Could assisting a homebirth lead to prison?

In January, midwife and obstetrician Ágnes Geréb lost an appeal against the Hungarian Supreme Court, which could see her sent to prison for assisting homebirths. Paul Golden explains

The case of Ágnes Geréb has lessons for us all. Dr Geréb is a Hungarian midwife and obstetrician who has focused on listening to women and providing for their needs by enabling them to give birth at home. Like many countries, Hungary does not encourage homebirths, as they take place outside of the control of the hospital and the regulators. According to the Hungarian constitution, women have the right to give birth at home, but the Hungarian public health authority prevents this in practice by refusing to issue licenses to independent midwives (Hill, 2010). As a result, women are unable to claim their legal rights, and midwives who assist homebirths, such as Dr Geréb, are doing so illegally.

In 2010, Anna Ternovszky, who wanted to give birth at home with Dr Geréb's help, challenged Hungary at the European Court of Human Rights (ECHR), asserting that a woman has a right to choose how and where to give birth. She won, and the ECHR ruling stated that each country must provide homebirth as a realistic option for women.

Dr Geréb's small antenatal groups led her to work for 30 years as a midwife, assisting approximately 3500 homebirths. This expertise appears to have made her a target, and she has been prosecuted for challenging the status quo of doctor-led births in hospitals. She now faces jail for practising homebirth after a baby died following a difficult birth.

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On 9 January 2018, however, the Hungarian Supreme Court confirmed a two-year jail sentence given to Dr Geréb, in a case that predated Ternovszky v Hungary [2010], for reckless endangerment causing injury and death. This is in addition to four years of house detention and to the time Dr Geréb has already spent in jail. This judicial process started in 2010, and those eight years have demonstrated a questionable approach to justice. The old legal maxim 'slow justice is no justice' reminds us that fair process requires reasonable time scales without unfair delays.

The delays in this case could be seen as a form of cruel and unusual punishment, and a breach of Article 3 of the European Convention on Human Rights, which prohibits torture and 'inhuman or degrading treatment or punishment', and Article 6 (the right to a fair trial). The home detention and jail sentences may also be breaches of Article 8 (the right to private and family life). Despite these contraventions and the rulings from the ECHR, the Hungarian judicial system has appeared to ignore the international community. Will this benefit Hungary or will it become further isolated from the world of rational, respectful thinking?

What does this mean for women requesting homebirth?

The treatment of Ágnes Geréb would suggest that the findings of Ternovoszky v Hungary [2010] have not been implemented and have discouraged other practitioners. Homebirths in Hungary are now in the hands of a few courageous midwives and doulas, with some women opting for unassisted births in order to avoid traumatic hospital births.

Similar reactions have occurred in other countries following a clamp-down on homebirth. In fact, there are anecdotal reports of increases in unassisted birth in the UK following the regulator's decision that independent midwives (IMUK) were not adequately indemnified. The declared desire by the UK regulator, like the Hungarian authorities, to keep women safe, has led to more women birthing alone at home, some with resultant complications.

Anecdotal reports in the UK and Hungary have also said that there are double standards that place unfair restrictions and demands on homebirth practitioners, while there are daily breaches of women's rights and lack of respect for truly informed of consent in government hospitals in both countries.

Professional indemnity insurance

There are now other indemnity insurances available to UK midwives, including My Midwife & Me, Neighbourhood Midwives and UK Private Midwives, which have governance structures to satisfy the legal requirements. The premiums are significantly higher than before, which raises the question of what constitutes adequate indemnity cover, and whether there could be an alternative to a system of escalating compensation.

The two countries envied in this area appear to be Sweden and New Zealand. The New Zealand model of indemnity insurance includes a no-fault compensation scheme, with a focus on rapid learning from adverse events as opposed to a purely legal, fear-based defence.

Claims of criminal gross negligence

The case of Ágnes Geréb has raised questions for UK midwives about how to defend and protect themselves from politically motivated allegations and unfair processes.

The Albany Midwifery Practice in south London faced similar unwarranted investigations and predetermined judgements, resulting in its closure. With exemplary safety statistics (as in the case of Dr Geréb), it appears that the death of one baby can be used as an excuse for political interference that would not be applied to state-run hospitals.

When a death occurs at, or any time after, a birth, it can be investigated as a potential manslaughter. Gross negligence manslaughter was defined in the case of an anaesthetist R v Adamako [1994] as:

> ***'A breach of a duty of care which causes death through gross negligence which the jury considers to be criminal and was a substantial cause of the death.'***

For negligence to be criminal, it must satisfy the higher burden of proof, which is beyond any reasonable doubt. This is a suitably high threshold to usually keep innocent, reasonable mistakes out of jail. While accountability is essential to continually improve maternity care, it needs to be balanced against a woman's right to choose, and the midwife's ability to effectively carry out their work.

In 2016, a consultant anaesthetist was prosecuted after a woman died following a caesarean section in the first UK case of manslaughter in maternity care (R v Cornish [2016]). The case was the subject of significant controversy, including the Health Secretary, Jeremy Hunt, tweeting from the courtroom (the judge was critical of the tweet and ordered it be deleted). The jury was directed by judge that there was essentially no case to answer and the case was dismissed; however, the case showed a willingness by the Crown Prosecution Service to consider negligent manslaughter in maternity care in the UK. An independent judiciary is essential to weigh evidence fairly (allowing expert witnesses for the defence, unlike in the case of Dr Geréb) and dismissing cases without evidence of gross negligence.

In Australia, a manslaughter case continues against Lisa Barrett, a homebirth midwife, who deregistered to provide care to women who could not find anyone who would support their choices in childbirth. This included cases of twins and breech births, where perceived risk, rather than women's choices, were the main consideration by maternity services. Some midwives in the UK have also deregistered to have greater freedom from the regulator and provide woman-centred care as doulas.

How can midwives protect themselves from allegations?

Reasonable records will demonstrate reasonable practice, so recording times of events, decisions and crucial conversations will provide strong evidence of what took place. Showing how practice is reasonable and safe requires referencing care to evidence-based practice, and although there can be opposing views on what evidence is more reliable, intuitive decision-making may be entirely valid if the practitioner can demonstrate that they discussed risks (Montgomery v Lanarkshire Health Board [2015]). Strong interprofessional relationships will demonstrate collaboration and a body of knowledge (Bolam v Friern Hospital Management Committee [1957]), which can be called upon for support, including expert witness statements, if the care meets the logical analysis requirement established by Bolitho v City and Hackney Health Authority [1997].

Sometimes, it may not be enough to defend allegations, and midwives may have to engage with accusers in a positive way to determine their motivations, then to question and show these to any investigators. Allegations require evidence. If there is no evidence, then consideration can be given to whether the complaint could be dismissed as it is without merit.

Where an investigation continues to the detriment of the midwife, then actions can be taken for breach of the Articles above, along with civil claims for falsified statements, malicious prosecutions, and loss of income during investigations and

other actions. The key is to take action, to challenge and educate accusers and investigators with facts that show how reasonable and safe the midwifery practice is. Some suggest getting political by being actively involved in the promotion of human rights.

Why do people make complaints? For fear of losing the power and control they enjoy? Professional jealousy? Misguided, vexatious and malicious complaints can take time to answer and rebut, but need to be challenged to reduce these allegations. Midwives may not like to challenge, as it could feel upsetting, yet it is essential for survival. Redirecting the focus away from the midwife and onto the accusers can bring a shift in equalising the balance of power and how a case is perceived.

Midwives can share ideas nationally and internationally to find greater strength together. Their legal arguments need to be rational, applying the law to the facts. Emotion can be used positively outside the legal arena, processing emotions safely in therapeutic relationships. Strong self-care can lead to increased survival rates for midwives who manage to rebut unfair allegations from positions of strength. **BJM**

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582

Bolitho v City and Hackney Health Authority [1996] 4 All ER 771

Hill A. Hungary: Midwife Agnes Gereb taken to court for championing home births. 2010. https://www.theguardian.com/world/2010/oct/22/hungary-midwife-agnes-gereb-home-birth (accessed 22 January 2018)

Montgomery v Lanarkshire Health Board [2015] SC 11 [2015] 1 AC 1430

R v Adomako [1994] 3 WLR 288 HL

R v Cornish and Maidstone and Tunbridge Wells NHS Trust [2016] EWHC 779 (QB)

Ternovoszky v Hungary [2010] ECHR