File No. 39568

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

- and -

KEVIN ERIC GOFORTH **Respondent**
(Appellant)

FACTUM OF APPELLANT

(Pursuant to Rule 42 of *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW AND FACTS

Overview

1. A child starved to death. Another child was found on the brink of starvation. Their bodies were covered with wounds. Their bedroom reeked of faeces. This was the result of the respondent's pattern of neglect over a period of time. This case is about the minimum standard of care the law imposes on those in charge of children.

2. NB and JG were two and three years old when they came to live with the respondent and his family. When they arrived, they had chubby cheeks and were developing well. The tragic end came in only nine months. Experts believed the children had been malnourished for weeks. A jury found the respondent guilty of manslaughter and unlawfully causing bodily harm by failing to provide necessaries of life.

3. The majority judges of the Saskatchewan Court of Appeal allowed the respondent's appeal. They concluded the jury charge had not sufficiently connected the evidence to the objective fault element of the predicate offence. The evidence in question was the respondent's explanations that he was busy, his wife was responsible for the girls, he did not know the children were starving to death. The dissenting justice found these explanations were irrelevant to the objective test and the respondent was guilty because he had not turned his mind to risks that any reasonable person would have appreciated.

4. The majority judges also found the jury instructions may have confused the jury about the requisite *mens rea* for failing to provide necessaries because the instructions also referenced the *mens rea* required to prove manslaughter. They arrived at this finding by applying the wrong standard of appellate review. They were looking for perfection in the charge without regard to the contents of the charge as a whole, the submissions of the parties and the evidence at trial. The jury charge was proper, fair and responsive to the evidence and arguments. It properly equipped the jury to decide the case. The Crown's appeal should be allowed and the convictions against the respondent should be restored.

Summary of Facts

5. JG was born on March 2, 2008 and her sister NB on October 5, 2009. On January 14, 2010 Social Services apprehended the girls. For close to two years the children lived in temporary foster care before being permanently placed with the respondent and his wife on November 8, 2011. About nine months later, the Goforths rushed JG to the hospital where she died as a result of brain injury that developed following a cardiac arrest secondary to malnutrition and dehydration.[1] Police discovered NB in dire condition. She received food and medical attention and survived. The Goforths were charged with second-degree murder of JG and unlawfully causing bodily harm to NB. They were tried before a jury.

Crown's Evidence

6. Alicia Ward was the child protection worker for the girls. She testified that she met the girls in late December 2009 and described them as "both fairly pudgy children, very full-faced, full-cheeked."[2] She also spoke about the girls' history with two main foster parents:

Diana Woytas:	Jan 14, 2010	to	Feb 2, 2010	19 days
Liotta George:	Feb 2, 2010 Dec 8, 2010	to to	Dec 3, 2010 June 17, 2011	16 months
Diana Woytas:	June 24, 2011	to	Nov 8, 2011[3]	4.5 months

7. Referring to the second placement with Ms. George, Ms. Ward described JG as full-faced, pudgy, warm, happy and affectionate. There were no concerns with the girls' development.[4]

8. Liotta George had been fostering children going back to 1990.[5] She testified that when she first met the girls, Ms. George mistook NB for a 6-month-old because she was a "big baby."[6] JG

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[1] Agreed Statement of Facts, AR Vol II, Tab 11.
[2] Alicia Ward, Transcript, AR Vol III, Tab 14 at T140/39 – T141/7; see also T144/4 – 10.
[3] Alicia Ward, Transcript, AR Vol III, Tab 14 at T141/20 – 21; T145/1 – 9; T153/26; T155/21 – T156/15.
[4] Alicia Ward, Transcript, AR Vol III, Tab 14 at T154/4 – T155/15.
[5] Liotta George, Transcript, AR Vol IV, Tab 15 at T252/25.
[6] Liotta George, Transcript, AR Vol IV, Tab 15 at T254/39 – 40.

was a little larger and was already walking around albeit slowly.[7] Ms. George described NB as happy and always smiling.[8] Both were active and liked dancing.[9]

9. Ms. George said JG was at first in pull-up diapers and Ms. George started to potty-train her. By the end of their stay, JG was wearing panties but the younger NB was still in diapers.[10] Ms. George at some point took the girls to Dr. Joomun because they were throwing up and she was told she had been over-feeding them. Ms. George used the girls' health card for the medical appointment and someone from Social Services picked up the cards from her after the girls left.[11]

10. Dianne Woytas had fostered between 70 to 100 children starting in 2006.[12] She became a foster parent to the girls initially for about 2 to 3 weeks when NB was about 3 months old and JG was 2 or 2.5 years old. She described both as average-sized and said that JG had chubby cheeks. The infant NB just drank, ate and slept, and JG ate jarred food, toast and crackers.[13]

11. The girls returned to Ms. Woytas' home for a longer stay. Ms. Woytas again described NB as a bubbly, happy child with chubby cheeks who liked to play. JG was average-sized, had "big, chubby cheeks, a little belly."[14] Both girls had a good appetite, did not have problems holding down food and did not refuse any food except broccoli.[15] Ms. Woytas also bathed the girls and never noticed any scars on them.[16] Both had high energy but JG was quieter and was "slow with speech."[17] They did not wander at night.[18]

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[7] Liotta George, Transcript, AR Vol IV, Tab 15 at T255/1 – 6.
[8] Liotta George, Transcript, AR Vol IV, Tab 15 at T257/4 – 20; T258/8 – 16.
[9] Liotta George, Transcript, AR Vol IV, Tab 15 at T261/18 – 21.
[10] Liotta George, Transcript, AR Vol IV, Tab 15 at T258/22 – T259/8.
[11] Liotta George, Transcript, AR Vol IV, Tab 15 at T268/1 –31; T265/39 – T266/35.
[12] Dianne Woytas, Transcript, AR Vol IV, Tab 15 at T227/25 – 30.
[13] Dianne Woytas, Transcript, AR Vol IV, Tab 15 at T229/3 – T230/33.
[14] Dianne Woytas, Transcript, AR Vol IV, Tab 15 at T232/12 – 25; T244/2 – 18.
[15] Dianne Woytas, Transcript, AR Vol IV, Tab 15 at T232/18 – T233/14; T238/12 – T239/6.
[16] Dianne Woytas, Transcript, AR Vol IV, Tab 15 at T235/5 – 19; T244/9 – 15.
[17] Dianne Woytas, Transcript, AR Vol IV, Tab 15 at T239/8 – 13; T242/8 – 16.
[18] Dianne Woytas, Transcript, AR Vol IV, Tab 15 at T234/9 – 11.

12. Ms. Ward's notes said that Ms. Woytas was at some point worried about JG's eating and had given her supplements to keep her weight up but there was no "concerning" weight loss.[19] Ms. Woytas was not questioned about this during her testimony.

13. When the names of Tammy and Kevin Goforth came up as a possible permanent placement, Ms. Ward spoke with Ms. Goforth and explained that Social Services was looking for a long-term placement and a "person of sufficient interest" (PSI), and explained what that entailed. Ms. Goforth wanted to think about the prospects and speak with the respondent.[20] Ultimately, Ms. Goforth said they were interested in taking the girls.[21] A home study was completed and the Goforths were approved as caregivers. They received money for the cost of caring for the children and the girls stayed with them three times before moving in.[22] At some point Ms. Goforth complained that NB was wandering at night and Ms. Ward suggested a playpen or a gate.[23]

14. The girls moved in on November 8, 2011 and Ms. Ward visited the Goforth home a month later. Ms. Goforth was alone with JG, and NB was at Ms. Goforth's mother's house. Ms. Goforth explained that JG was going to begin the Head Start pre-school program and she wanted NB to get used to being away from her sister.[24] Ms. Goforth said the girls were doing well but NB had an accident that required stitches to her cheek.[25]

15. On January 19, 2012, an order of the Provincial Court of Saskatchewan named Tammy and Kevin Goforth as persons of sufficient interest.[26] Ms. Ward telephoned the Goforths, left a message and mailed the order to them. A few months later, Ms. Ward telephoned Ms. Goforth

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[19] Alicia Ward, Transcript, AR Vol III, Tab 14 at T156/29 – 37.
[20] Alicia Ward, Transcript, AR Vol III, Tab 14 at T159/27 – T164/25.
[21] Alicia Ward, Transcript, AR Vol III, Tab 14 at T165/36 – T166/1.
[22] Alicia Ward, Transcript, AR Vol III, Tab 14 at T166/8 – T167/10; T170 – T172; T178 and T80.
[23] Alicia Ward, Transcript, AR Vol III, Tab 14 at T168/26 – 25.
[24] Alicia Ward, Transcript, AR Vol III, Tab 14 at T175/34 – T176/5.
[25] Alicia Ward, Transcript, AR Vol III, Tab 14 at T178/14 – 21.
[26] Agreed Statement of Facts, AR Vol II, Tab 11 at para 18.

about the girls' overdue immunizations. She could not reach Ms. Goforth and left another message. The Goforths never called Ms. Ward again about this or any other issue.[27]

16. Ms. Ward was shown a photograph of JG taken at the hospital in August 2012. She said it was a stark contrast from when she last saw JG. At that time, JG "was plump and her face was full and she had a little belly." Ms. Ward had hugged JG good-bye and said she would have noticed "a significant weight loss like that." She also looked at the photographs of NB taken in the hospital and said NB was "much thinner in her face" and she had not seen NB with dark body hair before.[28]

17. In cross-examination, Ms. Ward said the Ministry would have sent the Goforths health cards in the form of barcoded pieces of paper along with the court order. But she had not documented in her notes that this was sent.[29]

18. Medical records showed that both JG and NB had seen Dr. Joomun five times, the last being in January 2011. The records established that no doctor in Saskatchewan had billed the province for the treatment of either JG or NB between October 2011 and August 1, 2012. The Head Start preschool program had no record of registration for JG at any time.[30]

19. We move now to the night the Goforths rushed JG to the Regina General Hospital. Connie Garstin was a nurse working the night shift on July 31, 2012. A code blue was called at 11:30 p.m.[31] Ms. Goforth told Ms. Garstin that JG had not been eating or drinking for a couple of days. She had gone to change JG's diaper and found her not breathing properly. Ms. Goforth said she had custody of the child until she was 18 and that JG's birth mother did not have rights to the children.[32] Ms. Garstin said the Goforths were distraught.[33]

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[27] Alicia Ward, Transcript, AR Vol III, Tab 14 at T185/8 – T186/21.
[28] Alicia Ward, Transcript, AR Vol III, Tab 14 at T190/4 – T192/19.
[29] Alicia Ward, Transcript, AR Vol IV, Tab 15 at T215/39 – T216/29.
[30] Agreed Statement of Facts, AR Vol II, Tab 11 at paras 11 – 17.
[31] Connie Garstin, Transcript, AR Vol V, Tab 16 at T426/37 – T427/24; T428/10 – 16.
[32] Connie Garstin, Transcript, AR Vol V, Tab 16 at T428/24 – T429/2; T430/29 – T431/21.
[33] Connie Garstin, Transcript, AR Vol V, Tab 16 at T433/38 – T434/5; T437/35 – T438/27.

20. In her 11 years of experience, Ms. Garstin had never seen a child as thin as JG.[34] She saw JG briefly but described her as basically "skin-and-bone." Concerned about the welfare of other children, she asked the Goforths if there were others in the house.[35] Ms. Goforth said there was a 2.5-year-old sister and an older son.[36] Ms. Garstin contacted Mobile Crisis. The emergency doctor tending to JG also told Ms. Gastin to call the police according to protocols for suspected child abuse. This was just over half-an-hour from when the Goforths came to the hospital.[37]

21. At 1:23 a.m., an officer went to the Goforth residence. She saw a blue Ford truck, registered to Daryl Berg, Ms. Goforth's step-father, parked in front of the Goforth house. It drove away within seconds.[38] The police entered the house but there was no one inside.[39]

22. Sgt. Sulymka met Mobile Crisis at 2:45 a.m. and went to the home of Daryl and Jane Berg (Ms. Goforth's mother). She saw Daryl Berg's blue truck in the driveway.[40] Ms. Berg was very evasive but eventually acknowledged that NB was there.[41] Sgt. Sulymka found NB on a bed. She described NB as very thin and frail. She said NB's left cheekbone was bruised, there was a large bandage on her lower leg, a large gauze on her shin and she was not very responsive.[42] NB was taken to the hospital.

23. In the morning, Cst. Fleece searched and photographed the Goforth house. Inside the front-door closet were garbage bags full of infant clothing.[43] A cardboard box in the kitchen contained a pair of pink pyjama pants with duct tape stuck to them.[44] The pants seemed to be stained with blood or faeces and the tape on the bottom of the pants had been "crunched-up" into a "string."[45]

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[34] Connie Garstin, Transcript, AR Vol V, Tab 16 at T426/37 – 38; T434/19 – 20.
[35] Connie Garstin, Transcript, AR Vol V, Tab 16 at T431/23 – 41.
[36] Connie Garstin, Transcript, AR Vol V, Tab 16 at T432/1 – 5.
[37] Connie Garstin, Transcript, AR Vol V, Tab 16 at T432/7 – 41.
[38] Cst. Dunford, Transcript, AR Vol IV, Tab 15 at T367/24 – T368/13.
[39] Sgt. Lamer, Transcript, AR Vol IV, Tab 15 at T358/11 – 21.
[40] Sgt. Sulymka, Transcript, AR Vol IV, Tab 15 at T346/20 – T347/8.
[41] Sgt. Sulymka, Transcript, AR Vol IV, Tab 15 at T348/5 – 9; T352/15 – 21;
[42] Sgt. Sulymka, Transcript, AR Vol IV, Tab 15 at T348/11 – T349/11; T353 – T354/36.
[43] Cst. Fleece, Transcript, AR Vol III, Tab 14 at T58/32 – 41.
[44] Cst. Fleece, Transcript, AR Vol III, Tab 14 at T59/35 – T60/12.
[45] Cst. Fleece, Transcript, AR Vol III, Tab 14 at T80/31 – T81/3.

24. Cst. Fleece took photos of a bedroom with a double bunkbed. There was a string tied to the doorknob. Both beds were covered with plastic. There was painters' tape on the top bunk.[46] Cst. Fleece found a strip of pink cloth by the foot of the bed. It was in a loop with a large knot at one end. In the knot was a large amount of dark-coloured hair.[47]

25. A piece of cardboard with a "large blob" of what seemed to be blood was on the floor behind the bedroom door. A presumptive screening test showed the substance was likely blood.[48] There was another piece of cardboard at the foot of the bed that seemed to have blood on it as well. Both cardboards also had brown stains which Cst. Fleece suspected was faeces because of the strong odour of urine and faeces. The odour was very dominant in that one bedroom. This was the girls' bedroom.[49]

26. In the basement, Cst. Fleece found a white rack hanging from the ceiling. A black cargo strap, attached to the rack by hooks, was hanging down slightly. There was a single strand of black hair in the buckle area of the cargo strap.[50] Below the rack was a large pile of plastic shrink wrap, silver duct tape and green painters' tape. There was a large amount of black hair on the duct tape. There was also black hair stuck to the green tape.[51]

27. Samples were sent for DNA analysis. Areas on the pyjama pants with duct tape, hair in the pink loop of fabric, hair in the pieces of tape / shrink-wrap and hair in the cargo strap matched JG's DNA.[52] NB's DNA was on the cardboard from the bedroom.[53]

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[46] Cst. Fleece, Transcript, AR Vol III, Tab 14 at T61/20 – 38.
[47] Cst. Fleece, Transcript, AR Vol III, Tab 14 at T61/40 – T62/3; T63/3 – 4; Exhibit P2, AR Vol II, Tab 12 Photos of Home, #19B.
[48] Cst. Fleece, Transcript, AR Vol III, Tab 14 at T64/15 – T65/35.
[49] Cst. Fleece, Transcript, AR Vol III, Tab 14 at T65/6 – 7; T66/12 – 34.
[50] Cst. Fleece, Transcript, AR Vol III, Tab 14 at T67/1 – 39.
[51] Cst. Fleece, Transcript, AR Vol III, Tab 14 at T67/7 – 31; T77/17 – T78/9; Exhibit P2, AR Vol II, Tab 12 Photos of Home, #20B and #21F.
[52] Exhibit P19, AR Vol II, Tab 13, Report dated 2012-11-08 at p 5, para 1.
[53] Exhibit P19, AR Vol II, Tab 13, Report dated 2013-01-09 at p 1, para 1.

28. Dr. Abdulhafid Ali Essalah was qualified as an expert in diagnosis and treatment of children. He was covering the paediatric ICU on August 1, 2012. JG was in cardiac arrest and it took Dr. Essalah 15 minutes to get the heart beating again. This, he said, was a very long time to try to resuscitate. Because she was not breathing, JG was placed on a life support machine.[54]

29. Dr. Essalah described JG as severely dehydrated, very emaciated, very thin, just skin and bones. She looked malnourished and had multiple bruises and abrasions on her body.[55] She was also in renal failure likely because she was dehydrated and malnourished. Normally, the kidney would have served as a corrective, but renal failure meant JG had been dehydrated and sick for some time.[56] She was eventually declared braindead, taken off life support and died on August 2.[57]

30. JG's weight was "way below the third percentile." A year and a half earlier, JG's weight had been normal and in the middle of the chart. According to Dr. Essalah, this definitely showed that JG had been malnourished for a period of time.[58] Tests did not show bacterial infection, there was no sign of a disease that caused malnourishment, and there was no sign of a chronic illness that could explain any of this.[59] Based on the bloodwork, Dr. Essalah assumed JG had been dehydrated for at least 24 hours.[60]

31. Dr. Shauna Flavelle was qualified as an expert in diagnosis and treatment of children, including malnourishment. Mobile Crisis had brought NB to the hospital emergency unit at 3:30 a.m. on August 1st. There, doctors inserted an intravenous line to combat NB's dehydration. Dr. Flavelle saw NB at 8:00 a.m. when her vital signs had stabilized.[61]

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[54] Dr. Essalah, Transcript, AR Vol V, Tab 16 at T399/6 – 32; T401/1 – 6; T403/27 – T404/7.
[55] Dr. Essalah, Transcript, AR Vol V, Tab 16 at T406/1 – 26; T413/21 – 36.
[56] Dr. Essalah, Transcript, AR Vol V, Tab 16 at T407/8 – 25; T415/15 – 18; T415/15 – 18.
[57] Dr. Essalah, Transcript, AR Vol V, Tab 16 at T406/30 – 35; T408/32 – 39; T410/21 – 23.
[58] Dr. Essalah, Transcript, AR Vol V, Tab 16 at T413/1 – 22.
[59] Dr. Essalah, Transcript, AR Vol V, Tab 16 at T408/2 – 15; T413/38 – T414/37.
[60] Dr. Essalah, Transcript, AR Vol V, Tab 16 at T417/31 – T418/1.
[61] Dr. Flavelle, Transcript, AR Vol VI, Tab 17 at T643/22 – T644/19.

32. Dr. Flavelle described NB as extremely thin and wasted, with very prominent ribs sticking out and her skin sagging in areas.[62] She had lost a good portion of body fat and appeared strikingly malnourished. She had a significant skin infection, pneumonia and urinary tract infection.[63] She had increased hair on her torso, arms and legs, a condition that Dr. Flavelle had seen in anorexic patients as the body's way of insulating itself when fat stores are lost.[64]

33. NB weighed only 10.5 kilograms, just under the 3rd percentile compared to children of her age and gender. Her body mass index (BMI) also fell below the 3rd percentile. The norm would have been between 15th and 85th. After a month or two, NB gained 3.5 kilograms, placing her BMI close to the 85th percentile. As a three-year-old, she was now heavier than most children her age.[65]

34. NB had bruises on her face. She had open sores and abrasions on the lower spine. On her lower left leg there was a large and fairly deep ulcer with signs of infection. There were bruises and scars around her wrists and ankles that appeared to be "wrap-around lesions."[66] Dr. Flavelle was concerned about the deep ulcer on NB's leg and the possibility of a bone infection. It was unusual for a child to have skin ulcers and NB's seemed to be festering.[67]

35. The hospital had to start feeding NB slowly. Over the next few days, NB's caloric intake was increased and she responded by eating voraciously. It was hard to keep her at half portions. Dr. Flavelle was not aware of any vomiting or diarrhoea during NB's hospital stay.[68] By the time NB was discharged on August 10th, the pneumonia and urinary tract infection had been resolved and her skin infection was improving. The wound care team was put in charge of follow-up.[69]

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[62] Select Photos from Exhibit P2, AR Vol II, Tab 12, Photos of NB, #6.
[63] Dr. Flavelle, Transcript, AR Vol VI, Tab 17 at T644/21 – T645/28.
[64] Dr. Flavelle, Transcript, AR Vol VI, Tab 17 at T646/1 – 7.
[65] Dr. Flavelle, Transcript, AR Vol VI, Tab 17 at T646/20 – T647/23; T667/39 – 41.
[66] Dr. Flavelle, Transcript, AR Vol VI, Tab 17 at T651/12 – T652/8; Select Photos from Exhibit P2, AR Vol II, Tab 12 Photos of NB, #8 and #18.
[67] Dr. Flavelle, Transcript, AR Vol VI, Tab 17 at T653/20 – 40.
[68] Dr. Flavelle, Transcript, AR Vol VI, Tab 17 at T649/1 – T650/25; T667/27 – 28; T679/40 – T680/1.
[69] Dr. Flavelle, Transcript, AR Vol VI, Tab 17 at T654/9 – 29; T660/3 – 9.

36. It was hard to tell how long NB had been malnourished. Dr. Flavelle believed NB's malnourishment was more longstanding because it took time for the body to grow hair to keep itself warm. Dr. Flavelle had seen children with stomach flu not eating for seven to ten days, or those with bad pneumonia not eating or drinking well for a week or two. These children never wasted as much as NB and they did not have NB's blood abnormalities, more typical of patients with anorexia nervosa.[70] There was nothing by way of disease or illness that explained NB's severe malnutrition. What was most telling for Dr. Flavelle was NB's recovery in one or two months after simple re-feeding.[71]

37. Dr. Sharon Leibel was also qualified to give opinion evidence as to the diagnosis and treatment of children. She was part of the child-abuse team at the hospital and examined both children. She examined JG after she was moved to the ICU.[72] JG was two years older than NB. After rehydration, JG weighed 10.6 kilograms. This meant she was at the 0.1 percentile and "significantly off-the-chart."[73] Dr. Leibel described JG as wasted, lacking subcutaneous tissue, looking like skin over skeleton.[74]

38. Dr. Leibel detailed many injuries throughout JG's body but we have to confine our summary to just a few examples. JG had a bruise under her chin that lined up with a matching red mark on her central upper chest. There were multiple linear marks wrapping around her wrists. She had bruising under the armpits. She had scabs, bruises and cut skin on her lower legs.[75] Dr. Leibel noted raw, open skin over the buttocks and the marks along the spine. She said she had seen nothing like it.[76] Instead of subcutaneous tissue on either side of the anus beneath the pubic bone, there "was just folds of skin."[77]

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[70] Dr. Flavelle T660/19 – 41.
[71] Dr. Flavelle, Transcript, AR Vol VI, Tab 17 at T667/36 – T668/22.
[72] Dr. Leibel, Transcript, AR Vol V, Tab 16 at T476/21 – 39; T477/37 – 41.
[73] Dr. Leibel, Transcript, AR Vol V, Tab 16 at T481/32 – 41; T552/1 – 6.
[74] Dr. Leibel, Transcript, AR Vol V, Tab 16 at T482/10 – 17.
[75] Dr. Leibel, Transcript, AR Vol V, Tab 16 at T485/5 – 6; T495 – T498; T494/11 – 16; T494/7 – T496/3; T500/3 – T502/24.
[76] Dr. Leibel, Transcript, AR Vol V, Tab 16 at T503/25 – T505/36; Select Photos from Exhibit P2, AR Vol II, Tab 12, Hospital Photos of JG, #17 and #18.
[77] Dr. Leibel, Transcript, AR Vol V, Tab 16 at T515/24 – T516/1.

39. Dr. Leibel also examined NB. NB was very tense and flinched when someone reached to touch her. She started to cry and fight when Dr. Leibel and hospital staff tried to take off her diaper, so they just put it back on and bundled her up. She had been given some food in the morning and her stomach "blew up like a balloon," indicating that she had very little food for a prolonged period of time. Despite being ravenous, she had to be put back on fluids.[78]

40. Dr. Leibel said the most remarkable thing was the deep ulcerated open area on NB's left leg and she had several "very unusual looking deep brown indented wrap-around lines on that leg."[79] NB was in the hospital for 12 days. When she was discharged, her weight was 11.54 kilograms. Dr. Leibel saw NB as an out-patient 8 days later. By this time, the leg wound was shallow enough that it no longer needed packing. NB still limped. Her weight was up to 13 kilograms. When Dr. Leibel saw NB again about a month later, she weighed 13.55 kilograms and was at or above the 50th percentile. Her other wounds were healing.[80]

41. Dr. Ladham testified as an expert in forensic pathology and gave opinions on causes of injury and death. He had conducted an autopsy on JG. He explained that JG died from a hypoxic brain injury that developed following cardiac arrest secondary to malnourishment and dehydration. To be precise, JG's brain injury and her pneumonia were caused by the cardiac arrest, itself caused by dehydration and malnourishment.[81]

42. Dr. Ladham said the mark under JG's chin and the matching bruise on her chest were likely not caused by simple impact given that the rib or jaw were not fractured. This pressure sore was likely from the head being held in the same position against the chest for a long time as a result of being bound or confined. This would have taken "a lot longer" than minutes.[82]

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[78] Dr. Leibel, Transcript, AR Vol V, Tab 16 at T523/11 – T524/22.
[79] Dr. Leibel, Transcript, AR Vol V, Tab 16 at T530/15 – T531/35; Select Photos from Exhibit P2, AR Vol II, Tab 12 Photos of NB, #18.
[80] Dr. Leibel, Transcript, AR Vol V, Tab 16 at T556/6 – T557/15; T559/15 – T560/28.
[81] Dr. Ladham, Transcript, AR Vol VI, Tab 17 at T712/6 – 9; T719/12 – 22; T754/40 – T755/10.
[82] Dr. Ladham, Transcript, AR Vol VI, Tab 17 at T727/40 – T729/20; T759/2 – 18.

43. Dr. Ladham noted skin loss to the back of the head.[83] This could have resulted if JG had been kept in a position with her head pressed against something for a while. Or it could happen to someone who is not moving well, especially if the person is malnourished.[84] There were patchy skin abrasions that continued from the neck to the top of the shoulders and upper back. The skin looked like it had come off. The top of the shoulders was not where one usually received pressure from laying down but Dr. Ladham said he had seen this in cases where a seatbelt or strap had been pulled across the skin in that area causing it to come off.[85]

44. JG had patchy petechial haemorrhage in the armpits. Dr. Ladham said it was hard to get direct trauma to that small area. This could have been caused by JG being picked up and squeezed or by being held up by a strap. JG's arms could have also been held and pushed together. A couple of seconds of pressure would not cause this because the skin was actually coming off but Dr. Ladham could not say how long the pressure was applied.[86]

45. JG had several abrasions or erosions of the skin on her lower back and buttocks.[87] These were in various stages of healing and ranged from new and healing ones to scars. This was the area pressed on the most when a person is lying down or if the person is pushed up against something. The scars led Dr. Ladham to believe that prolonged pressure had occurred over weeks if not months. This could have resulted from being kept in one position for too long or from being unable, because of weakness or malnutrition, to change positions. It was his opinion that JG was malnourished for a long time.[88]

46. Dr. Ladham testified that the wrap-around abrasions and scars on the wrists could be from tape. This was consistent with someone applying tape all around to hold JG's arms in position. In his opinion, the presence of old and new scars and marks meant that there were repeated episodes

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[83] Select Photos from Exhibit P2, AR Vol II, Tab 12, Autopsy Photos of JG, #143.
[84] Dr. Ladham, Transcript, AR Vol VI, Tab 17 at T729/30 – T731/10.
[85] Dr. Ladham, Transcript, AR Vol VI, Tab 17 at T731/15 – 37.
[86] Dr. Ladham, Transcript, AR Vol VI, Tab 17 at T737/1 – T738/12.
[87] Select Photos from Exhibit P2, AR Vol II, Tab 12, Autopsy Photos of JG, #6.
[88] Dr. Ladham, Transcript, AR Vol VI, Tab 17 at T738/24 – T740/6; T762/7 – 33.

of the same thing happening to JG.[89] In cross-examination, Dr. Ladham agreed that tape could have been used to hold something over the child's hand.[90]

47. Dr. Ladham saw similar tape marks and abrasions suggesting that the feet or legs could have been bound together for a prolonged period of time.[91] In cross-examination, defence counsel asked if the abrasions could have been caused by poor-fitting shoes. Dr. Ladham said it was possible, but added that shoes did not reach the calf and the back of the knee.[92]

48. The Goforths' nephew Keegan Berg was 14 years old when he testified at trial. He stayed at the house for two weekends. NB and JG, he said, were always in their room where he once saw them playing with Barbie toys.[93] On his first visit the girls were locked in their bedroom all weekend by a rope tied to the door. The girls did not eat with the family at meal times.[94]

49. Keegan had also seen the girls elsewhere in the house. On the second visit, JG was alone in the basement. Keegan was looking for his golf ball there when he found 'poop' in the corner. When he told Ms. Goforth about this, she taped JG's hands to the basement wall. Ms. Goforth told Keegan to go upstairs and he complied. He said Matthew Goforth saw this too.[95]

Defence Evidence

50. The Goforths' son, Tyler Goforth, was 12 years old when the girls moved in. He said JG was kind of skinny and NB had a little body, but both had chubby cheeks. He saw the girls at supper time when the family ate together – Tyler, his brother Matthew, Ms. Goforth, the respondent and the two girls.[96]

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[89] Dr. Ladham, Transcript, AR Vol VI, Tab 17 at T746/6 – T749/21; T760/10 – 20.
[90] Dr. Ladham, Transcript, AR Vol VI, Tab 17 at T775/18 – T776/6.
[91] Dr. Ladham, Transcript, AR Vol VI, Tab 17 at T746/38 – T747/5; T753/1 – 40.
[92] Dr. Ladham, Transcript, AR Vol VI, Tab 17 at T780/9 – 28.
[93] Keegan Berg, Transcript, AR Vol VI, Tab 17 at T686/6 – 29; see also T698/1 – 20.
[94] Keegan Berg, Transcript, AR Vol VI, Tab 17 at T689/28 – T690/28.
[95] Keegan Berg, Transcript, AR Vol VI, Tab 17 at T686/34 – T689/26; T695/2 – 29; T700/13 – 36.
[96] Tyler Goforth, Transcript, AR Vol VII, Tab 18 at T790/15 – T791/15; T795/15 – T796/12.

51. Tyler did not see the girls on the day they were taken to the hospital. He thought he saw them a couple of nights before at suppertime. He said it was a normal supper, "just the four of us" around the table eating. When asked to clarify, he changed his answer to "five of us," and then changed it again to "six actually. Yeah, well, there was me and my brother, my mom and dad, and then the two girls, so six." He said both girls still had chubby faces at that time.[97]

52. The Goforths' other son, Matthew Goforth, also testified. He was a year younger than Tyler. He confirmed that Keegan Berg spent a lot of time at their house. He said the girls were big eaters. He saw them throw up no more than two times.[98] He said his mother used green tape to stick mittens on the girls' hands but said he only saw this a couple of times. On cross-examination, he said he only saw JG's hands taped.[99] Matthew claimed he did not see injuries on NB or JG. When cross-examined, he said he did not remember telling the police JG was getting skinnier.[100] Contrary to what Keegan Berg had testified, Matthew said that he had never seen either of his parents tape JG to a wall.[101]

53. Ms. Goforth testified the respondent did not want the girls at first but changed his mind at Ms. Goforth's insistence.[102] Alicia Ward therefore arranged visits before the November, 2011 move-in date. Ms. Goforth said the girls were small and thin.[103] On cross-examination, she agreed the girls had chubby cheeks.[104]

54. Ms. Goforth asked for but never received health cards for the girls.[105] She gave an example of when the Goforths took NB to the hospital for a facial injury. NB got stitches and also received a prescription at the hospital. Later, the hospital billed the Goforths because NB did not have a health card. The invoice called NB "Tanasha Goforth" because the Goforths did not know her

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[97] Tyler Goforth, Transcript, AR Vol VII, Tab 18 at T798/35 – T799/35; T811/37 – 40.
[98] Matthew Goforth, Transcript, AR Vol VII, Tab 18 at T827/35 – T828/18.
[99] Matthew Goforth, Transcript, AR Vol VII, Tab 18 at T831/35 – T832/7; T848/26 – 40.
[100] Matthew Goforth, Transcript, AR Vol VII, Tab 18 at TT865-866.
[101] Matthew Goforth, Transcript, AR Vol VII, Tab 18 at T831/25 – T832/16.
[102] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T872/2 – 34.
[103] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T873/4 – 40.
[104] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T928/16 – 22.
[105] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T882/23 – 38.

name at the time.[106] The hospital admission date was November 7, 2011 and the prescription was dated November 8.[107] (According to the Agreed Statement of Facts, the girls started living with the Goforths on November 8, 2011.[108]) Ms. Goforth admitted that she never took the girls to the doctor even when they were sick because she did not have health cards.[109]

55. Ms. Goforth said the girls roamed around at night. For their safety, she tied a string on the doorknob so they could open the door a little and ask for help. She only tried this once.[110] She denied ever refusing the children food.[111] At first the girls ate so much that they threw up and Ms. Goforth slowed their food down to help them. This became less of an issue a few months before the "incident" because by then JG understood food would be available.[112] Ms. Goforth testified that JG was in pull-up diapers but NB was not potty-trained when she came to the house and Ms. Goforth was responsible for changing her diapers.[113]

56. As for the family's routines, Ms. Goforth woke the girls up at 8:30 a.m. and had breakfast with them. The respondent would be at work. She would have lunch with the kids around noon. Sometimes she would go to McDonald's with the girls, run the respondent's lunch to him, and then let the girls eat their fries in the car. Ms. Goforth bathed the children every two days.[114] At supper time, everyone was at the table including the respondent if he was home on time.[115]

57. When shown photos of JG at the hospital, Ms. Goforth denied knowing how JG got the bruises to her forehead and foot. She said the marks on the wrist and arm were caused from the

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[106] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T882/29 – T884/32; T885/19 – 35.
[107] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T883/ 31 – T884/10; T886/33 – 37.
[108] Agreed Statement of Facts, AR Vol II, Tab 11 at para 4.
[109] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T899/21 – T900/12; T929/37 – T930/14.
[110] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T893/16 – T895/21.
[111] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T924/4 – 30.
[112] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T874/24 – 28; T895/23 – T896/26.
[113] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T891/32 – T892/1.
[114] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T931/24 – T933/12.
[115] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T876/32 – 39.

tape on her mittens. Ms. Goforth said she used tape to keep the mittens on and stop JG from scratching herself or her sister.[116] She denied pulling off the tape before going to the hospital.[117]

58. Ms. Goforth denied ever seeing the ulceration on JG's back and did not know how it got there. She said the rest of the marks on JG's back were diaper rashes. They would clear up and come back. She denied seeing the large red mark on the back of JG's head and had no idea how it got there. Ms. Goforth claimed the marks behind JG's heels were from her high-cut runners.[118]

59. Ms. Goforth said she taped mittens to NB's hands as well. She did not know where the bruises on NB's cheek came from. She claimed she only saw the mark on NB's back the week before JG's death. She said it was caused from lying down. Ms. Goforth said she tended to the wound and cleaned it. She said the wound on NB's shin resulted when NB tripped in the backyard. She said it was just a little cut and insisted it did not look like the photograph.[119]

60. Ms. Goforth said the marks around NB's lower legs near the ankle were from tape. She was not asked why NB's legs had been taped around the ankle. She assumed it was likely itchy or bothering NB so she probably rubbed it.[120] Ms. Goforth said the pink fabric with JG's hair entwined was a homemade hair band. She explained the clump of plastic with the various tape found in the basement by saying that they taped plastic on the girls' bed to protect the mattress from urine. She had no idea how JG's hair got on the green tape in the basement. She denied using plastic or tape to bind the girls.[121]

61. Ms. Goforth said everything was normal until the last two weeks when she and the girls got sick. The girls started to eat less but still ate soup. She thought they might have had the flu. They had diarrhoea. JG threw up a couple of times. Ms. Goforth described herself as a "severe anaemic" and said her energy level was very low. On July 31st, 2012, she tried to give the girls

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[116] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T902/15 – T905/23.
[117] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T955/6 – T956/13.
[118] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T906/2 – T907/7; T909/31 – T910/11.
[119] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T910/39 – T913/35.
[120] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T914/9 – 23.
[121] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T914/39 – T917/26.

liquids for breakfast, lunch and supper and "they would take it."[122] Around 11 p.m., she went to check on the girls' diapers. NB was sitting up but JG was not responsive. She called for the respondent and he came. They rushed JG to the hospital.[123]

62. On cross-examination, Ms. Goforth said she did not bathe the girls on July 31st and said the last time she bathed them could have been over two weeks before.[124] She maintained that the girls' emaciated state was only from having diarrhoea in the two weeks before JG's death. She repeated that she was sick too and not feeling very well. She said she moved the girls to liquids because she thought the food would just come back up.[125]

63. Ms. Goforth said she did not take NB to the hospital that night because she did not think there was anything wrong with her. She denied wanting to hide NB from the authorities. When directed to look at the photos of JG, Ms. Goforth disagreed that JG was skin and bones, preferring to call her "slender" and said the girls had always been slender.[126]

64. The respondent also testified at trial. He explained he was at first against having more children in the house but changed his mind because of his wife. When he met the girls, he fell in love with them and said he now wanted them with open arms. He described the girls as slender with high cheek bones.[127]

65. When asked to describe in one word what he did for a living, the respondent answered "busy." He then explained that he was a carpenter, started work at 6:00 a.m. and finished work at 5:00 or 7:00 p.m. at the latest. He worked six days a week, Monday to Saturday. The girls went to bed usually around 8 or 8:30 p.m.[128] Typically, the respondent would get home and everyone

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[122] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T919/2 – T922/24; T933/18 – T934/16.
[123] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T922/26 – T923/9.
[124] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T938/5 – 18.
[125] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T965/39 – T966/15.
[126] Tammy Goforth, Transcript, AR Vol VII, Tab 18 at T966/17 – T969/2 and T977/8 – 14.
[127] Respondent, Transcript, AR Vol VIII, Tab 19 at T1002/6 – T1003/13; T1049/13 – 18.
[128] Respondent, Transcript, AR Vol VIII, Tab 19 at T998/26 – T999/11; T1003/18 – 21; T1009/16 – 35.

would be anxiously waiting for him. When asked if the girls were present at suppertime, he responded that as a father he made sure everyone was at the table every day so he could ask them about their day.[129] On cross-examination, he said that he took few holidays. Despite his evidence about his work schedule, he testified he was expected to work 90 to 120 hours a week.[130]

66. The respondent said his wife dressed, changed and bathed the girls. He never changed their diapers and never saw the girls without their clothes. When shown pictures of NB, the respondent said everyone in the house including himself had noticed the girls' body hair and he had thought this was unusual. He managed to observe this when the girls wore 'muscle shirts.'[131]

67. The respondent commented on the girls' eating habits. He said NB would not chew her food and would just swallow. He remembered a time when she choked as she ate and also remembered seeing her vomit once. JG would chew her food most the time and he had seen or heard about her vomiting after supper. The respondent said there was always food at the house and stated adamantly that neither he or his wife ever denied the girls food.[132]

68. He testified about the girls' playing habits. The girls played all over the house with their dolls and strollers but they hardly ever got along and got into fights. Sometimes the boys would colour with the girls and they got along well.[133]

69. The respondent said he had seen mittens taped to the girls' hands and his wife had explained the rationale behind it. He never taped mittens onto the girls' hands himself.[134] The respondent said he had never seen the string on the girls' bedroom door but had heard his wife would tie the string to the closet's door handle.[135] He said he and Ms. Goforth learned to cover the mattress

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[129] Respondent, Transcript, AR Vol VIII, Tab 19 at T1010/25 – T1011/3.
[130] Respondent, Transcript, AR Vol VIII, Tab 19 at T1009/20 – 21; T1066/35 – T1067/9.
[131] Respondent, Transcript, AR Vol VIII, Tab 19 at T1011/9 – 35; T1039/32 – T1041/37.
[132] Respondent, Transcript, AR Vol VIII, Tab 19 at T1020/35 – T1022/5.
[133] Respondent, Transcript, AR Vol VIII, Tab 19 at T1022/12 – 31.
[134] Respondent, Transcript, AR Vol VIII, Tab 19 at T1042/6 – 15.
[135] Respondent, Transcript, AR Vol VIII, Tab 19 at T1030/14 – 33; T1068/6 – 13; T1069/5 – 6.

with protective plastic covering because 'pee and poo' would soak through the girls' diapers. They used duct tape for any joints and seams so urine would not go through to the bed.[136]

70. The respondent denied ever seeing the pink fabric hair band. He denied using the cargo strap to tie down the girls and he said he never saw his wife do this either.[137]

71. He said from the beginning the girls' health fluctuated. There were good and bad days and Ms. Goforth would nurse the girls back to health before the girls would run high fevers again. Sometimes he would see this himself and sometimes he was told by his wife or his kids.[138]

72. As for the days leading to July 31st, the respondent said he had noticed the girls' eating habits change a lot. Whereas they used to eat a lot, by the end of June and beginning of July he noticed they would eat just small portions, "like tablespoons."[139] He noticed they had started vomiting. He first said that he noticed diarrhoea but then said that he had heard about the diarrhoea from his wife. He stressed that there was always plenty of food available.[140]

73. The respondent said that on Tuesday, July 31, 2012 he came home around 6 or 6:30 p.m. The house was quiet and Ms. Goforth was on the couch. He had a shower, spoke to his son Matthew, lay on the couch and fell asleep watching TV. He woke up to Ms. Goforth's screams. He ran upstairs and saw Ms. Goforth holding JG, who was limp and wrapped in a sheet. NB was sitting up on her bed. He carried JG to the car and they rushed her to the hospital.[141]

74. On cross-examination, the respondent said that he was not home to see the girls eat that night but saw bowls in NB's spot on the table and also noticed a 'sippy cup.'[142] He also said he had noticed the girls' eating habits "down to the last week" and remembered the girls were "just

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[136] Respondent, Transcript, AR Vol VIII, Tab 19 at T1031/3 – 18.
[137] Respondent, Transcript, AR Vol VIII, Tab 19 at T1032/2 – T1033/31; T1035/34 – T1036/10.
[138] Respondent, Transcript, AR Vol VIII, Tab 19 at T1036/16 – 23.
[139] Respondent, Transcript, AR Vol VIII, Tab 19 at T1042/17 – 27.
[140] Respondent, Transcript, AR Vol VIII, Tab 19 at T1043/8 – 16.
[141] Respondent, Transcript, AR Vol VIII, Tab 19 at T1023/5 – T1026/3.
[142] Respondent, Transcript, AR Vol VIII, Tab 19 at T1085/1 – 17; T1113/35 – 39.

eating soup in the last few days." He remembered the girls eating on the Sunday prior when he had the day off. He was "concerned about the girls" and "it was visible" that they were sick, but he knew they were "sickly little girls" and knew that his wife would bring them back to health. He agreed that it did not cross his mind to get medical attention.[143] When Crown counsel asked him if he ever spoke to his wife about what he had noticed about the girls, he said he never did.[144]

75. He also explained that he was never home, was always at work and his wife looked after the girls.[145] Throughout the girls' stay, he never thought to call anyone about the girls because he did not feel it was his part to call.[146] At one point he said he knew in his mind that the girls were "skinny all the time" and that he had seen a few bruises. He then corrected himself and said the girls were "slender" not skinny.[147]

76. Crown counsel confronted the respondent with his statement to the police. When the police officer had asked him where it all went wrong and when it was that Ms. Goforth reached a breaking point, the respondent had replied it was a "couple of weeks ago, she just -- it seemed like -- it didn't seem like she cared anymore." The respondent claimed the police put words in his mouth and what he meant was that his wife did not care about herself anymore.[148]

77. On cross-examination, the respondent said he had often changed the boys' diapers in the past and had given the occasional bath, but they had decided to leave the girls to Ms. Goforth.[149] He said he had not noticed the girls' bad teeth. When asked if taking the children to the dentist was his wife's responsibility, the respondent replied, "we would share responsibilities on certain things, if I was home."[150] He said the girls' day-to-day needs was Ms. Goforth's responsibility.[151]

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[143] Respondent, Transcript, AR Vol VIII, Tab 19 at T1092/27 – T1093/3; T1107/1 – 34; T1112/16 – T1113/7; T1114/3 – 5; T1124/12 – 31; T1128/10 – 25; T1129/35 – 39.
[144] Respondent, Transcript, AR Vol VIII, Tab 19 at T1114/26 – 30.
[145] Respondent, Transcript, AR Vol VIII, Tab 19 at T1105/35 – 38; T1129/18.
[146] Respondent, Transcript, AR Vol VIII, Tab 19 at T1106/38 – 40.
[147] Respondent, Transcript, AR Vol VIII, Tab 19 at T1104/34 – T1105/6.
[148] Respondent, Transcript, AR Vol VIII, Tab 19 at T1102/23 – T1103/13.
[149] Respondent, Transcript, AR Vol VIII, Tab 19 at T1047/24 – 40; T1063/19 – 29.
[150] Respondent, Transcript, AR Vol VIII, Tab 19 at T1051/33 – T1053/6.
[151] Respondent, Transcript, AR Vol VIII, Tab 19 at T1062/30 – 32.

He later clarified that he did "manly things with the boys" and Ms. Goforth did "woman things with the girls" and that was "the way it is in our home."[152]

78. The respondent said he did not know NB's full name and it was not until the preliminary hearing for this matter that he learned it. He said he never knew his status in relation to the children. He thought they were caring for JG and NB for a short term.[153]

79. When the Crown asked if the girls had chubby cheeks at the beginning, the respondent said that they had "high cheekbones" and clarified the two terms were not equivalent.[154] He described the girls as slender. He disagreed that NB looked skinny in the hospital photograph and continued to call her slender.[155]

80. The Crown asked the respondent if he knew cardboard boxes were used to soak up urine. The respondent explained that one day he came home and saw the girls colouring on the rug in the living room. He saw "pee or mixed diarrhea" seeping through their clothes and onto the rugs. He and his wife both agreed to use cardboard boxes as a solution. When asked why not just change the diapers, the respondent said that Ms. Goforth had been changing the girls' diapers and he saw evidence of this when he got home.[156] Later he said, "that was the only fix we've thought of."[157]

81. The respondent said that he had never seen JG's back but his wife told him that there was a pretty bad rash there. He never looked himself.[158]

82. The respondent said most of the injuries seen on JG and NB were self-inflicted or inflicted on each other. When Crown asked the respondent to explain their emaciated state, he said they

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[152] Respondent, Transcript, AR Vol VIII, Tab 19 at T1101/25 – 28; T1122/14 – 20.
[153] Respondent, Transcript, AR Vol VIII, Tab 19 at T1051/3 – T1052/5; T1058/37 – 41; T1098/6 – 41.
[154] Respondent, Transcript, AR Vol VIII, Tab 19 at T1053/35 – T1054/7.
[155] Respondent, Transcript, AR Vol VIII, Tab 19 at T1056/2 – T1057/4.
[156] Respondent, Transcript, AR Vol VIII, Tab 19 at T1064/19 – T1065/6.
[157] Respondent, Transcript, AR Vol VIII, Tab 19 at T1093/23 – 37.
[158] Respondent, Transcript, AR Vol VIII, Tab 19 at T1084/17 – 35.

were sick girls and that he had hardly seen their bodies.[159] He said he had seen some marks on the girls' wrists. He had also seen marks and bandages on JG's heels and said this was from tight leather shoes. He said he never saw the injuries themselves.[160]

83. In pre-charge discussions, the respondent's counsel explained defence's theory that the respondent was not the primary caregiver and at no time denied foods, fluids or medical care to the children.[161] Counsel submitted their positions and the judge incorporated them in the charge.[162]

84. The jury found Ms. Goforth guilty of second-degree murder of JG and unlawfully causing bodily harm to NB. The respondent was found guilty of manslaughter in relation to JG and unlawfully causing bodily harm to NB. On appeal, after argument and while the decision was on reserve, the Court raised an issue on its own motion and asked the parties to file supplementary submissions regarding the *mens rea* for the offence of failing to provide necessaries of life, including the defence of honest but mistaken belief and foreseeability of risk of harm.[163] After supplementary written submissions were filed, the panel highlighted a specific issue directed at the judge's instructions about foreseeability of harm beyond what is trivial or transitory.[164] This became one of the main issues that decided the appeal.

85. The majority judges allowed the respondent's appeal and ordered a new trial. They found the jury may have been confused by the trial judge's explanations of the *mens rea*. They also found the instructions had failed to adequately connect the evidence to the law. Caldwell J.A. wrote the dissenting opinion and would have dismissed the respondent's entire appeal.

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[159] Respondent, Transcript, AR Vol VIII, Tab 19 at T1079/30 – T1080/40.
[160] Respondent, Transcript, AR Vol VIII, Tab 19 at T1081/26 – T1082/15.
[161] Pre-Charge Discussions, AR Vol VIII, Tab 19 at T1168/8 – 30.
[162] Pre-Charge Discussions, AR Vol VIII, Tab 19 at T1176/20 – 22. Jury Charge, AR Vol I, Tab 5, "Count Two" at para 248.
[163] CA Reasons, Vol II, Tab 7 at para 83.
[164] CA Reasons at para 94.

PART II – ISSUES

86. Did the Court of Appeal err by finding the trial judge failed to provide adequate instructions to the jury when relating the evidence to the *mens rea* of the predicate offence of failing to provide necessaries of life? Yes.

87. Did the Court of Appeal err by finding the respondent's personal characteristics or subjective awareness to be relevant factors in the objective *mens rea* analysis? Yes.

88. Did the Court of Appeal err by finding the trial judge's *mens rea* instructions may have confused the jury? Yes.

89. Did the Court of Appeal err by applying an incorrect standard to its review of the jury instructions? Yes.

PART III – ARGUMENT

90. This appeal concerns the *mens rea* for the offence of failing to provide necessaries of life. This predicate offence founded the respondent's guilty verdicts for the manslaughter of JG and the offence of unlawfully causing bodily harm to NB. The jury instructions on these charges were virtually identical so far as the issues in this appeal are concerned. For the sake of brevity, we reference mainly the jury charge in relation to manslaughter but our arguments relate equally to the charge of unlawfully causing bodily harm. We respectfully adopt Caldwell J.A.'s dissenting opinion and offer the following submissions.

The Instructions Adequately Related the Evidence to the Law

91. The majority judges found the jury instructions inadequately connected the evidence to the objective *mens rea* for the offence of failing to provide necessaries of life. The evidence in question was the respondent's testimony about his busy work schedule, the apportionment of

duties in the house and his claim that he did not know the children were being abused or were starving to death. The Crown submits these factors were irrelevant to the objective fault element.

1) The Mens Rea Cannot Undercut Basic Duties Imposed by the Actus Reus

92. Section 215 of the *Criminal Code* imposes a duty to provide necessaries of life. The *actus reus* entails being under a duty to provide necessaries, failing to do so, and certain health or life-threatening consequences. The section is meant to guarantee a minimum level of safety and security for children. The *mens rea* for this duty-based offence is objective and is assessed by reference to the reasonable person in the circumstances.[165]

93. Although perfect symmetry between the *actus reus* and *mens rea* of an offence may not be always possible, the fault element cannot be defined in a way that erodes the requirements imposed by the *actus reus*. This is what the majority judges did. They defined the objective *mens rea* for failing to provide necessaries of life in a way that a person, like the respondent, could live under the same roof as two small children but neglect them for long enough that one child starved to death and the other barely survived – all supposedly justified because he was busy and it was his wife's responsibility to take care of the children.

94. The majority judges found the respondent's busy work schedule and his claim that he was not the primary caregiver for the children were relevant to the objective *mens rea*. They reasoned that parents need not personally provide for the necessaries and may rely on others to do so in their absence. To illustrate the point, they posed two hypothetical scenarios, one of a travelling oilfield worker and the other a near-absent shift worker, both of whom haplessly trusted their spouses to provide for the children only to find out later that the children had been deprived. The judges explained that Canadian societal norms countenance diverse family structures as well as reliance on a spouse, day-care providers or other caregivers and these were relevant to whether a reasonable

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[165] *R v J.F.*, 2008 SCC 60 at paras 66 – 67.

person would have foreseen the risk of harm.[166] All this served as a basis for what they thought the jury instructions should have looked like.[167]

95. These hypothetical scenarios had nothing to do with this case and could not have shed light on the adequacy of the jury instructions. The majority judges mischaracterized the case by speaking in terms of an absent parent or treating the case as if it were only about an incident that happened behind the respondent's back as opposed to a pattern of extreme neglect.

96. The circumstances of the respondent were unremarkable. He was not an absent or far-away oilfield worker. Other than being absent during the day, he ate, slept and lived in the same house. He was home every night and all day on Sundays. He knew the girls were 'sickly' and knew they had not been eating normally in the last week before JG was rushed to the hospital. He admitted knowing the girls were in such a poor state that it was necessary to put them on a piece of cardboard to protect the rug from the urine and faeces leaking from their clothing. He knew JG had a "bad rash" but never bothered to check on her condition. The medical expert who saw the damage had seen nothing like it. The respondent said he was busy and his wife was responsible for the girls. A child died and another was found at the brink of starvation. Their bodies were covered with bruises and open sores. Experts testified deprivation had taken place over a prolonged period of time.

97. There is a difference between making temporary childcare arrangements and unlawfully abdicating parental duties to provide necessaries of life. A parent may fulfil the duty to provide necessaries by making sure the children are looked after during the parent's temporary absence. But a parent cannot live in the same house as the children and wash his hands of the duty to ensure the children are not starving to death by pushing all responsibility onto the other parent.

98. Section 215 does not distinguish between primary and secondary caregivers. It imposes the same minimum standard of care on parents regardless of their gender or their preconceived

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[166] CA Reasons at paras 190 – 196.
[167] CA Reasons at paras 199 – 200.

notions about gender roles. The respondent's explanations about the apportionment of responsibilities in the household were irrelevant to the objective *mens rea*. If this were not so, then a person could live in the same house as his children but simply contract out of the statutory duty to provide basics of life. The *actus reus* of the offence had been established and, as a caregiver, the respondent owed the children a baseline level of care and attention. But the majority judges defined the *mens rea* in a way that chipped away at the basic performative duties the *actus reus* imposed.

99. In legislating section 215, Parliament expressed a societal standard that guaranteed a minimum level of care for the most vulnerable. This was the only societal value the majority judges were entitled to consider. Instead, they tapped into general conceptions about the diversity of families.[168] Personal beliefs about who bears childcare responsibilities can never excuse failure to perform the minimum standard of care imposed by Parliament. The Alberta Court of Appeal recently expressed the point in these words, albeit in relation to a different issue under section 215:

> An infant child has no control over what his or her parents do – or do not do. The criminal law, as an instrument of society's values, is intended to protect children's health and safety. This objective transcends individual choice. Society no longer accepts that it has no valid interest in what goes on behind closed family doors; it is more informed and better able to address dangers to the life and security of children. Parents in this country have no right to endanger their children's lives for ideological, philosophical or cultural reasons or otherwise. After all, the life they would endanger is not their own; it is their child's.[169]

100. The practical consequence of the majority decision is that parents have an unfettered discretion to opt out of their duties to provide the necessaries of life to children simply by delegating their legal responsibilities to others. Such reasoning effectively denies the protection section 215 was meant to provide to society's most vulnerable and is plainly contrary to law.

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[168] CA Reasons at para 190.
[169] *R v Stephan*, 2021 ABCA 82 at para 76.

2) The Respondent's Personal Circumstances Were Irrelevant to the Objective Mens Rea

101. The objective fault element required by s. 215 does not take into account personal circumstances of an accused person short of incapacity to appreciate the risk. At this point it is necessary to look at this Court's discussions of the objective fault element in *R v Naglik* and *R v Creighton*. In these concurrently released cases, the majority opinion on the objective test was articulated by McLachlin J. (as she then was) and the minority by Lamer C.J. What distinguished the two approaches was the extent to which personal characteristics of an accused entered into the objective test.[170]

102. Lamer C.J. held that the reasonable person had to be instilled with "frailties which might have rendered the accused incapable of having foreseen what the reasonable person would have foreseen."[171] He defined 'frailties' broadly to encompass "personal characteristics habitually affecting an accused's awareness of the circumstances which create risk." Even so, these had to be characteristics that the accused could not manage or control.[172]

103. McLachlin J. rejected this approach because it turned the test into a subjective one and eroded the minimum standard of care set by Parliament.[173] She also rejected Lamer C.J.'s 'habitual' factors that altered the test based on the background and predisposition of an accused.[174] Absent-mindedness, age, education and culture did not matter.[175] Neither did individual excusing conditions.[176] The only characteristics relevant to the test were those that amounted to "incapacity to appreciate the nature of the risk which the activity in question entails."[177] Still, the reasonable person did not operate in a factual vacuum and the law was interested in what a reasonable person would have done in the circumstances of the case.[178] In other words, the test was blind to the actor

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[170] *R v Creighton*, [1993] 3 SCR 3 at p 59 *i – j* [*Creighton*].
[171] *R v Creighton* at p 25 *h – j.*
[172] *R v Creighton* at p 30 *d – j.*
[173] *R v Creighton* at p 58 *b – c*.
[174] *R v Creighton* at p 61 *a – b*.
[175] *R v Creighton* at p 70 *h – i.*
[176] *R v Creighton* at p 63 *b – c.*
[177] *R v Creighton* at p 61 *f.*
[178] *R v Creighton* at p 71 *c – g.*

but sensitive to the activity.[179] That is why greater care is expected of the reasonable person engaging in activities that require special skill.[180]

104. The majority judges of the Saskatchewan Court of Appeal heavily relied on a passage[181] that the majority judges in *R v Naglik* explicitly rejected.[182] In that passage, Lamer C.J. had explained that the reasonableness of the conduct is assessed by reference to "the circumstances of the accused and the offence." But as we explained above, the reasonableness of conduct is to be assessed almost exclusively in light of the circumstances of the offence or the activity.[183]

105. By relying on the dissenting judgment, the majority judges repeatedly blurred the line between subjective factors and objective intent. Even though they said personal characteristics of an accused were irrelevant, they injected subjective factors into the analysis. To be precise, the respondent's explanations about his busy schedule and the apportionment of responsibilities in the household, even if accepted, were characteristics that pertained to him not the activity. At best, they amounted to a habitual disposition not to care, a disposition that was entirely under the respondent's control.

106. The objective test was not concerned with the respondent's personal way of life. As Caldwell J.A. pointed out, the respondent was under a duty to meet the minimum standard of care under section 215 no matter how he decided to structure his family.[184] The only relevant question was whether a reasonable person in the circumstances of the case would have directed his or her mind to the risk.[185]

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[179] *R v Creighton* at p 72 *j;* see also *R v Javanmardi,* 2019 SCC 54 at para 38 [*Javanmardi*].
[180] *R v Javanmardi* at para 37.
[181] CA Reasons at paras 166 and 176; *R v Naglik*, [1993] 3 SCR 122 at pp 142 *e* – 144 *a* [*Naglik*].
[182] *R v Naglik* at p 148 *b – h* (McLachlin J.)*;* 149 *f – g* (L'Heureux-Dube J.).
[183] See *R v Beatty*, 2008 SCC 5 at para 39 [*Beatty*].
[184] CA Reasons at para 109.
[185] *R v Creighton* at p 58 *h – j.*

3) Actual Knowledge or Beliefs Are Irrelevant to the Objective Mens Rea

107. According to the majority judges, the respondent's claim that "he thought that these necessaries were being provided by Ms. Goforth" was relevant.[186] They held the jury needed to assess whether this belief was reasonable in light of the respondent's particular spousal relationship. Among others, relevant questions for the jury to consider included the way the couple had discussed child-rearing responsibilities; whether the respondent had reason to believe his spouse was willing and able to carry out her duties; and his reasons for believing that Ms. Goforth was carrying out the duties.[187]

108. These questions show that the majority judges collapsed the objective test into a subjective one. As this Court explained in *R v Creighton*, the objective *mens rea* "is not concerned with what the accused intended or knew. Rather, the mental fault lies in failure to direct the mind to a risk which the reasonable person would have appreciated."[188]

109. The condition of the children would have been readily apparent to anyone. This was not a case where the respondent was somehow blinded by external forces from seeing the obvious. Rather, he refused to see the obvious and even at trial insisted on describing starving children as merely slender. The respondent had a duty, independent of his wife, to care for the children. He was responsible to give the children food and water and call for help before it was too late. A child starved to death under his roof and her body was covered with injuries. The child who survived had a deep, festering wound and still limped after being released from the hospital. We have filed a selection of photographs from the trial depicting major wounds and injuries. These children were not just 'sickly,' as the respondent kept calling them in his testimony. They endured prolonged agony.

110. As this Court said in *R v Beatty*, there are cases where the reasonable person in the circumstances of the accused would not have been aware of the risk or would not have been able

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[186] CA Reasons at para 236 (emphasis added).
[187] CA Reasons at para 200.
[188] *R v Creighton* at p 58 *h – j*.

to avoid creating the danger. The issue is assessed based on the events surrounding the activity and not the personal characteristics of the accused short of incapacity to appreciate the risk or incapacity to avoid creating the danger. Again, it is never open to an accused to say that he or she gave no thought to the matter because "the fault lies in the failure to bring to the dangerous activity the expected degree of thought and attention that it required."[189]

111. The respondent's subjective beliefs that the girls were going to get better or that his wife was going to take care of the situation were all irrelevant to the objective test. These were just explanations as to why the respondent had given no thought to dire circumstances that would have been apparent to anyone.

4) The Instructions Repeatedly Placed the Respondent's Circumstances Before the Jury

112. The issues raised above served only as the backdrop for the majority judges' conclusion that the jury instructions failed to adequately relate the evidence to the law. As noted, Caldwell J.A. disagreed with the majority on this issue.

113. However, even if the majority judges were correct to reason as if the respondent's subjective awareness of the girls' condition was relevant, the trial judge's instructions were proper and consistent with the applicable law. The trial judge's instructions included repeated references to the respondent's testimony.

114. As this Court explained in *R v Jacquard*, a trial judge should review substantial parts of the evidence and give the jury the theory of the defence. However, in many cases, the judge only needs to review the relevant evidence once and does not have to repeat it in relation to every essential issue. A reviewing court will look at the jury charge as a whole to see if the jury was left with a sufficient understanding of the facts in relation to issues.[190]

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[189] *R v Beatty* at paras 37 – 40.
[190] *R v Jacquard*, [1997] 1 SCR 314 at para 14 [*Jacquard*].

115. The jury instructions involved overlapping law and evidence. Two people were at trial for two offences each in relation to a different child. The alleged crimes shared the same predicate offence of failing to provide necessaries. Similar instructions and recitation of facts were repeated four times.

116. The instructions began with Ms. Goforth and the charge of second-degree murder. The summary of the facts in this section included the respondent's work hours and his claim that he was busy, that he was not responsible for bathing, dressing or changing diapers and never saw the children without clothes. It included the various explanations he had received from his wife about the girls.[191] This evidence would be repeated again later in the instructions in relation to Ms. Goforth's charge of unlawfully causing bodily harm to NB.[192]

117. The judge then turned to the respondent's charge of second-degree murder. At the outset, she laid out an overview of the law and stated that the respondent's conduct had to constitute a marked departure "from that of a reasonable person in the same circumstances."[193] She then outlined the facts in relation to the *actus reus* of the offence.

118. This summary even more comprehensively described the respondent's circumstances and his various explanations about his lifestyle.[194] A main thrust of the respondent's evidence was that he thought the girls were just 'sickly' and believed that Ms. Goforth would again bring them back to health.[195] Right after this section, the judge instructed the jury on the test in *R v W.(D.)*[196] and invited jurors to acquit the respondent if they believed his evidence or if it raised a reasonable doubt.[197]

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[191] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at paras 73 – 88.
[192] Jury Charge, AR Vol I, Tab 5, "Count Two" at paras 72 – 88.
[193] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at para 195 (emphasis added).
[194] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at paras 227 – 253.
[195] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at para 250.
[196] *R v W.(D.)*, [1991] 1 SCR 742.
[197] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at paras 260 – 261.

119. Again, this summary of the respondent's circumstances were repeated later in relation to the charge of unlawfully causing bodily harm to NB.[198] The judge also incorporated the respondent's position into the charge – his claim that he was not the primary caregiver for the children, that he earned money for the family and Ms. Goforth was responsible for the children.[199]

120. When the judge turned to the *mens rea* for the predicate offence, she outlined the test in a more fulsome manner and again explained that the test involved "a marked departure from the standard of conduct of a reasonably prudent person in the circumstances."[200] She did not repeat all the evidence at this point and simply said the following:

> In order to answer these questions and to decide whether the Crown has proven these questions beyond a reasonable doubt, you should consider the medical evidence which has been presented. You should consider the photographs filed as exhibits. You should consider the evidence of the police officers who had the opportunity to observe [JG]. You should also consider the evidence of Tammy and Kevin Goforth.
>
> Tammy testified that she believed the girls would get better. Kevin testified that the girls were sickly and that they were sick twice per month during the nine months they lived in their home.[201]

121. This was the passage the majority judges found to be problematic because of its brevity. They believed evidence such as the apportionment of duties in the household, the respondent's working hours, his claim that he did not see the children without clothes, all needed to be repeated at this junction and in relation to the fault element.[202] They offered two reasons for this. They reasoned that the respondent's claim that "he thought that these necessaries were being provided by Ms. Goforth" was relevant to the fault element and not the *actus reus*.[203] We have already

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[198] Jury Charge, AR Vol I, Tab 5, "Count Two" at paras 182 – 204.
[199] Jury Charge, AR Vol I, Tab 5, "Count Two" at para 248.
[200] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at paras 266 and 267(B) (emphasis added).
[201] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at paras 269 and 270.
[202] CA Reasons at para 234.
[203] CA Reasons at para 236.

addressed this issue. Second, the majority judges believed the brief reference may have led the jury to conclude the respondent's explanations were irrelevant to the fault element.[204]

122. To start, the judge did not have to repeat the evidence she had repeated multiple times in what was already a long jury charge. The jury would have been thoroughly familiar with the respondent's circumstances and would have fully understood what these circumstances entailed.

123. In addition, the trial judge had instructed the jury on the test in *W.(D.)* at the end of the section on *actus reus* and had invited the jurors to acquit the respondent if they believed his evidence.[205] The verdict shows that the jury rejected the respondent's explanations. It would be illogical to think that jurors would have believed the same explanation in the *mens rea* context only if it were repeated to them as fully as the first time they rejected it.

124. Lastly, the trial judge had provided a draft of the instructions to counsel and defence counsel did not object to the brief overview of the evidence in the impugned passage. As this Court pointed out in *R v Royz*, lack of objection is not fatal but may be informative.[206] Trial counsel was well-positioned to assess the adequacy of the charge in relation to the defence theory, which consisted of the respondent being busy and not being the girls' main caregiver. Defence counsel would have understood that a full repetition of the evidence in relation to *mens rea* would have included not just the respondent's explanations, but also another full-blown reminder to the jury of the devastating body of evidence about the condition of the girls. Brevity benefitted the respondent.

125. In conclusion, the objective *mens rea* does not consider what a person knew or intended and the fault lies in the failure to direct the mind to the risk. Neither does the test consider personal characteristics short of what robs a person of the capacity to appreciate the risk. The majority judges erred in holding otherwise. They also erred by failing to look at the jury charge as a whole

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[204] CA Reasons at para 237.
[205] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at paras 260 – 261.
[206] *R v Royz*, 2009 SCC 13 at para 3.

and by thinking that the judge needed to repeat evidence that would have been thoroughly familiar to the jury. The jury simply did not believe the evidence.

The Court of Appeal Applied an Incorrect Standard of Review in Finding that the Judge Had Misdirected the Jury About the Elements of the Offence

126. This Court has endorsed a functional approach to assessing the adequacy of jury instructions. A functional approach requires appellate courts to examine the instructions as a whole and in the context of the evidence and arguments. Jury instructions are adequate if they properly equip the jury to perform its task. The ultimate question is whether an appellate court is satisfied that the jurors would adequately understand the issues, the law relating to the charge, and the evidence they should consider in resolving the issues.[207]

127. Overcharging is just as incompatible with the functional approach as is undercharging. The trial judge's duty is to decant and simplify. Jury instructions do not become inadequate if more could have been said or if the contents could have been located in another place in the instructions. Instructions do not fall short of the standard if things could have been expressed or arranged better. Perfection is not required. Instructions are not to be endlessly dissected and subjected to minute scrutiny and criticism. Accused persons have a right to a properly, not perfectly, instructed jury.[208]

128. Here, the jury instructions covered relevant evidence in detail, outlined them either fully or in summary fashion multiple times and reduced the issues to what really mattered. In reviewing the instructions, the majority judges did not follow the functional approach. They instead examined passages in isolation and dissected them for errors.

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[207] *R v Daley*, 2007 SCC 53 at para 31; *R v Taylor*, 2015 ONCA 448 at para 94; *R v Araya*, 2015 SCC 11 at para 39; *R v Pickton*, 2010 SCC 32 at para 10.
[208] *R v Rodgerson*, 2015 SCC 38 at paras 50 – 51; *R v Jacquard*, at para 13; *R v Mack*, 2014 SCC 58 at para 48; *R v Cooper*, [1993] 1 SCR 146, at p 163 *g*.

129. The majority judges focused on paragraph 195, in which the trial judge introduced the concept of *mens rea* only to flesh out the concept later:

> 195 The Crown must establish beyond a reasonable doubt the essential elements of an offence under section 215(2), its external circumstances and the mental or fault element. The accused's conduct must also constitute a marked departure from that of a reasonable person in the same circumstances. Further, the Crown must establish beyond a reasonable doubt that a reasonable person would foresee the risk of bodily harm, beyond the trivial or transitory, in the context of dangerous conduct.[209]

130. The judges held that this paragraph was both incorrect and incomplete. It was incorrect, because the adverb 'also' underlined above intimated that proof of marked departure was something different than or in addition to the fault element.[210] This, of course, had no real consequences. It does, however, exemplify an approach that teased errors out of unimportant syntax contrary to a functional review. The judges also believed paragraph 195 was incomplete, because the passage did not mention the foreseeability requirement. The majority judges acknowledged that the trial judge had discussed the requirement later, but this did not matter.[211]

131. The judge indeed returned to the test and discussed it comprehensively in a section that focused on the fault element. The earlier overview needed to be read in light of the later exposition in which the judge broke down the test into two questions:

> 267. These further considerations can be transformed into questions for you to consider.
>
> A) Was it objectively foreseeable that the failure to provide [JG] with food or fluids or the failure to seek medical attention for [JG] would lead to a risk of danger to life or a risk of permanent endangerment to [JG's] health?
>
> B) If so, did Kevin's failure to provide [JG] with food or fluids or to seek medical attention represent a marked departure from the standard of conduct of a reasonably prudent person in the circumstances?[212]

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[209] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at para 195 (emphasis added).
[210] CA Reasons at paras 216 – 217.
[211] CA Reasons at para 218.
[212] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at paras 266 – 267.

132. The jury was fully instructed on the test for *mens rea* for the predicate offence multiple times. The complete iteration of the *mens rea* requirement was already put to the jury in the preceding instructions on Ms. Goforth.[213] It was repeated again in the context of the charge of unlawfully causing bodily harm in relation to both the respondent and Ms. Goforth. The majority judges did not assess the adequacy of the instructions based on the charge as a whole. They assessed it based on paragraph 195.

133. The majority judges also faulted the jury instructions for mentioning the standard of foreseeability applicable to manslaughter (bodily harm beyond the trivial and transitory)[214] in the context of discussing the foreseeability requirement for failing to provide necessaries of life (risk of danger to life, or risk of permanent endangerment to health).[215] They believed there was a real possibility that jurors could have concluded that 'not trivial or transitory' was the actual test.[216]

134. The trial judge, however, was correct in mentioning both *mens rea* requirements. As this Court has explained, "The fault element of unlawful act manslaughter is, as noted, objective foreseeability of the risk of bodily harm that is neither trivial nor transitory, coupled with the fault element for the predicate offence."[217] The same is true for the offence of unlawfully causing bodily harm.[218] The instructions were therefore legally correct.

135. When the trial judge juxtaposed the two fault elements, she almost always spoke of the *mens rea* for manslaughter as a "further" requirement.[219] By presenting the two requirements cheek-by-jowl, the judge minimized the risk for confusion and ensured that the jurors understood that they needed to be satisfied of both requirements. This was one of the arguments the Crown had made at the Court of Appeal. The way the majority judges responded again revealed that they did not undertake a functional review of the jury instructions.

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[213] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at paras 134 – 135.
[214] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at 271, 273, 278, 285.
[215] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at 266 – 267.
[216] CA Reasons at para 223.
[217] R v *Javanmardi* at para 31.
[218] *R v DeSousa*, [1992] 2 SCR 944 at pp 956 *j* – 957 *a*.
[219] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" para 271, 278, 285.

136. The judges first reasoned that the manslaughter *mens rea* was misplaced under the heading "i. Did Kevin Goforth commit an unlawful act?"[220] That is true. It is also true about the entirety of the trial judge's discussion of *mens rea*, including the fault element for failing to provide necessaries of life. But this did not matter. A jury trial is not a law school classroom. Jurors did not need to know the correct name to a legal test so that they could apply it to the next fact pattern. They needed to be functionally equipped to apply the law only to the case in front of them.

137. The majority judges also pointed out that the judge did not always introduce the additional *mens rea* by saying 'further' and there was one exception in which she had introduced the manslaughter *mens rea* by saying "once more."[221] However, the trial judge had fully instructed the jury on the *mens rea* requirement for failing to provide necessaries of life. The possibility that jurors would have ignored those instructions simply because the judge had on one occasion used the phrase "once more" instead of "further" is illusory at best.

138. Also, as Caldwell J.A. pointed out, the instructions needed to be assessed in light of the evidence. The risk here related to depriving small children of food and fluids for a prolonged period of time. No reasonable jury could have thought that risk of non-trivial or non-transitory harm was foreseeable but not the risk of death or permanent endangerment to health.[222]

139. The majority judges, however, believed that the distinction was potentially decisive because what the respondent actually knew was contentious. In their view, if the jury had believed the respondent's testimony that the girls were merely sick and Ms. Goforth, charged exclusively with the day-to-day needs of the children, was in control of the situation, then they could have concluded that risk of non-trivial bodily harm was foreseeable but not risk of death or permanent health impairment.[223]

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[220] Jury Charge, AR Vol I, Tab 5, "Law and Evidence," the heading between paras 187 and 188; CA Reasons at para 226.
[221] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at para 273; CA Reasons at para 227.
[222] CA Reasons at para 102.
[223] CA Reasons at para 230.

140. The logic here is hard to follow, particularly given the extreme condition of the children. But more fundamentally, the majority judges' view rested on an erroneous understanding of the objective fault element. The judge instructed the jury that personal characteristics of an offender did not bear on the fault element unless they amounted to incapacity to appreciate the risk.[224] She did not tie this to any specific *mens rea* requirement and it was not open for the jury to consider the respondent's irrelevant personal factors.

141. Lastly, the majority judges said that the judge had not explained the meaning of marked departure.[225] But as Caldwell J.A. explained, defence counsel did not raise this as an issue at trial and for good reason. This would have been contrary to the respondent's position that neither he nor his wife denied food and fluids to the children and the children did not require medical attention.[226] In other words, arguing that his lack of care was not serious enough would have contradicted the respondent's basic claims at trial. The sufficiency of the jury instructions needed to be assessed based on the evidence and the arguments at trial. This case was not about marked departure and the judge was correct to reduce the issues to what really mattered.

142. The facts of this case were extreme and involved denial of food, fluids and medical care to children for a prolonged period of time. There are cases where the facts are not clear-cut and it is hard to determine what amounts to a marked departure. The Alberta Court of Appeal decision in *R v Stephan* is an example. In that case a jury found the parents guilty of failing to provide the necessaries of life. They had allegedly failed to seek medical attention in time and the child died of meningitis. This Court agreed with the dissenting justice that the trial judge had not sufficiently explained the concept of marked departure in a way the jury could understand and apply it.[227]

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[224] Jury Charge, AR Vol I, Tab 5, "Law and Evidence" at para 196.
[225] CA Reasons at para 240.
[226] CA Reasons at para 106.
[227] *R v Stephan*, 2017 ABCA 380, rev'd 2018 SCC 21 at para 2.

143. The situation in *R v Stephan* is distinguishable. *R v Stephan* was about the exercise of judgment when a child becomes suddenly sick and the level of medical attention that is appropriate in the circumstances. The child in that case had shown symptoms that resembled croup in the two-week period leading up to his death. The symptoms waxed and waned. The parents had twice consulted a registered nurse and gave the child natural products. It was not until the day before the child was rushed to the hospital that the parents learned their son might have meningitis as opposed to something more benign.[228]

144. The parents in *R v Stephan* were alleged to have failed to seek medical attention. Given that the parents had sought some medical help, the jurors needed to know what level of medical attention was required under the law and what counted as a marked departure from what is expected of a reasonable parent. They needed direction to assess whether the direness of the child's condition would have been apparent to a reasonably prudent parent.[229]

145. Whereas *R v Stephan* concerned the level of appropriate medical care for a child who starts showing symptoms of an illness, the children in our case were both in extreme emaciated states. Their bodies were covered with bruises and sores. The Crown had alleged that the Goforths' acts and omissions had placed the children in that condition. The wide range of acceptable behaviour in *R v Stephan* added nuance to what constituted reasonable action and made the concept of marked departure complicated and in need of elucidation. This level of complexity did not exist in this case at all. As Caldwell J.A. pointed out, the prolonged failure to provide the children food, fluids and medical care was a marked departure on any measure.[230]

146. The majority judges did not take a functional approach in assessing the adequacy of the jury instructions. They reviewed the instructions on a standard of perfection, focused on isolated passages to the detriment of the larger context and the evidence at trial, and lost sight of the trial judge's important task to decant and simplify the instructions in light of issues that were actually

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[228] *R v Stephan,* 2017 ABCA 380 at paras 215 and 235.
[229] *R v Stephan* 2017 ABCA 380 at paras 233 – 236.
[230] CA Reasons at para 102.

at play. The jury instructions were not perfect but no substantial wrong or miscarriage of justice flowed from the imperfections. The instructions were responsive to the evidence and arguments at trial and properly equipped the jury to perform its task.

PART IV – COSTS

147. The Attorney General makes no submissions as to costs.

PART V – ORDER SOUGHT

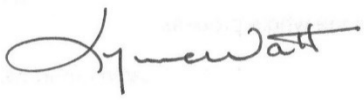
148. The Attorney General respectfully submits the appeal from the decision of the Court of Appeal of Saskatchewan should be allowed and the convictions against the respondent should be restored. The majority judges did not consider the respondent's sentence appeal. Therefore, in the event the appeal is allowed, the Court should order the case to be remitted back to the Court of Appeal for a consideration of the respondent's appeal of sentence.

PART VI – CONFIDENTIALITY ORDER

149. The trial judge made an order under section 486.4(2.2) of the *Criminal Code* banning publication of information that could identify JG and NB.

ALL OF WHICH is respectfully submitted.

DATED at the City of Regina, in the Province of Saskatchewan, this 28th day of April, 2021.



for:

Pouria Tabrizi-Reardigan
Agent of the Attorney General for the Province of Saskatchewan, Counsel to Her Majesty the Queen

PART VII – TABLE OF AUTHORITIES & LEGISLATION

	Cases:	**Cited at Paragraph**
1	*R v Araya*, 2015 SCC 11.	126
2	*R v Beatty*, 2008 SCC 5.	104, 110
3	*R v Cooper*, [1993] 1 SCR 146 (SCC).	127
4	*R v Creighton*, [1993] 3 SCR 3 (SCC).	101, 102, 103, 106, 108
5	*R v Daley*, 2007 SCC 53.	126
6	*R v DeSousa*, [1992] 2 SCR 944 (SCC).	134
7	*R v J.F.*, 2008 SCC 60.	92
8	*R v Jacquard*, [1997] 1 SCR 314 (SCC).	114, 127
9	*R v Javanmardi*, 2019 SCC 54.	103, 127
10	*R v Mack*, 2014 SCC 58.	127
11	*R v Naglik*, [1993] 3 SCR 122 (SCC).	101, 104
12	*R v Pickton*, 2010 SCC 32.	126
13	*R v Rodgerson*, 2015 SCC 38.	127
14	*R v Royz*, 2009 SCC 13.	124
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17	*R v Taylor*, 2015 ONCA 448.	126
18	*R v W.(D.)*, [1991] 1 SCR 742 (SCC).	118, 123
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