SCC File Number: 37846

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

DAVID ROBERT STEPHAN

APPELLANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM
DAVID ROBERT STEPHAN, APPELLANT
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

A. Overview

[1] A jury found David Stephan ("David") and Collet Stephan ("Collet," together "the Appellants") guilty of failing to provide the necessaries of life[1] in relation to their 18-month-old son, Ezekiel Stephan ("Ezekiel"). A majority of the Alberta Court of Appeal (the "Majority") dismissed their appeal, while Mr. Justice B.K. O'Ferrall (the "Dissent") would have allowed the appeal and ordered a new trial. This is an appeal as of right based on the Dissent.

[2] The Appellants have prepared their respective facta by dividing the issues to be addressed and each adopts the other's factum. Together, the Appellants advance a single common ground of appeal: the trial judge's instruction to the jury was legally incorrect and constituted a reversible error. The factum of the Appellant Collet Stephan will focus on what is required of a proper jury instruction, and how these legal principles apply to the facts of this appeal. The factum of the Appellant David Stephan herein will focus on the essential elements of the offence charged, arguing the jury instruction delivered in this case failed to adequately explain this offence to the jury.

[3] According to the Majority, the trial judge's instruction correctly identified the three elements of the offence and nothing further was required. According to the Dissent, the trial judge's instructions fell into error because he wholly neglected to explain the fourth element of the offence: the *mens rea*.[2] The Dissent identified a number of legal errors in the trial judge's instruction to the jury. In addition to failing to properly instruct the jury on the *actus reus* of the offence, the trial judge failed to provide *any* guidance on how to perform the *mens rea* analysis.

[4] The thrust of the Dissent is that the instruction gave the jury little choice but to convict. The instruction was confusing, misleading and deficient. The instruction did not instruct the jury on how to assess when any alleged "failure" occurred, nor did it give them the tools they needed to evaluate the Appellants' actions in light of the conduct of a reasonably prudent parent. Further, there was no explanation of what might constitute a "marked departure" from that conduct.[3]

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[1] Contrary to section 215(2)(a)(ii) of the ***Criminal Code***, R.S.C., 1985, c. C-46. **[BOA TAB 16]**
[2] Memorandum of Judgment of the Court of Appeal of Alberta at para 220 [**"Court of Appeal Memorandum"**], Appellant's Record [**"AR"**], Vol 1, [**TAB 1B**].
[3] Court of Appeal Memorandum, *supra* note 2 at paras 212, 245 AR, Vol 1, [**TAB 1B**].

[5] Many cases of failure to provide involve egregious acts of neglect, violence or cruelty on the part of the caregiver; the offence is often alleged along with more serious charges, such as aggravated assault or criminal negligence causing death. In such cases, whether the conduct amounted to a "marked departure" is typically a non-issue. However, in the circumstance of this case, the *actus reas* and the *mens rea* needed significant attention because the evidence was complicated and there were no allegations of egregious parental neglect. There is *no* dispute that the Appellants were doting, loving and conscientious parents. In the circumstances of this case, the fundamental issue was, *if* a failure was found, was the conduct of the Appellants such that it should have been criminalized? For the reasons that follow, the Appellants submit that the jury did not have the instructions necessary to properly consider these questions.

[6] The Crown's theory of the case was that the Appellants failed to take Ezekiel to a doctor because they did not believe in the "efficacy of modern medicine."[4] The Crown called expert medical evidence to provide after-the-fact opinions regarding how Ezekiel would have presented to the Appellants and why. The Crown argued Ezekiel had stopped breathing because bacterial meningitis caused pressure to build up in his brain and that he was essentially dead when the Appellants called 911. With the benefit of 20/20 hindsight, the Crown's experts offered their personal and professional views on what they would have understood and what they would have done if they had seen Ezekiel's symptoms.

[7] In contrast, the defence theory was that Ezekiel had been fighting off a routine childhood illness. The Appellants testified they believed that Ezekiel had croup or the flu; they did not take him to a doctor because his symptoms appeared mild.[5] The day prior to being rushed to the hospital on March 13, 2012, an experienced Registered Nurse who worked in a local emergency department examined Ezekiel, she was unable to find anything wrong with him. This nurse mentioned meningitis to Collet because it was on her mind; she had *no concerns* that Ezekiel actually had it. She suggested to Collet it was something they could "look into."[6]

[8] The defence contended that Ezekiel ultimately stopped breathing because of a mucous obstruction in his airway. His brain death was not caused by swelling due to meningitis, but

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[4] Submission of Mr. Giles, Transcript at 2242/27, AR, Vol II **[TAB B]**.
[5] Closing by Mr. Buckley, Transcript at 3293/24-28, AR, Vol 8 **[TAB 3N]**.
[6] Evidence of Terrie Fay Menders, Transcript at 715/41 – 716/8, AR, Vol IV **[TAB D]**.

rather due to the fact that he went over 8 minutes without oxygen in the ambulance that transported him to the hospital. The ambulance in question was "de-stocked" of the equipment necessary to secure an airway. It had *no* equipment suitable for use on an 18-month-old toddler.

[9] This case offers this Court an opportunity to provide clarity on the analytical framework applicable to this offence. It raises the critical issue of when loving and well-intentioned conduct should be criminalized. In other areas of law, this Court has emphasized the important distinction between the civil and penal standards for negligence.[7] Unlike civil negligence, penal negligence is aimed at punishing morally *blameworthy* conduct. The distinction between civil and penal negligence acquires a constitutional dimension when convictions can result in jail sentences, as is the case here.[8]

[10] For the reasons that follow, the Appellants submit that the material errors and inadequacies in the trial judge's charge undermined the Appellants right to a fair trial and may have culminated in "an unsafe or suspect verdict."[9]

B. The Evidence

The Evidence of David Stephan

[11] During February-March, 2012, David was the vice president of a company that sold natural health products and oversaw its marketing. This position required frequent travel within Western Canada, usually for 3 days per week; while David was on the road, Collet stayed home and cared for the children (Ezekiel and Ezra, aged 4).[10] During the week of February 27, David away from Wednesday to Friday; the following week, he was away from Monday until Thursday. While away, David would speak to Collet regularly by phone, but had no personal knowledge or observations of his children.[11]

[12] On Sunday, February 26, the family went to church. That morning, David gave Ezekiel a bath and recalled that he was less energetic than normal (i.e. he did not fuss as much as he usually did when it was time to wash his hair).[12] However, it was only in hindsight that he

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[7] ***R v Beatty***, 2008 SCC 5 at para 6.
[8] *Ibid.*
[9] Court of Appeal Memorandum, *supra* note 2 at para 212, AR, Vol 1 [**TAB 1B**].
[10] Evidence of David Stephan, Transcript at 2133/37; 2134/12-14, AR, Vol III [**TAB B].**
[11] Evidence of David Stephan, Transcript at 2160/1-21, AR, Vol III [**TAB B].**
[12] Evidence of David Stephan, Transcript at 2160/30-36, AR, Vol III **[TAB B].**

attached any potential meaning to this behaviour.[13] At the time, there was nothing remarkable about Ezekiel's behaviour that day.

The Week of February 27, 2012

[13] On Monday, February 27, David took Collet and the children to preschool then went to a business meeting. Near the end of preschool, Collet called David and told him Ezekiel was sick. When David picked them up, he noticed Ezekiel seemed uncomfortable, agreeing with Collet's assessment that he was sick.[14] David testified, as compared to other days in the relevant two-week time span, Ezekiel's symptoms were the worst on February 27.[15] However, even that day, Ezekiel was fully mobile, and it seemed he had a cold or some other sort of childhood respiratory illness.[16]

[14] The family left preschool and went to the grocery store. During this time, Collet called Terrie Meynders (an experienced emergency room nurse) to inquire about Ezekiel's symptoms. She told Collet that Ezekiel might have "croup" based on the sound he was making.[17] At this time, David noticed that Ezekiel displayed noisy breathing and that he appeared uncomfortable.[18] Based on their understanding of recommendations for croup, David and Collet made sure Ezekiel got plenty of fresh air and exposed him to humidity.[19] Additionally, David and Collet introduced some herbal remedies. David gave Ezekiel olive-leaf extract, because he understood it to contain antiviral and antibacterial properties.[20] He and Collet had used the extract on themselves in the past and felt that it was effective in fighting off colds and the flu.[21] They also added herbal supplements to Ezekiel's usual smoothies to boost his immune system so he could fight off what was ailing him.[22] Collet explained to David that the croup was viral and not much could be done for it.[23]

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[13] Evidence of David Stephan, Transcript at 2162/9-14, AR, Vol III **[TAB B].**
[14] Evidence of David Stephan, Transcript at 2162/23-35, AR, Vol III **[TAB B].**
[15] Evidence of David Stephan, Transcript at 2174/24-25, AR, Vol III [**TAB B].**
[16] Evidence of David Stephan, Transcript at 2175/4-6; 2172/39-41, AR, Vol III **[TAB B].**
[17] Evidence of David Stephan, Transcript at 2163/26-28, AR, Vol III **[TAB B].**
[18] Evidence of David Stephan, Transcript at 2163/38-41, AR, Vol III **[TAB B].**
[19] Evidence of David Stephan, Transcript at 2173/14-16, 22-25, AR, Vol III **[TAB B].**
[20] Evidence of David Stephan, Transcript at 2167/21-22, AR, Vol III **[TAB B].**
[21] Evidence of David Stephan, Transcript at 2167/25-28, AR, Vol III **[TAB B].**
[22] Evidence of David Stephan, Transcript at 2168/3-6, 27-28, AR, Vol III **[TAB B].**
[23] Evidence of David Stephan, Transcript at 2351/1-8, AR, Vol III **[TAB B].**

[15] David and Collet made fruit smoothies for themselves and their children for breakfast on a regular basis. They included frozen berries, organic sugar-free juice, and protein powder; to that, they would add multivitamins, probiotics, omega fatty acids as well as greens. When a family member started to come down with cold, immune system boosters would typically be added for extra nutrition to assist in fighting off the illness. An example of a supplement that may be added was olive leaf extract because it was believed to help overcome symptoms of the flu or a cold.[24] Additionally, David described Collet as being "extremely attentive" in terms of ensuring that the children were receiving the appropriate amounts of fluids. Anytime Collet believed any of the children were not getting enough liquids, she would use an eyedropper to administer extra liquids to them.[25] With respect to Ezekiel's hydration, David never noticed him having difficulty drinking between February 27 and March 13.[26]

[16] David was out of town for work from Wednesday, February 29 - Friday, March 2. During that period, through calls with Collet, he understood that Ezekiel had the progression of a normal cold. David's recollection was that, by either Friday or Saturday, Ezekiel was back to running around again.[27] David understood that Collet stopped giving Ezekiel extra supplements on the Friday and Saturday because it appeared they were no longer needed. Ezekiel's symptoms were improving and his congestion and discomfort seemed to have disappeared.[28] David believed that, by Saturday, Ezekiel appeared to be about 80% back to normal; it was clear to him that he was now in recovery.[29] He and Collet did not take Ezekiel to a doctor over this time period because his symptoms seemed like a normal childhood croup or a cold. There were no severe symptoms and nothing suggested to David medical attention was needed; Ezekiel seemed to be coming out of his cold like Ezra had in the past and like David himself had experienced.[30]

[17] On Sunday, March 4, Ezekiel joined the family at church around noon, after his nap. Normally Ezekiel would skip naptime for church, but David and Collet decided that day he

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[24] Evidence of David Stephan, Transcript at 2164/6-2165/17, AR, Vol III **TAB B].**
[25] Evidence of David Stephan, Transcript at 2170/13-15, AR, Vol III **[TAB B].**
[26] Evidence of David Stephan, Transcript at 2171/8-13, AR, Vol III **[TAB B].**
[27] Evidence of David Stephan, Transcript at 2184/37-38, AR, Vol III **[TAB B].**
[28] Evidence of David Stephan, Transcript at 2184/4-15, AR, Vol III **[TAB B].**
[29] Evidence of David Stephan, Transcript at 2185/39-2186/1, AR, Vol III **[TAB B].**
[30] Evidence of David Stephan, Transcript at 2186/5-10, AR, Vol III **[TAB B].**

would attend after his nap, which would be better for his recovery. David explained that Ezekiel sat on the pew and, at some point, David moved him to his lap so he could "restrain" him for the remainder of the service (i.e. ensuring he stayed seated and did not run around the church).[31] If there had been a concern for Ezekiel's health, David would not have taken him to church that Sunday.[32] David described Ezekiel as not "100%" but in "recovery mode"; Ezekiel was returning to his normal activities, playing with toys, looking at books or playing in the large downstairs playroom. David did not take Ezekiel to a doctor on or around that date because Ezekiel was almost entirely over his illness, his energy levels were returning and he was beginning to behave as normal.[33]

The Week of March 5, 2012

[18] David went on another business trip on Monday, March 5. He learned from Collet that Ezekiel and Ezra would be going to preschool as usual. At this point, Collet was no longer giving Ezekiel supplements in his smoothie because he did not appear to need them. When asked why Ezekiel was not taken to a doctor at this point, David testified that based on his observations of Ezekiel, it did not appear appropriate to do so because Ezekiel was "doing well."[34]

[19] David spoke with Collet over the phone on Tuesday, March 6, and she told him that Ezekiel had been tired and spent the day in bed watching cartoons.[35] They discussed that Ezekiel had done "too much too soon" and Collet mentioned the "diaper pulling."[36] This behavior did not mean anything to David when he first heard it, but later when Dr. Gamble told him there was evidence of Ezekiel having seizures, David thought that maybe the diaper pulling could have been a seizure. David testified that Ezekiel was not taken to a doctor on March 6 because, from what he was told by Collet, it seemed like he was just tired from having done too much the day prior.[37]

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[31] Evidence of David Stephan, Transcript at 2187/4-20, AR, Vol III **[TAB B].**
[32] Evidence of David Stephan, Transcript at 2188/8, AR, Vol III **[TAB B].**
[33] Evidence of David Stephan, Transcript at 2191/29-31 AR, Vol III **[TAB B].**
[34] Evidence of David Stephan, Transcript at 2194/9-10, AR, Vol III **[TAB B].**
[35] Evidence of David Stephan, Transcript at 2196/31-33, AR, Vol III **[TAB B].**
[36] Evidence of David Stephan, Transcript at 2194/28-2195/4, AR, Vol III **[TAB B].**
[37] Evidence of David Stephan, Transcript at 2198/13-23, AR, Vol III **[TAB B].**

[20] During their phone conversation on Wednesday, March 7, Collet told David Ezekiel might be getting sick again. During their conversation, they agreed to give Ezekiel some olive-leaf extract.[38] David picked up some items for Ezekiel at a health food store that he thought could help boost his immune system and help him fight off the illness. On Thursday, March 8, David returned from his business trip around noon. Ezekiel was lying in David and Collet's bed watching cartoons. His first thought was that maybe Ezekiel was coming down with a flu he had had picked up at preschool.[39] He did not think it was a continuation of the illness Ezekiel had had the week before. David observed that Ezekiel seemed to have a bit of achiness or tension but equated this to the normal tension one gets when one has the flu.[40] David explained that he made up a batch of ginger, garlic, onion, hot peppers and apple cider vinegar that can be eaten as a chip dip (salsa) or as a salad dressing mixed with oil. This blend of ingredients was used by him but was also added to Ezekiel's diet to assist in boosting his immune system.[41] David explained that Ezekiel would sit on his lap and eat the salsa and chips with him.[42]

[21] Over the course of the next two days, Ezekiel appeared to get better; the tension completely subsided – he was back in recovery mode again, and out of the illness. His energy levels had not completely returned, but he was not showing the same signs of illness from when he had the croup.[43] When asked why they did not take Ezekiel to the doctor at this point, David testified that it was because they believed that all of the symptoms he had were consistent with a mild flu. There was nothing severe that would call for bringing him to a doctor – there was no throwing up or anything that required medical intervention.[44] David and Collet decided it was best to keep Ezekiel home from church on Sunday, March 11 because his energy levels were low and they believed he was still recovering.[45]

Monday, March 12, 2012

[22] On Monday, March 12, David went to a meeting in the morning. He had slept in the spare room that night because he did not want to wake up Collet when he got up early in the

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[38] Evidence of David Stephan, Transcript at 2199/L2-7, AR, Vol III **[TAB B].**
[39] Evidence of David Stephan, Transcript at 2199/24-2200/9, AR, Vol III **[TAB B].**
[40] Evidence of David Stephan, Transcript at 2201/31-38, AR, Vol III **[TAB B].**
[41] Evidence of David Stephan, Transcript at 2200/16-2201/1, AR, Vol III **[TAB B].**
[42] Evidence of David Stephan, Transcript at 2201/25-26, AR, Vol III **[TAB B].**
[43] Evidence of David Stephan, Transcript at 2201/40-2202/6, AR, Vol III [**TAB B].**
[44] Evidence of David Stephan, Transcript at 2204/6-16, AR, Vol III **[TAB B].**
[45] Evidence of David Stephan, Transcript at 2207/28-31, AR, Vol III **[TAB B].**

morning. At this time, Ezekiel slept with Collet "off and on". When David returned at lunchtime, Collet was frustrated with David's "absenteeism" and the fact that she had been up in the night with Ezekiel. He was about to head off to another meeting but, prior to leaving, they discussed what to do for Ezekiel. They discussed taking Ezekiel to the hospital or doctor. They were concerned about upsetting Ezekiel by taking him out and they decided to have Ms. Meynders, the Registered Nurse, come and look at him.[46] The plan was that they were going to get an opinion from Ms. Meynders before taking any further steps.[47]

[23] David went to his afternoon meeting; when he next spoke to Collet, she told him Ms. Meynders recommended that they give Ezekiel Pedialyte and electrolytes. Collet mentioned that Ms. Meynders had suggested looking into the potential of meningitis. David asked Collet about meningitis and she explained it to him over the phone.[48] When Collet described the symptoms, he thought it was similar to the flu.[49] After speaking with Collet, David had a conversation with his father, Anthony Stephan. David asked him to come by the house that night to look at Ezekiel and give him a blessing.[50]

[24] When David arrived home that evening, Collet was in much better spirits because Ms. Meynders had checked Ezekiel's vitals and had reassured her that everything appeared fine.[51] David noticed that Ezekiel's stiffness had returned but equated this to the stiffness one might experience when they are coming down with the flu.[52] Collet told him that Ms. Meynders said that if they took Ezekiel to the hospital, they would likely be turned away because of his lack of symptoms.[53] They agreed to go back to giving him the nutritional supplements they were using the week before and, if anything got worse, they would take Ezekiel to the doctor immediately.[54] David testified that, overall, their level of concern was low at this point because the symptoms had been off and on for a week and they were not as severe as what Collet had

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[46] Evidence of David Stephan, Transcript at 2211/9-25, AR, Vol III **[TAB B].**
[47] Evidence of David Stephan, Transcript at 2211/22-25, AR, Vol III **[TAB B].**
[48] Evidence of David Stephan, Transcript at 2211/27-34, AR, Vol III **[TAB B].**
[49] Evidence of David Stephan, Transcript at 2142/10-14, AR, Vol III **[TAB B].**
[50] Evidence of David Stephan, Transcript at 2211/37-39, AR, Vol III **[TAB B].**
[51] Evidence of David Stephan, Transcript at 2211/41-2212/6, AR, Vol III **[TAB B].**
[52] Evidence of David Stephan, Transcript at 2212/23-30, AR, Vol III **[TAB B].**
[53] Evidence of David Stephan, Transcript at 2212/36-38, AR, Vol III **[TAB B].**
[54] Evidence of David Stephan, Transcript at 2214/11-21, AR, Vol III **[TAB B].**

read about meningitis online.[55] They believed that *if* Ezekiel had meningitis, he would have full-blown symptoms, none of which were present at that time.[56]

Tuesday, March 13, 2012

[25] On Tuesday, March 13, the family took a brief trip into Lethbridge. There, they went to their lawyer's office to sign documents pertaining to the sale of their house. They took turns going into the office so one parent could stay in the car with the children. They then went to the naturopath's clinic and the grocery store. Collet went inside while David dozed off in the backseat with Ezekiel. He awoke to Ezekiel playing with his lip. He told Collet about this and they had a chuckle over it. When they returned home, Ezekiel consumed a child-sized cup of the Pedialyte recommended by Ms. Meynders.[57] Ezekiel then laid down for a nap and appeared to be sleeping normally with no tension or achiness.[58]

[26] David testified that, during this trip, Ezekiel was never too stiff to be placed into his car seat; he had in fact been put into his car seat but looked uncomfortable.[59] While in the car seat, he was not crying or indicating to them that he was in pain – he just did not look comfortable.[60] Considering the hour-long drive, they decided to bring his mattress topper into the vehicle and lay down one of the seats so the he could move around or lay down during the drive.[61]

Ezekiel's Respiratory Arrest

[27] Later in the afternoon, David and Collet agreed that Collet would go to a church function that evening and David would stay home with the kids. Originally Collet was not planning to go but based on Ezekiel's progress over the day, they decided she would attend. By the time Ezekiel went down for his nap he was tired but David did not see any signs of illness.[62] About an hour after Collet left, David noticed that Ezekiel had a breathing irregularity. David described it as a deep breath, followed by a normal breath, followed by a shallow breath.[63] It

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[55] Evidence of David Stephan, Transcript at 2214/24-29, AR, Vol III **[TAB B].**
[56] Evidence of David Stephan, Transcript at 2218/15-23, AR, Vol III **[TAB B].**
[57] Evidence of David Stephan, Transcript at 2224/1-32, AR, Vol III [**TAB B].**
[58] Evidence of David Stephan, Transcript at 2224/35-2225/4, AR, Vol III **[TAB B].**
[59] Evidence of David Stephan, Transcript at 2220/1-2, AR, Vol III **[TAB B].**
[60] Evidence of David Stephan, Transcript at 2220/4-8, 16-17, 27-33, AR, Vol III **[TAB B].**
[61] Evidence of David Stephan, Transcript at 2219/2-14, AR, Vol III **[TAB B].**
[62] Evidence of David Stephan, Transcript at 2225/11-16, AR, Vol III **[TAB B].**
[63] Evidence of David Stephan, Transcript at 2226/11-14, AR, Vol III **[TAB B].**

was different than the sound Ezekiel made when he had croup.[64] He explained this to Collet over the phone when she called to see how things were going and she returned home.[65]

[28] While David and Collet were discussing whether or not they should be worried about the rhythm and whether they needed to take Ezekiel to the doctor, Ezekiel suddenly stopped breathing.[66] David called 911 and advised the operator that they needed an ambulance because his son had stopped breathing. He was trying to communicate the address but because they live in a rural area, regular addresses do not apply. David ran down the driveway to the township road and located the "911 address" for the operator so they could dispatch an ambulance. When he ran went back into the bedroom, he found Ezekiel had coughed up mucous and was breathing again.[67] David thought that maybe Ezekiel had aspirated some of the fluid he had been giving him and that was why his breathing had changed. David thought it would be faster to drive Ezekiel to the hospital rather than wait the 30 minutes for the ambulance to get to them. At that point Ezekiel was breathing "fine" and the plan was to take him to the hospital and have him checked as to why he had stopped breathing for that brief period of time.

[29] David began preparing the vehicle for the trip, putting the mattress topper back in the vehicle, getting Ezra out of bed and ready, and making calls to inform his father to meet them at the hospital. After travelling for about 1-2 miles Collet said that Ezekiel had stopped breathing again.[68] David (while attempting to maintain control over the vehicle on a gravel road) called 911 again and told them they needed an ambulance "right away" and that they would meet the ambulance on the road. He told the operator where to have the ambulance meet them, and passed the phone to Collet so they could coach her through CPR.[69]

[30] They met the ambulance about 5-8 kilometers outside of Cardston. The paramedic came to the driver's side backdoor where Collet was performing CPR and they took Ezekiel into the ambulance. Since there was no room for Collet or David to go with Ezekiel, they sat in their vehicle and waited for the ambulance to leave.[70] They then followed the ambulance to the

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[64] Evidence of David Stephan, Transcript at 2234/12-20, AR, Vol III **[TAB B].**
[65] Evidence of David Stephan, Transcript at 2226/19-24, AR, Vol III **[TAB B].**
[66] Evidence of David Stephan, Transcript at 2226/36-38, AR, Vol III **[TAB B].**
[67] Evidence of David Stephan, Transcript at 2227/2-30, AR, Vol III **[TAB B].**
[68] Evidence of David Stephan, Transcript at 2228/10-38, AR, Vol III **[TAB B].**
[69] Evidence of David Stephan, Transcript at 2228/34-38; 2230/8-11, AR, Vol III [**TAB B].**
[70] Evidence of David Stephan, Transcript at 2135/14, 28-32, AR, Vol III **[TAB B].**

Cardston Hospital; once they got there, things were "kind of a blur."[71] David estimated he was there for about an hour. He recalled seeing Dr. Clarke and the EMTs treating Ezekiel. He recalled phone calls being made to transport Ezekiel to the Children's Hospital in Calgary *via* helicopter.[72]

[31] As there was a snowstorm blowing in, Ezekiel had to be taken to the Lethbridge Hospital so that the helicopter could land. David and Collet decided to go home and pack what they needed and then drive to Calgary.[73] David testified that, when he returned to the house, he felt "shell-shocked";[74] his brother, Daniel, was there with his wife, Karalyn, and they helped David and Collet pack.

Attendance at the Alberta Children's Hospital

[32] Daniel drove them to the Children's Hospital in Calgary, where Ezekiel arrived about 45 minutes after they did. They spoke with Dr. Burkholder, who told them that that Ezekiel's heart had stopped beating for a prolonged period of time and that there was a lack of brain activity.[75] David testified that, when discussing Ezekiel's history with Dr. Burkholder, he attempted to relay the confusion caused by Ezekiel's lack of symptoms before he stopped breathing. David was trying to give the doctors every possible clue that they observed in order to help them rectify the situation.[76]

[33] Prior to speaking with Dr. Burkholder, all of David's knowledge about meningitis had come from Collet.[77] He did not conduct any of his own research.[78] Based on the information he had received from Collet, he believed meningitis was a possibility simply due to the overlap of symptoms with the flu.[79] He knew bacterial meningitis could be fatal, but it was his understanding that if Ezekiel had bacterial meningitis, there would be a 24 to 48-hour window where the symptoms would become severe. These symptoms would include: extreme fever and seizures. Based on Ezekiel's symptoms, Collet explained that, if Ezekiel had meningitis, it must

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[71] Evidence of David Stephan, Transcript at 2136/8-10, Vol III **[TAB B].**
[72] Evidence of David Stephan, Transcript at 2136/17-18, 34-37, AR, Vol III **[TAB B].**
[73] Evidence of David Stephan, Transcript at 2137/1-16, AR, Vol III **[TAB B].**
[74] Evidence of David Stephan, Transcript at 2137/28-30, AR, Vol III **[TAB B].**
[75] Evidence of David Stephan, Transcript at 2138/31-41, AR, Vol III **[TAB B].**
[76] Evidence of David Stephan, Transcript at 2140/12-17, AR, Vol III **[TAB B].**
[77] Evidence of David Stephan, Transcript at 2143/7-10, AR, Vol III **[TAB B].**
[78] Evidence of David Stephan, Transcript at 2147/39-41, AR, Vol III **[TAB B].**
[79] Evidence of David Stephan, Transcript at 2148/13-14, AR, Vol III **[TAB B].**

have been viral [80] David's understanding of viral meningitis was that it could not be treated with antibiotics and one would have to wait it out, try to boost the immune system and monitor the symptoms.[81]

[34] At the time that he was speaking to Dr. Burkholder and the other doctors (as well as Cst. Bulford and the social workers), David had no idea that the paramedics were unable to secure an airway for Ezekiel for over 8 minutes. Two days later, he learned about the problems in the ambulance. As he had no idea about the airway problem, he was dumbfounded when the doctors told him that Ezekiel's heart had stopped, there was a lack of brain activity and that Ezekiel had seizures.[82] When he was speaking to the various doctors and officials, David was trying to absorb what they were telling him and put together any of his past symptoms that would shed any light on the situation. He was providing as much information as he could, in an attempt to save Ezekiel's life.[83]

Cross Examination of David Stephan

[35] At the outset of cross-examination, the Crown advised he sought advance rulings on 5 proposed areas of cross-examination, providing a supporting legal brief. Defence counsel had no prior notice of these issues and objected to the proposed lines of questioning on the basis that they involved character evidence, and were not relevant because the operative test was an objective one (citing *Naglik*). According to the Crown, the proposed areas of questioning were relevant to "motive."[84] Specifically, the Crown's theory of "motive" was that David did not take Ezekiel to the doctor because he did not believe in "efficacy of modern medicine."[85] The Crown also intended to question David's "economic" or "ideological" interest in preferring "homeopathic" medicine to "conventional modern medicine."[86] The Crown also wanted to ask about his past experiences with modern medicine that may have led him to be skeptical about its efficacy. The trial judge determined that David's "motive" in not taking Ezekiel to the doctor was relevant to determine if his conduct amounted to a marked departure from the standard of

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[80] Evidence of David Stephan, Transcript at 2142/30-39, AR, Vol III **[TAB B].**
[81] Evidence of David Stephan, Transcript at 2484/13-17, AR, Vol III **[TAB B].**
[82] Evidence of David Stephan, Transcript at 2139/27-28, AR, Vol III **[TAB B].**
[83] Evidence of David Stephan, Transcript at 2139/13-19; 2140/12-17, AR, Vol III **[TAB B].**
[84] Submission by Mr. Giles, Transcript at 2243/10-32, AR, Vol III **[TAB B].**
[85] Submission by Mr. Giles, Transcript at 2242/27, AR, Vol III **[TAB B].**
[86] Submission by Mr. Giles, Transcript at 2242/41-2243/1, AR, Vol III **[TAB B].**

the reasonable person. According to the trial judge, it was permissible for the Crown to suggest that David "did not believe in doctors."[87]

[36] In cross, David reiterated that Collet had told him that Ms. Meynders had examined Ezekiel and suggested to her that meningitis was something "to look into."[88] According to Collet, her suggestion was simply an idea based on a case of meningitis having been diagnosed two weeks prior at the hospital where she worked. David reiterated that, according to Collet, Ms. Meynders had said meningitis should be "looked into"; she never said it "might be" meningitis. Collet further relayed it was Ms. Meynders opinion that, if they took Ezekiel to a doctor or the hospital, they would likely have been turned away due to lack of symptoms.[89]

[37] The Crown suggested to David, "You don't trust conventional medicine very much do you?"[90] The Crown suggested, by way of example, that David had used herbal remedies for his knee injuries because he did not believe in conventional medicine. David replied that he had actually had surgery for his knees, and he altered his diet to lose weight, which also assisted his knees.[91] The Crown asked David about his resentment for "conventional medicine" because family members had suffered from mental illness and had not been cured by psychiatric drugs.[92] David agreed that certain side effects of psychiatric medications were of concern to him. He further agreed that, while natural remedies may assist certain health issues, when it came to "infectious disease," there was nothing more powerful than antibiotics.[93] The Crown suggested that David believed that conventional medical practices have significant shortcomings, to which David responded that he felt there were certain shortcomings in psychiatric medication that did not apply to "emergent" medical situations or infectious disease.[94]

[38] As to why Ezekiel was not taken to see a naturopathic doctor, David explained that it was "telling" that Collet never took him because the symptoms were just not concerning enough. The Crown responded, "well I think you and I, sir will just have to disagree on what it

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[87] Trial Judge's Ruling, Transcript at 2306/34-36, AR, Vol III **[TAB B].**
[88] Evidence of David Stephan, Transcript at 2477/16-18, AR, Vol III **[TAB B].**
[89] Evidence of David Stephan, Transcript at 2479/31-37; 2480/9-11, AR, Vol III **[TAB B].**
[90] Question by Mr. Giles, Transcript at 2489/8-9, AR, Vol III **[TAB B].**
[91] Evidence of David Stephan, Transcript at 2489/37-2490/3, AR, Vol III **[TAB B].**
[92] Question by Mr. Giles, Transcript at 2490/15, AR, Vol III **[TAB B].**
[93] Evidence of David Stephan, Transcript at 2491/7-10, AR, Vol III **[TAB B].**
[94] Evidence of David Stephan, Transcript at 2504/16-20, AR, Vol III **[TAB B].**

is telling about."[95] After a break, and despite the trial judge cautioning the Crown about offering opinions as commentary, the Crown began a line of inquiry suggesting David was delusional due to his affinity for the products he sold. The Crown asked "subconsciously or otherwise, you may be able to recognize now, that had in fact, your children been sick in a way that was incommensurate with your continued belief that they were effective, you just wouldn't see what you were looking to not find?"[96] The Crown questioned, "it was very difficult for you to see the sickness in Ezekiel because you wanted to see him as being healthy. Will you admit that that's possible?"[97] Mr. Stephan rejected the suggestion that he had been delusional in seeing Ezekiel's symptoms stating, "no, I don't put on blinders."[98]

Kenneth Cherniawsky – Ambulance Attendant

[39] At approximately 10:00 p.m., 911 dispatched an ambulance for Ezekiel.[99] About 4 minutes later, 8 kilometers north of Cardston, the ambulance met the Appellants' vehicle.[100] He and his partner immediately attempted to establish an airway using a pediatric-sized bagged valve mask (BVM). However, the pediatric mask is designed for children aged 8-10, and did not fit Ezekiel; with no seal, air could not enter Ezekiel's lungs.[101] According to his evidence, when he began his service in 2008, ambulances in Cardston had various BMV mask sizes, including infant and toddler-sized.[102] However, sometime between 2008-2012, an Alberta Health Service's control protocol had been interpreted by certain individuals as requiring that certain masks and other equipment be removed from the ambulances.[103] Mr. Cherniawsky had personally made several requests to have the ambulance re-stocked with the different-sized masks, all of which went unfulfilled.[104] However, within 1 week of Ezekiel's call, the ambulances were re-stocked with appropriate-sized masks.[105]

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[95] Question by Mr. Giles, Transcript at 2520/31, AR, Vol III **[TAB B].**
[96] Question by Mr. Giles, Transcript at 2350/31-34, AR, Vol III **[TAB B].**
[97] Question by Mr. Giles, Transcript at 2531/9-11, AR, Vol III **[TAB B].**
[98] Evidence of David Stephan, Transcript at 2531/34, AR, Vol III **[TAB B].**
[99] Evidence of Kenneth Cherniawsky, Transcript at 1758/20-30, AR, Vol IV **[TAB C].**
[100] Evidence of Kenneth Cherniawsky, Transcript at 1759/21-25, AR, Vol IV **[TAB C].**
[101] Evidence of Kenneth Cherniawsky, Transcript at 1761/12-16; 1782 AR, Vol IV **[TAB C].**
[102] Evidence of Kenneth Cherniawsky, Transcript at 1782; 1783/22-25, AR, Vol IV **[TAB C].**
[103] Evidence of Kenneth Cherniawsky, Transcript at 1783/2-8, AR, Vol IV **[TAB C].**
[104] Evidence of Kenneth Cherniawsky, Transcript at 1785/25-34, AR, Vol IV **[TAB C].**
[105] Evidence of Kenneth Cherniawsky, Transcript at 1786/24-26, AR, Vol IV **[TAB C].**

[40] After attempting a BVM for 2 minutes and 30 seconds without success,[106] Mr. Cherniawsky and his partner next attempted a laryngeal mask airway.[107] A device was used to estimate the size of equipment necessary for Ezekiel, indicating a number 2 would be required; on the ambulance, only number 1 and number 3 were available. Both were tried, with neither producing an adequate seal for the laryngeal mask.[108] Having unsuccessfully attempted the laryngeal airway for 5 minutes and 11 seconds, they moved onto the next technique – intubation.[109] The ambulance ought to have had an array of endotracheal tube sizes available, but this ambulance only had a size 3 tube. Although too small (causing air to blow past the tube), Ezekiel's chest began to rise and fall indicating that some ventilation was taking place.[110] A second ambulance equipped with the different endotracheal tubes, and paramedic Lou Labrash was successfully intubated Ezekiel at 10:11 p.m. By this time, Ezekiel had been in the care of emergency personnel, without an airway, for 8 minutes. The team arrived at the Cardston hospital at 10:13 p.m.[111] During transport Ezekiel's heart never began to beat on its own but his color did slightly improve during transport due to effective chest compressions.[112]

[41] Around the same time the ambulances were de-stocked of BVMs, they were also destocked of the various endotracheal tube sizes.[113] When Mr. Cherniawsky began working in Cardston, the ambulances were stocked with sizes 2.5 to 9, including different half-sizes. After being de-stocked, the Cardston ambulances were left with endotracheal tube sizes of 3, 5, 6, 7, and 8.[114] Recognizing that the ambulances were not appropriately stocked with equipment, Mr. Cherniawsky had also attempted to remedy this situation prior to the call involving Ezekiel.[115]

[42] The initial ambulance took over care of Ezekiel at 10:03. Within 30 seconds the team was attempting to secure an airway using the BVM. At 10:06 the team gave up their attempts with BVM and moved to laryngeal airway attempts. At 10:11 the second ambulance was finally

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[106] Evidence of Kenneth Cherniawsky, Transcript at 1795/3-4, AR, Vol IV **[TAB C].**
[107] Evidence of Kenneth Cherniawsky, Transcript at 1761/34-37, AR, Vol IV **[TAB C].**
[108] Evidence of Kenneth Cherniawsky, Transcript at 1762/3-23, AR, Vol IV **[TAB C].**
[109] Evidence of Kenneth Cherniawsky, Transcript at 1797/21-22, AR, Vol IV **[TAB C].**
[110] Evidence of Kenneth Cherniawsky, Transcript at 1762/31-33, AR, Vol IV **[TAB C].**
[111] Evidence of Kenneth Cherniawsky, Transcript at 1806/5-13; 1804/11, AR, Vol IV **[TAB C].**
[112] Evidence of Kenneth Cherniawsky, Transcript at 1811/35-1812/5, AR, Vol IV **[TAB C].**
[113] Evidence of Kenneth Cherniawsky, Transcript at 1799/31-32, 38-40, AR, Vol IV **[TAB C].**
[114] Evidence of Kenneth Cherniawsky, Transcript at 1800/1-3, AR, Vol IV **[TAB C].**
[115] Evidence of Kenneth Cherniawsky, Transcript at 1801/13-18, AR, Vol IV **[TAB C].**

successful with the intubation of Ezekiel, resulting in an 8 minute and 11 second delay between taking over care of Ezekiel and successfully getting Ezekiel's chest to rise and fall.[116] This 8 minute, 11 second delay was caused solely due to the lack of appropriate equipment sizes on the Cardston ambulance.[117] Somewhat tellingly, Mr. Cherniawsky testified that his employer had instructed him not to discuss any matters pertaining to Ezekiel's call with anyone, including with defense counsel.[118]

Evidence of Dr. Burkholder

[43] Dr. Burkholder, a paediatric intensivist, was qualified as an expert to provide opinion evidence.[119] She arranged for Ezekiel's transportation from Cardston to Lethbridge, where a STARS air-ambulance helicopter transported him to the Alberta Children's Hospital in Calgary. When he arrived, she assessed him and sent him for a CAT scan. She interpreted the CAT scan as being "extremely abnormal," thought he had brain swelling likely caused by meningitis, and opined he was going to die. She described meningitis, the types of meningitis and its treatment for the jury.[120]

[44] At the Crown's request, Dr. Burkholder provided her opinion on a number of other matters: WebMD not being a source that she would use as a doctor, explanation of the ambulance attendant's report, the Brudzinski and Kernig tests, the diagnosis of brain death, the Glasgow Coma score, and side effects from meningitis. She disagreed with the radiologist's conclusion that Ezekiel's brain swelling was due to a lack of oxygen. She said the radiologist would not be in a position to make that determination. In her opinion, there was no evidence that Ezekiel suffered a traumatic injury *en route* to the hospital.[121]

[45] The Crown also asked Dr. to provide an opinion based on hypothetical symptoms. The Crown asked her to comment on whether a litany of symptoms were consistent with meningitis: tired or less alert, lying on a bed, not playing, decline in appetite, involuntary rubbing of the

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[116] Evidence of Kenneth Cherniawsky, Transcript at 1805/14-1806/33, AR, Vol IV **[TAB C].**
[117] Evidence of Kenneth Cherniawsky, Transcript at 1807/8-10, AR, Vol IV **[TAB C].**
[118] Evidence of Kenneth Cherniawsky, Transcript at 1774/4-15, AR, Vol IV **[TAB C].**
[119] Qualification Ruling of the Trial Judge, Transcript at 1217/11-14. AR, Vol V **[TAB I].**
[120] Evidence of Dr. Burkholder, Transcript at 1224/13-21; 1226/40-1226/1; 1231/16; 1232/16-17; 1249/7-9; 1234/2; 1234/21-22, AR, Vol V **[TAB I].**
[121] Evidence of Dr. Burkholder, Transcript at 1249/27-28; 1250/36-37; 1321/10-16, AR, Vol V **[TAB I].**

head or pulling of the diaper, or a decrease in fluid intake. The Crown read the following text message to her, "Poor little man tries to sleep, but every 30 seconds, sits up straight, even though he is propped up, and opens his eyes because he chokes on his saliva. His troublesome sleep is killing me," and asked her opinion on those statements relative to the diagnosis of meningitis.[122]

Objection to Further Medical Evidence – Evidence Unnecessary

[46] At trial, the Crown sought to tender several other doctors to provide evidence regarding Ezekiel's treatment and meningitis more generally, including Doctors Ross and Gamble. The Defence objected, on the basis these experts would provide essentially the same evidence as Dr. Burkholder. Defence counsel applied to exclude Dr. Ross' testimony because the evidence was "cumulative" and the probative value was not greater than the prejudicial effect.

[47] The Crown argued that Dr. Ross' experience with meningitis was "much larger" and would include the "presentation of the illness and symptomology." Furthermore, Dr. Gamble was going to provide opinions on "hypotheticals" at different stages of "progression." The Crown stated that Dr. Burkholder testified to the potential "sequelae" of meningitis out of "happenstance" and argued that that they were allowed to call five experts and would only be asking the court to qualify four. The Crown argued that the Defence was raising the issue that outside forces may have led to Ezekiel's condition, making additional medical evidence required. In the Crown's submission, a proper instruction to the jury would go a long way. Since Dr. Ross was more senior and experienced than Dr. Burkholder, the Crown argued they were entitled to ask her about the radiology report and the EMS report even though they had already presented that evidence through Dr. Burkholder.

[48] The trial judge ruled that the Crown was entitled to call witnesses to describe their involvement with the case. The trial judge concluded that, while there was some potential overlap of the evidence, much of it was caused by the Defence.

Evidence of Dr. Ross

[49] After Dr. Ross was qualified as an expert,[123] the Crown asked her to interpret the ambulance records. Just as Dr. Burkholder had, she described the respiratory rate, blood

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[122] Question by Mr. Giles, Transcript at 1267/13-17, AR, Vol V **[TAB I].**
[123] Submission by Mr. Giles, Transcript at 1405/16-24, AR, Vol V **[TAB J]**, Ruling on

saturation and significance of the use of the word "ashen." Dr. Ross was asked about the notes on the EMS report and she explained the abbreviations and terms. She explained that "complications, wrong tube size" related to the vehicle's inventory.[124]

[50] She went on to explain what meningitis is, and the effect of pressure build up inside the skull. When the Crown asked her about the CAT scan, she cautioned that she was not a neuroradiologist or a neuropathologist but explained what was normally seen in a CAT scan. She explained "diffuse hypoxic insult," meant that a lack of oxygen had been delivered to the brain causing an injury to the "whole thing." She agreed with the radiologist's CAT scan conclusions. She explained that meningitis may have caused the diffuse hypoxic insult, or it could have been cardiac arrest, or it could have been another reason. She explained that meningitis on its own could not be the cause, but the severe inflammation causing increased pressure could lead to arrest.[125]

[51] Dr. Ross was asked by the Crown to describe the Brudzinski and Kernig tests that had already been described by Dr. Burkholder. Crown counsel asked Dr. Ross to comment on various hypothetical symptoms and provide her opinion whether they indicated meningitis: refusal to eat and drink, lethargy, not being active or playful, stiffness, arched back, etc.[126]

Evidence of Dr. Gamble

[52] Dr. Gamble ran a pediatric intensive care practice and was qualified as an expert to give opinion evidence.[127] Dr. Gamble described the in-depth process of determining brain death.[128] Both tests on Ezekiel were consistent with brain death and there was a zero optimism of Ezekiel recovering brain function.[129] The Crown asked Dr. Gamble whether or not he would be content with a home diagnosis if he were concerned about meningitis in relation to his own children. He

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Qualification by Trial Judge, 1408/21-23, AR, Vol V **[TAB J].**

[124] Evidence of Dr. Ross, Transcript at 1417/15-17, 31-36; 1418/5-20; 1421/36-41, AR, Vol V [**TAB J].**

[125] Evidence of Dr. Ross, Transcript at 1425/34; 1426/1-6; 1430/5-6; 1430/19-28; 1433/38-40, AR, Vol V **[TAB J].**

[126] Evidence of Dr. Ross, Transcript at 1445/28-32; 1446/25-28, AR, Vol V **[TAB J].**

[127] Qualifications of Dr. Gamble, Transcript at 1446/30-35, AR, Vol V **[TAB J]**, Ruling on Qualification by Trial Judge, 1901/23-28, AR, Vol VI **[TAB K]**.

[128] Evidence of Dr. Gamble, Transcript at 1913/31-33, AR, Vol VI **[TAB K].**

[129] Evidence of Dr. Gamble, Transcript at 1914/16-20, AR, Vol VI **[TAB K].**

said he would not.[130] Dr. Gamble was asked to comment on the medical resources he used, and WebMD. He was familiar with WebMD but said it was not a reputable source for the medical community. The Crown presented him with a number of hypothetical symptoms:

1. Troublesome breathing and a cough; lethargy; difficulty swallowing; decreased appetite; and presence of a fever. He testified this was un-concerning except the difficulty swallowing and choking on saliva.
2. No fever, lack of energy, decreased appetite, gradual normalization of breathing but with episodes of difficulty. He testified this would not be particularly worrisome.
3. The child recovering somewhat but still presenting lower appetite and lethargy. He testified this is a difficult situation because these symptoms are indicative of common diseases in children.
4. Weakness, low responsiveness, uncommunicative, involuntary actions like pulling on the diaper and not eating and drinking. He testified he would be very concerned about the child and that child would need to be admitted to the hospital.
5. Added stiffness, gradual improvement, but still lacking appetite. He testified this was "textbook meningitis."
6. Arching the back, increased lethargy and refusal of food and drink. He testified this would strengthen the clinical diagnosis of meningitis and this presentation would put the child's life at risk.
7. His opinion on positive results in the Brudzinski and Kernig tests and stiffness to the point of not being able to put the child in a car seat, and an increase lethargy. He testified this would be a medical emergency.
8. The Crown asked him to consider the final fact that the child had stopped arching the back and has gone into a deep sleep. He was concerned that the arching stopped because they were now comatose.[131]

Evidence of Dr. Adeagbo

[53] Dr. Adeagbo, a medical examiner, was qualified to give opinion evidence on forensic pathology, including: conducting examinations, coming to conclusions, and explaining cause of

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[130] Evidence of Dr. Gamble, Transcript at 1940/14-16, AR, Vol VI **[TAB K].**
[131] Evidence of Dr. Gamble, Transcript at 1918/5-26; 1920/30-40; 1922/6-9; 1923/1-3; 1924/6; 1925/34-36; 1928/5-6, AR, Vol VI **[TAB K].**

death, manner of death, and processes leading to death, which includes the interpretation of diseases and injuries. He conducted Ezekiel's autopsy on March 19, 2012.[132] He believed Ezekiel's death was caused by meningitis and an empyema of the lower right lung.[133]

[54] Dr. Adeagbo described meningitis and empyema. He testified Ezekiel's brain was not functioning properly because it was covered in pus and the pus caused the brain to swell. Based on the appearance of his brain, he would have expected Ezekiel to display lethargy, possible seizures and body stiffness. He also stated that a person with this type of brain disease may have fevers, septic shock, weak or shallow breathing, and the heart could stop working properly. With respect to the empyema, he testified that it was a cause of death because the lung was not functioning properly and the body was denied adequate oxygen.[134]

[55] He explained that the symptoms of meningitis are variable and may wax and wane. It would be possible for a patient to exhibit one symptom one day and a different symptom the next. Based on his review of the medical record, Dr. Adeagbo believed Ezekiel also had an upper respiratory infection. He observed rod-shaped organisms under the microscope and attempted to culture a sample to determine what the organism was but the lab was unable to identify any type of bacteria. The DNA profile of the organism indicated it was haemophilus influenzae. Everyone in society carries haemophilus influenzae and it only causes harm when one is immunocompromised (which Ezekiel was not).[135]

[56] Dr. Adeagbo testified he observed "petechiae" (blood spots) on Ezekiel's lungs that usually occur due to lack of oxygen.[136] He said they were caused by "the depression of the respiration from the brain, as well as the lung not being able to expand properly."[137] In his opinion, Ezekiel had an infection that caused the development of a disease that led to his

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[132] Evidence of Dr. Adeagbo, Transcript at 934/37-40, AR, Vol VII **[TAB M]**; Crown-Vetted Confidential Autopsy Report, Alberta Justice Office of the Chief Medical Examiner, File No. 1018-7289, Exhibit 9, AR, Vol IX, **[TAB E].**
[133] Evidence of Dr. Adeagbo, Transcript at 936/4-6; 937/4-5; 978/15, AR, Vol VII **[TAB M].**
[134] Evidence of Dr. Adeagbo, Transcript at 936/17-22; 938/1-21; 939/1-10; 949/36-40; 950/1-11; 937/35-39, AR, Vol VII **[TAB M].**
[135] Evidence of Dr. Adeagbo, Transcript at 940/18, 26-29, 36-38; 941/35-41; 945/26-946/36; 947/8-14, AR, Vol VII **[TAB M].**
[136] Evidence of Dr. Adeagbo, Transcript at 970/34-40, AR, Vol VII **[TAB M].**
[137] Evidence of Dr. Adeagbo, Transcript at 971/10-11, AR, Vol VII **[TAB M].**

death.[138] This is because the pus on Ezekiel's brain and lungs correlated "strongly with the gram-negative bacilli bacteria" that was found which Dr. Adeagbo said was confirmed to be "Haemophilus influenzae."[139] When cross-examined on the test used to come to this conclusion, Dr. Adeagbo confirmed it was a non-clinical test that he called "not ordinary."[140] He testified he found rhinovirus/enterovirus in Ezekiel's nasopharyngeal wash, both of which can cause croup.[141]

[57] Dr. Adeagbo agreed that bacterial meningitis can be difficult to diagnose even for doctors because it can present as a normal childhood illness and can wax and wane. He acknowledged that meningitis can get serious quickly. When asked if it is often too late when meningitis gets obvious and serious, he stated "it depends." Dr. Adeagbo acknowledged there's a pattern of meningitis whereby it can develop quickly and someone can suddenly be in trouble, and agreed such sudden development may occur in a matter of hours.[142]

[58] When questioned whether the 8 minutes of oxygen deprivation in the ambulance could have caused brain damage, Dr. Adeagbo asked for the ambulance report and reviewed it. He then said, "Ezekiel was practically dead when the EMS got there […]. The body was just gone. It was just die (sic)." He further testified:

> We talk about the several minutes it took them to find – if you say eight minutes -- to find, to establish this. You know what? **I really have no comment on that**. I -- I see that -- after that sounds -- I mean, **found somebody particularly dead, but you still continue to do your best** to make -- to establish ways **to revive that person**; you know what, if they've succeeded, that would fantastic, that would be a bonus, and we'd probably call that one an act of God. You know what? I can't […] I have no comment.[143] [Emphasis added.]

[59] When asked whether his finding of "scant neutrophils" was inconsistent with such a serious lung infection, Dr. Adeagbo said that it was due to the fact that the tests were done after several days of antibiotic therapy that the neutrophils may not show up.[144]

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[138] Evidence of Dr. Adeagbo, Transcript at 978/22, AR, Vol VII **[TAB M].**
[139] Evidence of Dr. Adeagbo, Transcript at 978/28-31, AR, Vol VII **[TAB M].**
[140] Evidence of Dr. Adeagbo, Transcript at 1079/27, AR, Vol VII **[TAB M].**
[141] Evidence of Dr. Adeagbo, Transcript at 991/33-35, AR, Vol VII **[TAB M].**
[142] Evidence of Dr. Adeagbo, Transcript at 1009; 1006/10-15; 1011, AR, Vol VII **TAB M].**
[143] Evidence of Dr. Adeagbo, Transcript at 1047/33-36; 1048/7-16, AR, Vol VII **[TAB M].**
[144] Evidence of Dr. Adeagbo, Transcript at 1083/22-34, AR, Vol VII **[TAB M].**

Evidence of Dr. D'Mello

[60] Dr. D'Mello was a pediatrician at the Alberta Children's Hospital and worked in child abuse services.[145] She examined Ezekiel and described him as sick as one could get while still being alive, and testified Ezekiel had already met the initial criteria for brain death.[146] She took his medical history from the Appellants[147] and prepared a report that was tendered in evidence. She was qualified by the Defence as an expert paediatrician in the diagnosis of illness in children, the prognosis of children suffering from illness, and the interpretation of the presentation and the history of illness in children.[148] She testified meningitis in children is hard to diagnose.[149]

Defence Medical Evidence – Dr. Sauvageau

[61] The only doctor called by the Defence was Dr. Anny Sauvageau. She worked as a forensic pathologist from 2002-2009 and performed over 300 autopsies per year.[150] She was also very involved with the Royal College of Physicians and Surgeons, reviewed journal articles and published extensively in her field. From 2009-2010, she was a forensic pathologist in Alberta and in 2010, she became the Deputy Chief Medical Examiner at the Office of the Chief Medical Examiner in Edmonton. From 2011 to 2014, Dr. Saugaveau was the Chief Medical Examiner for Alberta.[151] At the time of trial she had been qualified as an expert witness over 300 times.[152] With respect to Ezekiel, Dr. Saugaveau adopted her report as an explanation of what she had done and her opinions, and it was tendered.[153]

[62] The trial judge qualified Dr. Sauvageau as an expert in forensic pathology and asphyxia entitled to give opinion evidence, which included "conducting examinations, coming to conclusions, and explaining cause of the death, manner of death, and processes leading to death, which includes the interpretation of diseases and injuries, including hypoxic and anoxic injury

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[145] Evidence of Dr. D'Mello, Transcript at 1105/1-5, AR, Vol VI [**TAB L].**
[146] Evidence of Dr. D'Mello, Transcript at 1111/29-34, AR, Vol VI **[TAB L].**
[147] Evidence of Dr. D'Mello, Transcript at 1113/7-18, AR, Vol VI **[TAB L].**
[148] Ruling on Qualification by Trial Judge, Transcript at 1164/27-30, AR, Vol VI **[TAB L].**
[149] Evidence of Dr. D'Mello, Transcript at 1166/1-41, AR, Vol VI **[TAB L].**
[150] Curriculum Vitae of Dr. Anny Sauvageau, M.D., M.Sc., Exhibit 22, AR, Vol IX **[TAB O].**
[151] Curriculum Vitae of Dr. Anny Sauvageau, M.D., M.Sc., Exhibit 22, AR, Vol IX **[TAB O].**
[152] Evidence of Dr. Sauvageau, Transcript at 2892/34, AR, Vol VII **[TAB N].**
[153] Redacted Version of the Report of Dr. Anny Sauvageau, Re: Death of Ezekiel Stephan, Exhibit 23, AR, Vol IX, **[TAB P].**

and when brain damage is caused by hypoxic and anoxic injury." The trial judge ruled that she was *not* qualified to give any opinions "on the diagnosis or prognosis of chronic illness."[154] The issue of Dr. Sauvageau's qualification was revisited multiple times during the proceedings.[155]

[63] Dr. Sauvageau reviewed Ezekiel's file at the Office of the Chief Medical Examiner as well as Dr. Adeagbo's evidence at trial and the preliminary inquiry. Her un-redacted report included the following notable conclusions:

a. Ezekiel presented with intermittent symptoms of croup in the two weeks prior to March 13, 2012;
b. Ezekiel's respiration during the 911 call was characteristic of an airway obstruction which could be suggestive of croup;
c. The most likely infectious agent to explain the croup was enterovirus or rhinovirus (which was present in the nasopharyngeal wash/swab performed at autopsy);
d. Ezekiel had meningitis but the infectious agent that caused it is not known and viral meningitis cannot be excluded in the manner that Dr. Adeagbo suggested. When a child presents with symptoms of meningitis, the infectious agent is more likely to be viral (95%) than bacterial (5%) and, in 85-95% of cases, viral meningitis is caused by enteroviruses;
e. Dr. Adeagbo's finding that haemophilus influenza was the infectious agent is not scientifically valid. Due to the association between croup and meningitis, the most likely infectious agent was enterovirus or rhinovirus;
f. In the absence of the medical misadventure in the ambulance, Ezekiel would have had a good expected outcome;
g. If the meningitis had been bacterial, the delay in antibiotics would likely have had no consequences on the outcome;
h. There are two possible causes of Ezekiel's hypoxic and anoxic brain injury: (i) the croup and/or meningitis caused the brain injury, or (ii) the failure of the paramedics to establish an airway for 8 minutes caused the brain injury. In the circumstances of this case, the second is more likely;

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[154] Trial Judge's Address to the Jury, Transcript at 2861/37-2862/3, AR, Vol VII **[TAB N].**
[155] For example: Discussion from Trial Judge, Transcript at 2910/12-25, AR, Vol VII **[TAB N]**, Evidence of Dr. Sauvageau, Transcript at 2929-2936, AR, Vol VII **[TAB N]**, Submission of Mr. Giles, Transcript at 2952/17-31, AR, Vol VII **[TAB N]**

i. Contrary to Dr. Adeagbo's evidence, the absence of neuronal eosinophilic changes in Ezekiel's brain did not rule out the possibility that his brain damage was caused by the failure to establish an airway for 8 minutes;

j. Contrary to Dr. Adeagbo's evidence, the pleural empyema in Ezekiel's right lung was not a cause of death. It was not present at the time of the medical crisis, would not have caused him respiratory problems and probably developed as a secondary infection caused by aspiration during intubation by the paramedics;

k. Contrary to Dr. Adeagbo's evidence, petechiae and lack of oxygen are not causally related;

l. Contrary to Dr. Adeagbo's evidence, there was no evidence of brain herniation (and therefore no way brain herniation could have caused the respiratory arrest in the manner he suggested). There are other mechanisms of meningitis that could cause such arrest but the more likely cause was respiratory obstruction from croup;

m. The fact that the paramedics were unable to secure an airway for 8 minutes was an important fact in Ezekiel's clinical history. Dr. Adeagbo's claim that he excluded it because "only trying to write positive things" was his "style at that time" was surprising for two reasons: (i) autopsy reports must contain pertinent negative findings, and (ii) his report included several other pertinent negative findings.[156]

PART II – STATEMENT OF ISSUES

The trial judge's instruction to the jury was legally incorrect constituting a reversible error.

Issue 1 – Insufficient Instruction on the Alleged Failure to Provide Necessaries

Issue 2 – Error in Conflating the Second & Third Elements of the *Actus Reus*

Issue 3 – Insufficient *Mens Rea* Instruction – Failure to Explain Marked Departure

PART III – STATEMENT OF ARGUMENT

A. Starting Point for the Appellants' Analysis – The Law of Penal Negligence

[64] Failing to provide the necessaries of life is a negligence-based offence. Negligence-based criminal offences have traditionally been assessed on the objective standard of what a

[156] Redacted Version of the Report of Dr. Anny Sauvageau, Re: Death of Ezekiel Stephan, Exhibit 23, Vol IX **[TAB P].** See also: Evidence of Dr. Sauvageau, Transcript at 2984/16-25 and 2987/30-34, AR, Vol VII **[TAB N]** regarding x-rays from the Cardston Hospital.

reasonable person would have foreseen and done in the circumstances of the accused. Since the advent of the *Charter*,[157] permitting such findings of guilt in the absence of subjective *mens rea* has not been without debate. As Professor Stuart wrote in his treatise, *Canadian Criminal Law*:

> Negligence is another form of fault. Its basis is culpable inadvertence on the objective reasonable person standard: not thinking at all when one ought to have been thinking or thinking in a certain way when one ought to have thought differently. This is a controversial basis for responsibility.[158][Emphasis added]

[65] Controversy aside, it is clear that not all criminal offences require subjective *mens rea*; it is well-established that the fault-based component of some offences can be properly grounded in *penal* negligence.[159] To establish negligence on this higher threshold, a "marked departure" from the standard of care is required.[160] *Mere* negligence will not suffice, as this would offend the principle of fundamental justice that the morally blameless are not to be punished criminally.[161] As Charron J. wrote in *Beatty,* "…criminal fault must be based on conduct that merits punishment."[162]

[66] Since 1993, this Court has decided numerous cases considering the offence of failing to provide (i.e. *Tutton*, *Naglik*, and *J.F.*), as well as other cases considering penal negligence more generally (i.e. *Creighton*, *Hundal*, *Beatty,* and *Roy*). In each instance, the Court focused on casting the net of criminal negligence narrowly to ensure only those who are sufficiently blameworthy are criminally convicted.

[67] The Dissent's reasoning in this case is rooted in these fundamental principles of justice. The Appellants submit that by applying the principles established by this Court, the Dissent has

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[157]***Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982***, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11, s. 33.

[158] Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Carswell Thompson Reuters, 2014) at pp 282. **[BOA TAB 2]**

[159]See, for example: ***R v Creighton***, [1993] S.C.J. No. 91 (S.C.C.). at pp17-18, referring to ***R v DeSousa***, [1992] 2 S.C.R. 944 [not reproduced] and ***R v Vaillancourt***, [1987] 2 S.C.R. 636 [not reproduced]

[160]***Beatty***, *supra* note 7 at para 36*;* ***R v Roy,*** 2012 SCC 26 at para 31. In the case of criminal negligence the standard is the even higher "marked and substantial" departure. See: ***R v J.F.***, 2008 SCC 60, [2008] 3 SCR 215, ***DeSousa***, *supra* note 159 at para 36.

[161]***Beatty***, *supra* note 7 at para 34, ***DeSousa***, *supra* note 159 at para 36.

[162]***Beatty***, *supra* note 7 at para 35.

correctly identified the critical deficiencies in the jury instruction in this case.[163] To assist this Court in its assessment of the persuasiveness of the Dissent and evaluate whether the jury instruction properly distilled the pertinent legal principles, a brief summary of the evolution of penal negligence in Canada has been set out below.

B. Failing to Provide the Necessaries as a Negligence-Based Offence

[68] Section 215 of the *Criminal Code* does not specify whether the offence of failing to provide is assessed on a subjective or objective standard. As such, the mental element of the offence has developed in this Court's post-*Charter* jurisprudence. The requisite *mens rea* for the offence was first settled in *Naglik.*[164] There, the accused parents were charged with aggravated assault and failing to provide the necessaries after their 11-week-old baby suffered a broken collarbone, fractured ribs, a fractured vertebra, two skull fractures, brain hemorrhaging and retinal hemorrhaging. On review, this Court determined the requisite *mens rea* for failure to provide should been delineated as one of *objective fault*.[165]

[69] Specifically, it was determined that parental conduct should be "measured against an objective, societal standard to give effect to the concept of "duty" employed by Parliament."[166] Lamer CJ (for the Court on this point) explained the policy goals of the section were "aimed at establishing a uniform minimum level of care to be provided for those to whom it applies, and this can only be achieved if those under the duty are held to a societal, rather than a personal, standard of conduct."[167] It was held that section 215 punishes a marked departure from the conduct of a reasonably prudent parent in circumstances where it was objectively foreseeable that the failure to provide the necessaries of life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health, of the child.[168]

[70] This Court next had occasion to consider failing to provide in *J.F,* wherein the accused was charged with two counts of manslaughter for failing to protect his 4-year-old foster child

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[163] Note: In contrast, the Majority reasons largely ignored these fundamental concepts, preferring instead to assess the adequacy of the jury instruction on the basis that perfection is not required.

[164] ***R v Naglik***, [1993] 3 S.C.R. 122.
[165] *Ibid*, at pp 140.
[166] *Ibid*.
[167] *Ibid*.
[168] *Ibid*.

from his wife's ongoing beatings.[169] The respective predicate offences for each count were criminal negligence and failing to provide. The jury convicted on the first count, but acquitted on the second. On appeal, the question was whether the verdicts were consistent.

[71] Writing for the majority, Fish J. reiterated that the *mens rea* for failing to provide the necessaries of life is a marked departure from the norm of a reasonably prudent parent.[170] He observed that the offence does not require proof of intention or actual foresight of the prohibited consequence; the issue is what the accused ought to have foreseen.[171]

C. Broader Evolution of the Law of Penal Negligence

[72] This Court's reasons in *Creighton*[172] were released concurrently with *Naglik,* and addressed the broader constitutional implications of penal negligence. It was held that an objective test for criminal negligence was constitutionally valid, although McLachlin J. (as she was then was) emphasized that "[w]hile the legal duty of the accused is not particularized by his or her personal characteristics short of incapacity, it is particularized in application by the nature of the activity and the circumstances surrounding the accused's failure to take the requisite care."[173] With *Creighton,* the idea that the marked departure standard *may* be a minimal constitutional requirement was born. As was expressed by McLachlin J., "the constitutionality of crimes of negligence is also subject to the caveat that acts of ordinary negligence may not suffice to justify imprisonment."[174] It was made clear that "the negligence must constitute a "marked departure" from the standard of the reasonable person. The law does not lightly brand a person as a criminal."[175]

[73] Since *Creighton,* the jurisprudence has overridden the idea that mere negligence "may not" suffice with clear articulations that it will *never* suffice, nor is it capable of meeting minimal constitutional standards where penal interests are at stake. This Court has made clear (predominantly in the in the context of driving offences) that the marked departure standard

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[169] ***J.F.***, *supra* note 160. Note: His wife had pled guilty to manslaughter for causing the child's death.
[170] *Ibid*, at paras 8, 11, 16-17.
[171] *Ibid*, at para 7.
[172] ***Creighton***, *supra* note 159.
[173] *Ibid*, at pp 69.
[174] *Ibid*, at pp 59 [emphasis added], citing ***R v Sault Ste. Marie***, [1978] 2 S.C.R. 1299; and ***R v Sansregre*t**, [1985] 1 S.C.R. 570.
[175] ***Creighton***, *supra* note 159, at pp 59.

avoids the risk of violating principles of fundamental justice[176] by separating criminal law from regulatory law and ensuring appropriate fault requirement from a *Charter* perspective.[177]

[74] In *Hundal*, a dangerous driving case, Cory J. (writing for the majority) began his analysis by noting "…s. 7 of the *Canadian Charter of Rights and Freedoms* prohibits the imposition of imprisonment in the absence of proof of that element of fault."[178] Ultimately, it was held that "the *mens rea*… should be assessed objectively but in the context of all the events surrounding the incident."[179] It was again reinforced that, to prove *mens rea* by way of penal negligence, there must be proof that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation.[180] This message was re-affirmed in *Beatty* where Charron J. (writing for the majority) stressed that "[i]f every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy. Such an approach risks violating the principle of fundamental justice that the morally innocent not be deprived of liberty."[181]

[75] Most recently, this Court considered the operation of the penal negligence standard in *Roy*, where the accused was charged with dangerous driving causing death. In concluding the circumstances of the collision did not support the conviction,[182] Cromwell J. reinforced the *Charter*-based importance of the "marked departure" standard.[183] Reiterating the clarification provided in *Beatty*, he emphasized the importance of differentiating between the two elements of the offence – the prohibited conduct and the required fault. He noted, "[t]he Court in *Beatty* sought to ensure that a meaningful analysis of both elements would be performed in every case and it did this by defining and separating the conduct and mental elements of the offence."[184] [Emphasis added]

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[176] ***Beatty***, *supra* note 7 at para 34 to 36.
[177] ***Roy***, *supra* note 160 at para 31.
[178] ***R v Hundal***, [1993] 1 SCR 867 at pp 882.
[179] *Ibid*.
[180] *Ibid*.
[181] ***Beatty***, *supra* note *7* at para 34.
[182] ***Roy***, *supra* note 160 at para 55.
[183] *Ibid*, at para 31.
[184] *Ibid*, at para 27.

[76] This evolution of the law of penal negligence forms the backdrop to the issues in this appeal. The principles established in *Beatty* and *Roy* ought to apply with equal or greater force to an offence alleged under section 215. It is submitted that a careful reading of *J.F.*[185] supports this view. To the extent that there may be uncertainty in relation to the correct analytical approach to section 215 offences, the Appellant asks this Court to clarify the same and confirm the fundamental principle that the marked departure standard is the minimal constitutional fault requirement, as the Court did in *Beatty* and *Roy.*

D. Findings of the Alberta Court of Appeal in the Case at Bar

[77] The Majority of the Alberta Court of Appeal dismissed the Appellants' appeal. Writing for himself and Watson J.A., McDonald J.A. found that the trial judge correctly identified the three elements of the offence and did not err in his instructions on these elements.[186] As accused persons are entitled only to an adequately, and not perfectly, instructed jury, the Majority was not persuaded by any of the errors identified by the Dissent.[187]

Majority Reasons

Actus Reus

[78] There was no disagreement regarding the Appellants' legal duty to provide the necessaries of life for Ezekiel at trial or on appeal. Regarding the alleged failure (the second element), the Majority found that the jury charge provided sufficient definition of 'necessaries of life,' when the trial judge explained this element required proof that the Appellants' "conduct represented a marked departure from the conduct of a reasonably prudent and ordinary person, without medical training, in circumstances where it was objectively foreseeable that failing to provide the necessaries would lead to a risk of danger to Ezekiel's life."[188]

[79] In relation to endangerment (the third element of the offence), the Majority found the trial judge provided a sufficient explanation to the jury when he stated: "to endanger Ezekiel's

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[185] ***J.F.***, *supra* note 160.
[186] Court of Appeal Memorandum, *supra* note 2 at paras 88, AR, Vol 1, [**TAB 1B**].
[187] Court of Appeal Memorandum, *supra* note 2 at para 87 citing ***R v Jacquard***, [1997] 1 SCR 314 ; ***R v Gray***, 2012 ABCA 51 at para 29, 522 AR 374 [not reproduced]; ***R v Cooper***, [1993] 1 SCR 146 at para 43, 146 NR 367.
[188] Court of Appeal Memorandum, *supra* note 2 at pp 157, AR, Vol 1, [**TAB 1B**].

life is to expose Ezekiel to a risk of danger to his life by failing to provide him with medical attention at a time when that medical attention could, not would, have made a difference."[189]

[80] With respect to the scope of the instruction, the Majority found that the trial judge was correct that the Crown only needed to prove that "what" the Appellants failed to do significantly contributed to a risk of danger to Ezekiel's life.[190] The Majority was confident that:

> [T]he jury would have known they were to determine how ill Ezekiel appeared based on all the evidence they heard and accepted. They would have known they were to determine whether a reasonable and prudent person in the appellants' circumstances, seeing the symptoms the jury found were present, would have taken Ezekiel to a doctor because it was foreseeable that failing to do so could endanger Ezekiel's life.[191]

Mens Rea

[81] The Majority was satisfied the trial judge's *mens rea* instruction was adequate because the trial judge twice stated, "a marked departure was foreseeing medical attention was required and foreseeing that failing to provide medical attention would endanger the child's life."[192]

Dissenting Reasons

[82] The Dissent based its analysis of the requisite elements of the offence of failing to provide on the legal framework articulated in Deschamps J.'s dissent in *J.F.*[193] While her reasons have not been widely cited,[194] reliance on her analysis is not precluded either by the majority ruling in *J.F.*[195] or any subsequent ruling of the Court. Her analysis utilized the marked departure standard in relation to the *mens rea* requirement[196] in accord with the broader principles of penal negligence, as they have evolved post-*Naglik.*[197] Distilling her reasons therein, the Dissent in the case at bar summarized the requisite legal components for the offence as follows:

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[189]Court of Appeal Memorandum, *supra* note 2 at para 91, AR, Vol 1, [**TAB 1B**].
[190]Court of Appeal Memorandum, *supra* note 2 at para 92, AR, Vol 1, [**TAB 1B**].
[191]Court of Appeal Memorandum, *supra* note 2 at para 96, AR, Vol 1, [**TAB 1B**].
[192]Court of Appeal Memorandum, *supra* note 2 at para 205, AR, Vol 1, [**TAB 1B**].
[193]Court of Appeal Memorandum, *supra* note 2 at para 221, AR, Vol 1, [**TAB 1B**].
[194]See, for example: ***R v Pitre***, 2015 NBQB 44 at para 54. [Not Reproduced]
[195]Her disagreement with the majority was on a different issue, and did not relate to the required elements of the offence of failing to provide the necessaries of life.

[196]***J.F.,*** *supra* note 160 at para 7 to 11.
[197]*Ibid*, at para see para 67.

a. ***Actus reus,* consisting of 3 elements:**

i. **Duty**: the accused was under a legal duty to provide the necessaries of life to the person in question;

ii. **Failure**: from an objective standpoint, the accused failed to perform the duty; and

iii. **Danger**: from an objective standpoint, this failure endangered the life of the person to whom the duty was owed, or caused or was likely to cause the health of that person to be endangered permanently.

b. ***Mens Rea* –** requiring demonstration of a marked departure from the conduct of a reasonable parent, foster parent, guardian or family head in the same circumstances.[198]

[83] In light of these essential elements of the offence, the Dissent found the trial judge's jury instruction to be lacking because:

a. The trial judge did not adequately explain what the jury's focus should have been in determining whether there had been a *failure* under the second element of the offence;
b. The charge incorrectly invited the assumption that an element of the offence (endangerment) had already been established;
c. The instruction did not sufficiently instruct the jury on how to assess the conduct of a reasonably prudent parent, or what would constitute a "marked departure" from that conduct;[199] and
d. The instruction left the impression that the *mens rea* of the offence was that of "strict liability."[200]

[84] The Dissent noted that, because the Appellants were not tried until 4 years after Ezekiel's death, the "effluxion of time made it all the more imperative that the jury be fairly instructed and that the evidence be properly linked to the elements of the offence."[201] The

[198]Court of Appeal Memorandum, *supra* note 2 at para 221, AR, Vol 1, [**TAB 1B**].
[199]Court of Appeal Memorandum, *supra* note 2 at para 254, AR, Vol 1, [**TAB 1B**].
[200]Court of Appeal Memorandum, *supra* note 2 at para 214, AR, Vol 1, [**TAB 1B**].
[201]Court of Appeal Memorandum, *supra* note 2 at para 217, AR, Vol 1, [**TAB 1B**].

Dissent was particularly concerned that the charge did not adequately link the evidence to the issues the jury needed to determine.[202]

Actus Reus

[85] The Dissent found that the trial judge's instruction on whether or not the Crown had established a "failure" was inadequate and legally incorrect. The second element of the offence required the jury to determine whether the Appellants had *failed* to provide the necessaries of life (which the trial judge identified as being "medical attention"). The Dissent held the trial judge did not adequately explain what the jury's focus should have been on this issue and did not direct the jury to the critical pieces of evidence they needed to consider.[203] The trial judge failed to tell the jury that they would need to determine the nature of the failure (be it a specific act or a general and ongoing omission) and also failed to caution the jury on the permissible uses of the experts' evidence. This was particularly important as medical experts had been permitted to testify about what *they* would have done (as parents with medical degrees and years of related experience) had they been in the Appellants' position. The issue of what could have constituted the failure from the position of a reasonably prudent parent was crucial because, "unlike many other such cases, the determination as to whether there has been a failure [was] perhaps the most difficult issue needing resolution."[204]

[86] The Dissent also found the trial judge erred by conflating the second and third elements of the *actus reus*. The Dissent noted that this error may have been the result of misapplying a passage of *Naglik*, where Lamer C.J. discussed and summarized the section 215 test *without* a focus on the *individual* elements requiring proof.[205] As the instruction was confusing, there was a reasonable likelihood the jury would not have understood the test or where to focus their attention in making the determinations required of them.[206]

Mens Rea

[87] The Dissent found that the instruction on *mens rea* was insufficient because it provided "no explanation whatsoever" as to what constituted a marked departure from the standard of a reasonable parent, as opposed to simple negligence. The Dissent noted that "marked departure"

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[202]Court of Appeal Memorandum, *supra* note 2 at para 212, AR, Vol 1, [**TAB 1B**].
[203]Court of Appeal Memorandum, *supra* note 2 at para 235, AR, Vol 1, [**TAB 1B**].
[204]Court of Appeal Memorandum, *supra* note 2 at para 272, AR, Vol 1, [**TAB 1B**].
[205]Court of Appeal Memorandum, *supra* note 2 at para 243, AR, Vol 1, [**TAB 1B**].
[206]Court of Appeal Memorandum, *supra* note 2 at para 243, AR, Vol 1, [**TAB 1B**].

is a difficult concept even for those with legal training, particularly in cases where there are no prescribed or codified standards governing the conduct at issue (e.g. parenting).[207] The failure to explain the concept of a marked departure was also important because of the volume of medical evidence heard by the jury. The jury should have been specifically cautioned that a marked departure was not failing to do what a medical doctor would have done in the Appellants' shoes.[208]

Criticism of the Dissent by the Majority

[88] With respect to the *actus reus*, the Majority was of the view that the Dissent had set "far too high a standard for a jury charge."[209] According to the Majority, the jury did not need to determine "when" the failure took place nor "what" the Appellants failed to do, as these were not elements of the offence.[210] The Majority opined that the jury did not need to be instructed on the specifics of the failure; it was sufficient if they were simply instructed that the Appellants "failed to take the child to a doctor."[211]

[89] The Majority was of the view that the Dissent's criticisms did not consider the charge as a whole.[212] The Majority interpreted the Dissent as requiring proof that the Appellants failed to provide specific medical attention. The Dissent complaint that there was "no evidence about what the reasonably prudent person ought to have done when presented with the symptoms the appellants' child exhibited" was unfounded because the jury was instructed to "use its own experience to determine what a reasonably prudent person would have done."[213]

E. APPLICATION OF THE LAW TO THE ISSUES IN THIS CASE

Issue 1 – Insufficient Instruction on the Alleged Failure

[90] There being no dispute that the Appellants had a "duty" to provide for Ezekiel, the first issue for analysis was whether either Appellant "failed" to provide Ezekiel with the necessaries of life. On this aspect of the jury charge, two deficiencies were identified by the Dissent:

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[207] Court of Appeal Memorandum, *supra* note 2 at paras 247 and 251, AR, Vol 1, [**TAB 1B**].
[208] Court of Appeal Memorandum, *supra* note 2 at para 251, AR, Vol 1, [**TAB 1B**].
[209] Court of Appeal Memorandum, *supra* note 2 at para 195, AR, Vol 1, [**TAB 1B**].
[210] Court of Appeal Memorandum, *supra* note *2* at para 198, AR, Vol 1, [**TAB 1B**].
[211] Court of Appeal Memorandum, *supra* note 2 at para 201, AR, Vol 1, [**TAB 1B**].
[212] Court of Appeal Memorandum, *supra* note 2 at para 204, AR, Vol 1, [**TAB 1B**].
[213] Court of Appeal Memorandum, *supra* note 2 at para 200, AR, Vol 1, [**TAB 1B**].

a. The failure to instruct the jury that they needed to determine the nature of the alleged failure with particularity; and

b. The failure to sufficiently instruct the jury on the evidence that was relevant to this assessment.[214]

[91] Firstly, since the Indictment covered a two-week period and did not particularize the conduct alleged to be the failure, the jury needed to "consider what, if any, medical attention the Stephans failed to provide but also when they ought to have provided it."[215] Secondly, the instruction did not sufficiently direct the jury to evidence relevant to determining if the purported failure had actually occurred.[216] Such evidence included the Appellants seeking medical advice from a registered nurse on two separate occasions, the additional medical assistance sought by way of the 911 calls, and the driving of Ezekiel from their rural home to the ambulance for transport to a hospital. According to the Dissent, "[t]he jury needed to consider whether the steps the Stephans did take could be properly characterized as seeking medical attention and if not, was the Stephans' failure one of simply not taking him to a hospital soon enough."[217]

The Need for Particularity

[92] It is a basic principle of criminal law that the *actus reus* and *mens rea* of an offence require some degree of overlap in order to ground penal liability.[218] As such, regardless of whether the "failure" here was a failure to perform a single act or a longer, continuing series of omissions, the nature of the failure needed be assessed with some degree of particularity.

[93] In this case, the initial determination of the manner in which each Appellant had purportedly "failed" in their parental duties was critical. While the jury did not necessarily have to agree on when the failure occurred, they did need to determine the timing and nature of the failure in order to properly perform their subsequent *mens rea* analysis. As was pointed out in *Roy*, "[t]he trier of fact must identify *how* and *in what way* the departure from the standard goes markedly beyond mere carelessness."[219]

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[214]Court of Appeal Memorandum, *supra* note *2* at para 237, AR, Vol 1, [**TAB 1B**].
[215]Court of Appeal Memorandum, *supra* note *2* at para 228, AR, Vol I, [**TAB 1B**].
[216]Court of Appeal Memorandum, *supra* note 2 at paras 227, 228, 237, AR, Vol I, [**TAB 1B**].
[217]Court of Appeal Memorandum, *supra* note 2 at para 234, AR, Vol I, [**TAB 1B**].
[218]***Cooper***, *supra* note 187 at pp 163-164.
[219]***Roy***, *supra* note 160 at para 30.

[94] However, as a result of the trial judge's instruction, the jurors were rendered incapable of properly making this required determination. Contrary to the binding jurisprudence of this Court, they were instead told they could each find their own manifestation of a failure at any point in the two-week period; they were explicitly instructed they need not agree as to when a reasonable parent in the circumstances of the Appellant would have been required to seek medical attention for Ezekiel.[220] The Majority's attempt to uphold the propriety of this instruction by suggesting "what" and "when" are not elements of the offence fails to account for this Court's direction in *Roy* – there is a need to determine "*how* and *in what way* the departure from the standard goes markedly beyond mere carelessness."[221] Thus, the charge as delivered in this case misdirected the jurors on this critical point of law.

The Need to Focus the Evidence

[95] The Dissent further contended that the charge did not sufficiently review the evidence relating to whether or not either of the Appellants had failed to provide the necessaries of life for Ezekiel.[222] It was insufficient for the trial judge to simply tell the jury, "[t]he circumstances here occurred over more than a two-week period," particularly given the volume, scope and tone of the medical evidence heard. What those circumstances were was not adequately flagged for this jury – a summary of the pertinent evidence was required.

[96] Such an assessment should have highlighted the evidence relevant to how Ezekiel presented to each Appellant individually, and ought to have provided the jury with a balanced summary of that evidence. Each Appellant had different opportunities to observe Ezekiel at different times; consequently, their knowledge in relation to his status was not necessarily always the same. For example, during much of the relevant time period, David was travelling for work. Collet spoke with him often, but his knowledge was based upon her interpretation of what was occurring. Conversely, when Ezekiel's breathing problems arose, initially Collet was not at home. While these differences do not necessarily favor one Appellant over another, they were important in the jury's analysis of precisely when the alleged failure occurred and what that failure was *for each accused*.

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[220] Trial Judge's Charge to the Jury, Exhibit 25, AR, Vol IX, **[TAB Q].**

[221] ***Roy***, *supra* note 160 at para 30.

[222] ***Jacquard***, *supra* note 187 at para 14; see also: ***R v Pickton***, [2010] 2 S.C.R. 198 at para 10 [not reproduced], ***R v Daley,*** 2007 SCC 523, [2007] 3 SCR 523 at para 31; and ***R v Kociuk,*** 2011 MBCA 85, 346 DLR (4th) 195 at para 72. [Not reproduced]

[97] The jury instruction failed to highlight Ezekiel's apparent improvements when he resumed going to preschool and church with his family. As the Dissent notes, Collet cared for Ezekiel throughout his illness. Collet consulted with a registered nurse twice during the relevant time period and had the nurse attend for an in-home physical examination.[223] She also continued to discuss Ezekiel's symptoms with this nurse *via* text message.[224] Both Collet and David followed the nurse's advice in relation to treating croup. Collet took steps to educate herself on the illnesses Ezekiel might have. When Ezekiel appeared to be in medical distress, they immediately called 911 and took him to the hospital.[225] Collet performed CPR under the direction 911 operator until EMS could take over. These are examples of the circumstances that required the jury's analysis as to whether there was a failure to provide necessaries in all of the circumstances of this case.

[98] In contrast, the jury was exposed to inappropriate and sensationalized evidence that was irrelevant to their determination, with no direction on how it ought to be treated in their deliberations. In closing submissions, the Crown highlighted this evidence for maximum prejudicial effect, leaving the impression that the Appellants should be judged based on what trained pediatric specialists would do.[226] Examples of such evidence included:

a. Dr. Burkholder described this situation as one of the ***sickest*** transport calls she had experienced;[227]
b. Dr. Burkholder testified the appropriate response to a similar patient presenting at a family doctor would be to ***'run'*** to the hospital, as opposed to 'walk';[228]
c. Crown counsel's leading questions, suggesting Ezekiel was ***"essentially dead"*** by the time he came to Dr. Burkholder,[229] following up by querying why

[223] Evidence of Collet Stephan, Transcript at 2580/30-33; 2623/32-33; 2624/25-39, AR, Vol II, **[TAB A]**.
[224] 10 Pages of Double-Sided Photographs of Text Messages, Exhibit 6, AR, Vol IX, **[TAB C].**
[225] Evidence of David Stephan, Transcript at 2227/2-30; 2228/34-38; 2230/8-11, AR, Vol III [**TAB B].**
[226] Final Submissions of Ms. Weich, Transcript at 3344-3348, AR, Vol VIII, **[TAB P].**
[227] Evidence of Dr. Burkholder, Transcript at1220/26, Transcript at AR, Vol V, **[TAB I].**
[228] Evidence of Dr. Burkholder, Transcript at1245/1-13, Transcript at AR, Vol V, **[TAB I].**
[229] Evidence of Dr. Burkholder, Transcript at 1274/29-34, Transcript at AR, Vol V, **[TAB I].**

emergency personnel would have provided resuscitative efforts ***"if a person is essentially dead?"***;[230]

d. Crown counsel asking Dr. Gamble what his level of satisfaction would be with a home diagnosis regarding meningitis his own child, to which Dr. Gamble responded, "***I wouldn't be***."[231]

[99] The jury needed to determine what the Appellants *ought to have foreseen* based on the all of the circumstances.[232] The jury's task was to draw the line between morally blameworthy conduct and conduct that may have been careless or negligent – but not criminal. As was stated in *Beatty*, "[t]he degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment."[233]At no point did the trial judge assist the jury in understanding *how* it could use the voluminous, complicated evidence to determine if there had been a "failure." As explained by the Dissent, in the circumstances of this case, a more specific and helpful instruction was required. This issue is more fully explored in the factum of the co-Appellant, Collet Stephan.

Issue 2 –Error in Conflating the Second & Third Elements of the *Actus Reus*

Instruction on the Second Element of the Offence – Failure to Perform the Duty

[100] According to the Dissent, the trial judge erred in law in his articulation of the second element of the offence: the failure to perform the duty. The relevant excerpt from the trial judge's instruction is as follows:

> In deciding whether the Crown has proven beyond a reasonable doubt that David Stephan failed to provide necessaries of life you must determine whether the Crown has proven beyond a reasonable doubt that the conduct of David Stephan represented a marked departure from the conduct of a reasonably prudent and ordinary person **where that reasonable person, in all the circumstances of David Stephan would foresee that medical attention was required to maintain Ezekiel's life, and that reasonable person would also foresee that failing to provide the medical attention would endanger Ezekiel's life.**[234] [Emphasis in original]

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[230]Evidence of Dr. Burkholder, Transcript at 1275/26-28, Transcript at AR, Vol V, **[TAB I].**
[231]Evidence of Dr. Gamble, Transcript at 1940/14-16, Transcript at AR, Vol VI, **[TAB K].**
[232]***J.F.***, *supra* note 160 at para 7.
[233]***Beatty***, *supra* note 7 at para 35.
[234]Court of Appeal Memorandum, *supra* note 2 at para 239, AR, Vol 1, [**TAB 1B**].

This passage of the charge – a single, 92-word sentence – is difficult to comprehend even for the legally trained. Moreover, its wrapped-up approach wholly fails to articulate the discrete steps of an already complicated test.

[101] The charge gave no indication to the jury that they were required to consider the third element of the *actus reus* separately and distinctly. Instead, it invited the jury to assume as true the latter half of bolded portion (i.e. the third element of the *actus reus*) when considering whether the conduct amounted to a failure. The jury was *not* legally entitled to presume this to be true – they were required to determine that third element independently, and only *after* they were satisfied a failure had been established.[235]

[102] Concluding the charge constituted an incorrect explanation of the second element of the *actus reus*, the Dissent opined it may have impeded the jury's ability to properly determine this issue because, if the jurors assumed the truth of the latter portion of the instruction (i.e. that the reasonable person in the appellants' shoes would have foreseen that failing to provide medical attention would endanger their child's life), the answer to the second element of the *actus reus* would necessarily have been affirmative.[236]

Impact of the Error – Assuming a Contentious Issue to have been Proven

[103] At trial, the defence evidence suggested that on the day he stopped breathing, Ezekiel was sick with croup and had viral meningitis. His symptoms were mild and he stopped breathing because of an obstruction in his airway.[237] If the jury accepted that Ezekiel's breathing stopped because of an obstruction, the reasonable foreseeability of such an occurrence would have been low; furthermore, immediately upon occurrence, the Appellants sought medical attention by calling 911. The attending ambulance was not able to secure an airway due to improper supplies and Ezekiel was in the care of the medics, without an airway, for 8 minute and 11 seconds. By contrast, the Crown's theory proposed that swelling in the brain caused by advanced bacterial meningitis had caused Ezekiel to stop breathing by placing pressure on his brain stem.

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[235]Court of Appeal Memorandum, *supra* note 2 at para 240, AR, Vol 1, [**TAB 1B**]. See also: ***R v Alexander***, 2011 ONSC 980; ***R v Boone***, 54 WCB (2d) 621, [2002] OJ No 2796. **[BOA TAB 1]**

[236]Court of Appeal Memorandum, *supra* note 2 at para 242, AR, Vol 1, [**TAB 1B**].

[237]See Redacted Version of the Report of Dr. Anny Sauvageau, Exhibit 23, AR, Vol IX, **[TAB P].**

[104] Given the two divergent theories put before the jury, the timing of any failure was crucial to determining whether that failure endangered Ezekiel's life. Ensuring the jury understood and properly engaged in independent, discrete analysis of each of these elements was critical to securing a reliable verdict. The trial judge's failure to articulate his instructions in a manner which accorded with the requisite analytical exercise was an error. In light of the complexity of the jury's task, the trial judge needed to break the legal test down into manageable components and to explain the nuanced reasoning required at each stage and for each Appellant.

Issue 3 – Insufficient *Mens Rea* Instruction – Failure to Explain Marked Departure

[105] According to the Dissent, the trial judge "provided no explanation whatsoever to the jury as to what constituted a marked departure."[238] In this case, it was critical to instruct the jury to consider whether the Appellants' failure constituted a marked departure from what a reasonable parent would be expected to do in the same circumstances. This obligation was particularly important given the volume and highly inflammatory nature of much of the medical evidence. As stated by the Dissent, the "jury should have been cautioned that a marked departure was not failing to do what a medical doctor would do when presented with the symptoms exhibited by their child."[239]

The Marked Departure Standard is a Constitutional Imperative

[106] The minimal fault requirement for a crime of penal negligence is a marked departure from the standard of a reasonable person. Anything less would offend the principles of fundamental justice and risk convicting the morally blameless.[240] This standard must be considered in determining the question of *mens rea* – i.e. Did the conduct merit punishment?[241]

[107] The Appellants submit that the instruction in this case did nothing to ensure a meaningful analysis of the *mens rea* component was undertaken by the jury, as mandated by the jurisprudence and the Constitution. As a result, the charge was not constitutionally compliant and there is a genuine and substantial risk that the jury convicted on the basis of mere

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[238]Court of Appeal Memorandum, *supra* note 2 at para 246, AR, Vol 1, [**TAB 1B**].
[239]Court of Appeal Memorandum, *supra* note 2 at paras 250-251, AR, Vol 1, [**TAB 1B**].
[240]***Beatty***, *supra* note 7 at para 36; ***Roy***, *supra* note 160 at para 31.
[241]***Beatty***, *supra* note 7 at para 43 – 45; ***Roy,*** *supra* note 160 at para 27 and 28.

negligence. This is precisely the risk this Court has been guarding against in the 25 years post-*Naglik.*

Conclusion

[108] The facts of this case are very different from most others where failure to provide is charged. The Appellants were attentive, loving parents who were actively attempting to fulfill their parental duties. If their "failure" was not taking Ezekiel to a doctor, it did not stem from eccentric beliefs or a distrust of "modern" medicine as the Crown tried to allege. The evidence establishes ongoing consultations with a medically-trained emergency room nurse as well as an urgent 911 call and a trip to the hospital.[242] The Appellants were not trying to hide an injured child because they feared legal repercussions.[243] They did not take Ezekiel to a doctor because his symptoms appeared to be mild and consistent with a typical cold or flu. They were told by a medical professional that she could find nothing wrong with him. The determination of whether the Appellants' conduct represented a marked departure from the standard of the reasonable parent was compromised by a misleading, confusing instruction – an error which was compounded inadmissible and highly prejudicial opinions offered by a number of medical doctors regarding what they would have done. It is the respectful position of the Appellants that a new trial is required.

PART IV STATEMENT CONCERNING COSTS

[109] The Appellant has no submissions as to costs.

PART V ORDER SOUGHT

[110] The Appellant requests his conviction for failure to provide the necessaries of life be set aside and that and a new trial be ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 26th day of January 2018.

Marie-France Major As Ottawa Agent

KAREN MOLLE
Counsel for the Appellant

[242] See ***R v Tutton***, [1989] 1 SCR 1392.
[243] ***R v S.B.***, 2017 ONSC 5924, [2017] O.J. No. 5152.

PART VI – TABLE OF AUTHORITIES

TAB	APPELLANT AUTHORITIES	Cited at Paragraph No.
DAVID STEPHAN		
	R v Alexander, 2011 ONSC 980	101
	R v Beatty, 2008 SCC 5, [2008] 1 SCR 49	9, 65, 73, 74, 99, 106
1	*R v Boone*, [2002] O.J. No. 2796, 54 W.C.B. (2d) 621 (ONSC)	101
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2	Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Carswell Thomson Reuters, 2014) at pp 282	64
COLLET STEPHAN		
	Azoulay v The Queen, [1952] 2 SCR 495	72, 74