Who has a duty of care to keep midwives safe?

Midwives have a duty of care to the women and babies they look after, but who has a duty of care to midiwves? Paul Golden explains when an employer may be responsible for harm

A duty of care exists between employer and employee (Donoghue v Stevenson [1932]; Caparo Industries plc v Dickman [1990]). This means that employers are liable for any reasonably foreseeable harm caused by a negligent act or omission that directly caused the injury. This can result in compensation to a claimant midwife and may indirectly lead to improvements in standards of clinical care and greater protection for midwives as a result of the successful legal action.

In RE and others v Calerdale [2017], a woman who had experienced a traumatic birth, and her mother, who had witnessed the birth, successfully sued for nervous shock and were awarded compensation. Usually, for the reasons given in a previous column in *British Journal of Midwifery* (Symon, 2017), it is difficult for this type of action to succeed, mainly because the harm caused must directly result in a psychiatric injury; meaning that there needs to be a duty of care that is breached by a negligent act or omission.

There are also cases where the question is whether the employer could have done more to keep its employees safe from physical or psychological harm. As a result of staff shortages, midwives frequently work for long hours without breaks. In addition, midwives need to be given adequate support, training and supervision. The question is whether unfair working practices cause midwives harm, and when a midwife is alleged to get something wrong, it is important to examine whether this is due to system errors, human factors or a combination of the two.

A successful case of employees suing their employer is White v Chief Constable of South Yorkshire [1998], which arose as a result of the 1989 Hillsborough disaster, where 96 people were killed. Some of the police attending scene successfully claimed for nervous shock, having been traumatised by attempting resuscitation and dealing with people who suffered horrific injuries or died. The chaotic event resulted from mismanagement by senior police. The case was won with the trial judge, overturned by the Court of Appeal. The original decision was then upheld by the House of Lords, who found in favour of the police officers, and held that the duty owed by an employer to protect their employees included foreseeable emotional shock or psychiatric injury.

Elements considered by the House of Lords in the case of White v Chief Constable of South Yorkshire [1998] included the anger and shame that was directed towards the police officers by the public for not being able to protect them. These elements can be transferred to a midwifery scenario, where a poor outcome negatively affects the relationship with the woman and her family, who may project anger at a midwife, triggering a shame response for her perceived failings.

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Can a midwife who witnesses a traumatic birth take action for nervous shock?

Scenario

In a busy, under-staffed hospital maternity unit, a midwife is called to a room in order to manage a case of shoulder dystocia. The woman is being induced for suspected large-for-dates and for one episode of reduced fetal movements, and is attended by experienced medical staff, who have attempted to deliver the baby with forceps, followed by suction with an extended second episiotomy. The staff then fractured the baby's clavicle. The scene is chaotic and traumatic for all. The midwife participates in the emergency and gives suprapubic pressure after recommending that the woman changes position from supine to all fours. The medical staff fail to recognise the need to change positions to release the shoulders, and persist with excessive traction that is later determined to have caused the injuries. The baby is born alive but in poor condition. Resuscitation is successful and the baby is admitted to intensive care. The mother, father and family are distraught, as is the midwife, who later suffers reactive depression and post-traumatic stress disorder, and makes a claim for nervous shock.

The claim by the midwife is that the employer failed to protect the her in her employment. The midwife claimed that the harm was reasonably foreseeable and that she was not party to the negligence that caused harm to the mother and baby.

Answer

The court would normally determine if the midwife's relationship was of sufficient proximity to the victim. This could be in cases where she was related, or knew the family intimately, which may satisfy the requirement for a 'close tie of love and affection' (Caparo Industries plc v Dickman [1990]). The distinction normally made between primary and secondary victims

claiming damages for shock in witnessing a terrible event does not apply to employees who were contractually obliged to be present. If an employee is obliged to be there due to work, they would be a primary victim due to being at the event (RE and others v Calerdale [2017]).

Proving causation (that the event directly caused the damage) is usually a significant challenge in legal cases. However, the Calerdale case was won perhaps more because the records at the defending hospital were so poor (or in some cases, missing) that, without sufficient notes to defend the hospital, the trial judge found for the claimant. Similarly, a case against an employer (or public body such as the NHS or the Nursing and Midwifery Council (NMC)) may also succeed if the organisation has little evidence on which to rely for its defence.

Perceived errors in clinical and professional practice

When a midwife is, or appears to be, lacking in training or a particular skill, they may be referred to the regulatory authority, the NMC. Approximately 40% of referrals to the NMC are from employers, which may increase significantly to account for the now defunct Local Supervising Authority, who represented some 30% of referrals (NMC, 2017). This can cause a breakdown in the relationship of trust and confidence with the employer, leading to stress, reactive depression and possibly nervous shock.

Sadly, there have been cases of suicide (Johnston, 2009) and suicidal ideation by midwives from the stress of employment conditions, investigations and referrals to the regulator, or from other investigations by the Coroners' Courts, the police or other judicial bodies. Some of these may have resulted from a breach in the duty of care by an employer to the midwife.

Mediation

A strong case is not always essential to win. Beginning a case can be enough to achieve an engagement with the other party, which can lead to a mediated agreement through the very real threat of litigation.

The perception of power imbalance is due to the belief that an employer, such as an NHS Trust, is sanctioned by the Government and therefore has greater power than an individual. One example is IMUK v NMC [2017], a High Court case for Independent Midwives, who have taken litigation against the NMC for alleged failures in fair process, claiming that it acted beyond its powers when deciding that independent midwifery indemnity scheme was inadequate to satisfy the requirements (Independent Midwives UK, 2017).

> **Mediation will help both parties to engage and consequently contribute to greater staff and consumer satisfaction**

It may be difficult for an individual to have a conversation with the employer about breaches in the duty of care. When litigation is commenced, this can motivate a reluctant party into mediation. In some situations, mediation is compulsory. Litigation may not be desirable, yet it may be essential to bring about mediation, as in the case of the New Zealand College of Midwives, who achieved a mediated settlement with the New Zealand government over pay inequalities in 2017 (New Zealand College of Midwives, 2017).

Mediation is a structured conversation with a neutral third party. The mediator's role is more about building a safe space for open constructive conversation than being focused purely on reaching any agreement.

Mediation will help both parties to engage, save costs, reduce stress, increase retention and consequently contribute to greater staff and consumer satisfaction.

With each successful legal case, others can use these as precedents and point these out to any employer who requires motivating into participating in the earlier resolution process of mediation.

Conclusion

The question is how to keep midwives safe and whether employers can do more.

The employer, and public bodies such as the NMC, owe a duty of care to those reasonably affected by its decisions and conduct, and so midwives must identify areas of concern and raise these for training, supervision and support. If issues need to be escalated, the answer may be for midwives to create greater opportunities for dealing with conflict through third parties, such as mediators and the courts.

The NMC frequently states its legislative remit, which is to protect the public. However, this has to be performed with reasonableness, fairness and proportionality. Therefore, how the NMC perform its duties must be without causing harm to those to whom it owes a duty of care. **BJM**

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