DATE: 20061020
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COURT OF APPEAL FOR ONTARIO

GILLESE, ARMSTRONG AND JURIANSZ JJ.A.

B E T W E E N :	)	
	)	
KALID AHMED, LESLISE KRISTEN ZARA AHMED, a minor by her Litigation Guardian, KALID AHMED and LAILAH CASSY MAZNO AHMED, a minor by her Litigation Guardian KALID AHMED	)	**William D. Black and Julie K. Parla, for the appellant**
Plaintiffs (Respondents)	)	
- and -	)	
RODICA STEFANIU	)	**Brian A. Horowitz and Amanda B. Potasky, for the respondents**
Defendant (Appellant)	)	
	)	**Heard: June 1, 2006**

On appeal from the judgment of Justice Harvey Spiegel of the Superior Court of Justice, sitting with a jury, in Toronto on April 22, 2005.

ARMSTRONG J.A.:

[1] On January 24, 1997, William Johannes, murdered his sister, Roslyn Knipe. Johannes had been an involuntary patient pursuant to the *Mental Health Act*, R.S.O. 1990, c. M.7 at Humber Memorial Hospital in Toronto. He was released from Humber Memorial Hospital (prior to the murder) on December 5, 1996.

[2] Ms. Knipe's husband, Kalid Ahmed, commenced an action on his own behalf and on behalf of his two daughters (the "respondents") against Dr. Rodica Stefaniu (the "appellant") for medical malpractice. The appellant, a psychiatrist, was responsible for

the care of Johannes at Humber Memorial Hospital and made the decision to change his status from an involuntary patient to a voluntary patient on December 5, 1996.

[3] After a jury trial presided over by Justice Harvey Spiegel of the Superior Court of Justice in Toronto, the appellant was found to be negligent in that she failed to meet the standard of care of a psychiatrist practising in a general in-patient psychiatric unit in a community hospital, when she made the decision to change Johannes' status under the *Mental Health Act* to that of a voluntary patient. The respondents were awarded damages in the amount of $160,000 and additional damages of some $12,000 which had been agreed upon between the parties before trial.

[4] The appellant appeals the finding of negligence made against her. For the reasons which follow, I would dismiss the appeal.

FACTUAL BACKGROUND

[5] In October 1995, Johannes was admitted to the Scarborough General Hospital as an involuntary patient. He was said to have threatened his landlord and engaged in aggressive behaviour. He was prescribed medication to treat a psychotic disorder. After his release from Scarborough General Hospital, he was readmitted as a voluntary patient with a diagnosis of acute psychosis. After his second hospital stay, he lived with his sister and her two daughters where he functioned reasonably well. He returned to work.

[6] In the summer of 1996, the condition of Johannes deteriorated. He exhibited bizarre, aggressive and paranoid behaviour. On September 25, 1996, his sister contacted Johannes' family doctor and expressed concern about her brother. She told the family doctor that Johannes had threatened to hurt her if she did not prove that she was "on his side" within two weeks.

[7] The following day, September 26, Johannes was forcibly taken by the police to the emergency department of the Humber Memorial Hospital. On September 27, 1996, the appellant assessed Johannes and concluded that he was lacking insight, with severe paranoia, and that he had a potential for violence. On September 28, 1996, Johannes was admitted to the Humber Memorial Hospital as an involuntary patient pursuant to a Form 3 under the *Mental Health Act*. The attending physician on September 28, 1996, found that Johannes was likely to cause serious bodily harm to another person. He was also declared not mentally fit to consent to treatment.

[8] Johannes appealed his involuntary hospital admission to the Consent and Capacity Review Board. A hearing was held on October 8, 1996. In its decision, the Board concluded:

> [T]he Board is of the opinion that at this time, without treatment, there is a likelihood that the patient if he left hospital would continue to deteriorate to the point where there is a likelihood that he will cause serious bodily harm to another person. He would simply lose control due to anger and frustration.

[9] In mid-October, the appellant recorded the following in a progress note concerning Johannes: "further deterioration of his mental state with potential for self harm and/or harassing others".

[10] On October 24, 1996, Johannes struck another patient. He had to be placed in two-point restraints due to his level of agitation. On October 31, 1996, Johannes threatened the Department Chief and a staff psychiatrist. Following the latter episode, Johannes was involved in a fight with two staff porters. Two security guards were required to subdue him and place him in four-point restraints. While in Humber Memorial Hospital, physical restraints were used on Johannes on 25 different occasions.

[11] In mid-November, the hospital security records disclose that Johannes attempted to assault two patients. On December 2, 1996, the appellant did an assessment of Johannes. Her progress note refers to Johannes as remaining delusional and paranoid.

[12] The nurses' notes of December 3, 1996, describe Johannes as very angry, loud and intrusive, with threatening body language and a rigid posture. He is further described as "extremely hostile". On the following day, December 4, 1996, Johannes threatened a nurse.

[13] In addition to the above, there was also evidence before the court that over the course of his hospital stay, Johannes became less threatening in his manner, facial expression and interactions with the hospital staff. Although not a model patient, there was observed a general trend of improvement in his behaviour.

[14] In the early evening of December 4, 1996, the appellant carried out an assessment of Johannes. In her progress notes, she described Johannes as having no signs or symptoms of paranoia or psychosis. She found him very appropriate, co-operative and with a great sense of humour. During this assessment, he told the appellant that he had no intention of harming himself or anybody else, including his sister. He also told the appellant that all of his behaviour at the hospital had been "staged and planned". She understood him to tell her that he had faked his psychosis. She testified that she took this information with a grain of salt. The appellant concluded on December 4 that Johannes probably did not meet the criteria for an involuntary patient at that time. She decided to meet with Johannes the next day for further discussion.

[15] The appellant met Johannes on December 5. Her progress note presents a somewhat mixed picture of the patient:

> Patient seen again today. Pleased he is finally released. Good mood, pleasant, co-operative, but inappropriately flirtatious (jokingly insists we go for dinner). Has plans about job, picking up his car, and restarting life. No signs of delusions, paranoid thinking or psychosis. Denies any suicidal or/and homicidal ideas…(illegible) or plans. Alert and oriented – however remains provocative, macho and in [*sic*] the same time angry and fragile.

[16] The appellant concluded on December 5, 1996 that Johannes no longer met the criteria to be detained in the hospital as an involuntary patient. She changed his status from involuntary to voluntary under the *Mental Health Act*. In doing so, she considered a number of factors including: the patient's general trend of improvement, his stated intention that he did not plan to harm himself or others, his response to medications, the decision of the Consent and Capacity Review Board, his previous admission to Scarborough General Hospital, consultations with other psychiatrists and conversations with his employer.

[17] When the appellant changed Johannes' status to voluntary, she suggested that he remain in the hospital on a voluntary basis but he refused to do so. He also declined to follow the appellant's suggestion that he continue with a psychiatrist whom he had been seeing prior to his admission to Humber Memorial Hospital.

[18] When Johannes left the hospital he moved back into his sister's apartment.

[19] Johannes returned to Humber Memorial Hospital on more than one occasion to visit a female patient. Such visits were disruptive and he was asked to leave the premises. On one occasion, he was escorted off the premises by the police and spent the night in jail.

[20] On January 21, 1997, Johannes attended at the North York General Hospital emergency department. He was assessed by Dr. Weinstein, a psychiatrist. Dr. Weinstein noted that Johannes was depressed. He was also noted as being well dressed and articulate. In response to questions from Dr. Weinstein, Johannes said that he was not capable of hurting himself or others. Dr. Weinstein saw no indication of violence or potential for violence from Johannes on January 21, 1997. Dr. Weinstein concluded that Johannes did not meet the criteria for involuntary admission.

[21] On January 22, 1997, Johannes attended at the Toronto General Hospital emergency department where he was seen by Dr. Lee, a Toronto General Hospital

resident. Dr. Lee reviewed his medical history, including his involuntary admission at Humber Memorial Hospital. Johannes requested an immediate psychiatric consultation. Dr. Lee declined to order a consultation because at that time she did not regard Johannes as a danger to himself or to others. Dr. Lee assessed Johannes to be stable and opted to go with out-patient care. Dr. Lee concluded, in consultation with her supervisor, Dr. Caravaggio, that Johannes did not meet the criteria for involuntary admission under the *Mental Health Act*.

[22] On January 24, 1997, Johannes murdered his sister at her apartment. At the time that he murdered his sister, he was in a floridly psychotic, acutely delusional rage in which he believed that his sister was possessed by the devil.

THE EXPERT EVIDENCE AT TRIAL

[23] In addition to the appellant, a number of physicians were called as witnesses at the trial. The respondents called two experts, Dr. Hector and Dr. Glumac. Dr. Hector testified that the appellant failed to meet the standard of care expected of a psychiatrist in the circumstances of this case by completing a Form 5 on December 5, 1996, and changing Johannes' status to that of a voluntary patient. Dr. Glumac offered a similar opinion.

[24] Dr. Shugar and Dr. Max testified on behalf of the appellant. They testified that the appellant acted in an honest and intelligent manner and that she met the standard required of her in respect of her approach to Johannes.

[25] It is apparent that the jury accepted the evidence of Dr. Hector and Dr. Glumac in reaching its verdict.

THE APPEAL

[26] The appellant raises three grounds of appeal:

> (i) The trial judge failed to instruct the jury properly on the law regarding the "honest and intelligent" exercise of judgment by a physician and failed to characterize properly certain admissions made by Dr. Hector in his evidence.
>
> (ii) The trial judge failed to instruct the jury properly on the law regarding clinical judgment that is supported by a "reputable body of opinion within the profession" and failed to characterize properly certain admissions made by Dr. Glumac in his evidence.

(iii) The trial judge failed to instruct the jury properly on the issue of causation.

It perhaps should be noted that "duty of care" was not raised as an issue in this appeal.

ANALYSIS

(i) The Honest and Intelligent Exercise of Judgment

[27] Counsel for the appellant submits that his client considered the appropriate factors in formulating her judgment as to whether Johannes met the criteria under the *Mental Health Act* for an involuntary patient on December 5, 1996. He further submits that while the respondents' expert witness, Dr. Hector, felt that the appellant put insufficient weight on some of the factors or different weight than Dr. Hector would have applied, he agreed that she exercised her judgment in an honest and intelligent fashion. Counsel for the appellant relies upon the following statement from *Wilson v. Swanson*, [1956] S.C.R. 804 (S.C.C.) at 812:

> An error in judgment has long been distinguished from an act of unskillfulness or carelessness or due to lack of knowledge. Although universally-accepted procedures must be observed, they furnish little or no assistance in resolving such a predicament as faced the surgeon here. In such a situation a decision must be made without delay based on limited known and unknown factors; and the honest and intelligent exercise of judgment has long been recognized as satisfying the professional obligation.

[28] From the above, counsel argues that the trial judge should have clearly instructed the jury that if they accepted that the evidence of Dr. Hector constituted an admission that the appellant exercised her medical judgment in an honest and intelligent fashion, she could not be found negligent.

[29] The appellant relies upon the following evidence of Dr. Hector on cross-examination:

> Q. And what I'm going to suggest, Dr. Hector, is that albeit you disagree with the weight or emphasis that she put on certain factors and therefore disagree with her judgment on December 5th to change Mr. Johannes' status to voluntary she did, to your knowledge, at least take into account all of the appropriate factors for her consideration. Right?

A. Right.

Q. And she clearly made an attempt to kind of weigh all of those factors as a clinician must do to come to a proper determination in Mr. Johannes' case?

A. Yes.

Q. And albeit that you disagree with her ultimate decision, I take it you'd be prepared to concede that she did exercise her judgment in an honest and intelligent fashion?

A. She certainly made her observations, and recorded those observations in the file. And she states the purpose of her examination of the patient and does, as you suggest, conduct an examination one evening and again the following day. And makes the decision on the following day.

Q. Right?

A. She does do that.

…

Q. …We've [a]greed [*sic*], I think, that Dr. Stefaniu was, number one, continuing to do her best to treat Mr. Johannes appropriately on December 4 and 5. Right?

A. As far as I can tell from the record, yes.

Q. She was quite appropriately taking into account, what you and I have discussed, as being the full range of appropriate considerations to take into account for those purposes. Right?

A. Yes.

…

Q. All right. And so assume, as His Honour suggested, that in performing the assessment that she did Dr. Stefaniu was operating in keeping with the practice,

which is thought to be an appropriate [medical] practice within the Humber Hospital. Okay. Make that assumption. In that context, I'm suggesting to you that Dr. Stefaniu, albeit that you still disagree with her ultimate decision –

A. Uh'hmm.

Q. – took into account all the appropriate factors, weighted them in the balance, exercised her judgment having regard to all of the right considerations, and albeit that you think her decision at the end of the day is wrong or you disagree with it, her approach at least bespeaks an intelligent and honest approach to the issue? Let's just stop with "intelligent." It's an "intelligent" way of approaching the problem, right?

A. Yes, I think so, as you described it, yes.

…

Q. And I couldn't help but overhear a comment: It's possible for intelligent people to disagree about issues. Right?

A. Of course, that's not the question.

Q. Right - -

A. Dr. Stefaniu does approach, examine and record the findings of her examination on the evening of both December 4th and December 5th. And she does record in the notes, in her notes, items of behaviour that, um, are of concern.

Q. Yes?

A. It is her responsibility to weigh the significance of those observations.

Q. Right?

A. So one would say it's honest, I think that's correct, she does identify and record, as she does during the course of this admission, her observations fairly.

Q. Yes?

A. And in some detail.

Q. Yes?

A. She explicates the differential diagnosis, for example, carefully. And I think it's to her credit that she puts in the item of behaviour, the sexually inappropriate behaviour, in the note and she records it. It is true I don't agree with the weight she gives to it. And it is true I don't agree with the weight she gives to the statement that this behaviour is all faked, feigned, that it was some kind of contrivance. But she certainly does identify the detail, records them in her notes and then makes a decision.

Q. And does so albeit you disagree with her, does so in an intelligent way?

A. Certainly – yes, I think – I think that's correct.

[30] It perhaps should be noted that in re-examination Dr. Hector said, in response to an obviously leading question by respondents' counsel, that the appellant's judgment did not meet the standard that he, Dr. Hector, would expect of an experienced psychiatrist and clinician in a psychiatric unit in Ontario.

[31] Dr. Hector, in arriving at his opinion that the appellant failed to meet the standard of care expected of a psychiatrist in the circumstances that obtained on December 5, testified to the following:

(i) The carefully articulated set of reasons from the Consent and Capacity Review Board ought to have dominated the assessment of the patient. The Board had described the expressed concern of a potential dangerousness in respect to this man and his family. Such a description should have stood at the forefront of the appellant's determination.

(ii) The appellant should have recognized that the sexually inappropriate behaviour of the appellant which was documented through the course of his hospital stay (including exposing himself to the nurses) and which was present on December 4 and December 5 was fairly clear evidence of a continuing psychotic illness.

(iii) His statement that he staged and planned his behaviour should have been discounted completely.

[32] Dr. Hector also testified in cross-examination that the decision to decertify Johannes and allow him to take his own discharge was well outside what he, Dr. Hector, "would regard as her responsibilities as a psychiatrist's responsibilities at that moment."

[33] On the issue of honest and intelligent exercise of judgment, the trial judge instructed the jury as follows:

> In my opinion there is not a great deal of difference between this concept [of honest and intelligent exercise of judgment] and the concept of error in judgment. Obviously, intelligent people can make mistakes. And you can go about something in an intelligent way, but you got the wrong answer and you made a mistake, and you forgot something but you're doing it intelligently – what's the opposite of intelligent – well, I'm going to leave that to you. Because someone is acting in an intelligent way does that mean they are exercising reasonable skill and care and diligence that's required of them? It doesn't necessarily mean that unless in the evidence that that is shown as well. If a medical practitioner exercises her judgment in an honest and intelligent fashion without lack of skill, without lack of skill or knowledge, and with a reasonable degree of care she should not be held liable merely because the judgment turned out to be wrong. Another way, in my opinion, of – and certainly for you to understand, that's the way I would explain it to you.
>
> …
>
> Now, you heard that exchange. And my view, I'm not certain that he [Dr. Hector], in fact, went quite that far. He certainly said that she conducted the treatment of Mr. Johannes in an

> excellent way, and that she did consider many factors. Although she didn't give weight to a lot of the factors – too much weight to other factors, but even assuming that he did go that far, in my view, he didn't back down from the opinion that he gave that she should have given more weight to some factors and gave too much weight to others.
>
> …
>
> Now Mr. Black says to you: Once he said it was honest and intelligent that amounts to his opinion about breaching the standard of care being nullified. Because if it's honest and intelligent it's mere error in judgment and therefore it can't be a breach of the standard. That's for you to decide.
>
> …
>
> I thought Dr. Hector was very fair in his evidence. He didn't try to weasel, and when he was faced with questions on cross-examination I think he acknowledged when the situation was – when the circumstances dictated it that he may have changed his opinion on some things. But I think he didn't change his opinion on the key things that – that the best predictor of violence is past violent episodes.

[34] It is my view that when Dr. Hector's evidence is considered as a whole, there does not appear to be a straightforward admission that the appellant, in deciding to change Johannes' status to that of a voluntary patient, was engaged in the honest and intelligent exercise of medical judgment. What emerges from Dr. Hector's testimony is that the appellant considered the appropriate factors but failed to appreciate, not just their weight but the clear message that should be taken from them, i.e. this patient should not be permitted to leave the hospital because of continuing psychotic illness and the opinion of the Consent and Capacity Review Board that he was likely to cause serious bodily harm to another person.

[35] While the trial judge's instruction to the jury on this point may be somewhat confusing, I am not persuaded that it constitutes reversible error. He outlined the evidence of Dr. Hector in respect of the exercise of honest and intelligent judgment and did so in the context of all his evidence. On this record, I do not think he was required, nor was it open to him, to tell the jury that there was in fact an admission from Dr. Hector which, if accepted, would nullify a finding of negligence. I appreciate that there is often a fine line between a mere error in judgment and a failure to meet the professional

standard of care. In my view, the jury could find that the line was crossed on the evidence in this case.

(ii) A Reputable Body of Opinion within the Profession

[36] Laskin J.A. said in *Connell v. Tanner* (2002), 158 O.A.C. 268 at para. 1:

> A doctor who treats a patient in accordance with a respectable body of medical opinion – even if it is a minority opinion – will not normally be held liable in negligence. The rationale for this principle is that courts lack the institutional competence to decide between reasonable medical practices.

[37] In cross-examination of the respondents' expert, Dr. Glumac, counsel for the appellant asked the doctor a number of questions concerning opinions given by the appellant's expert witnesses, Dr. Shugar and Dr. Max:

> Q. I think we have, and I want to see if I can extend the common ground on which we're standing together, doctor. Dr. Shugar and Dr. Max, I think we are agreed, are reputable respected psychiatrists?
>
> A. Yes.
>
> Q. Their views, you would expect, would, as a general proposition, be representative of a reputable body of opinion within the psychiatric community?
>
> A. Yes.
>
> Q. And in expressing the views that they have in this case, therefore, Dr. Glumac, they are expressing then, you would expect, views representative of a reputable body of opinion.
>
> A. Yes, there is a portion of the psychiatric community that would support their opinion.
>
> Q. Right. So the point is, then, that you'd expect there is a portion of the psychiatric community which would share in their opinion that Mr. Johannes was appropriate for discharge as at December 5, 1996. Right?

> A. Yes, different psychiatrists have different opinions in these difficult judgments.

[38] The appellant submits that the trial judge in his charge to the jury failed to instruct the jury on the significance of the evidence of Dr. Glumac. Counsel further submits that the trial judge left with the jury the question of whether there was evidence of a reputable body of opinion which supported the approach taken by the appellant when he should have told them that there was such evidence. In particular, the appellant argues that these errors are exhibited in the following excerpts from the judge's charge:

> You heard Mr. Horowitz's response to Mr. Black's submission. He says that the admission was based upon hypotheticals that were not borne out in the evidence of Dr. Stefaniu, and that there was no evidence called by the defendant that the opinions of Dr. Shugar and Dr. Max represented those of a reputable body of medical opinion. Now, that's going to be a matter for you to decide.
>
> …
>
> In conclusion, Dr. Glumac while recognizing that a mere error of judgment does not constitute a breach of the standard of care was of the opinion that Dr. Stefaniu was guilty of a series of cumulative errors in judgment which fell below the standard.

[39] If the trial judge had said no more on this issue than is set out above, I would have no difficulty in concluding that his charge was insufficient. However, the trial judge also gave the following instructions on this issue:

> Now, we come to the respectable body of professional opinion.
>
> The law in recognition of the fact that there are, in many instances, more than one right way of approaching a problem, has laid down that a doctor may not be found liable if the course that he or she followed was in conformity with a reputable body of medical opinion, even if it conflicts with the preponderant, the weightier body of medical opinion.
>
> So if you follow in your decision-making process, the judgment that would be exercised by a reputable body of professional opinion, there is always more than one way of

> skinning a cat and that's acceptable. Again, Mr. Black says that he extracted from Dr. Glumac a concession on cross-examination that Dr. Max and Dr. Shugar represented their opinion – that the opinion expressed by Dr. Max and Dr. Shugar represented the opinion of a reputable body within the psychiatric community. He read to you the extract from his cross-examination of Dr. Glumac,…
>
> …
>
> You will recall that I told you you are free to decide some or to accept some, all or none of a witness' testimony. It's not an all or nothing affair. If you come to the conclusion that Dr. Glumac's evidence taken as a whole supported the proposition that there was a reputable body of opinion within the psychiatric community, which taking into consideration all the information available to and considered by Dr. Stefaniu would have made the same decision as she did, then you should find that according to Dr. Glumac Dr. Stefaniu did not breach the standard of care.

[40] There was no objection to the trial judge's charge on this issue. While failure to object at trial is not fatal to the success of the argument on appeal, it nevertheless is some indication that the judge's charge was adequate. In my view, the trial judge did not fail in his obligation to instruct the jury properly on this matter.

(iii) Causation

[41] Counsel for the appellant submits that the trial judge failed to instruct the jury properly on the issue of causation. Counsel's position at the trial was that the respondents failed to show that the murder would not have occurred but for the alleged negligence of the appellant. The argument is summarized as follows in the appellant's factum:

> Even if Johannes had met the criteria for involuntary status on December 5, 1996, and the Appellant's decision to change his status to voluntary had fallen below the standard of care, by January 21 and 22, 1997, nearly seven weeks later, Johannes did not meet the criteria for involuntary status. Accordingly, his status would have been changed in any event prior to the date of the murder on January 24, 1997. Therefore, even if the Appellant was found to have fallen below the standard

> required, her decision could not have been the cause of the plaintiffs' damages.

[42] Counsel for the appellant argues that the trial judge paid very little time and attention to the issue of causation and treated it as being of secondary importance. Counsel takes issue with the following observation of the trial judge as misleading:

> There was, obviously, a causal connection between his being released and the actual murder, in the sense that if he was still in the hospital on January 24, 1997, he, obviously, wouldn't have murdered Roslyn [Knipe].

However, the above excerpt should be considered with what followed from it:

> There was, obviously, a causal connection between his being released and the actual murder, in the sense that if he was still in the hospital on January 24, 1997 he, obviously, wouldn't have murdered Roslyn. But the defendant (s) say, and I read it to you, they say another thing – they say: That even if the answer to question number 1 is "no", I'm summarizing it, by January 21st and January 22nd, 1997 Mr. Johannes did not meet the criterion for involuntary status and his status would have to be changed, in any event, so he would have to be let go from the hospital by January 21st – let's say January 22nd, and then he could have been free to kill his sister. So they say the negligence of letting him go on December 5th wasn't the cause of the plaintiffs' damages. And, of course, in that respect, Mr. Black relies heavily on the evidence of Dr. Weinstein and I think Dr. Lee is her name, and you've heard that how he presented in the hospital on those occasions. And you'll read those discharge notes and the treatment notes; how he presented on the one occasion I think he said his life was falling apart, he's having a breakdown; and the other how he felt it looked like depression. It's admitted that both of those doctors exercised due care and attention in carrying out his assessment, and they concluded that he wasn't – or that he didn't meet the criterion of involuntary admission.

In my view, the above instruction fairly puts the appellant's defence on the causation issue to the jury. I also observe that counsel did not take objection to the trial judge's charge on causation at trial.

[43] In respect of the causation issue, counsel for the appellant also objected to the trial judge's characterization of the term, "foreseeable". There was a recharge on this issue. The trial judge clarified what he meant by the use of the term, "foreseeable". In my view, there was no reversible error.

[44] In oral argument, counsel for the appellant submitted that the jury's verdict in respect of causation was unreasonable because there was no evidence to support such a finding. I do not agree. In my view, it was open to the jury to find on the basis of the evidence that but for the change in Johannes' status to a voluntary patient on December 5, the murder of his sister would not have occurred. The jury was entitled to reject the submission of counsel for the appellant, based on the evidence of the emergency room physicians, that Johannes' status would have changed in any event prior to the date of the murder on January 25, 1997.

DISPOSITION

[45] For the above reasons, I would dismiss the appeal.

COSTS

[46] The respondents have submitted a bill of costs on a partial indemnity scale in the amount of $41,365 for fees, $1,767.67 for disbursements and $3,019.31 for GST for a total of $46,151.98. Three lawyers worked on this appeal. Their total docketed hours are 144.7. While I accept that those hours were expended, I am not persuaded that the respondents should recover their costs for all of them. This was an appeal in which there were no complex legal issues. The grounds of appeal were clearly defined. The amount in issue in the appeal was $172,000. In the circumstances, I do not agree that a total bill of $46,000 is fair and reasonable.

[47] I would order that the respondents' costs of the appeal be fixed on a partial indemnity basis in the amounts of $30,000 for fees and $3,019.31 for disbursements plus GST.

RELEASED:

"OCT 20 2006"
"EEG"

"Robert P. Armstrong J.A."
"I agree E.E. Gillese J.A."
"I agree Russell Juriansz J.A."