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'Obstetric Violence' and Modern American Medical Jurisprudence

By Eric J. Frisch

In November 2015, Yahoo! Parenting ran an article titled "Woman Sues Hospital over Traumatic Birth That Turned Our Family Life Upside Down," http://yhoo.it/1VJGaVp (http://yhoo.it/1VJGaVp). The article describes a lawsuit filed by Caroline Malatesta in Birmingham, AL, against Brookwood Medical Center and Tenet Healthcare. According to the article, Malatesta alleged that she was enticed to switch from a traditional hospital offering "a typically medicalized approach" to childbirth, such as laboring on her back with her feet in stirrups, to a new facility that "used a splashy marketing campaign to offer women 'autonomy,' birthing tubs, cushy suites, and the honoring of 'any personalized birthing plan.'" Malatesta reported to Yahoo! Parenting that her experience at Brookwood included "aggressive medical interventions that left her disempowered, permanently injured, and psychologically traumatized." The Yahoo! Parenting article grouped the Malatesta lawsuit under the larger rubric of "obstetric violence," with links to other articles with titles such as "Bullied, Powerless, and Defeated: 45 Women Share Their Striking Birth Stories" and "Woman Forced into Episiotomy Fights Back with Lawsuit."

But, what is "obstetric violence" and how does it fit into the modern American medical jurisprudence?

A few countries have codified the term "obstetric violence" to include acts such as failure to obtain informed consent to obstetric care, overuse of medical interventions and disrespect toward the laboring mother. Thus, it appears "obstetric violence" encompasses more than traditional medical malpractice claims arising out of prenatal and perinatal injuries.

In this article, we introduce the medical concept of obstetric violence, examine the claims filed by plaintiff Caroline Malatesta and others in the United States, and raise questions about how the idea of obstetric violence might fit into the modern American tort compensation system.

'Obstetric Violence'

American medical malpractice attorneys are familiar with traditional claims arising out of obstetrical care. Historically, those claims have focused on injuries to the fetus and newborn, such as perinatal oxygen deprivation, brachial plexus injuries and wrongful death. On occasion, parents may assert a claim for wrongful birth, in the states that recognize such a claim, related to failed abortive efforts or prophylactic methods. Using traditional medical malpractice as the foundation for the tort claims, the focus is typically on whether a trained provider should have intervened sooner using modern medical methods.

Fetal and newborn cases tend to have more jury appeal for obvious reasons. When claims are asserted for maternal injuries, they typically include allegations of surgical mishaps such as ureteral injuries or pelvic floor prolapse, infections, or death from hemorrhaging or other complications. That is to say that the mother suffered a significant physical injury either as a direct result of intervention or failure to intervene, either at all or fast enough.

Outside of the United States, there is a growing recognition of a second type of maternal injury claim, one in which the health of the newborn is not an issue. Moreover, in this second type of claim, the issue revolves around the patient's desire for natural, spontaneous and unassisted vaginal delivery. Natural physiologic childbirth is, of course, the most common method of giving birth. In addition, the World Health Organization and other non-governmental entities include natural physiologic childbirth into the larger category of women's rights, which includes the right and autonomy to decide between the natural physiological act of childbirth and any disruption of that process by a medical practitionerr. *See, e.g.*, International Childbirth Education Association, Physiologic Birth, http://bit.ly/1ZO9WdQf (http://bit.ly/1ZO9WdQf). In addition to natural, spontaneous, uninterrupted, and unassisted vaginal delivery, proponents argue for uninterrupted mother-baby bonding following delivery, and delayed cord clamping, among other things. This is not to say that proponents of natural physiological birth oppose any medical treatment; rather, most advocate for an evidence-based approach and informed consent.

Conversely, there is recognition that increased rates of surgical delivery may not result in decreased morbidity or mortality. *See, e.g.*, Obstetric Care Consensus — Safe Prevention of the Primary Cesarean Delivery, The American College of Obstetricians and Gynecologists and Society for Maternal and Fetal Medicine, Number 1, March 2014;, World Health Organization, Caesarean Sections Should Only Be Performed When Medically Necessary, http://bit.ly/1MTUjIv (http://bit.ly/1MTUjIv). Last, according to a 2014 World Health Organization Fact Sheet titled "Maternal Health and Respectful Maternity Care," a global survey of maternal health in 19 countries concluded that maternity care "often fails to go beyond the prevention of morbidity or mortality to encompass respect for women's basic human rights." Common complaints included lack of privacy, lack of informed consent, and disrespect or abuse during labor and delivery

The term "obstetric violence" grew out of this attention to natural physiologic childbirth, concern over the rising C-section rates, and the need to recognize basic human rights for childbearing women. *See, e.g.*, Obstetric Violence: A New Legal Term Introduced in Venezuela, Perez D'Gregorio R, *Int J Gynaecol Obstet*, Volume 111, Issue 3 , 201-202 (2011). For example, Venezuela defines "obstetric violence" as " … the appropriation of a woman's body and reproductive processes by health personnel, in the form of dehumanizing treatment, abusive medicalization and pathologization of natural processes, involving a woman's loss of autonomy and of the capacity to freely make her own decisions about her body and her sexuality, which has negative consequences for a woman's quality of life." Article 15(13) of Venezuela's Organic Law on Women's Right to a Violence-free Life. Similarly, Argentina defines "obstetric violence" as "one that exerts health personnel on the body and reproductive processes of women, expressed in a dehumanized treatment, abuse of medicalization and pathologizing of natural processes." Law 26.485, 11 March 2009, (Argentina).

Reports of the types of acts that fall under the larger umbrella of obstetric violence include:

- physical violence during labor and delivery, including slapping, pushing on the abdomen to force the baby out, and excessive force on the fetus;
- lack of informed consent;
- misinformation about delivery options and methods;
- disrespect for non-medical delivery methods such as water births, use of a doula, and home delivery;
- lack of confidentiality; or
- forced sterilization.

The initial reaction is that tort claims based on problems such as these are unlikely to be as prevalent in the United States as in countries with a less robust health care system. Likewise, it is easy to fit many of these issues into traditional tort categories — assault and battery, violation of informed consent statutes, invasion of privacy or administrative claims for violation of the HIPAA Privacy Rule or state confidentiality regulations, or traditional medical malpractice cases. But, as we explore below, the concept of "obstetric violence" may ripen into new claims under American tort law.

Three American Cases

To start our research, we searched the "All States and All Federal" database on Westlaw for the term "obstetric /2 violence." There were no reported cases in the results and no secondary sources that specifically discussed "obstetric violence" as a concept. A broader Internet search yielded three state trial level cases: 1) Caroline Malatesta's case against Brookwood Medical Center in Alabama; 2) *Kimberly Turbin v. Alex Abbassi, M.D.*, Superior Court of California, County of Los Angeles (http://bit.ly/1O5zvSt (http://bit.ly/1O5zvSt)); and 3) *Michelle Mitchell v. Mark Brooks, M.D.*, Augusta County, VA (http://bit.ly/1ObsRYS (http://bit.ly/1ObsRYS)). While there are likely to be more cases, these were the primary cases returned in our search.

Malatesta v. Brookwood Medical Center

Carolina Malatesta alleges she was misled into switching birthing facilities for the birth of her fourth child. She delivered her first three children at a hospital with "traditional" medical interventions. She contends she decided to switch to Brookwood Medical Center based on promises of patient autonomy, a personalized birth plan and a less restrictive birthing environment. Malatesta contends that she instead encountered "aggressive medical interventions that left her disempowered, permanently injured, and psychologically traumatized." We were not able to find a copy of the Complaint or any other pleadings, so the details of what happened and what claims were asserted are unknown.

Turbin v. Abbassi

Kimberly Turbin alleges she presented to Providence Tarzana Medical Center for the birth of her first child in May 2013. Turbin disclosed to the staff that she had been a victim of rape. She requested that the staff ask her permission before touching her and that they be gentle. According to the Complaint, Dr. Abbassi performed an unnecessary and unconsented episiotomy, which Turbin recorded on video. Turbin alleges she was placed on her back with her legs in stirrups, immobilized with an epidural and told by Dr. Abbassi that he was performing an episiotomy after she pushed with a contraction. Turbin objected to the episiotomy and repeatedly asked Dr. Abbassi why he was going to perform one. In response, Dr. Abbassi reportedly raised his voice in anger, told Turbin that he was "the expert here," and told her she could "go home" if she wanted to push. Finally, Turbin alleges Dr. Abbassi did not disclose an emergency and that she did not consent to the episiotomy, which was performed anyway.

Turbin asserted claims for assault and battery (based on lack of informed consent) and intentional infliction of emotional distress. In paragraph 9 of her Complaint, Turbin enunciates the principle underlying the obstetric violence concept: "All competent patients (including pregnant women) have the absolute right to decline any unwanted medical procedures, even if one or more doctors believes the procedure is necessary." There is no specific amount of money demanded in the Complaint. The Improving Birth website includes a press release dated June 4, 2015 and a video clip regarding service of process on Dr. Abbassi, but no further information regarding the progress on the case.

Mitchell v. Brooks

We have not located original source materials for this case, so we are piecing together the allegations from news articles regarding a defense verdict at trial on Nov. 6, 2015. According to the news articles, Ms. Mitchell alleged that Dr. Brooks forced her to have a C-section based on concerns of gestational diabetes and fetal macrosomia (larger than normal-sized) (http://bit.ly/1ObsRYS (http://bit.ly/1ObsRYS)). Although Mitchell consented to the C-section, she claimed she signed the consent form under duress because Dr. Brooks threatened to call child protective services. The issue appeared to be the unwanted surgery because, according to the article, both mother and baby were "fine." Ms. Mitchell initially sought $2.5 million in damages, but reduced her claim to $200,000. An Augusta County, VA, jury returned a defense verdict for Dr. Brooks.

Conclusion

While "obstetric violence" does not appear to be a new cause of action in the United States, the cases do represent a new basis for tort claims based on increased awareness of maternal autonomy and control over the birth plan and environment.

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