LEGALLY SPEAKING
Risk management in obstetrics and gynecology

# CASE STUDY: "BRAIN DAMAGED" TWINS

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**THE FACTS:**

The plaintiff, a then-19-year-old primigravida with a history of substance abuse, presented to the defendant hospital in "premature" labor at approximately 8:30 am on May 10, 1986. At approximately 11:56 am on May 11, she gave birth to twins by cesarean section, which was performed by the co-defendant.

An ultrasound performed when the plaintiff was admitted revealed the presence of twin fetuses at approximately 32 weeks' gestation. The patient was 2-cm dilated and 70% effaced. At approximately 11:30 am, secondary to maternal contractions, the attending began administering ritodrine. He testified that he ordered the ritodrine stopped at 10:45 pm because the mother had failed to progress but had a persistent contraction pattern and he felt that after almost 12 hours, the drug was not benefitting her and wasn't without risk to her health. At 5:00 am, a decision was made to perform an abdominal x-ray to determine why the mother was not progressing. The x-ray, ordered at 5:30 am and performed at 8:30 am, indicated that Twin B was in a transverse lie.

Because of Twin B's position, the attending requested a C/S "as soon as possible." The attending anesthesiologist's preanesthesia record indicated that the C/S was being done because of "emergency" and secondary to "fetal distress." The anesthesiologist had difficulty intubating the patient and called in the Chief of Anesthesia, who also had difficulty. Because they were under the impression that the C/S was an emergency, the anesthesiologists maintained the patient on general anesthesia by mask. As a result, she aspirated and suffered hypoxic injury during the delivery. The mother brought a suit, alleging that she suffered brain damage during delivery, which was settled before the trial began on behalf of her infant daughters.

Twins A and B had Apgar scores of 2, 5, and 8 and 3, 5, and 8, respectively. Both had benign neonatal courses. There were no signs of hypoxic ischemic encephalopathy in the infant's neonatal charts and the twins had no evidence of organ damage or seizure activity. For unknown reasons, they were discharged with the diagnosis of "perinatal asphyxia."

**THE ALLEGATIONS:**

The plaintiff alleged that the hospital staff and the attending physician departed from the standard of care by failing to determine earlier that Twin B was transverse. In particular, the plaintiff alleged that if the transverse position had been recognized when the ritodrine was discontinued, an immediate C/S could have and should have been performed, sparing the twins the stress of labor and avoiding the "emergent" C/S done the next morning. The plaintiff asserted that Twin B was damaged by remaining in a transverse lie until the C/S and that if the position had been known earlier, there would have been time to wake the mother during the C/S and avoid the aspiration.

The plaintiff alleged that the mother's aspiration and hypoxia led to reduced oxygen delivery to the twins in utero, resulting in brain damage. Insofar as damages were concerned, the plaintiff asserted that the infants were learning-disabled (which they were) and likely unemployable after high school.

**DISCOVERY:**

The discovery process revealed that despite the alleged brain damage from their births, the infant plaintiffs had almost no medical treatment to speak of for the 15 years leading up to trial. Surveillance undertaken by the attorneys for the defendant revealed that the two teenagers played on a scholastic basketball team.

The plaintiff's counsel had deposed most of the defendants in the litigation during the course of the case previously brought on behalf of the mother. The defense in the case described here was complicated by the defendant's testimony during the earlier litigation that C/S was necessary because of fetal distress, despite a lack of any evidence of such distress in the hospital record.

**THE TRIAL:**

At trial, the defendant testified that there was no fetal distress, but that he chose to perform C/S because Twin A's membranes had ruptured and he discovered that Twin B was transverse. He confirmed that he told the anesthesiologist that the infants had to be delivered "as soon as possible." Both the attending anesthesiologist and the Chief of Anesthesiology testified that they were advised by the defendant that

C/S was warranted secondary to fetal distress. All defense witnesses testified, however, that the approximate 10 minutes during which they had difficulty achieving intubation did not and would not have contributed to oxygen deprivation to the infants in utero. (They were delivered 6 minutes after the intubation problems occurred.) Our expert in maternal-fetal medicine testified that whatever happened to the mother during the surgery did not affect the infants, because fetal hemoglobin binds oxygen in a different manner than maternal hemoglobin and thus fetuses can survive on much lower partial oxygen pressure than the mother. Because the fetuses were delivered shortly after the failed intubation, it was the defendant's expert's position that no hypoxic event occurred.

Our expert neonatologist also testified that the condition of the infants in the nursery belied significant hypoxia during the birthing process. No cord blood gas was ever obtained, but the arterial blood gas done soon after birth showed that the infants were not acidotic.

The defendant's own maternal-fetal specialist testified that there was no evidence of fetal distress in the chart and no evidence of perinatal asphyxia. Furthermore, with the benefit of hindsight, it was clear that the infants did not suffer in utero from anything other than the effect of the anesthesia given to the mother, which plaintiff's own expert had to concede could diminish the 1- and 5-minute Apgar scores. The plaintiff's expert neurologist agreed that the 10-minute Apgars were more reflective of neurologic condition and, in this case, scores for both infants were normal.

The plaintiff's expert obstetrician-gynecologist testified that the failure to diagnose a transverse lie earlier resulted in perinatal asphyxia and the low Apgar scores. He initially stated that the fetal monitoring strips demonstrated stress, as shown by reduced beat-to-beat variability, but admitted that the meperidine given to the mother could cause that reduction.

Finally, the plaintiff's anesthesiology expert testified that the mother's aspiration occurred during the first intubation at approximately 11:45 am, which caused perinatal asphyxia and low Apgar scores. Thereafter, he testified, the mother was hyperventilated, which caused reduced blood flow to the infants in utero. On cross-examination, however, the anesthesiologist admitted that he did not know for certain when the aspiration occurred. The defendant's anesthesiologist then testified that if the mother did aspirate, the nature and timing of the event was such that it would not have interfered with the infants' in utero oxygenation. This expert gave technical testimony on the acid-base balance in the mother's blood to support his position that whatever happened to the mother developed *after* the birth of the infants. Finally, an expert in obstetrical anesthesiology testified that neither the mother's nor the infants' oxygenation was reduced while the infants were in utero, a fact underscored by how easy it was to resuscitate the infants at delivery.

In their testimony, the 15-year-old twins were cute, personable, and articulate. Both were then playing on multiple sports teams, used computers for homework and research, lived as independently as was normal for teenagers at the time, and had career goals. They were, however, in "Special Education" and had low Wechsler (IQ) scores.

After a 6-week trial and 2 days of deliberations, the jury returned a unanimous defense verdict

**ANALYSIS:**

Because so many of the allegations and the explanations in this case were predicated on hindsight, it was fitting that we realized only in hindsight that this case was won largely through jury selection. The jurors were a mix of individuals with some college education, most of whom had a high school education. One person had not completed high school but had worked extensively with the mentally retarded and knew that they were employable. That juror, it turned out, would not accept the premise that the twins—who were not retarded and in fact were well adjusted, despite some low intelligence-testing scores—would ultimately be "unemployable."

The medical records and the testimony of the witnesses—particularly the contradictory testimony given during litigation of the mother's case—gave the jury ample opportunity to find against the defendants. The hospital record indicated that the C/S was done due to fetal distress and that the infants were diagnosed with perinatal asphyxia. The defendant did not document in the chart and waffled as to whether he wanted the C/S because of fetal distress. There was clear miscommunication between the defendant and the anesthesiologist about the urgency of the C/S, and of course, there was the problem with intubation of the mother, which resulted in her aspiration and asphyxiation.

Despite these hurdles, multiple experts in multiple specialties were presented to assure the jurors that none of these mishaps had anything to do with the health of the fetuses at delivery. The infants' course in the nursery and throughout their lives, leading up to trial, argued vigorously against their having been damaged in utero.

Ultimately, the jurors' decision was based on the fact that they simply did not believe the children were damaged by the circumstances surrounding their birth. Sometimes, it is as simple as that: Despite the presence of departures or, at the minimum, contradictions in care, an inability to provide more than speculative testimony linking those failures to the injury and a jury's disbelief that an injury actually exists can make a case with seemingly insurmountable hurdles eminently winnable.

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