

## Damages recorded for brain damaged child

After numerous setbacks Thomson Snell & Passmore has just recovered over £5 million for a child who was severely brain damaged as a result of the mismanagement of her birth.

Miss E's mother was admitted to hospital in labour just after midnight. At 0425 a midwife ruptured the membranes and the fetal heartbeat immediately started to decelerate. A doctor ordered preparations for theatre but a more senior doctor then arrived and, instead of confirming the decision to carry out a crash caesarean, carried out further tests including a fetal blood sample at 0515. It took about an hour from the time that the fetal heart first slowed to the final decision to carry out a caesarean and Miss E was not delivered until 0553.

The baby suffered birth asphyxia causing catastrophic brain damage resulting in severe learning difficulties, motor disability, epilepsy, double incontinence and poor sight. Sadly, her prognosis is that she will cognitively function at only a 12 month old level. She is very demanding of attention but has a happy and good natured personality.

The first step of the investigation was to obtain a report from an obstetrician. He reported that the management of the birth had fallen below an acceptable standard and Miss E should have been delivered 48 minutes earlier than she was. However further reports from experts indicated that there were a number of factors that could make it difficult to prove that the injuries would have been avoided. These included the fetal blood gas sample taken at 0515 which indicated a very low oxygen level, which would be consistent with the baby being already damaged. Furthermore there was a possibility of her being damaged by hypoglycaemia (abnormally low blood sugar).

We then arranged for a neuroradiologist to perform and report on an MRI scan. This revealed that the brain damage was that typically associated with deprivation of oxygen over a prolonged period and not a short acute deprivation.

As one of our experts believed that Miss E was already damaged at the time of negligence it looked likely that the case would have to be abandoned. We had to fight hard for further legal aid to pay the costs of obtaining a report from another expert. This expert

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The team dealing with this case was led by Fiona Mills, Partner and Joint Head of Clinical Negligence & Personal Injury

Direct Line  
Tunbridge Wells 01892 701286  
[fiona.mills@ts-p.co.uk](mailto:fiona.mills@ts-p.co.uk)

### Head Office

3 Lonsdale Gardens  
Tunbridge Wells  
Kent TN1 1NX  
T 01892 510000  
F 01892 549884

### Thames Gateway

The Old Rectory  
St. Mary's Road  
Greenhithe  
Kent DA9 9AS  
T 01322 623700  
F 01322 623701

## Damages recorded for brain damaged child Continued...

supported the case but when he later examined Miss E, he noted several dysmorphic features (an abnormality of the structure of the body) and thought her damage may have arisen as a result of a genetic condition.

A consultant geneticist was instructed. He ruled out a number of genetic conditions and concluded that birth asphyxia was more likely to be the cause of Miss E's damage.

Court proceedings were issued and a defence was filed denying liability on the basis that although Miss E should have been delivered 28 minutes sooner, this was not the cause of her injuries. Shortly, before the date of trial the parties' experts met with a view to discussing the case and preparing joint reports. A lot of work was put into preparing for these meetings and this proved time well spent since both parties' experts finally agreed (and this meant the defendant's expert changing his mind) that Miss E should have been delivered by 0503, some 50 minutes earlier than she was. Nonetheless, the defendant's experts continued to insist that the damage was already done.

Despite the severity of her disabilities our experts assessed that Miss E's life expectancy was 75. The schedule of loss, calculated on the basis of a lump sum award, totalled just over £7.5 million. The defendant contended that life expectancy was only 61 and the total for the value of the case was just over £4.8 million. However they also continued to deny liability.

The parties arranged a meeting to try to negotiate a settlement and this was held on 17 January 2008. The defendant sought a 25% discount to reflect the risk that we would lose at trial but after discussions with the experts in the expert meetings, we felt confident that the risk was only 10%. After protracted negotiations, the case settled on terms that Miss E would receive a lump sum of £1.5 million with annual payments of £60,000 per annum until age 19 and £140,000 per annum thereafter. The annual payments for care are linked to carers' wages so will rise appropriately each year. The total value of the settlement was estimated at just over £5 million.

This case was similar to many of its type where proving causation was significantly more difficult than proving breach of duty. It is not unusual for one or two features of the clinical picture to be puzzling, or even inconsistent with each other, and a long fight is often required to recover compensation. At Thomson Snell & Passmore we have many years experience of birth damage cases and are generally dealing with at least a dozen cases at any one time. At a number of stages prospects of success did not seem good. This case illustrates however that experience, thoroughness and perseverance are often the key to success.

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