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Electronic Fetal Monitoring and the Standard of Care in Cerebral Palsy Court Litigation

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There is much that goes on in Court in cases dealing with alleged medic al negligence and which never reaches the ears of physicians including those of the same specialty as that facing the music. Although this is but human nature it is both worrying and wrong. Furthermore, it is also unwise for however far away in one's mind is an allegation of medical negligence today, tomorrow may open a chapter an unforgettable chapter in one's mind. In this instance I put under the lens the obstetrician facing an allegation of labour mismanagement resulting in the birth of a child suffering from the dreaded cerebral palsy. This terrible condition is a major parental heartbreak and a lifelong cruel sentence on the child whose life will be completely altered from the usual and normal pattern of life. Indeed, cerebral palsy will radically and permanently alter the whole family's usual and normal and pattern of life and often entail radical changes in living, not excluding changes in daily transport and the very house and home. These changes entail vast amounts of money to be sent both on the care of the suffering individual as well his or her supporting family. Which is why Court ordered remuneration in cases of proven obstetric mismanagement often run in the millions, be they dollars, euros or sterling. And which brings us to a core problem in the jurisprudence of such cases, namely, the standard of care (SOC) to be adopted by the Court.

It is always the Court's prerogative to decide on the standard of care, obviously guided by a Court appointed medical expert(s). This Editorial is not the correct place to discuss the mode of selection of a Court's SOC. The scope of this Editorial is to constrictively criticise and evaluate a worrying trait which is encountered in the reviews of numerous Court cases pertaining to cerebral palsy jurisprudence. We speak here about the frequently present marked hegemony exhibited by the use of electronic fetal heart monitoring employed in labour, in the form an intrapartum cardiotocographic strip trace. Such IP CTG monitoring is a universally used way of monitoring fetal well-being during the challenging time of labour. It has many intrinsic liabilities and is often misinterpreted and mismanaged but remains indispensable in the foreseeable future with no other practical test or investigation visible on the obstetric horizon. In spite of its value in this regard, one must admit that IP

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CTG has directly or indirectly rendered much disservice to obstetrics and womanhood. It tends to draw attention from the parturient mother, has low sensitivity, high subjectivity, high intra- and inter-observer errors and still evolving classification of its abnormality….and has led to much unnecessary caesarean sections from misinterpretation as well as much defensive obstetrics. It has also misled both the science of obstetrics as well as its legal application, commencing in the 1960's when it was wrongly assumed that cerebral palsy most in its majority caused by intrapartum hypoxia. It is not the place or time to indulge in the long list of how IP CTG has negatively impacted cerebral palsy jurisprudence but it is crucial to stress this. And now that all this has been known for sufficiently long time to percolate through all medical, obstetrical and medico-legal strata and sub-strata one would have thought that there would not exist in the 21st century Court cases where CTG would still rule the roost. Cases, where a word search of the Court transcript would yield negative results for such terms as encephalopathy, hypoxic ischaemic encephalopathy, neuro-imaging, fetal pH, etc….

It is time for crucial and indispensable changes to be enacted in Court cerebral palsy jurisprudence. One paradigm shift tis to render the concept of Hypoxic Ischaemic Encephalopathy (HIE) as the central pillar of related reasoning. By itself, HIE, like IP CTG can never be rendered as the Standard of Care but it certainly can be the magical ingredient of retrospective analysis of the child's core pathology. Using the core requirements to establish HIE as recommended by the ACOG-AAP Task Forces (2003/2014) the Court will have a number of scientific parameters to guide its analysis of intrapartum management. One notes that in this classification, IP CTG is not even required as a core feature in the establishment of HIE but plays a role as a secondary criterion in determining the timing of the hypoxic-ischaemic incident in labour. That by itself is a reflection of silent condemnation and rendering of sole IP CTG centralised litigation reasoning as anathema in the modern Court. Adopting HIE oriented reasoning is not a one all be all formula. Nor is it a one size fits all solution. The establishment of standard of care is, or should be, a much more complex process, if it is to truly enable a just evaluation of establishing the truth of whether an allegation of obstetric negligence is justified or not.

There is little doubt that cerebral palsy jurisprudence is in a state of flux induced by healthy and justified scientific reasoning. The last stae of flux was in the 1960's where science was also the main instigator but unfortunately it was junk science. It is time to weed off all roots originating fifty years ago and let in new light which can withstand true scientific challenge.

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