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BJM legal column – June 2018 *Andrew Symon*

The high cost of poor communication

Many of the legal cases discussed in this column relate to circumstances surrounding the birth. Less usual are claims focussing on postnatal issues – and breastfeeding in particular - but such a claim has just been settled in the English High Court (Rajatheepan v Barking and others 2018). In fact the original claim did assert that the baby's cerebral palsy was due to a delay in carrying out an emergency caesarean section, but this head of claim was dropped, with the focus shifting to an alleged failure to ensure that the mother understood what she was being told about breastfeeding. The court record notes that the baby's parents are Tamil refugees, and that the mother spoke very little English, although the father, when available, could translate.

> "At the heart of the … case is Mrs Rajatheepan's lack of understanding of and ability to communicate in English … at the material time (she) had a minimal command of English, which was limited to a few basic words and that, as a result, the midwives involved in the care of the Claimant (i.e. the baby) and his mother were not able effectively to communicate with Mrs Rajatheepan." (HHJ McKenna @ 25)

The baby was born just before 11 p.m. on a Thursday. During the first nine hours or so he was given formula feed because the mother was tired, in pain and unable to breastfeed. However, the records state that at 15 and 19 hours of age he was breastfeeding well, and further feeds at 25 and 29 hours of age were recorded.

On the second postnatal day (a Saturday) the decision was taken to discharge mother and baby home, and a midwife completed the discharge process at about 2 p.m. (some 39 hours after the birth). She gave the mother a folder with "a large number of papers in it", all in English, some involving "complicated concepts". The midwife said she would have gone through key sections of these papers; the mother claimed she did not inspect the papers at this time, as she was more concerned about her baby's persistent crying.

The mother and baby did not leave the hospital until nearly 10 p.m. because the baby's father was working until the evening. At the time of discharge the postnatal ward midwives do not appear to

have identified anything untoward. Central to the claimants' case is that it was negligent to have discharged the mother and baby home because of a lack of effective communication.

None of the midwives called to give evidence were able to recollect the events in question; it is often the case that witnesses have to rely on contemporaneous records to inform their written and verbal evidence. While no midwife could be sure that she had actually sat down and observed the mother breastfeeding her baby, the fact that the case notes recorded that the baby was feeding well was taken by the midwives collectively to indicate that they could not have had any concerns.

Part of the defence case was that "communication is of fundamental importance to midwives", and that the midwives would have been "likely to have realised if (the mother) was unable to understand what was being said to her" (@91). The judge commented:

> "In the course of their oral evidence each of the midwives, in marked contrast to their strong assertions in their witness statements that there were no difficulties with communication, to a greater or lesser extent, accepted in effect that there was a language barrier, albeit that they each thought, mistakenly, that they had succeeded in surmounting it with the use of hand gestures, sign language and the like." (HHJ McKenna @ 95)

Asked why she had not told the midwives that she did not understand them, the mother cited her "inability to communicate (her) inability to understand". While the judge was initially unconvinced by this assertion, he conceded that this was in fact the most likely explanation "given her young age and lack of experience, the comparatively short time she had been in this country, the stressful situation in which she found herself and the fact that she had been used to being accompanied by her husband or one of his friends" [who could translate for her] (@92).

As to whether she had tried to convey her own sense of unease about the baby's crying, the mother claimed that despite telling the midwives this, she was repeatedly told that this was normal for a newborn baby. Further attempts to get the midwives' attention were unsuccessful:

> "She went to the midwives' station but none of the midwives seemed to notice her so she returned to her bed … she returned two or three times … on each occasion without being able to attract the attention of any of the midwives on duty. She said that no one

> was paying her any attention and she felt unable to communicate her concerns because of her lack of English."

The father arrived to take his wife and son home. Having taken them to the car, he stated that he and a friend had returned to the ward to ask the midwives to examine the baby, who was still crying. He claimed that a member of staff had essentially repeated, somewhat rudely, that it is normal for a baby to cry.

The community midwife who visited at lunchtime the next day found the baby to be pale and lethargic, and called an ambulance. By the time the baby was readmitted he was unresponsive, floppy, with reported seizures. It transpired that he had not fed since leaving the hospital fifteen hours earlier. Endocrinology reports agreed that 12-15 hours of not feeding would be sufficient to result in symptomatic hypoglycaemia; they also noted that if the baby had either not been discharged home when he was, or had returned to hospital within eight hours, his catastrophic brain injuries would probably have been avoided.

This case essentially turned on whether adequate steps had been taken by the postnatal midwives to ensure that the mother had sufficient understanding, before she left the hospital, about how to breastfeed, and how to manage any feeding problems. While none of the midwives could recall the specific events in question, one did remember that it was very busy that day, and it is hard not to have some sympathy for busy postnatal ward midwives looking after up to 26 mothers and babies. However, did they take enough care to ensure that they were communicating effectively with the mother? One midwife admitted that she probably would not have read the antenatal case notes. Had she or the others done so, they would have noted that it was documented throughout the pregnancy that the mother had very little understanding of English. If the midwives had realised that communication was challenging they could have asked for her husband to translate, even over the telephone. While this is not usual policy, and can cause difficulties (Gill et al 2011) it is not an unusual practice. An alternative would have been to use a professional telephone-based translation service (the 'language line'), which was also available. The judge concluded:

> "The sad reality is that Mrs Rajatheepan did not, in fact, ever get any instruction on how to feed properly, still less did she receive any instruction on what to look out for and what to do if feeding was unsuccessful." (HHJ McKenna @ 100)

With reference to the midwife who conducted the discharge examination the judge continued:

> "Frankly it beggars belief that she maintained her ability to convey effectively a substantial amount of often complicated information in the course of the twenty minute discussion which she said she had with Mrs Rajatheepan." (HHJ McKenna @ 103)

Wards are busy. Staff feel they are over-stretched, not least by being pressured to discharge women home soon after the birth, even after an emergency caesarean section. Assessing individual needs in these circumstances is noted to be difficult (Beake et al 2005), but it is part of a midwife's duties. This mother felt ignored, and when she managed to indicate her concerns she felt they were disregarded.

The midwives felt they had carried out their duties adequately. Whether it was carelessness in not reading the antenatal notes, struggling to complete the ward workload, or over-confidence in their ability to assess effective communication, or a combination of these and other factors, the care given by the midwives was adjudged to have fallen below an acceptable level. Sadly, this had disastrous consequences.

Beake S, McCourt C, Bick D (2005) Women's views of hospital and community-based postnatal care: the good, the bad and the indifferent. *Evidence-Based Midwifery*, 3 (2): 80

Gill PS, Beavan J, Calvert M, Freemantle N (2011) The Unmet Need for Interpreting Provision in UK Primary Care. PLoS ONE 6(6): e20837. https://doi.org/10.1371/journal.pone.0020837

Rajatheepan v Barking, Havering and Redbridge NHS Foundation Trust [2018] EWHC 716 (QB)