as reporting the prevalence of Cerebral Palsy as ranging from 1.5 to 4% plus per 1000 live births [4], and ask if this prevalence justifies this aspect of disclosure of pre-pregnancy information.

Firstly, it is important to remember that Cerebral Palsy is the commonest motor disability in childhood [5]. Secondly, disclosure of medical information should be directed by the effect on the patient's life rather than incidence of occurrence. This point was raised both in the Court ruling in *Nadine Montgomery* and, twenty three years *previously* in *Rogers v Whitaker* [6]. The ruling in the latter case from the Australian High Court, could have been as much of a page turner as *Nadyne Montgomery*, but fate decreed otherwise. In it, the Bolam principle was also rejected. The case concerned an allegation of medical negligence, not regarding the ophthalmological operation itself, as this was done *secundum artem*, but, rather on the basis of failed disclosure of pre-operative information.

In *Rogers v Whitaker*, we speak of the post-operative complication of sympathetic opthalmia, with a risk of occurrence of 1/14,000. Mrs Rogers was never warned that the surgery on the defective (nearly blind) eye might cause this complication in the contralateral and healthy eye. Unfortunately, the complication did ensue, resulting in bilateral blindness. Dr Whitaker argued that most ophthalmologists would not have warned the patient about such a rare complication. The Australian High Court, rejecting this Bolam oriented defence argumentation, ruled, that the doctor *had a duty to warn of a complication, which, however rare, if it were to occur, would have most dire consequences on one's life*.

This was echoed by the UK Supreme Court in the case of |Cerebral Palsy resulting from shoulder dystocia in *Nadine Montgomery*. Hopefully, it will not echo again. However, one does wonder what the odds are.

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