Cerebral palsy is the most common physical disability in childhood, with an incidence of around 1 in 500 births.[1] The condition has traditionally been assumed to be caused by brain injury sustained during childbirth. It can lead to a very severe disability, and is frequently the subject of damages claims pursued on the basis that different management of the mother’s labour could have avoided the injury. Claims tend to be in large, and it is estimated that around $300 million dollars is spent on settlements of cerebral palsy cases in Australia each year.

However, research has increasingly challenged the traditional assumption that the cause of cerebral palsy is brain injury arising from oxygen deprivation as a result of a difficult birth. A dramatic rise in the rate of caesarean delivery over the past 50 years has not resulted in a corresponding decrease in the rate of cerebral palsy. Factors that are much more strongly linked to the condition include pre-term delivery, intra-uterine growth restriction and the presence of other congenital abnormalities.

The latter factor has raised suspicions regarding a genetic cause, and recent rapid advances in this area of medicine have suggested that the genetic contribution may be much higher than previously suspected. In a recent study of 200 patients:[2]

- 14% were found to have a plausible genetic cause.
- A further 44% recorded gene variants that are yet to be resolved in terms of the causation of cerebral palsy.
- The researchers have concluded that current research suggests a potential genetic contribution to causation in up to 34% to 45% of cerebral palsy cases.

Implications

Developments in this area are of obvious significance in relation to damages claims based upon alleged negligence at the point of delivery and allegations involving a failure to progress sooner to caesarean delivery. If a clear genetic cause can be established, such claims will not be maintainable. Even a contributing or potential genetic cause will make it significantly more difficult for a plaintiff to establish on the balance of probabilities that their condition arose from negligence on the part of the doctor, hospital or midwives.

The courts have already demonstrated a willingness to order a plaintiff (and if necessary his or her parents) to undergo genetic testing where there is evidence of a possible genetic cause for the condition in question. [3] Doctors, insurers and solicitors involved in cerebral palsy litigation should always give consideration to the possibility of genetic cause.

The identification of a genetic cause, or causes, for cerebral palsy will also have implications beyond litigation outcomes and professional indemnity premiums. Advances in genetic medicine are happening very rapidly. It is already possible to isolate the DNA of a fetus from the blood of the mother at an early stage of pregnancy and to use this to test for chromosomal abnormalities such as those that cause Down
Syndrome. The range of conditions that can be identified with such testing can be expected to increase as the technology develops.

It may in time be possible to test for cerebral palsy (and other serious genetic conditions) at an early stage of pregnancy.

Not only will such a development reduce the amount of litigation related to cerebral palsy cases it will also mean that more prospective parents will find themselves with access to the results of testing which may indicate a raised risk or likelihood of cerebral palsy and all that this involves.

At the moment no greater certainty can be provided when testing for cerebral palsy in the unborn foetus, unlike Down Syndrome where one may test with near certainty regarding the outcome.

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