

CITATION: R. v. Christopher Marchant and Steven Snively, 2021 ONSC 3901

COURT FILE NO.: 18-8315

DATE: June 8, 2021

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Her Majesty the Queen

- and -

Christopher Marchant and Steven
Snively

)

)

) Linda Shin and Scott Patterson, for

) the Crown

)

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) Jeffrey R. Manishen, for Mr.

) Marchant

)

) Michael M. DelGobbo, for Mr.

) Snively

HEARD: November 23 - 26, 2020,
November 30 - December 4, 2020,
December 7 - 11, 2020, December 14

- 18, 2020, December 21 - 23, 2020,
January 11 - 15, 2021, January 20 -
21, 2021, January 25 - 26, 2021,
March 25 - 26, 2021

The Honourable Mr. Justice H. S. Arrell

JUDGMENT

INTRODUCTION:

[1] The accused, Mr. Marchant and Mr. Snively, are both paramedics. They are charged with failing to provide the necessities of life to Yosif Al-Hasnawi (“deceased”) on December 2, 2017, after he had been shot, contrary to Section 215(3) of the *Criminal Code*.

[2] To say this is a tragic case would be a gross understatement. A young and promising life was snuffed out because he was attempting to be a “good Samaritan”.

[3] Yosif was 19 years old at the time of his death. He was attending Brock University in his first year in a science program. His family testified that he wished to be a doctor. He lived with his father and his two younger brothers. His father and mother were separated.

FACTS:

i) TIMELINES:

1. 20:51 (approximately) Yosif is shot.
2. 20:56 the 911 call is made to police dispatch.
3. 20:58 police arrive on scene.
4. 21:00:45 EMS dispatches fire department.

5. 21:03:34 EMS contacts the accused paramedics to attend the scene.
6. 21:09:05 Marchant advises dispatch that the paramedics were on scene.
7. 21:15 Ambulance Call Report (ACR) authored by the accused state Yosif was put on a stretcher and placed in the ambulance.
8. 21:25 first reading of vital signs in the ambulance according to the ACR.
9. 21:31:59 ambulance leaves the scene for St. Joseph's Hospital.
10. 21:32 first dispatch to emergency department at St. Joseph's Hospital advising of the vital signs taken at 21:25.
11. 21:36 second dispatch to St. Joseph's Hospital advising of deteriorating vital signs.
12. 21:39 ambulance arrives at St. Joseph's Hospital.
13. 21:58 time of death of Yosif according to Dr. Healey.

ii) EVIDENCE OF CIVILIAN WITNESSES:

[4] On the evening of December 2, 2017 Yosif, his two younger brothers and his father were at their Mosque for evening services. Yosif had participated by doing a reading at the beginning of the service.

[5] The Mosque was located on Main St. East, in the inner city of Hamilton, close to its intersection with Sandford Ave. It was dark with only overhead street lighting and the weather was clear.

[6] At approximately 20:40 that evening Yosif, his younger brother Ahmed and a friend Mustafa Ameer took a break from the service and went outside. They were standing near the front of the Mosque on Main St. chatting.

[7] Ahmed was 13 years old at the time of his brother's death and in grade 8. He spoke a little Arabic, but English was his first language and that was all that was

used between Yosif and himself. Mustafa was 15 years old at the time and in grade 8.

[8] At some point while talking outside they noticed an elderly man across Main St. walking in an easterly direction. It appeared to these three young men that this elderly gentleman was being harassed by two younger men. Yosif yelled across the street at the two young men to leave the elderly gentleman alone. The two younger men then came across the street and confronted Yosif and the others.

[9] One of these men was described as bald while the other had dark hair. It appears that a short, likely heated, discussion took place. No one can remember exactly what might have been said other than Mustafa's recollection that one of the two men said words to the effect "don't mess with us because we have a gun".

[10] According to Mustafa after the gun comment was made the man with the dark hair lifted his sweater and he saw the silver handle of a small gun tucked in his waist band. He believes Yosif was in a position that he would have seen the gun. He recalls hearing Yosif saying in response to the two men words to the effect "I am not afraid of that gun". At that point the bald man "sucker punched" Yosif to the side of his head and he staggered back but did not fall.

[11] The two men then ran off and Yosif gave chase with his brother and Mustafa following. The group ran through the parking lot of a nearby variety store and then north on Sandford Ave. According to Mustafa and Ahmed, Yosif was ahead of them and had almost caught up to the two men when the dark-haired man turned around, extended his right hand and he heard a bang. He did not see the actual gun and saw no flash of any kind.

[12] Mustafa and Ahmed testified that upon Yosif being shot he looked at his stomach and sat down on the curb. None of the boys had a cell phone so Ahmed ran back to the convenience store while Mustafa remained with Yosif.

[13] The video inside the variety store shows Ahmed running in and visibly upset. He was unable to speak coherently on the store clerk's phone to 911. As a result, a customer who was already in the store, Steve Ryan, spoke to 911.

[14] Mr. Ryan, while on his way into the store, had seen a number of boys running through the store parking lot. He then heard a loud bang and he testified that he thought it sounded like a firecracker. However, in his statement to the police on the night of this incident he said he "heard a pop and it didn't sound like a gun" and in fact thought it may have been a pellet gun. Before this court he testified that he was not sure if he heard the term pellet gun from the crowd rather than his own memory.

[15] Mr. Ryan recalls Ahmed saying my brother has been shot when he came into the store. The call to 911 is noted to have been at 20:56. During the call Mr. Ryan told the police call taker, "I think there was a gunshot at Sanford and Main". He also told her he did not know if anyone was hurt. He then indicated he was not sure if it was a gunshot, but it was a "loud bang".

[16] Mr. Catsoudas, who was with his son, had just parked his car at the convenience store and as he was getting out of his car, he saw two boys running through the parking lot and at the same time heard what he thought was a BB gun. He then went into the store and a young boy was there with the store clerk and another customer who said his brother had been shot and was bleeding. Mr. Catsoudas announced he thought it was a BB gun.

[17] It appears that the initial source of information as to the weapon used likely came from Mr. Catsoudas. As will be shown in this judgment that information was passed on over a short period of time to everyone involved and became crucial in subsequent decision making to the detriment of Yosif. Regrettably, the information was incorrect, as Yosif was shot with a 22-caliber hollow point bullet.

[18] Mr. Catsoudas left the store and attended the scene where he observed Yosif on his back with his shirt up. He saw a small mark on his stomach which had a smear of blood around this mark, but it was not bleeding. He recalls saying to Yosif “it was a BB gun and you’re going to be fine”. There was no response by Yosif and in fact Mr. Catsoudas thought he was in shock.

[19] The first police responder, Officer Zezella arrived shortly after and Mr. Catsoudas commented to the Officer “it looks like a BB gun”. He then saw the Officer look at the wound with his flashlight and say into his radio “looks like a minor wound from a BB gun”.

[20] The crown called 10 civilian witnesses, being the victim’s father, two brothers, a friend, director of the Mosque, two people from the variety store and two people who lived in the neighbourhood. Their evidence was often inconsistent with each other in a number of areas, as well as with prior statements to investigators or prior hearings, however, the general consensus of the civilian witnesses was that none of the first responders including the accused were taking the situation seriously or with any urgency. I accept their evidence as reliable on this point and in my view is corroborated by the videos of the scene.

[21] Ahmed Al-Hasnawi, was the youngest brother of the victim and 13 years old at the time of the shooting. His evidence was somewhat inconsistent with other evidence, prior statements he gave and the video of the events at the scene. He confirmed to this court that it was a very emotional, traumatic, and stressful night. He did see the shooter with a small silver gun in his right hand when he and the other young man came across the street to confront the three boys in front of the Mosque. It was pointed out to him in his statement given the next day that he described the gun as a pocket gun like a modified pellet gun. He described the sound of the shot as “like a pop or firecracker that you would hear using a dollar

store gun”. He told the court that he heard one of the paramedics say the victim should win an Oscar. However, in prior statements and testimony he attributed those comments to the police.

[22] Yosif’s father Majed Al-Hasnawi gave evidence through an Arabic interpreter, as English was his second language. While in the mosque his son Mahdi came and told him Yosif had been shot. He immediately ran to the scene. The accused were present by this time. He recalls the taller paramedic (Marchant) say to him “tell him to stop acting and there is no need to lie”. He recalls his son telling his father in a very low voice that he could not breath. He has no idea as to whether the paramedics would have heard those comments. Mr. Al-Hasnawi felt that the accused did not take his son’s injury seriously and were not acting professionally although he did not elaborate on why he came to that conclusion. He recalls several times telling the paramedics in English his son needed to get to the hospital, he could not breath and perhaps there was internal bleeding.

[23] Yosif’s brother Madhi Al-Hasnawi was 15 at the time of this incident. He came to his brothers’ side, before the paramedics arrived, and also heard him say he could not breath. Madhi passed those comments on to a police officer who replied “he’s faking it. He will be O.K.” After the paramedics arrived, he saw one of them pressing on Yosif’s stomach. He believes he heard this paramedic say, ‘he should win an Oscar for his acting”. He agreed that previous statements he made attributes this comment to the police.

[24] Madhi testified that he eventually picked up Yosif under his arm pits to take him to the ambulance because he felt the paramedics were not doing anything. He was never instructed by the accused to not touch their patient. After watching the video, during cross examination, he agreed others helped him lift his brother.

[25] Amin Al-Tahir, who is 60 years of age and a director of the mosque, recalls seeing the tall paramedic (Marchant) pressing the wound but doing nothing more. He heard Yosif say he had been shot in English and the paramedics were closer to Yosif than was Amin when this comment was made. He also heard Yosif say in English to Marchant, who was kneeling beside him, that he was having difficulty breathing. This witness recalls telling the paramedics this, and he heard Yosif's father say the same thing, that Yosif was having trouble breathing and needed to get to the hospital. He also heard one of the paramedics, as well as the police, say "he is acting".

[26] Mohammad Hasan, who was 28 and a contractor, was at the scene and heard Yosif say in English that he could not breath while one of the accused was in close proximity to Yosif. This witness also heard a paramedic comment that "he is a fake". This witness also heard Yosif's father say to the paramedics that his son could not breath and take him to the hospital.

[27] Anthony DiCiccio lived nearby and attended the scene. He saw Yosif on the ground not moving. He heard no comments from him. He did not feel the paramedics were taking the situation seriously. He thought the scene chaotic, with a number of people milling about. In his opinion Yosif appeared in pain with his eyes closed.

[28] Mustafa Ameer, a friend, was 15 at the time of this incident. His memory of events at the scene after the shooting is poor. He was contradicted a number of times in cross examination and with prior inconsistent statements. He does recall hearing the Oscar comment from one of the paramedics and he also formed the opinion the accused were not taking Yosif's injury or the situation seriously.

iii) EVIDENCE OF FIRST RESPONDERS:

[29] The police arrived at 20:58 according to Officer Zezella. The police dispatcher relayed to the EMS dispatcher at 20:59 “we have a male that has superficial wounds to his abdomen from being shot with a BB gun, it sounds like.” Both police officers on the scene deny relaying this information about a superficial wound from a BB gun. It is unclear who gave the police dispatcher this information. I accept the evidence of Mr. Catsoudas that he relayed the BB gun information to Officer Zezella and then heard the Officer pass that information on to the police dispatcher.

[30] At 21:00:45 the EMS dispatcher called the Fire Department dispatcher and repeated that a male had been shot with a BB gun and had superficial wounds. Rescue truck one was dispatched as a “First Aid” call for a superficial wound from a BB gun, according to Fire Captain Mark Stevens.

[31] At 21:03:34 Janice McMeeken, the EMS dispatcher was able to contact the accused who were in ambulance 3036 that shift. They had just finished a call. They were told this call was a priority 4, the highest priority, and were dispatched to the scene for “...a male patient who was shot with a BB gun. He’s got superficial wounds to the abdomen area.” Marchant asks, “why is this code 4?” Ms. McMeeken says she would check with the call taker. The call ends at 21:04:44. At 21:05:38 Ms. McMeeken calls Marchant back and advises him it was a penetrating wound to which Marchant replies “So it is not superficial.”

[32] At 21:09:05 Marchant called dispatch to advise they had arrived on scene. By this time approximately 13 minutes have elapsed since 911 was advised of this shooting and medical assistance arrived on the scene.

[33] The evidence from the 911 dispatch centre indicates this was an extremely busy night and the centre was short staffed. There was no supervisor on duty as there was supposed to be. In my view nothing turns on this fact.

[34] Officer Zezella was first on the scene and followed almost immediately by Officer Campovari. There were a group of people on the sidewalk when he arrived. His only information from the police dispatch at that point was “shots fired”. People in the crowd indicated a “BB gun, fireworks, loud bang, shotgun”. Officer Zezella went immediately to Yosif who was lying on the sidewalk and at the same time he heard over his radio “male down, BB gun possible”.

[35] Officer Zezella bent down and examined Yosif who he says was conscious. He had his flashlight on and lifted the deceased’s shirt and saw what he described as a small circular puncture wound to the right side of the belly button which he said was not really red but a dark mark like a puncture. He felt the victim’s stomach to see if it was hard which he thought might have indicated internal bleeding. It was not hard, and neither was there any reaction of pain to this examination. He felt Yosif’s pulse which in his opinion was fine. He sat the victim up so he could examine his back for any exit wound and saw none. He recalls comments from the crowd to the effect of “loud bang”, “shotgun”, “BB gun”, “fireworks”. He relayed those comments to Marchant once the accused arrived. He further stated he helped Marchant attempt to sit the patient up without success. The video, as I describe later in this judgment, shows a more aggressive attempt at trying to stand Yosif up. This officer also denied ever waving off Captain Stevens, one of the firefighters, from examining Yosif. He denied ever saying the victim was acting like he was shot with an AK-47.

[36] Officer Campovari arrived on scene immediately after Officer Zezella. The only medical training both officers had was in CPR. Both had personal experience shooting guns and BB guns and/or pellet guns. They had no experience in specific wounds by such instruments. He describes the wound of Yosif in similar terms as

did Officer Zezella. He likewise confirmed that Yosif was conscious but not speaking. He was moving his arms and legs.

[37] Officer Campovari spoke to the crowd to see if he could get details on the shooters. During these discussions he heard from 3 or 4 males in the crowd say that they thought a BB gun had been used. He also took a statement from the witness Steve Ryan who said he heard a single pop and thought it was a BB gun. This Officer felt the scene was somewhat chaotic with a number of by-standers as well as first responders and the crowd continued to grow. He testified that he did his best to move the crowd back once the paramedics arrived. However, it is clear from the courts numerous viewings of the videos of the scene that Officer Campovari had very limited success with that endeavour and the scene continued to appear somewhat chaotic and far from secure.

[38] The fire service arrived shortly after the police with the accused being the last of the first responders on the scene.

[39] There were three police officers on the scene initially with the third being a supervisor Sgt. Shawihat. There were three fire fighters led by Captain Mark Stevens. All were consistent in their observations, although some had a better view than others, that the wound to Yosif appeared minor with no blood or very little. The wound was basically described as a small red mark, puncture, or bruise on his abdomen. All reported that he was conscious and moving his arms and legs. All six felt that the accused, once they arrived, were taking the situation seriously, professionally and doing what they expected paramedics would be doing to look after the patient. No first responder ever heard Yosif speak.

[40] Firefighter McQueen believed he may have heard one of the paramedics say something to the effect “he is acting” while he was leaving and 10 feet away.

None of the other first responders heard any laughing, or similar comments such as he is faking or that Yosif should win an Oscar, from either of the accused.

[41] Captain Stevens testified that when he and his two firefighters approached the scene, they were waved off by one of the police officers when they were about 15 feet away. This Officer said rather loudly, according to Captain Stevens, that the victim “has been shot with a BB gun and he is acting like it is an AK-47”. Shortly after the paramedics arrived, Snively advised the Captain that he and his men could leave. According to Captain Stevens the victim was moving very little by the time the paramedics arrived. I accept the evidence of Captain Stevens where it conflicts with the evidence of Officer Zezella as more credible. Likewise, it was clear from Captain Stevens that he and his team would have treated Yosif pending the arrival of the paramedics given their superior medical training compared to the police. The only reason that did not occur was because they were waved off by Officer Zezella.

[42] Several of the first responders including Officer Campovari, Sgt. Shawihat and the accused Snively, did make enquiries of members of the crowd in general, and Yosif’s father and brother in particular, as to whether Yosif might have taken any drugs or alcohol in an attempt to find out all they could about his condition. They also asked about any known medical conditions and all the answers were consistent that he had not used any drugs or alcohol, nor did he have any preexisting medical conditions.

iv) EVIDENCE OF THE EXPERTS:

[43] Dr. Bulakatina was qualified, on consent, as a pathologist. She was at the Hamilton General Hospital where she performed the autopsy on Yosif on December 3, 2017. She found a single penetrating wound to the abdomen and the cause of death was massive blood loss caused by a gunshot to the abdomen with a

hollow point 22-caliber bullet which had perforated two high pressure blood vessels which she opined would never clot on their own. She found two litres of blood in the abdomen. She also found a small abrasion above the right eyebrow and right cheek as well as a bruise to the outer corner of the right eye.

[44] Dr. Bulakatina opined that this type of wound was very lethal with the survival rate between 38-51% at best if treated at a lead trauma hospital. She felt Yosif's chance of survival at St. Joseph's Hospital, a non-lead trauma hospital, was 0-18%. She did not feel a blood transfusion anywhere would have helped without surgery to stop the bleeding. She was not surprised that there was no blood visible to the paramedics as all the bleeding was internal. She agreed that initially Yosif's vital signs may have been reasonable, but she could give no opinion as to how long that could last.

[45] In essence this doctor was of the opinion that Yosif had, at best, a 50% chance of survival as of the moment he was shot and the longer it took for him to get treatment at a lead trauma hospital his chances of survival deteriorated.

[46] Dr. Namja Ahmed was qualified on consent as an expert in trauma medicine and surgery. She has been at St. Michaels Hospital for the past 21 years specializing in traumatic injuries and most recently has been Surgeon-in-Chief. She had no expertise in paramedic care. Ontario has a series of lead trauma hospitals in various areas. The Hamilton General Hospital in Hamilton is the designated hospital for that region and St. Joseph's Hospital is not such a trauma hospital.

[47] Dr. Ahmed opined that the expertise and resources available in a trauma hospital enhances the survivability rate of seriously injured people such as Yosif who was shot with a 22-caliber hollow point bullet. The type of injury he suffered to his abdomen is highly lethal and difficult to control. His only chance of survival was immediate blood replacement and simultaneous surgery to stop the bleeding

by an experienced vascular surgeon. She was also of the opinion that it would be highly unusual for a shot to the abdomen not to cause serious internal injuries. The outward appearance would not indicate the depth of the penetration of the wound nor show much outward blood.

[48] Dr. Ahmed concluded, based on her review of the records, that Yosif's vital signs were absent at approximately 21:41. She also opined that sitting up or standing with this type of injury was contraindicated and lying down would be much more appropriate. The Doctor noted that on the ACR Yosif's vital signs at 21:25 would be very concerning to her and she noted that he did not get to the hospital until approximately 15 minutes after that.

[49] Yosif had a 10-15% chance of survival if he had attended a trauma hospital shortly after having a no vital signs reading. He had a zero chance of survival at a non-trauma hospital under the same circumstances. At best he had only a 50% chance of survival if he had been shot in the lobby of a lead trauma hospital such as the Hamilton General Hospital and got the required care within 15 minutes. This Doctor agreed that a BB gun injury is usually superficial and would not end up in a trauma hospital. The most significant factor regarding the wound Yosif suffered was that it was penetrating.

[50] Dr. Andrew Healy was the emergency room doctor who treated Yosif upon his arrival at St. Joseph's Hospital. He was qualified on consent as an emergency room specialist and is currently Chief Medical Director of Medical Services at the Osler Health System. He agreed gunshot victims typically went to the General Hospital while psychology issues among other medical problems came to St. Joseph's.

[51] The most important information this doctor received through the ambulance patch from Marchant was that Yosif's heartbeat was 145 BPM, that he

had been shot in the abdomen with a small penetrating wound and he was in an altered state which in his opinion meant he was in shock. The doctor found no pulse upon Yosif's arrival at the hospital. He performed CPR and immediately called for blood, but it did not arrive before Yosif died and in any event he felt that a blood transfusion at that point likely would not have helped. He opened the chest and found the heart and aorta empty of blood.

[52] Dr. Nathalie Desrosiers was qualified on consent as an expert in Toxicology. Yosif's blood was analyzed and found to contain traces of Methamphetamine. This drug can increase pulse, blood pressure, alertness, agitation, and anxiety. This Doctor would not have expected any such symptoms to manifest themselves or be visible from Yosif one hour before his death given the trace amounts she found in his system. No other drugs or alcohol were detected.

[53] Hal Klassen was the Deputy Chief of the Hamilton Paramedic Service (HPS) in December 2017. He joined the HPS in 2013. He oversaw the day-to-day service of the HPS. He became a paramedic in 1985 and eventually became an advanced care paramedic. On consent Mr. Klassen was qualified to advise the court of the training and qualifications required to be certified as a paramedic in the HPS and the standards and guidelines governing them.

[54] Mr. Klassen testified that HPS, like all paramedic services, is inspected regularly by the province to ensure the service is operating in compliance with the provincial legislation and standards allowing its certification to extend over three-year periods. The minimal acceptable standard of care set by the province for every patient attended to by a paramedic is mandated by the Basic Life Support Patient Care Standards (BLS). The HPS continuously trains its paramedics to ensure they are meeting all provincial standards and are fully trained in the BLS standards.

Paramedics must also be conversant and trained on the province's Advanced Life Support Patient Care Standards (ALS).

[55] According to Mr. Klassen, a person becomes a paramedic by first graduating from a Ministry of Health sanctioned primary care paramedic program at a community college or private institution. This is either two years or a one-year condensed program followed by a province-wide standards exam. A person then applies to a paramedic service for employment. HPS invites all new applicants to write an exam created specifically by the HPS training department which is updated annually. The HPS then has a first interview of the top candidates from the exam and a percentage of those candidates who scored the highest on the first interview are asked to return for a second interview. The top candidates after the second interview are then offered jobs to fill the number of vacancies available. These new recruits then undergo a four-week training process by the HPS before they go into the field with a partner. Thereafter there is regular mandatory continuing training for all paramedics throughout the year. The training records of the accused confirmed they had taken all the required training and courses.

[56] Mr. Klassen stated paramedics always work in pairs in an ambulance and the same pair will work together on the same 12-hour shift for at least a year. One is the driver, and one is the lead attendant, and they generally switch roles for each call. They both, however, always have shared care for the patient. The lead paramedic on a call would primarily be responsible for charting or filling out the ACR on the in-ambulance computer with the driver reviewing it for accuracy and signing off.

[57] Mr. Klassen indicated that if paramedics were dispatched to a call of a penetrating wound it would be expected that they would take the Zoll/cardiac monitor, first response bag and trauma kit to the patient's side, which were

standard equipment in all ambulances. Every ambulance has an Automated Vehicle Locator (AVL) which allows it to be tracked in real time. This witness confirmed the accused left the John Street station at 21:05 with lights and siren on, since it was a code 4, arriving at the scene at 21:09. The ambulance then idled at the scene until 21:31:59 when it left for the hospital with lights on but siren off. They arrived at the hospital at 21:39.

[58] This witness described the Patient Priority System (PPS) used in Hamilton to determine, depending on the type of injury, which hospital that a patient should be taken for optimal care. Every paramedic is trained on the Field Trauma Triage Standard which is a provincial standard that dictates which type of hospital a patient with a certain type of injury would be taken to. A penetrating injury required that the patient be taken to the lead trauma hospital which in this case was the Hamilton General. All paramedics are trained in identifying a penetrating injury. There is no policy to distinguish between how serious a penetrating injury is nor is there any way for a paramedic to be able to determine the depth or seriousness of such an injury. Paramedics in Hamilton are also trained that a patient with a penetrating injury is to be treated as the most seriously injured type of patient. There is no distinction on how a penetrating injury is to be treated based on the type of weapon or gun which caused the wound. It is impossible for a paramedic to know what happened to a projectile inside a person or what injury it has caused once it passes through the layer of skin.

[59] Mr. Klassen testified that at 21:31:14 Mr. Marchant requested clearance from dispatch to attend St. Joseph's Hospital meaning Yosif had an emergency psychiatric problem. The dispatcher is the final authority on which hospital an ambulance will go to, based upon the information and recommendations of the

paramedics, because they have the complete picture of the entire system and volumes at the various hospitals.

[60] The accused had initially been dispatched as a code 4 which is the highest code and according to Mr. Klassen meant it was an emergency call requiring immediate response as the patient's life was threatened and time was crucial as set out in the dispatch code. The return to the hospital priority code is set by the paramedic and here it was set at 3 by the accused which meant the patient was stable and not in immediate danger.

[61] A patient with a penetrating injury lying on their back should be moved by way of a log roll onto a back board and then to the stretcher to minimize movement and minimize bleeding or injury to internal tissues according to Mr. Klassen. Lifting such a patient straight up by the arms should never be done nor should they be put in a seating position. The paramedics are the lead medical authority at the scene and they direct and control how a patient will be moved.

[62] Mr. Klassen testified that a paramedic is trained on the standards and through bulletins that a high index of suspicion of significant potential life-threatening injury must be given for any penetrating injury.

[63] Dr. Verbeek was qualified on consent as an expert in pre-hospital and emergency medicine. He is currently the Medical Director at Sunnybrook Hospital and has held that position since 1996. He has also been the medical director for paramedic services at Sunnybrook since 1996. He had reviewed most of the pertinent information in the crown's file as well as the videos when forming his opinions.

[64] The doctor testified that the overarching principal based on all the training and government standards for paramedics is to approach every case objectively

with an open mind and always assume a worst-case scenario until proven otherwise.

[65] The doctor opined on several serious deficiencies by the accused in the way they handled Yosif's care. They somehow concluded Yosif was having some sort of psychiatric issue possibly caused or accentuated by abuse of drugs or alcohol when the real problem, as they were initially told by dispatch, was a penetrating wound to the abdomen and assigned the highest code. All paramedics are trained that a penetrating wound to the abdomen is particularly serious because it is impossible to know by an external visualization or external physical assessment the depth or direction of the penetration or the damage caused to internal organs or tissues. The standard of care does not differentiate between guns that caused a penetrating wound, only that if it is a penetrating wound then it is of the highest level of seriousness and means that the patient should be taken to a trauma hospital immediately which is known as "load and go".

[66] The accused failed to control the scene so they could properly assess the patient according to Dr. Verbeek. They had numerous resources available by way of police and firefighters to ensure the scene was controlled but failed to utilize them. As a result, Yosif was not moved according to the standards and training of paramedics in a gentle manner by way of a log roll onto a back board and loaded onto the stretcher and put in the ambulance. Instead on one occasion Marchant and Officer Zezella each picked Yosif up by the wrists to get him to stand and walk to the stretcher. A move that was totally contraindicated. Next, the accused acquiesced in Madhi and others picking up Yosif by the arms and legs in an attempt to put him on the stretcher.

[67] At 21:25 the first vital signs in the ambulance were obtained. This showed a heart rate of 144 BPM; no valid oxygen readings were produced that could be

relied on; breathing would not be considered normal at 3-4 words; a comment by Yosif that he couldn't breathe; an altered level of consciousness; and aggressiveness. These symptoms to any paramedic, according to Dr. Verbeek would indicate a patient in severe distress and level 3 shock who needed to get to a trauma hospital immediately. That did not happen.

[68] Dr. Croskerry, on behalf of the defence, was qualified on consent as an expert on clinical decision making in health care. He has been a medical doctor since 1982 and has a Phd. in psychology obtained in 1975. He is a professor at Dalhousie University.

[69] He confirmed that although paramedics do not make a diagnosis, they are involved in clinical decision making. He opined that all people make decisions in one of two ways being either impulsive decision making when time is limited and the problem critical or reflective decision making when more time is available to consider the problem. The doctor further opined that we all are subject to unconscious biases which influence our decision making. Such biases were at play in the decision making of the paramedics in this case based on his review of the entire file.

[70] Dr. Croskerry felt the following biases were involved in this case.

- a. Outcome bias meaning that since there was a bad outcome someone must be at fault.
- b. Hindsight bias meaning that since the outcome is known it unknowingly influences past events and prevents a realistic appraisal of what actually happened at the time.
- c. Anchoring bias means that the decision maker fixates on a specific feature and forms an initial opinion which exerts an overly powerful influence on

future decision making and there is a failure to adjust when new information becomes available.

- d. Group think or group affirmation bias means everyone else thinks the same thing and this reinforces the decision makers similar impressions.

[71] Dr. Croskerry testified that the accused had the above biases but emphasized such biases are unconscious, and the accused would not have known they were being influenced by them in their decision making. The doctor also felt this was not a true penetrating wound although why he came to this conclusion is hard for this court to understand since he further testified that one cannot tell the depth of a penetrating wound simply by looking at it or what damage it may have caused internally. He did opine however, that if this was a true penetrating wound then it was clearly a load and go situation which the accused should have done as soon as they arrived at the scene.

[72] Dr. Croskerry agreed in cross examination that the accused made mistakes in this case but felt those mistakes were made as a result of poor decision making caused by the earlier described unconscious biases involved. He agreed training, standards and policies for paramedics are in place to eliminate these inherent unconscious biases.

v) THE ACCUSED:

[73] Mr. Marchant is currently 33 years of age. He graduated from his 52-week paramedic course in 2011 and after a short paramedic work experience in Newfoundland he was hired by HPS in 2012 as a primary care paramedic. He confirmed taking all mandatory courses and training each year for his continuing education. He confirmed he was very familiar with all the paramedic standards, legislation, regulations, and protocols. He never had any specific training on gunshot wounds and in fact had never dealt with one prior to December 3, 2017.

He had never dealt with a penetrating trauma to the abdomen. He had never received any specific training in clinical decision making. He and Mr. Snively had been working together for about a year.

[74] Upon arrival at the scene Snively went to the patient and Marchant got out the stretcher which had on it the first response bag, the trauma kit, and the Zoll heart monitor. He was told by firefighter McQueen that the patient had a small wound from a pellet gun which is what he says he had been told by dispatch. He heard similar comments from the police. In fact, he had been told by dispatch, in response to his question, that it was a superficial but penetrating wound. He agreed no equipment was taken to the patient's side.

[75] Marchant took over from Snively and went and knelt next to the patient. He took his pulse which he concluded was strong. Yosif made eye contact but did not answer his questions and instead he heard him speak to his father in Arabic. He denies ever hearing Yosif say anything in English while on the sidewalk. He examined the wound which he described as small with no blood coming out. He did a palpitation of the abdomen with negative results to pain, hardness, or distension. He agreed with everyone else that he had heard from that this appeared to be a superficial pellet gun injury. Marchant testified Yosif's father never relayed what Yosif was saying in Arabic. The father simply repeated "help my son". The father did confirm to Marchant that there were no drugs or alcohol involved. He denied ever saying anything about acting, faking or winning an Oscar. Yosif was flailing his arms and legs.

[76] Marchant felt there was no penetrating wound based on his assessment. He stated the patient needed to be moved to a stretcher and immediately one of the police officers grabbed his arm and started lifting Yosif, so Marchant felt it was best to assist and took the other arm. They were unsuccessful and they put him

back on the ground. He thought the patient could stand if given assistance. Madhi and some others then attempted to move Yosif a few feet before putting him back on the sidewalk. Finally, Snively and Marchant did a “fore and aft” lift putting him on the stretcher. He thought this type of lift was appropriate because he had ruled out a penetrating wound and had concluded Yosif was suffering from some type of psychiatric disorder.

[77] In the back of the ambulance, he and Snively decided that since it was not a penetrating wound, and in their opinion Yosif was in no immediate distress, they should do a more extensive assessment rather than load and go. Marchant testified on a number of occasions that Yosif, in his opinion, was aggressive and not cooperating. He testified Yosif pulled off the SPO2 finger monitor as well as the blood pressure cuff and 4 lead heart monitor and the oxygen mask. The accused therefore decided to restrain Yosif. He did hear Yosif say once in the ambulance that he could not breath but there was no other comments or responses to his questions.

[78] According to Marchant Yosif’s condition remained the same at 21:25 as it had been outside and also remained the same at 21:32. He acknowledged Yosif’s heart rate was 144 BPM but attributed that to his exertion in the back of the ambulance before being restrained. He did the first patch at 21:32 and felt Yosif was stable and therefore told the hospital this was a code 3 and still thought they were dealing with a psychiatric issue best treated at St. Joseph’s Hospital.

[79] Marchant testified that just after the first patch Yosif became unresponsive and he took new vitals which showed his heart rate at 45 BPM, a pulse of 45 and a manual blood pressure reading of 90/60 so he requested a second patch at 21:35 and raised the patient’s priority to a code 4. Surprisingly, Marchant still did not think this was a penetrating wound, so he never considered changing to a trauma

hospital. However, his first patch to St. Joseph's hospital 3 minutes earlier clearly describes the injury as "a small penetrating wound to his lower abdomen that's controlled". He likewise described the wound as penetrating in his ACR with "bleeding controlled" and "1/2cm by 1/2cm wound to central abdomen".

[80] In cross examination Marchant confirmed he was well aware that any penetrating wound is considered an immediate load and go to the trauma hospital, but he never thought this was a penetrating wound nor did he think Yosif was in shock. He confirmed he did an abdominal palpitation once on the sidewalk and once in the ambulance but did not note that on his ACR as he only noted pertinent negatives, according to him. He agreed that there were deficiencies in his ACR which he attributes to being very emotional and upset after Yosif died at the hospital. He agreed he assisted in a dangerous lift with Officer Zezella. He states that the autopsy picture of the wound was not what he saw which he described as sealed and not open "like a squeezed pimple". He further confirmed he wanted to get vital signs before leaving the scene and this was delayed because Yosif was uncooperative.

[81] Mr. Snively testified that he was 55 years of age. He was a physiotherapist for 10 years and then returned to school to become a paramedic. He started his employment with HPS in 2005 as a primary care paramedic. He had attended all necessary continuing education each year of his employment. He confirmed he was familiar with all the standards, legislation and protocols pertaining to paramedics, the care they administered and all the related decision-making principals. He was well aware that a paramedic must assume the worst in any given case until proven otherwise.

[82] He had attended one gunshot wound as a paramedic around 2013 which was a very obvious wound to the lower leg of that patient. He had also had

experience with BB gun injuries in the past, which he described as generally going from a welt to partially breaking the skin. He is a hunter and has had a gun license for 15 years. He is a member of a local gun club.

[83] Mr. Snively made the somewhat generalized comment that psychiatric issues combined with drugs and alcohol are very common in many of the patients he treats in Hamilton and those patients are usually taken to St. Joseph's Hospital.

[84] Mr. Snively confirmed that he and Marchant were dispatched on an urgent code 4 call for a penetrating wound to the abdomen with the added comment that it was superficial. As driver he activated his lights and siren since it was a code 4. The fire department and police were already on scene when he arrived. No one was giving treatment to Yosif who was on his back on the sidewalk. He attended the patient and found good pulse and breathing. He asked the patient his name and he replied Yosif. He answered no other questions. His eyes were open. His colour was good. He saw the small wound to the abdomen with no bleeding. He states he palpated the abdomen and found no pain reaction or rigidity. He agreed that assessment took about 19 seconds after reviewing the video. He concluded, after that 19 second assessment, that Yosif was in no distress and he so reported to Marchant who took over attending the patient. He then told the firefighters they could go. He had concluded that there was no penetrating wound suffered by Yosif.

[85] Mr. Snively then went to move the stretcher closer to Yosif and when he looked back, he saw Madhi and others attempting to move the patient. Mr. Snively testified that he immediately grabbed Yosif's legs to assist with this move which he stated was totally unexpected. In fact, he appears to watch this move for about 9 seconds according to the video before assisting. Yosif was eventually put back down on the sidewalk. This witness states that he and Marchant then did a fore and

aft lift and after several attempts put the patient on the stretcher. He spoke to a witness who told him Yosif had been shot by a pellet gun and that there was no muzzle flash. He heard similar comments from members of the crowd and the police that it was a pellet gun. He never said the patient was faking but he did hear a police officer make such a comment.

[86] Mr. Snively assisted Marchant in the back of the ambulance where they did a further assessment and got the vitals. He stated Yosif was moving, noncompliant, refusing to answer questions and appeared to be deliberately resisting the efforts of the paramedics to properly assess him. He did however hear Yosif state he could not breath and he did see that his heart rate was 144 BPM. He then assisted in restraining the patient with the soft restraints.

[87] Mr. Snively said to Marchant, after getting a 12-lead heart read out which showed no heart attack was taking place, that they should go. He went to the driver's seat leaving the scene at 21:31:59 with lights on. He agreed in cross examination that in fact he turned the lights off at 21:32:02 and did not turn them back on until 21:36:12. He gave no plausible explanation as to why this was done. He did not put the siren on until 21:37:55 after the second patch when Marchant yelled 4-2 meaning the patient was deteriorating. He heard neither patch from the driver's seat.

[88] Mr. Snively was shocked and distraught when he heard Yosif had died because he always thought the problem was behavioural. He reviewed the ACR prepared by Marchant and agreed it was accurate and signed it.

[89] On cross examination Mr. Snively concluded this was not a penetrating wound because there was no pain response to palpitation, vitals were good, the wound was very superficial with only a break in the skin, and everyone was telling him a pellet gun was involved. He also agreed that he was asking Yosif numerous

questions and although his eyes followed him, he was not answering. He also agreed the lighting was bad and the only light he had was a flashlight from another first responder while on the sidewalk.

[90] Mr. Snively confirmed the police were not controlling the scene and the crowd was closing in from the time of the paramedic's arrival. He gave no evidence of ever asking the police to control the scene. He did not feel the elevated heart rate necessarily meant a load and go situation. He agreed that any penetrating trauma is a load and go situation and must go the trauma hospital namely the General.

vi) THE VIDEOS:

[91] A number of videos from different cameras, some of which were enlarged, were made exhibits at this trial. In general, they showed the young men running through the convenience store parking lot and then north on Sandford Ave. They do not show the actual shooting although they do portray Yosif, Ahmed and Mustafa coming back and Yosif sitting down on the curb after being shot. They also show Ahmed coming into the convenience store clearly distraught and the 911 call. The scene is also visualized as the police arrive, the crowd forms, the fire truck arrives and then the paramedics.

[92] The videos of the scene I conclude shows a growing crowd, and a chaotic dark scene. The evidence of numerous witnesses and the videos indicate no one was seizing control of the scene. There appears to be a general lack of urgency by first responders. The move of Yosif by Marchant and Officer Zezella, whereby each grabbed a wrist and attempted the lift Yosif to his feet, is disturbing in its obvious lack of concern or gentleness. The lift by Madhi and others is equally concerning in its lack of gentleness and its abrupt nature. There is clearly no equipment at Yosif's side, and the stretcher is not visible in the videos. Likewise,

the actual moves of Yosif onto the stretcher and into the ambulance are not captured on video.

POSITION OF THE PARTIES:

[93] The defence agrees that the accused had a duty of care to Yosif and that he was under their care exclusively after they arrived on the scene until they got to the hospital. The defence also concedes that on the totality of the evidence that I could find that there was a departure from the standard of care expected of a reasonable paramedic in the circumstances of this case, however, not a marked departure.

[94] The defence takes the position that their clients acted in accordance with their reasonably held and honest believe that Yosif had a superficial wound to his abdomen as a result of a BB gun shot. They further had a reasonable and honestly held belief that Yosif was presenting as he was because of some psychiatric issue that could best be handled at St. Joseph's hospital. They state that such a mistake in fact, if reasonably held, is a complete defence. As a result, the crown has not proven beyond a reasonable doubt that the accused had the requisite *mens rea* to ground this offence.

[95] The defence also argues that the crown has not proven beyond a reasonable doubt that any failure by the accused to perform their duty had the effect of endangering Yosif's life since his life was already significantly endangered due to the wound he suffered as testified to by Dr. Ahmed and Dr. Bulakhtina.

[96] The defence states even though the crown may have proven a departure from the standard of care it has not proven beyond a reasonable doubt that such departure was a "marked" departure as required. Foreseeability of harm or endangerment is required according to the arguments of the defence and that I must consider such evidence in the circumstances of this case as it unfolded and without the benefit of hindsight.

[97] Significantly the defence takes the position that a series of negligent acts or a series of actions which fall below the standard but one or more of such acts is not a “marked departure” of the standard of care then they cannot become a “marked” departure as a result of the cumulative effect of such actions. In other words, a number of departures is not sufficient to elevate the departures to the standard of a “marked departure” and instead for the charge to be proven at least one of those departures alone must be a “marked departure”.

[98] The crown argues that it has proven beyond a reasonable doubt the *actus rea* of this offence. It is clear that the accused were under a legal duty to provide the necessities of life to Yosif pursuant to s. 215(1)(c): objectively the accused failed to provide such necessities and objectively these failures endangered Yosif’s life.

[99] The crown contends that the accused failed to rely on their extensive training as well as the provincial and Hamilton standards in treating Yosif’s injury as the code 4 emergency assigned to the case which meant his life was in immediate danger and prompt medical care was required at a lead trauma hospital which St. Joseph’s was not.

[100] The crown argues that the total delay of 23 minutes and the specific delay by the accused in the back of the ambulance of 17 minutes before transport began clearly endangered Yosif’s life as time was of the essence according to all the expert evidence given at this trial. When that delay was combined with the accused’s decision to take Yosif to a non-Lead Trauma Hospital as required by the standards his fate was sealed and any hope there was to save his life extinguished.

[101] All of these actions along with the inappropriate efforts at lifting Yosif onto the stretcher and lack of due care in observing him during transport fulfilled beyond a reasonable doubt the modified objective test applied to the *mens rea* for

negligence-based offences as they represented the required “marked departure” necessary from that of a reasonably prudent paramedic in similar circumstances.

[102] The crown submits that the actions of the accused must be assessed in light of their training and the medical standards they were made familiar with as paramedics, and that they cannot escape responsibility by reliance on what they were told by civilians or other medically untrained first responders as to the nature and extent of their patient’s injuries. Instead, they must be measured by a reasonably trained paramedic under similar circumstances.

[103] The crown states that there can be no doubt that the duty of a reasonably prudent paramedic is to follow the Basic Life Support Standards (BLS) on which they are extensively trained. The overarching principle of those standards is that the paramedic is to treat patient care in an objective, non-judgmental, thorough manner and always start by assuming a worst-case scenario until proven otherwise. The crown contends this principal was not followed from the very beginning of the accused’s interaction with Yosif and that never changed until a minute or two prior to arrival at St. Joseph’s Hospital.

THE LAW:

[104] The offence of failing to provide the necessities of life is codified in s. 215 of the *Criminal Code*. The pertinent sections are as follows:

S. 215(1) Every one is under a legal duty...

(c) to provide necessities of life to a person under his charge if that person

(i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and

(ii) is unable to provide himself with necessities of life.

(2) Everyone commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies on him, to perform that duty, if...

(b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

[105] I agree with the comments of Pomerance J. in *R v. Doering*, 2019 ONSC 6360 at paras. 85, 86, 87, 88:

[85] This offence is animated by the principle that, where a person is in the charge of another, the person having charge has a duty to provide the necessities of life. Certain relationships and legal duties are described in s. 215 of the *Criminal Code*. As noted in *R. v. A.D.H.*, 2013 SCC 28 at para. 67, [2013] 2 S.C.R. 269, “[the] essence of the s. 215 offence, then, is that it imposes legal duties arising out of defined relationships.”

[86] Section 215, as a penal negligence offence, imposes liability on an objective basis. As was explained in *R. v. Peterson*, [2005] O.J. No. 4450 (C.A.), at para. 35: Subsection 215(2) imposes liability on an objective basis. The offence is made out by conduct showing a marked departure from the conduct of a reasonably prudent person having the charge of another in circumstances where it is objectively foreseeable that failure to provide necessities of life would risk danger to life or permanent endangerment of the health of the person under the charge of the other. The personal characteristics of the accused, falling short of capacity to appreciate the risk, are not a relevant consideration. The use of the word “duty” is indicative of a societal minimum that has been established and is aimed at establishing a uniform minimum level of care: *R. v. Naglik*, 1993 CanLII 64 (SCC), [1993] 3 S.C.R. 122 at paras. 37, 51 and 33 respectively.

[87] As with other like offences, s. 215 is designed to prescribe a uniform, minimum standard of care. The “necessaries of life” include medical attention: see *R. v. S.J.*, 2015 ONCA 97, 124 O.R. (3d) 595. The standard is not one of perfection. For example, a parent or guardian is not required to run to a doctor or hospital whenever illness or the prospect of illness arises. An error of judgment will exculpate, so long as it does not, itself, reflect a marked departure from the relevant standard.

[88] The mental element of the s. 215 offence requires the Crown to prove, on an objective basis, a marked departure from the conduct of a reasonably prudent person having the charge of another, in circumstances where it is reasonably foreseeable that failure to provide the

necessaries of life would lead to a risk of danger to the life of the victim, or a risk of permanent endangerment to their health. See e.g., *R. v. Naglik*, [1993] 3 S.C.R. 122, at p. 143.

[106] The crown must prove beyond a reasonable doubt the following elements of S. 215(1)(c) before a conviction of the accused can occur.

1. The accused were under a legal duty to provide the necessaries of life to Yosif.
2. From an objective standpoint, they failed to provide the necessaries of life; and
3. From an objective standpoint, their failures endangered the life of Yosif.

See: *R. v. Doering*, 2019 ONSC 6360 at para 95; *R. v. Stephan*, 2017 ABCA 380 at para 219, O’Ferrall J.A. in dissent (appeal allowed endorsing reasons of dissent), 2018 SCC 21); *R. v. J.F.*, [2008] S.C.J. No. 62 at paras 66-67 (Deschamps J. in dissent, not on this point)

[107] In this particular case the crown must also prove beyond a reasonable doubt that in failing to provide the necessaries of life the accused conduct represented a marked departure of what a reasonably prudent paramedic would have done in similar circumstances where it was objectively foreseeable that the failure to provide the necessaries of life would lead to a risk of danger to the life of Yosif. See *R. v. Beatty*, [2008] S.C.J. No. 5 at paras 7-8; *R. v. Peterson*, [2005] O.J. No. 4450 (C.A.) at para. 35.

[108] In determining a “marked departure” the court must also conclude that the risk of harm to Yosif in not providing the necessaries of life was foreseeable. As stated in *R. v. Stephan*, at para 266,

[266] Also a requirement in assessing whether the marked departure standard has been met is foreseeability of harm or endangerment. Foreseeability is engaged because the standard is one of the reasonably prudent parent. To reiterate, the circumstances which presented themselves to the accused affect the determination of what was or was not foreseeable. Hindsight is not

foreseeability. That is why, in this case, it was so critical that the jury be carefully instructed to consider the circumstances as they unfolded and what the accused did to address those circumstances as they unfolded. The instructions need to address the facts as they presented themselves to the accused, what the accused did in response to those facts and when they did it.

[109] The court must also consider whether a marked departure can be grounded by a series of mere departures of actions by the accused. *Beatty*, at para. 72 is instructive on that issue and concludes that a larger pattern of behaviour considered as a whole can establish a marked departure:

72 A momentary lapse of attention without more cannot establish the *actus reus* and *mens rea* of the offence of dangerous driving. However, additional evidence may show that the momentary lapse is part of a larger pattern that, considered as a whole, establishes the marked departure from the norm required for the offence of dangerous driving. For example, a momentary lapse might be caused by the consumption of alcohol or by carrying on an activity incompatible with maintaining proper control of the automobile. The trier of fact might conclude in such a case that considering the total driving pattern in all the circumstances, a marked departure from the norm is established.

[110] A similar instruction is set out in *R v. Stephan*, 2021 ABCA 82, at para. 95:

[95] For certain offences, more than one act or omission may be required to satisfy the marked departure standard. Take dangerous driving for example. Determining whether the accused's acts or omissions constituted a marked departure along the "continuum of negligence" from civil to penal negligence will often be highly debatable. Objectively dangerous conduct – running a red light – may occur because of mere carelessness at one end of the spectrum or intentionally dangerous conduct at the other: *R v Chung*, 2020 SCC 8 at para 22. Whether running a red light constitutes a marked departure from the norm may involve considering multiple acts or omissions such as whether the driver passed other stopped vehicles in approaching the red light and, if so, how that occurred (did the driver cross a solid line to get around them or pass them on the right on a shoulder), whether the

driver failed to brake before actually running the light, the pattern of driving preceding the running of the light and the driver's opportunities to avoid running the light. And then of course, the circumstances themselves will include the location of the light (e.g. urban area), the time of day and the consequential vehicular and pedestrian activity on the road.

[111] The Supreme Court of Canada has instructed that the "reasonable person" must be judged based on the nature and circumstances of the conduct engaged in. Certain conduct or activities require special attention and skill as stated in *R. v. Javanmardi*, 2019 S.C.J. 54, at para. 37:

[37] An accused undertaking such an activity may be found to have breached the reasonable person standard if he or she is not qualified to provide the special care that the activity requires, or negligently failed to exercise such care while engaged in the activity. In this way, the law maintains a "constant minimum standard" for *every* person who engages in an activity requiring special care and skill: they must be both qualified *and* exercise the special care that the activity requires.

[112] The distinction between a mere departure and a marked departure is a question of degree. A "marked departure" requires more than simple inadvertence, carelessness, thoughtlessness or a simple error in judgment. See: *Beatty* at para. 7, 41; *Stephan*, 2017 at paras 247-249, per O'Ferrall J.A. in dissent.

[113] A reasonably held mistake of fact may provide a complete defence, if it is based on the accused's reasonably and honestly held perception of the facts based on the circumstances confronting the accused. As was stated in *Beatty*, at para. 37:

[37] However, because the accused's mental state is relevant in a criminal setting, the objective test must be modified to give the accused the benefit of any reasonable doubt about whether the reasonable person would have appreciated the risk or could and would have done something to avoid creating the danger.

[114] The court in *Beatty* goes on to say at para 38:

...a reasonably held mistake of fact may provide a complete defence if, based on the accused's reasonable perception of the facts, the conduct measured up to the requisite standard of care. It is therefore important to apply the modified objective test in the context of the events surrounding the incident.

[115] In analyzing the conduct of the accused as compared to a reasonable prudent paramedic, the court must consider their prior training, experience, and qualifications as paramedics, as well as the professional standards and policies in place at the time and on which all paramedics are trained and are expected to know. See *Javanmardi*, at paras. 39, 41; *Stephan*, at para. 250.

[116] Under S. 21(1)(a) of the *Criminal Code* two or more people may be jointly liable if they are engaged in a common activity and are jointly involved in that activity which creates a common risk even though they may each perform different activities as long as there is common participation. In other words, it is necessary that the co-perpetrators acted in concert with each other or were involved in a joint venture and each participated in an interrelated chain of events which ultimately resulted in the censured conduct. See *R. v. Ball*, 2011 BCCA 11 at paras 23-28 (leave to appeal to SCC refused), [2011] S.C.C.A. No 320); *R. v. Biniaris*, [2000] 1 S.C.J. 381, at paras 44-47.

[117] The law is very clear that an accused may be wrong and even negligent in his decision making and subsequent actions, but the law does not lightly brand a person as a criminal. The law is concerned with moral blameworthiness and objectively much depends on the circumstances the accused finds himself in. See *Stephan*, at para. 248, 264, 265; *Beatty*, at paras. 34, 36.

[118] Based on s. 215 of the *Criminal Code* the crown must prove only that the marked departure of the actions by the accused endangered the life of Yosif and that it was objectively foreseeable that he was in need of medical treatment.

Whether such medical treatment would or could have saved his life is not relevant as stated in *R. v. Stephan*, 2021 ABCA 82, at para. 60, 63, 64:

[60] First, the textual wording of the section does not support importing this requirement into the offence. Section 215(2)(a)(ii) is not directed to whether death would, or even for that matter could, have been prevented with earlier medical intervention. This section criminalizes endangering life, not causing death. The two are not the same. Therefore, the fact the failure to provide the necessities of life (in the form of medical treatment) is not the cause of any ensuing death does not preclude a conviction under s 215(2)(a)(ii): *R v Tutton*, [1989] 1 SCR 1392 at 1428.

[63] The offence under s 215(2)(a)(ii) involving endangerment of life is complete once it is objectively foreseeable that the child is in need of medical treatment, without which his or her life will be endangered (the *actus reus* or prohibited act of the offence), and the failure of the parent to provide that medical treatment represents a marked departure from the response expected of a reasonably prudent parent (the *mens rea* or fault element of the offence).

[64] Therefore, whether medical treatment would or could have saved a child's life is not relevant...

ANALYSIS:

[119] The conduct of care to Yosif in the case at bar was one of pre-hospital emergency medical care as would normally be provided by reasonably prudent paramedics similarly trained as the accused in circumstances like those found on the night in question by these accused. See *Javanmardi*, at para. 38.

[120] The accused have acknowledged they never concluded Yosif had suffered a penetrating wound. They argue this was their reasonable and honestly held belief and therefore they must be found not guilty.

[121] I conclude their erroneous belief about Yosif's wound and condition may have been honestly held but such a belief under the circumstances presented that night was objectively not reasonably held. See *R v. Peterson*, at para. 35; *R v. Doering*, at paras. 86, 87, 88.

[122] I conclude that the actions of the accused in the care of Yosif amounted to a marked departure from what should have been expected from reasonably trained primary care paramedics in several specific instances, for the following reasons:

- a) They failed to conclude Yosif suffered a penetrating wound to the abdomen and thereby treat Yosif's injury as a load and go situation of the highest emergency which required immediate attendance at a trauma hospital.
- b) They acquiesced and participated in inappropriate lifts.
- c) They delayed in leaving the scene.

A) FAILURE TO CONCLUDE A PENETRATING WOUND:

[123] The accused were told from the very beginning that this was a penetrating wound involving a gun shot. They questioned why this call was classified as a code 4 and were told clearly that the reason was that the wound was penetrating to which Marchant acknowledged "then it is not superficial". He knew at that point that penetrating was not superficial and that would be what he was dealing with.

[124] Both accused acknowledged in their evidence that a penetrating wound to the abdomen was considered the most serious type of injury which was also confirmed by Mr. Klassen as to the training of paramedics of the HPS. They knew they could not tell the depth of the wound or the internal damage it might be

causing by visualizing it or by any other type of assessment they could do at the scene which is why they were trained that such a wound was an immediate “load and go” to the nearest trauma hospital. They failed to follow those protocols and their extensive training in that regard and as such deprived Yosif of his only possible chance of survival. They failed to keep an open mind, err on the side of caution, assume the worst and do their own independent assessment which is what Dr. Croskerry testified paramedics are trained to do to avoid unconscious biases, such as group think.

[125] The accused gave evidence that their view of the actual wound was not what was depicted in the autopsy picture and as reported by Dr. Bulakhtina. Marchant described the wound as small, sealed over and like a squeezed pimple. However, in his patch to St. Joseph’s hospital and his ACR he describes it a small penetrating wound with bleeding controlled. Snively described it as an innocuous penetrating injury. The autopsy picture showed a small penetrating hole. Dr. Ahmed stated the autopsy picture accurately depicted a gunshot wound. Officer Zezella described the wound as a small, circular puncture which was not bleeding and he confirmed the autopsy picture showed what he saw that night. Officer Campovari described the wound as a small hole or indentation with no blood. Firefighter McQueen saw a small hole smaller than a dime. As did Mr. Diccio who said it was a small hole. I accept their evidence as a more accurate description of the wound which is corroborated by the autopsy pictures and Dr. Bulakhtina that the wound to Yosif was a small hole or puncture in his abdomen. Indeed, that is how Marchant described the wound in his first patch to St. Joseph’s hospital and in his ACR. It is difficult for this court to understand how the accused could conclude in their evidence before me that they honestly and reasonably did not think this was a penetrating wound when that is how they described it in the patch and the

ACR. As Mr. Klassen testified paramedics are trained that a penetrating wound is not complicated to conclude and involves any break in the skin and penetration into the tissue.

[126] I conclude that Yosif had a penetrating wound and that the accuseds failure to recognize this and act according to the standards was a marked departure from the minimum standards set and expected of any properly trained paramedic.

[127] The accused gave no plausible explanation as to why they concluded this was a psychiatric issue other than Yosif's altered state and their belief this was a superficial wound caused by a BB gun while the facts before them dictated otherwise. They had a young man on the ground who they knew had been shot; they saw the wound to his abdomen and knew or ought to have known the wound was penetrating; they had been told it was penetrating; the patient before them was not responsive even though his eyes may have been open; there was no evidence he had consumed drugs or alcohol and in fact the accused were told repeatedly that that was not the case; they had no evidence of any pre-existing medical conditions and were told there were none; they had a patient moving his arms and legs for no reason other than probably pain that he was in as concluded by Mr. Ryan and firefighter McQueen; at 22:10 while Yosif was still on the sidewalk the ACR notes in that assessment it is acknowledged he told the accused in English he could not breath; they had several witnesses telling them Yosif needed immediate hospital care and could not breath; they had no evidence to disregard the protocols that this was a worst case scenario of a penetrating wound requiring an immediate load and go to a trauma hospital.

[128] Instead of following their extensive training as professionals they listened to rumours and innuendo around them at the scene that this was a superficial wound which could not be serious because it was caused by a BB gun

and based their judgment on that unsupported information even though the wound itself did appear as a small penetrating hole. They further heard unsubstantiated comments such as he is faking or acting which reinforced their error in this case and they disregarded their extensive training, standards, and protocols.

[129] I conclude that the accused failure to deal with Yosif as highly trained professional paramedics and treat his injury as a worst case requiring immediate load and go to a trauma hospital was a marked departure from what would be objectively expected of any primary care paramedic employed by the HPS. I conclude these failures by the accused were not simple inadvertence, thoughtlessness or simple error in judgment but instead was a conscious decision to ignore the obvious evidence before them, their training, and the standards they were familiar with and were put in place, as Dr. Croskerry stated, to prevent errors in decision making and eliminate unconscious bias by paramedics.

[130] I also conclude that as a result of the failure of the accused to recognize the serious nature of Yosif's injury and immediately transport him to a trauma hospital was objectively and reasonably foreseeable that they were risking his life or would likely cause permanent endangerment of his health. See *R v. Naglik*, at p. 143.

B) THE INAPPROPRIATE LIFTS:

[131] The accused failed to bring any equipment to Yosif as called for by the protocols and unlike the firefighters who attended the scene. They failed to instruct the numerous first responders available to them to secure the scene so a more thorough assessment could be done.

[132] The standards are clear that there were only three appropriate methods to move a patient at that time: a log roll, fore and aft lift or a sheet pull. In every case paramedics are trained and expected to move a patient gently and minimize

movement. None of these acceptable methods on moving a patient were employed in Yosif's case. Both Mr. Klassen and Dr. Verbeek concluded, and I accept, that paramedics are trained that the only appropriate method to move a patient with a suspected penetrating wound to the abdomen is by log roll onto a backboard. That was not done in the case at bar.

[133] The lift done by Marchant and Officer Zezella, whether instigated by the officer or Marchant, was highly inappropriate and contrary to all training and protocols under which paramedics operate. Indeed, Marchant acknowledged in cross-examination that the lift he did with Officer Zezella was dangerous.

Likewise, acquiescing and assisting Madhi and his friends in their attempt to lift Yosif was equally inappropriate. The accused should have immediately instructed that Yosif not be touched.

[134] This dangerous and inappropriate lift would not have occurred if the accused had properly instructed the other first responders to secure the scene. I accept the evidence of Mr. Klassen and Dr. Verbeek on these issues. These failures were also in my view a marked departure from the actions that any primary care paramedic under similar circumstances would have undertaken or allowed.

[135] Likewise, the fore and aft lift performed by the accused to put Yosif on the stretcher was inappropriate under the circumstances, especially after the other two lift attempts had failed and Yosif was being basically unresponsive. There is no doubt a log roll onto a backboard was required as stated by Mr. Klassen and Dr. Verbeek. I conclude these lifts, and failure to utilize a backboard, by the accused were objectively a marked departure from their training and the protocols. I also conclude it was not a lift any other primary care paramedic would have attempted under the circumstances found that night.

[136] By not stopping the lift by Madhi the accused also failed to protect their charge from harm under s. 215(3) of the *Criminal Code*.

C) THE DELAY IN LEAVING THE SCENE:

[137] The BLS standards make it clear that paramedics should limit their time at the scene to under 10 minutes unless there are complications from extraction which was not the case here. It took 23 minutes from the time the accused arrived until the time they departed the scene.

[138] It is unclear to the court why the accused concluded a 17-minute wait in the ambulance to do further assessments was necessary, justified or could be of any benefit. By their own admission they had no useful information from Yosif or his family to assist them. Yosif in their opinion was not cooperating. They had no idea what was wrong with Yosif in the courts view, other than some vague psychiatric issue for which there appeared to be little supporting evidence. They held to the objectively incorrect belief that there was really nothing wrong with their patient instead of following their training and immediately leaving for a trauma hospital, that based on the evidence before me, was 5 minutes away.

[139] I conclude this delay was not justified and was not something any reasonably trained primary care paramedic would have done under the circumstances of this case and was objectively a marked departure from what should have been expected from a primary care paramedic. I also conclude that it would have been reasonably and objectively foreseeable to any reasonably trained paramedic that such delay in getting Yosif to a trauma hospital would endanger his life.

[140] I conclude that the evidence of the accused that Yosif was combative, uncooperative, and aggressive not reliable. I accept the evidence of Captain Stevens who indicated Yosif was barely moving when he last saw him. Further, the

evidence of Sgt. Shawihat in the back of the ambulance, which I accept, indicated that Yosif's movements were nonaggressive and minimal, and he was moaning but not communicating otherwise. The views of the videos by this court, although not perfectly clear, appear to show a patient lying on the sidewalk in a relatively placid state.

[141] Yosif was put in the ambulance at approximately 21:15. The Zoll heart monitor was turned on then. The first full assessment done in the back of the ambulance occurred at 21:25. For the 10 minutes in between those times it appears Yosif had his shirt and T-shirt removed, had his pupils checked, a finger monitor applied, his heart checked with a stethoscope and he was restrained, according to Sgt. Shawihat, who was also told by the accused that Yosif was going to St. Joseph's hospital before any vital signs were obtained. Thereafter she left the back of the ambulance and a blood pressure cuff was applied and heart leads. The rare step of applying the wrist restraints was never noted in the ACR nor was permission obtained as required by the protocols, according to Mr. Klassen.

[142] The accused had before them a Zoll heart reading of 144 BPM and no other valid or useful readings available due to artefact (invalid readings), movement and someone in an altered state of consciousness who had indicated he could not breath. There was no explanation for his condition, other than a penetrating wound. These results were relayed to the hospital 7 minutes later at 21:32 which is when the ambulance finally left the scene. These results as relayed then were no longer accurate as Yosif had significantly deteriorated which Marchant failed to recognize and did not report until the second patch. No credible explanation has been provided for this further 7-minute delay in leaving to get Yosif to a hospital. I do not accept as reasonable the accused explanation that they concluded the elevated heart rate was caused by Yosif's aggressive behaviour in

the back of the ambulance based on the evidence of Sgt. Shawihat which I do accept. I also accept the evidence of Dr. Verbeek that the symptoms presented to the accused at 21:25 would lead any reasonably trained primary care paramedic to conclude that Yosif was in severe distress and had level three shock. As such he needed to get to a trauma hospital immediately. The accused delay of a further 7 minutes with this additional information and failure to switch to a trauma hospital which was 5 minutes away was an objectively marked departure from the actions expected of a reasonably trained primary care paramedic under these circumstances and was Yosif's last chance at survival based on the evidence of Dr. Ahmed.

[143] I conclude these various failures by the accused were not simple inadvertence, thoughtlessness or simple error in judgment but instead were a conscious decision to ignore their training and the standards they were familiar with and were put in place, as Dr. Croskerry stated, to prevent errors in decision making and eliminate unconscious bias by paramedics.

[144] I also conclude that as a result of these various failures of the accused it was objectively and reasonably foreseeable that they were risking Yosif's life or permanently endangering his health. See *R v. Naglik*, at p. 143.

THE TOTALITY OF THE MARKED DEPARTURES:

[145] As indicated in my reasons I have concluded there were several instances where the accused actions were each a marked departure from what was to be expected of reasonably trained paramedics under the circumstances found in this case. I have also concluded that the totality of these independent marked departures further confirms the actions of the accused that night in their care of Yosif were in totality a marked departure of what should have been expected of reasonably trained primary care paramedics under the circumstances.

JOINT LIABILITY:

[146] I conclude based on the evidence before me of Mr. Klassen and the testimony of the accused that their actions fell under s. 21(1)(a) of the *Criminal Code* such that they were acting jointly in the decisions and care they provided to Yosif. It is clear that paramedics worked in pairs, as did the accused that night which they acknowledged and that they relied on each other. They both agreed on the contents of the ACR they submitted. They acted in concert with each other, and each participated in the interrelated chain of events that was a marked departure from the minimum standards that was to be expected of properly trained primary care paramedics of the HPS.

CONCLUSION:

[147] For the reasons given in this judgment I find that the crown has proven beyond a reasonable doubt that both accused are jointly guilty under s. 215(3) of the *Criminal Code* of failing to provide the necessities of life to Yosif Al-Hasnawi on December 2, 2017, after he was shot.



Arrell, J.

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COURT FILE NO.: 18-8315

DATE: June 8, 2021

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

Her Majesty the Queen

- and -

Christopher Marchant and Steven Snively

JUDGMENT

Released: June 8, 2021

