

## COURTS

# Botched birth suit upheld

Family with disabled daughter awarded \$8.5M over nurse's mistake

LIAM CASEY  
STAFF REPORTER

The Ontario Court of Appeal has upheld a lower court's decision to award about \$8.5 million to an Israeli family after a Toronto hospital botched the birth of their daughter, leaving her with severe brain damage.

On Jan. 10, 1984, Atalia Gutbir went into labour and was admitted to Toronto General Hospital around 8 a.m. After what was supposed to be a routine birth, her daughter, Zmora, arrived silent and blue, saddled with permanent brain damage.

A jury, and now the Court of Appeal in a decision released Thursday, found it should have been different.

Zmora, 28, has cerebral palsy and needs constant care. She now lives in an assisted-care facility in Jerusalem and works at a candle manufacturing plant, but needs to be driven there and back. She needs help getting dressed and undressed. She needs help eating, bathing and going to the bathroom. She needs her parents.

"What would happen to her when we stop living?" her mother, Atalia, 63, said from Jerusalem. "We have peace now that her future is secured. We can improve her life, both now and when we're gone."

The Gutbirs knew something went wrong on that winter day in 1984, but didn't realize at the time that they had recourse.

Since then, their lives have been filled with trips to countless doctors, speech therapists and a slew of experts.

LAWSUIT continued on GT7

# Birth case complicated by loss of medical files

LAWSUIT from GT1

In 2001, the Gutbirs retained the firm Sommers & Roth and sued the University Health Network, which runs the General, in a case that would last more than 11 years. (A not unusual amount of time given the complexities involved, lawyers say.)

"We thought it was our obligation, our duty as responsible parents to secure her future," her father, Avraham Gutbir, told a court in 2010.

A jury found Zmora's brain damage occurred "because she had been deprived of oxygen over a period of between one and three hours while in utero," according to court documents.

It was the nurse's fault for not monitoring the unborn baby's heartbeat properly. That nurse has never been found — her name wasn't in the medical files because they were mistakenly destroyed in 2000.

The case centred around one hospital document, which went along with Zmora when she had to be rushed from the General to Sick Kids Hospital.

Nothing was written under "Abnormalities of Labour" or "Signs of Fetal Distress," but there should have been had the nurse been monitoring the unborn child properly.

"This case was exceptionally difficult because of the absence of records," said Richard Sommers, the family's lawyer, who along with Hilik Elmaliah, worked on the case without pay for more than a decade.

"That single document was very important."

While Atalia was in labour, a nurse came every half hour to listen to the unborn baby's heart.

She didn't use a heart monitor but another acceptable method called manual intermittent auscultation, which requires listening to the heart for 60 seconds after a contraction ends. The nurse only monitored the heart for 10 to 15 seconds.

Unbeknownst to everyone in the room, including Atalia, Zmora was in trouble.

Her heartbeat plummeted during contractions and took too long to return to a normal rate.

Had medical staff seen that signal, they would have known something was wrong.

When Zmora was born, "a sense of panic set into the room."

She needed to be resuscitated, given oxygen and was suffering seizures. She was later transferred to Sick Kids, where doctors diagnosed her with prolonged partial hypoxia-



Zmora Gutbir, 28, with her mother, Atalia, and father, Avraham. The family was awarded \$8.5 million in a lawsuit.

ischemia, a brain injury due to a lack of oxygen.

There was a three-hour window of opportunity, experts later testified, where if they delivered the baby, Zmora's brain wouldn't be permanently damaged.

"Hearing the evidence how certain all the witnesses were that she could have been normal, like our other children, if detected on time, we find it very difficult to live with, but we cope," Atalia said.

Doctors' notes from Sick Kids, which, unlike the General, did have records of Atalia and Zmora, stated the baby was "not monitored during labour" and noted there was "no continual monitoring."

The court awarded Zmora \$5.5 million, \$625,000 to her parents and the remainder as interest and legal fees.

Paul Pape, counsel for the hospital, said they may appeal the decision, which would take the case to the Supreme Court, although the court can choose not to hear it.

The Gutbirs can now search for better help for their daughter.

In addition to her physical ailments, she struggles emotionally.

Zmora recently fell into a deep depression after her sister's wedding.

"She is aware enough to know that she will never get married, never have children," Atalia said.

"She's getting therapy and we're starting to get out of this crisis."