

# COURT OF APPEAL FOR ONTARIO

CITATION: Gutbir v. University Health Network, 2012 ONCA 66

DATE: 20120202

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Weiler, Armstrong and Hoy JJ.A.

BETWEEN

Zmora Gutbir, a mentally incapable person,  
and Tamar Gutbir and Yuval Gutbir, minors, by their  
Litigation Guardian, Shaya Petroff,  
Avraham Gutbir and Atalyah Gutbir

Plaintiffs (Respondents)

and

University Health Network and R. Derek Nicholson

Defendants (Appellant)

Paul J. Pape and Tanya A. Pagliaroli, for the appellant

Gavin MacKenzie, Hilik Y. Elmaliah and Mark Hines, for the respondents

Heard: January 10, 2012

On appeal from the judgment of Justice Darla A. Wilson of the Superior Court of Justice, dated December 10, 2010.

**Weiler J.A.:**

## **NATURE OF APPEAL**

[1] Mrs. Atalyah Gutbir was in the 42nd week of pregnancy. On the morning of January 10, 1984, she went into labour and was admitted to Toronto General Hospital ("Toronto General") between 7 and 8 a.m. Baby Zmora Gutbir was born

at 3:45 p.m., blue, silent and in critical condition. Her brain was permanently damaged.

[2] Following a trial with a judge and jury, the appellant was found to have breached the standard of care based on the manner in which it had monitored the foetal heart rate of the baby. The jury's finding was that this breach meant that foetal heartbeat abnormalities that should have been detected were not. "[Detection] would have allowed an earlier intervention, (birth of the baby), which could have prevented permanent brain injury." According to the jury, Zmora's brain injury occurred because she had been deprived of oxygen over a period of between one and three hours while in utero. She now lives with cerebral palsy.

[3] The appellant appeals the jury's findings of both breach of the standard of care and causation. Damages are not in issue. For the sake of completeness, we note that the appellant was ordered to pay damages of \$5,500,000 to the respondent, Zmora Gutbir, \$625,000 to each of the respondent parents, Avraham and Ataylah Gutbir, and costs on a partial and substantial indemnity basis.

[4] For the reasons that follow, we dismiss the appeal.

### **THE STANDARD OF REVIEW APPLICABLE TO A JURY VERDICT**

[5] It is well-established that a jury verdict may be set aside only if the verdict is "so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it":

*McCannell v. McLean*, [1937] S.C.R. 341, at p. 343. Where there is some evidence to support the verdict, a jury will be accorded a high degree of deference.

### **ISSUES ON APPEAL**

[6] The appellant seeks an order setting aside the judgment and dismissing the action. The appellant argues that there was no evidence upon which the jury could find that the appellant fell below the standard of care required of it in attending to the respondent. More specifically, the appellant asserts that the nurse attending to Mrs. Gutbir did not fall below the standard of care in monitoring the foetal heart rate. Alternatively, the appellant submits that any negligence on its part was found by the jury to be a “lost chance” to prevent permanent brain injury as opposed to a finding on the balance of probabilities that the appellant caused or materially contributed to Zmora’s injuries. The appellant submits there was no evidence that any negligence on its part caused or materially contributed to Zmora’s injuries.

### **BACKGROUND MEDICAL EVIDENCE**

[7] By way of background, the purpose of monitoring the foetal heart rate is to determine the well-being of the foetus during labour. A foetus can have accelerations of the heartbeat or decelerations, which are a slowing of the foetal heart rate during labour.

[8] There are three types of decelerations:

- (1) Early decelerations are normal decelerations caused by pressure on the foetal head that occur during each contraction, after which the foetal heart rate quickly returns to normal;
- (2) Variable decelerations are abrupt decelerations that are usually caused by compression of the umbilical cord during a contraction, after which the foetal heart rate abruptly returns to normal;
- (3) Late decelerations are serious decelerations caused by a lack of oxygen reaching the foetal heart. During a late deceleration, the foetal heart rate reaches its lowest point after the peak of the contraction and does not return to normal until more than thirty seconds after the conclusion of the contraction. Late decelerations indicate that the foetus may be suffering from a critical lack of oxygen that can cause injury to, or sometimes death of, the foetus.

[9] There are two methods of monitoring the foetal heart rate. One is electronic foetal monitoring ("EFM") in which an instrument is strapped to the mother's abdomen and measures the baby's heart rate and the mother's contractions on a continuous basis. The other method of monitoring the foetal heart rate is manual intermittent auscultation ("IA"). In IA, a nurse palpates the uterus to determine when a contraction begins and listens to the foetal heart rate with an instrument for a period of one minute, beginning as soon as the contraction ends. The nurse counts the number of heart beats and then calculates the foetal heart rate per minute. In general, both methods met the standard of care at the relevant time in question.

### **THE GUTBIRS' EVIDENCE AT TRIAL**

[10] Mrs. Gutbir's evidence was that, after she was admitted to the hospital, an attending nurse came into her room every 30 to 40 minutes to listen to the foetal heart rate with a "wooden stick" for 10 to 15 seconds (*i.e.*, IA).

[11] Around 1:00 p.m., Mrs. Gutbir's attending physician, Dr. Nicholson, ruptured her membranes with a metal instrument (*i.e.*, artificial rupture of membranes ("ARM")). Upon rupture, a thick greenish fluid called meconium was present in the amniotic fluid. This can be an indication of foetal distress or can be of no consequence. The nurse continued to come into the room every 30 to 40 minutes to listen to the foetal heart rate for 10 to 15 seconds with the wooden stick. An electronic foetal heart monitor was never used and Dr. Nicholson did not return for the three hours that followed.

[12] Approximately three hours after the ARM, the nurse and Dr. Nicholson returned to the room and told Mrs. Gutbir to push as the baby's position was high in her uterus. Neither indicated that the foetus had any heart rate irregularities. Mrs. Gutbir was moved into another room without explanation. The anaesthetist was called and, after topping up her epidural medication, he left. Dr. Nicholson used forceps to deliver the baby.

[13] After baby Zmora was born, a sense of panic set into the room. The anaesthetist was immediately called. The baby was intubated and given oxygen. She was transferred to the Hospital for Sick Children several hours later.

[14] After Zmora's birth on January 10, 1984, the Gutbir family returned to Israel. They did not notify the appellant or Dr. Nicholson of any potential claim until 2001.<sup>1</sup> By that time, Toronto General had destroyed all records relating to the event.

[15] The records from the Hospital for Sick Children are available. The notes made by the attending doctors at that hospital state "no continual monitoring", "not monitored during labour" and "no record of monitoring during labour". In addition, the transfer form that accompanied Zmora from Toronto General has nothing written in the box concerning "Abnormalities of Labour" or "Signs of Foetal Distress".

[16] Zmora's parents could not identify the attending nurse. Her identity remains unknown to this date.

[17] Dr. Nicholson had no record or recollection of the event. He could not say whether Zmora and her mother were his patients. The claim and cross-claim against him were resolved before trial.

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<sup>1</sup>Section 47 of the then *Limitations Act*, R.S.O. 1980, c. 240 provided that where a person entitled to bring an action is, at the time the cause of action accrues a minor, the period within which the action may be brought shall be reckoned from the date when such person became of full age.

## **ISSUES**

### **(1) Was there a breach of the standard of care?**

#### **(a) The preliminary issue: What did the jury find was a breach of the standard of care?**

[18] The appellant submits that the jury found one breach of the standard of care: IA was not done properly. The respondent submits that the jury found two breaches of the standard of care: (1) IA was not done properly; and (2) EFM should have been used.

[19] The questions put to the jury and their answers on the standard of care are as follows:

Question 1-A: Have the plaintiffs satisfied you on a balance of probabilities that there was a breach of the standard of care on the part of the hospital/attending nurse who provided care to Atal[yah] and Zmora Gutbir?

Answer: Yes.

Question 1-B: If yes, please state the particulars of negligence and provide clear and specific answers.

Answer: The standard of care in 1984 indicates that continuous electronic foetal monitoring should be strongly considered with high-risk cases to determine the well-being of the foetus. The risk factors include on arrival maternal age, 35 plus, and post-term gestation; after arrival, meconium stained liquid, artificial rupture of membranes and epidural. Therefore, continuous electronic foetal monitoring should have been used.

Evidence was provided that nurses interpret a guideline of strongly recommend as [sic] what they should do.

Witnesses indicated that intermittent auscultation, (I.A.), could also be used if done properly. Failure to detect foetal heart rate irregularity through I.A. is indicative that I.A. was not done properly, which would also constitute a breach of the standard of care.

Question 2-A: If your answer to question 1-A is yes, did the hospital's (attending nurse's), breach of the standard of care cause or materially contribute to the injuries of Zmora Gutbir?

Answer: Yes.

Question 2-B: If your answer to question 2-A is yes, how did the hospital's (attending nurse's), breach of the standard of care cause or materially contribute to Zmora Gutbir's injuries? Please provide clear and specific answers.

Answer: On the balance of probabilities Zmora's brain injury was caused by prolonged partial hypoxic insult. This would have taken place one to three hours before birth. The reasons for this conclusion include pattern of brain injury shown on Zmora's MRI consistent with hypoxic ischemia. (all witnesses indicated the pattern possible with H.I.)

Related kidney problems, brain edema, timing consistent with hypoxic ischemia in period prior to birth. Presence of lactic acid indicates that not all energy sources had been depleted. Diagnosis of professionals who examined and treated Zmora was prolonged partial hypoxic ischemia. The conclusion of prolonged partial hypoxic ischemia suggests that there was a window of opportunity to intervene earlier. There is a period of one to two hours of partial asphyxia which does not result in permanent brain injury. If the standard of care was not breached, the foetal heartbeat abnormalities would have been detected. This would have allowed an earlier intervention, (birth of the baby), which could have prevented permanent brain injury.



The alternate theory that hypoglycemia caused the brain injury is not accepted on the balance of probabilities because no recording of growth discordance by any doctor who saw Zmora. None of the treating doctors identified hypoglycemia as a cause of the injury. Treatment for low blood sugar was quite limited and the situation corrected quite quickly. Hypoglycemia by itself rarely causes brain damage, but in combination with hypoxic ischemia, can cause injury.

Therefore, even in hypoglycemia situations, hypoxic ischemia is a contributing factor.

[20] We agree with the respondent that the jury found that the standard of care had been breached in two respects: failure to perform EFM and failure to perform IA properly. The jury's finding that there were two breaches of the standard of care is supported by the concluding sentence of the jury's answer to question 1-B in which it stated, "Failure to detect foetal heart rate irregularity through I.A. is indicative that I.A. was not done properly, which would also constitute a breach of the standard of care" (emphasis added). The word "also" indicates that the jury had already found a breach of the standard of care in relation to EFM.

**(b) Was there evidence as to the standard of care for EFM and whether it had been breached?**

[21] There is no issue that the attending nurse has the responsibility for monitoring the foetal heart rate. The standard of care issue is based on how that monitoring should have been done. Two experts, Dr. Carson and Nurse Rosen, gave evidence in this respect.

[22] Dr. Carson is the head of obstetrics at a hospital in Regina, and the director of maternal foetal medicine at the University of Saskatchewan. He was qualified to give expert evidence concerning foetal heart rate monitoring. Dr. Carson testified that both EFM and IA were acceptable methods in 1984 and met the standard of care. However, EFM should have been used in this case as several high-risk factors were present. Had EFM been used, irregularities in Zmora's heart rate would have been detected, indicating to the nurse and Dr. Nicholson that immediate intervention was required.

[23] In addition to the evidence of Dr. Carson, the finding that the standard of care required EFM is supported by the evidence of Nurse Rosen. Nurse Rosen was qualified as an expert in obstetrical nursing entitled to provide an opinion on the standard of care. She was an instructor at the Victoria Hospital in obstetrics and gynecology and rose to become the senior director nursing, division of nursing, Victoria Hospital. Nurse Rosen testified that EFM was required because of the presence of the following risk factors: this was a post-term pregnancy; Mrs. Gutbir was older, at 35 years of age; Mrs. Gutbir had an epidural; and Mrs. Gutbir had membranes that were stained with meconium. When these risk factors were present, a nurse had no discretion to deviate from the applicable guidelines, which mandated the use of EFM. Meconium can be an indication that the baby is stressed, so a nurse must take further precautions and pay close attention to the baby's heart rate. The attending nurse's failure to use EFM when

it was clearly indicated in these circumstances was a breach of the standard of care.

[24] As there was evidence as to the standard of care for EFM and evidence to support the jury's verdict that the standard of care for EFM had been breached, the jury's verdict in this regard is not plainly unreasonable.

**(c) Was there evidence as to the standard of care for IA and whether it had been breached?**

[25] The trial judge ruled that Dr. Carson could not give evidence as to the standard of care of a nurse in 1984. He was, however, qualified as an expert on the issue of foetal heart rate monitoring. While he did not describe how IA was to be done in terms of specific technique, he did talk about the timing of when it was to be done.

[26] Nurse Rosen opined that the attending nurse in this case also fell below the standard of care in failing to properly auscultate the foetal heart rate. After an objection by defence counsel that she was giving an opinion outside her report, the jury was excused and the trial judge eventually ruled that Nurse Rosen could not offer an opinion as to what the standard of care was for IA. When the jury returned, the trial carried on. No request was made for a direction to the jury not to consider the initial statement by Nurse Rosen and no direction was given to this effect.

[27] When the trial judge summarized the evidence of Nurse Rosen, she stated that Nurse Rosen's opinion was that the attending nurse had "failed to auscultate the baby's heart rate appropriately." There was no objection to the trial judge's charge to the jury.

[28] The appellant submits that objection should have been taken and that the two rulings made it clear neither Dr. Carson nor Nurse Rosen could give evidence as to the standard of care for IA. Thus there was no evidence as to the standard of care for IA.

[29] There are two answers to this submission. First, having regard to the jury's finding that the failure to use EFM was a breach of the standard of care, the finding that the standard of care respecting IA was also breached is irrelevant.

[30] Second, contrary to the appellant's submission, it was open to the jury to conclude on the evidence that the nurse failed to conduct IA properly based on the infrequency in which she assessed Zmora's heart rate.

[31] Dr. Carson was qualified to, and did, give evidence as to the frequency with which IA should be performed. The objection sustained by the trial judge was to Dr. Carson giving evidence as to the standard of care of a nurse. Thus, quite apart from Nurse Rosen's evidence, there was evidence from which the jury

was entitled to infer that the attending nurse fell below the standard of care in the manner she administered IA.

[32] Dr. Carson testified that, when conducting IA “properly”, foetal heart rate monitoring should be done every 15 to 30 minutes during the first stage of labour and every five minutes in the second stage of labour. Both Atalyah and Avraham Gutbir’s evidence was that, during the second stage of labour, the nurse did not conduct measurements any more frequently than every 30 minutes as she had done during the first stage. There is support for this evidence in the notes made by the attending doctors at the Hospital for Sick Children which state “no continual monitoring”, “not monitored during labour” and “no record of monitoring during labour”.

[33] The appellant submits that because the jury made no mention of timing respecting when IA had to be done, the jury rejected Dr. Carson’s evidence on timing.

[34] We disagree. In his evidence, Dr. Carson referred to the frequency with which IA needed to be done. He equated the word “properly” with timing. In adopting the word “properly”, implicitly, so did the jury.

[35] The jury’s findings are not plainly unreasonable. The appellant’s arguments respecting the standard of care are dismissed.

**(2) Was there evidence of causation?**

[36] The appellant submits that there is no evidence the attending nurse did not detect signs of foetal distress and alert Dr. Nicholson. The appellant further submits that the jury's verdict ignores the fact that the nurse was not charged with determining the time and method of delivery; Dr. Nicholson was. The appellant submits that the nurse could have performed IA properly, heard the decelerations and taken all appropriate measures, only to have the doctor fail to deliver the baby in time to prevent injury. Instead the jury reasoned improperly from the result that the attending nurse's actions must have been negligent.

[37] The appellant's submissions ignore Dr. Carson's testimony that, if EFM had been used or IA had been done properly, the attending nurse would have detected signs of foetal distress. From this evidence, the jury was entitled to infer that the attending nurse breached the standard of care.

[38] Contrary to the appellant's arguments, there is evidence the attending nurse did not detect signs of foetal distress. Perhaps the strongest piece of evidence in this regard is that the transfer form that accompanied Zmora from Toronto General had nothing written in the box concerning "Abnormalities of Labour" or "Signs of Foetal Distress".

[39] There is further evidence from which the jury could infer that neither the attending nurse nor Dr. Nicholson was aware of the distress of the foetus. Dr.

Nicholson did not express any concern with respect to foetal distress prior to delivery. He did not have the anaesthetist stay in the delivery room as Dr. Carson testified one might expect if there was a risk of having to resuscitate Zmora. Moreover, the Gutbirs testified that everyone “panicked” only after Zmora was born.

[40] Whether one applies the “but for” test or the “material contribution” test, the appellant acknowledges that a tortfeasor cannot excuse itself from liability simply by pointing out that, in addition to the tortfeasor, another person caused or materially contributed to the plaintiff’s injuries. The appellant argues, however, that there was no evidence that the nurse’s breach of the standard of care caused or materially contributed to Zmora’s brain injury.

[41] Again, we disagree.

[42] We begin by noting that, on appeal, the appellant does not take issue with the jury’s finding that, on a balance of probabilities, Zmora’s permanent brain injury was caused by prolonged partial hypoxic insult or deprivation of oxygen.

[43] While there was no direct evidence of causation, there is evidence from which the jury could properly infer a causal connection. Dr. Carson testified that, if EFM had been used or IA had been done properly, the distress of the foetus would have been detected, detection would have prompted intervention, and intervention would likely have been beneficial in this case. The jury’s answer

tracks Dr. Carson's evidence which indicates that they accepted it. The evidence of Dr. Hill, a paediatric neurologist, was that it takes one or two hours of hypoxic ischemic insult before injury results. The extent of the injury increases as time goes on. The evidence of Dr. Carson and Dr. Hill establishes that, had the standard of care with respect to foetal monitoring not been breached, the distress of the foetus would have been detected and, once detected, there was sufficient time to deliver Zmora before injury to her brain resulted.

[44] Further, given the evidence that the attending nurse fell below the standard of care with respect to foetal heart rate monitoring, and the jury's rejection of the alternate theory that hypoglycaemia was a major contributor to Zmora's brain damage (which is not contested on appeal), the nurse's breach is the only reasonable explanation for the cause of Zmora's brain injury.

[45] The appellant further submits that the jury only found that any negligence on its part was found by the jury to be a "lost chance" to prevent permanent brain injury as opposed to a finding on the balance of probabilities that the appellant caused or materially contributed to Zmora's injuries. The appellant's submission is based on the following sentence in the jury's answer to question 2-b (*i.e.*, how the attending nurse's breach of the standard care caused or materially contributed to the injuries of Zmora): "[Detection of foetal heartbeat abnormalities] would have allowed an earlier intervention, (birth of the baby), which could have prevented permanent brain injury." While this sentence taken



in isolation can be read in the manner submitted by the appellant, when the jury's answers to the questions are read as a whole and in conjunction with Dr. Carson's evidence, we are satisfied the jury's finding was based on a balance of probabilities.

[46] Indeed, the jury's answer to the question on causation begins with, "On the balance of probabilities, Zmora's brain injury was caused by prolonged partial hypoxic insult. This would have taken place one to three hours before birth." The wording of the sentence relied on by the appellant reflects the jury's understanding that the longer the negligent situation prevailed, the more likely it was that serious permanent brain injury would result.

[47] Finally, we reject the appellant's submission that in order for causation to be established evidence as to exactly when irregular foetal heart beat began was required. Having regard to the evidence and the jury's answers to the two questions, if, as required by the standard of care, EFM had been used, or IA done after a contraction for the required length of time and with the required frequency, it is likely that the irregularities in the foetal heartbeat would have been noticed at a stage when permanent brain injury could have been prevented. In other words, the injuries were preventable on a balance of probabilities.

[48] Accordingly, the appeal is dismissed.

[49] The parties have agreed that in the event the respondents were successful, costs in the amount of \$50,000 inclusive of disbursements and all applicable taxes should be awarded. So ordered.

Released: Feb. 2, 2012

"KMW"

"K.M. Weiler J.A."

"I agree Armstrong J.A."

"I agree Alexandra Hoy J.A."