

THE HIGH COURT

[2002 No. 12882P]

BETWEEN

**DARAGH KEOGH A MINOR SUING BY HIS MOTHER
AND NEXT FRIEND NIAMH KEOGH**

PLAINTIFF

**AND
MICHAEL DOWLING AND RUTH CONNOLLY**

DEFENDANTS

Judgment of Mr. Justice Johnson delivered on the 10th day of Nov., 2005

1. The plaintiff in this case is an infant now aged five and a half years.
2. The first named defendant is a representative of Mount Carmel Hospital.
3. The second named defendant is an obstetrician who conducted the procedure during which the plaintiff was born. The following are the facts which are either agreed or not really contested.
4. The plaintiff's mother was admitted to Mount Carmel Hospital on the 29th July, 2000, expecting her first baby.
5. The obstetrician which she was attending was Dr. Dockery but he was not available on that date so he was covered by the second named defendant Dr. Ruth Connolly. The following matters were agreed between the parties -

(1) That the plaintiff was discovered to suffer from a brachial plexus injury.

(2) That it was mild to moderate in degree.

(3) That it was suffered at or before the time of birth.

6. The labour commenced quite spontaneously.

7. The membranes had been ruptured at 9 o'clock, admitted at 11.30 a.m., labour proceeded normally with an epidural anaesthetic induced for pain relief. Full dilation was diagnosed at 15.30.

8. At 5.15 Dr. Connolly was advised the presenting part was visible but was not advancing and had slowed down. Dr. Connolly prescribed Syntocinon and this appeared to have the effect of advancing to some extent the delivery. However, subsequently the delivery was held up and Dr. Connolly was called and having examined the patient applied the ventouse on two occasions. Unfortunately the ventouse slipped off, thereafter Dr. Connolly applied a Neville Barnes forceps. The second named defendant records that the Neville Barnes forceps produced an easy delivery of a male infant. It is noted that the male infant was in good condition, the Apgar scores being 8 at one minute, 9 at five minutes and 10 at ten minutes, however, some time later, within forty minutes, it was noted that the right arm was not functioning properly and this has been agreed that the infant is suffering from Erb's palsy.

This the plaintiff claims was due to the negligence of the defendants in their treatment of the plaintiff's mother and in particular in their failure to detect and properly deal with shoulder dystocia and in failing so to do applied unnecessary lateral traction which caused the said palsy.

The parties agreed that this is completely a question of fact between the experts.

Ms. Keogh gave evidence that she was given an epidural injection to assist with the childbirth but she felt a very very strong pulling traction at the time prior to the emergence of the head. As she told Dr. Bonner that there was no delay between the emergence of the head and the remainder of the delivery. It is further agreed between all the experts that in the majority of cases of brachial plexus or Erb's palsy that shoulder dystocia is an element.

10. As to how big that majority is is a matter for dispute, certainly it is in more than fifty percent of the cases and that I don't think is being contested by the parties.

11. Professor Taylor, who was called on behalf of the plaintiff indicated that because of his views that it is almost invariably that shoulder dystocia is an element in cases of brachial plexus and there being none of the other contributing factors which he acknowledged, namely premature baby, poor muscle tone in his view, on the balance of probabilities, there had been shoulder dystocia which had been undetected and untreated. In addition it had not been dealt with properly as this would have involved placing the mother in the McRobert's position.

12. Professor Taylor was satisfied that the traction which caused the damage, was lateral traction, and took place after the use of the forceps, about which neither the plaintiff's mother nor Professor Taylor had any complaint whatsoever. However he admitted that there were, in his view, a small percentage of cases, 5.9 in fact, in which shoulder dystocia does not take place. One of the matters he relied on was an article by G Evans Jones entitled "*Congenital Brachial Plexus Palsy Incidences, Causes and Outcome in the United Kingdom and the Republic of Ireland*" therein *inter alia* it was stated in 5.9 percent of the cases there was no obvious explanation and "no identifiable indicator of the application of unusual force in the course of delivery, that is, they were not delivered by assisted or breech delivery and did not have shoulder dystocia or other injuries and were not macrosomic" but he goes on to say in the subsequent part of that article "the most important factors associated with the occurrence of brachial plexus syndrome or Erb's palsy had been reported previously were shoulder dystocia, assisted delivery and high birth weight." At his birth the plaintiff weighed 4.86 kilograms, that is, in excess of 10lb.

13. Professor Taylor's opinion was based on his belief that there must have been an undetected problem which the mid-wife and the obstetrician failed to recognise and so failed to deal with. He said that his view was basically that this applied in 95 percent of the cases, and he was not prepared to be moved from that particular view.

14. Dr. Connolly gave evidence for the defence. She gave details of her experience, which was quite considerable. She indicated that whereas she had no personal recollection of the birth as far as she was concerned her notes were very straightforward, she used the

forceps and after that there was an easy delivery. She was satisfied that had there been a shoulder dystocia she would have (a) detected it and (b) recorded it and she does not think it was possible for it to happen without her recognising it. Mid-wife Murray gave evidence to the same effect that on the evidence and on the notes there was nothing unusual in the birth, nothing which would have in any way alerted her if anything was wrong. She also indicated that had there been shoulder dystocia she would have known it and would have recorded it.

Professor Bonner, whose qualifications are well known to everyone in this country, gave evidence and said that in his view as regards a majority of Erb's palsy cases these have shoulder dystocia. There was a very definite percentage who did not have shoulder dystocia and he estimated up to 25% did not have shoulder dystocia.

Both his view and that of another obstetrician, Dr. Turner, was that had there been shoulder dystocia there would have been a delay between the emergence of the head with the forceps and the delivery of the trunk. And it is quite clear from Ms. Keogh's own statement that this was not so and there was no such delay.

15. Therefore, on the one hand for the plaintiff we have Professor Taylor who indicates that only five percent of these cases do not have shoulder dystocia, for the defendants we have Professor Bonner and Dr. Murray who indicate that the figure is much greater and Dr. Bonner says twenty-five percent. For the plaintiff, Professor Taylor gave evidence that the shoulder dystocia was undetected and untreated, for the defence there is the evidence of Dr. Connolly and mid-wife Murray who said there was no dystocia and if there had been they would have seen it and there is further, the evidence of Professor Bonner who indicates quite clearly that it would be evident. He also indicated that it would almost be impossible to conceive of shoulder dystocia which would not be detected and Dr. Murray supports this view. Further we have the evidence of the defendants that the fact that there was no delay between the emergence of the head and the delivery of the trunk that tend to militate completely against the concept of shoulder dystocia. It would appear to me that the delivery, though assisted, was perfectly normal and simple and the notes indicate that, in my view, on the balance of probabilities, that this case falls within that range wherein shoulder dystocia is not a feature in the cause of brachial plexus.

16. I am quiet satisfied having seen the witnesses and having the opportunity of listening to them, I find the defence witnesses are very impressive. In addition to that I found that the authorities produced by Mr. Bonner, particularly Turnbull's Obstetrics, 3rd Edition, where it is stated at p. 596 "it should be noted though that these traumatic injuries are not necessary a result of shoulder dystocia although Erb's palsy is usually considered to be specifically associated with shoulder dystocia no perinatal risk factors could be identified in about one third of Erb's palsy, which most likely have arisen in urethra".

17. That figure from an authoritative book on obstetrics would appear to fly completely against the statistics produced by Professor Taylor.

18. However despite the statistics, the fact that they are in favour of the defendant quite apart from that, I am of the view that the plaintiff has failed to discharge the onus of establishing that on the balance of probabilities in this case there was shoulder dystocia which was undetected and untreated and under those circumstances the plaintiff fails to prove his case and I therefore dismiss the matter.