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COURT OF APPEAL FOR ONTARIO

DOHERTY, BORINS and CRONK JJ.A.

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	**David M. Porter and**
	)	**Christopher A. Wayland**
	)	**for the appellant**
Respondent	)	
	)	
- and -	)	
	)	
HEUNG-WING LI	)	**Thomas Galligan**
	)	**for the respondent**
	)	
Appellant	)	
	)	
	)	**Heard: November 7, 2003**

On appeal from the conviction entered by Justice W. J. Lloyd Brennan of the Superior Court of Justice, sitting with a jury, on December 12, 2001.

BORINS J.A.:

[1] The appellant, Heung-Wing Li, appeals from his conviction for sexual assault following a trial before Brennan J. and a jury. There are two grounds of appeal: (1) the trial judge erred in his instructions to the jury by failing to inform the jury of the appellant's defence and to review the evidence capable of supporting the defence; (2) the trial judge erred in his instructions to the triers on the proper conduct of the challenge for cause brought by the appellant. For the reasons that follow, I would give effect to the second ground, allow the appeal and order that a new trial be held. In addition, as I am troubled by the trial judge's instructions in respect to the appellant's defence, I will discuss the concern that I have with the instructions for the benefit of the judge conducting the new trial.

Background

[2] The appellant is a medical doctor. At the relevant time, he carried on a family practice. He was tried on four counts of sexual assault relating to four complainants,

each of whom alleged that he touched her breasts improperly during the course of a medical examination. In relation to each count, counsel agreed that the central issue was the purpose for which the appellant conducted the examination of the complainant. The Crown conceded that if an examination was conducted for a medical purpose, the appellant should be acquitted regardless whether, on an objective standard, the examination did not conform with generally accepted medical standards. The defence conceded that if the jury was satisfied beyond a reasonable doubt that an examination was conducted for a sexual purpose, and not for a medical purpose, it should return a verdict of guilty in respect to that examination. The appellant was found guilty of sexually assaulting J.L. He was acquitted of the other three counts.

Facts

[3] It is unnecessary to review the facts for the purpose of considering the trial judge's instructions to the triers. However, I will provide a review of the facts limited to those that are helpful in understanding my concern with the instructions given to the jury relative to the appellant's defence.

[4] The complainant, J.L., had been a regular patient of the Etern Clinic for several years. Normally, she was attended by her family doctor, Dr. Quan, although she saw the appellant occasionally for allergy treatment. She testified that prior to the incident in question, the appellant had never conducted a physical examination of her, although this was contradicted by Dr. Li. In the autumn of 1998, Dr. Quan had referred J.L. to a specialist for investigation of a suspected lump in her left breast. The specialist performed a number of tests.

[5] When J.L. attended at the appellant's office for an allergy treatment she had not yet been told the results of the tests. On seeing what appeared to be a report from the specialist in her chart, she asked the appellant about the results. He told her that the tests were inconclusive. Although there was a controversy in the evidence as to whether J.L. asked the appellant to examine her breasts, or whether the appellant proposed that he examine her breasts, there was no dispute that J.L. consented to a breast examination.

[6] J.L. testified that the appellant instructed her to stand for the purpose of the examination. The appellant stood behind J.L. and undid her brassiere. Then he reached around her and placed one hand on each breast. She testified that the appellant pressed the fingers of his left hand into her left breast in a circular motion, "just like he's examining a breast", while he placed his right hand on her right breast, immobile. J.L. admitted that during her encounter with the appellant he made no comments of a sexual or otherwise inappropriate nature.

[7] J.L. testified that while the appellant was examining her left breast, he palpated the lump and told her that he had located it. She said that the appellant returned to his desk

after the examination and made some notes in her chart, including a diagram of the left breast and the lump. The appellant was the only physician who had drawn a diagram of the lump in her breast.

[8] Subsequently, J.L. felt confused and was unsure whether the appellant had performed the breast examination in a proper manner. She thought that it was unusual for a doctor to examine a patient's breasts while standing behind her, and that it was not normal for a doctor to be touching the right breast while examining the left breast. Consequently, J.L. filed a complaint with the College of Physicians & Surgeons of Ontario ("the College") that led to the appellant's prosecution.

[9] It was the Crown's position that the appellant used the pretext of a breast examination to sexually assault each of the four complainants by touching them for a sexual purpose. To support this position, the Crown called two expert witnesses to comment upon whether each examination conformed with proper medical standards established by the College.

[10] The first expert, Dr. Chart, explained that there are two basic elements to a clinical breast examination: a visual inspection of the breast and a physical examination of it. Although a physical examination can take several patterns, the one currently taught is the radial pattern, where the physician uses his or her fingers to examine the breast in vectors or segments. The examination is conducted while the patient is in a sitting position, and is then repeated while the patient is lying on her back. She testified that a physician would not normally hold both breasts at the same time when conducting a breast examination. Dr. Chart saw no medical benefit in conducting a breast examination from behind the patient.

[11] The second Crown expert, Dr. Downs, substantially agreed with Dr. Chart's explanation of the deficiencies in the appellant's examination of J.L. She saw no medical benefit in the manner that he conducted the examination.

[12] There was additional testimony given by Dr. Chart that the appellant contends supported his defence. I will refer to this testimony after I review the evidence tendered by the appellant in his defence.

[13] The appellant testified for over two days. He discussed his examination of each of the four complainants. With respect to J.L.'s allegations, he relied on his medical records to refresh his recollection of what had transpired when he conducted her breast examination, as well as during previous encounters with J.L. Contrary to J.L.'s testimony, his records showed that he had conducted physical examinations of her on previous occasions, one as recently as six days before the breast examination. In addition, his records document a discussion with her about her breast lump two months prior to the examination in question.

[14] The appellant testified that J.L. appeared worried because the test results were inconclusive. She asked him if he would examine her breasts. He explained to her that he was going to show her how to conduct a breast examination in a manner different from what she was used to. He gave detailed testimony about the specific manner in which he conducted breast examinations while standing behind a patient, stating that he conducted J.L.'s examination in the same manner as he conducts all breast examinations while standing behind a patient. At the conclusion of the examination, the appellant sat down with J.L. He drew three diagrams in his chart and explained to her that the lump was probably benign, which it was.

[15] The appellant testified that he does not perform breast examinations in this manner on all occasions, but only where circumstances warrant. Because J.L. had undergone numerous recent breast examinations according to the "routine classical method" that were inconclusive, he believed that he might be able to obtain more information about the lump by performing the examination while standing behind her. He conceded that he knew that performing a breast examination in this manner did not meet the "approved standard". He also conceded that he had not been taught to perform a clinical breast examination in this manner and that he was not aware that it was endorsed in any medical literature. However, based on his own clinical experience, it was the appellant's belief that this method of examination allowed him to detect breast abnormalities and lumps that may not be detected by the "routine classical method" of breast examination.

[16] In summary, while the appellant stated that his approach to performing a breast examination may be unorthodox and not in accordance with approved medical standards, he expressed his genuine and deeply held belief in its efficacy. As such, he testified that he touched J.L. only for a medical purpose, and not for a sexual purpose.

[17] The defence expert, Dr. Rudner, testified for an entire day. The appellant submits that Dr. Rudner provided key evidence for the defence that is reviewed in detail in the appellant's factum. In oral argument, counsel focused on Dr. Rudner's answer to a hypothetical question and on his testimony that although in ideal circumstances a physician should perform a full breast examination while the patient is sitting and lying down, in a busy family practice this method is truncated to permit the physician to focus on the breast with the lump.

[18] It is helpful to reproduce the hypothetical question together with Dr. Rudner's answer and the explanation that he gave for his answer:

> **Q.** [A]ssuming that Dr. Li's account of what Dr. Li testified to transpired with [J.L.] is true, do you have an opinion as to whether Dr. Li's encounter with [J.L.] is consistent with an appropriate medical examination?

A. *With the assumption that what Dr. Li testified to is true and accurate, in my opinion the encounter with [J.L.] consisted of an appropriate medical examination*.

Q. And why is that, doctor?

A. In this case, we have a record of a lump in the breast that has been found and has been documented as being a, clinically, a benign fibroadenoma. A fine needle aspirate biopsy was done, which was inconclusive. So that leaves open some uncertainty as to the exact and true nature of the breast lump. There is a young woman who is apparently concerned and anxious about the lump in her breast and she – consent is obtained to examine the lump in her breast. The doctor, Dr. Li, proceeds to examine the breasts, the armpits. He does a cursory or truncated examination of the normal breast, which is the right one; then he proceeds to target the left – the lump in the left breast where he knows from the ultrasound report its location. He examines the lump, locates it and identifies it, and then based on his experience, confirms that it's of a benign nature. He then draws a diagram, points it out to the patient explaining in a diagrammatic way the origin of the lump, and proceeds to reassure her and relieve her anxiety.

So with the exception of the examination of the breast from behind, which is not approved, there is, in essence, an examination done. If we look at the consistency of an examination of a person presenting with a lump in a breast of uncertain origin which may be tumorous, a reassurance is sought and the physician confirms the benign nature of the lump and proceeds to reinforce the benign nature and hopefully relieve the patient's anxiety. *This was an examination of a lump in a breast* [emphasis added].

[19] In addition to Dr. Rudner's evidence, the defence also relied on the testimony of the Crown's expert, Dr. Chart, that was supportive of the appellant's testimony. This testimony included:

- the approved technique of breast examination involves the systematic palpation of the breast with the pads of the fingers, often in a circular motion, covering each quadrant of the breast;

- a clinical breast examination properly may be truncated in certain circumstances, especially where it is focused on a specific lump;

- a clinical breast examination was indicated on the facts of this case, in light of [J.L.'s] inquiry as to the results of the fine needle aspiration and her obvious anxiety;

- the appellant was correct to tell [J.L.] that the results of the fine needle aspiration were that the material was insufficient for analysis; and

- it would be appropriate to note any negative findings by way of a chart or diagram and to explain any negative findings to the patient and provide reassurance.

In addition, Dr. Chart testified that on occasion she would simultaneously touch both breasts for comparison purposes, thus contradicting the Crown's position that it is never appropriate for a physician conducting a breast examination to touch both breasts simultaneously.

The Instructions to the Triers on the Challenge for Cause

[20] At the outset of the trial, Crown and defence counsel agreed that potential jurors would be challenged for cause based on the appellant's race. There was agreement that each potential juror would be asked the following:

> Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the person charged with the offence is of East Asian Chinese origin?

[21] At the outset of the trial, the trial judge provided the jury panel with a series of "boiler plate" instructions, including the following instruction about juror challenges:

> In this case we have two kinds of challenge to jurors. The first stage will involve the defence counsel reading a question to you, which will be this question: Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the person charged with the offence is of East Asian Chinese origin? Everybody will be asked that same question. And as you will see shortly there's a process by which the impartiality of each juror will be tested pursuant to that question. …
>
> Now, Mr. Registrar, I think we're ready to call to the front our first 20. And then I'll deal with the triers.

[22] Thereafter, twenty members of the jury panel were selected to come to the front of the courtroom. The trial judge then asked the registrar to select two additional members of the panel to serve as the first triers, and went on to give the members of the panel this explanation:

> While the Registrar is doing that I'll explain that these two persons will be asked to judge by the responses and the bearing of the person giving the response to the question, whether the person can be a proper juror. I'll give you some further instruction after you've been selected as triers.

[23] Following their selection, the first triers were given their instructions. The remaining members of the jury panel who had not been selected to come forward were present in the courtroom while the following was read to the triers:

> Now, triers, your job is to listen to the answer that each person gives and observe the person's demeanour as he or she gives the answer, and then you decide whether or not that person is acceptable or not acceptable as a juror in this case. An acceptable juror is one who would likely approach jury duty with an open mind and decide the evidence on the case at trial, and decide the legal instructions. [*sic*] If you are satisfied that the person would approach their task with an open mind and decide this case on the evidence given here and my instructions you should find that person acceptable. If you're not satisfied that the person would not do that, that is approach the task with an open mind and decide this case on the evidence at trial only, and my instructions, then you

> should say: We find that person not acceptable. On each occasion that a person will answer the question, you may take the time to consult with each other, I invite you to do that, and then you simply indicate to me "acceptable" or not "acceptable." Now, members of the prospective jury, as we go through this process, you will replace the triers. So the instruction I've just given to the triers will apply to future jury members who will be selecting the balance of the jurors. You'll see shortly how that takes place.

[24] Following the selection of the first two members of the jury, they were sworn as triers to replace the first two triers. They were instructed by the trial judge that "the same instruction [given to the initial triers] applies", adding: "I'm sure you remember what I said about acceptable or not acceptable." No further instructions were ever given to the subsequent triers, notwithstanding that some of them were not from among the "prospective jury", but were selected from among an additional twenty members of the panel who were selected to come forward as potential jurors.

[25] In a series of recent decisions, in affirming the principle that the selection of an impartial jury is crucial to a fair trial, this court has emphasized that in the context of a challenge for cause it is important that the trial judge give the triers at least a general understanding of the nature of their task and the procedure they are to follow. See: *R. v. Moore-McFarlane* (2001), 56 O.R. (3d) 737 (C.A.); *R. v. Douglas* (2002), 62 O.R. (3d) 583 (C.A.); *R. v. Brown* (2002), 166 C.C.C. (3d) 570 (Ont. C.A.).

[26] On the principles established by these cases, I agree with counsel for the appellant that the instructions to the triers were deficient in that the triers were not told that they were to decide the question on a balance of probabilities, that the decision had to be that of both of them, that they had the right to disagree and that they could retire to the jury room or discuss the matter right where they were in the jury box. As well, it would have been preferable if the triers had been provided more assistance in understanding the meaning of partiality or acceptability, as well as the importance and purpose of challenging a potential juror for cause on the basis of race. In *Douglas*, this court endorsed, and urged trial judges to apply Justice Watt's specimen jury instructions as they apply to challenges for cause: Watt, D., *Ontario Specimen Jury Instructions*, (Toronto: Carswell, 2002) at 12-15. I concur in this endorsement.

[27] In addition, the general instructions that the trial judge delivered to the first two triers, flawed as they were, were never repeated to successive triers. Even though these instructions were delivered while remaining members of the jury panel were in the courtroom, it cannot be assumed that they listened to the instructions, or appreciated that they were expected to apply the instructions if they became a trier. I am not suggesting

that it is necessary for a trial judge to fully instruct each trier when he or she is selected. In whatever way a trial judge chooses to do so, he or she should instruct every trier about a trier's responsibility and duty and how to carry out his or her job. In this case, there was a substantial danger that at least some of the triers received virtually no instructions.

[28] Therefore, I am not satisfied on the record before this court that the triers had an adequate understanding of the nature of their task and the procedure to be followed. In the circumstances of this case, the error was fatal. Consequently, the verdict of the jury cannot stand.

The Trial Judge's Instructions to the Jury

[29] In his introductory instructions to the jury, the trial judge said that it was his "duty to review the important parts of the evidence and [that he would] be doing that shortly". Following instructions concerning the elements of the offences of which the appellant was charged, the trial judge gave the jury his "general observations with respect to the standard of practice" that the expert witnesses had stated a physician should follow in performing a breast examination. In the course of his observations, based on the testimony of the Crown and defence experts, the trial judge discussed the "points of good practice" to be followed by a physician in conducting such an examination. Thereafter, he provided a detailed, twenty-one page summary of the testimony of the four complainants.

[30] At the conclusion of his review of the testimony of J.L., the trial judge stated:

> Dr. Li told us that he remembered J.L.'s visit and the examination. He admitted that he knew examining a patient's breasts from behind was not within the standard of practice and you know that he was given a course in breast examination in 1996 by Dr. Chart. He maintained that he examined her from behind because he thought he might learn something other doctors who examined her had not. *He gave no evidence of what that might be. No evidence other than his own was offered to support that proposition. The evidence of Dr. Rudner called for the defence did not support it.* He, like Dr. Chart and Dr. Down and Dr. Yip, knew of no medical benefit to such an examination [emphasis added].

The only other references to the defence position during the course of the trial judge's summary of J.L.'s evidence were to her consent to a breast examination and the "defence [suggestion] that she was anxious [and] wanted the reassurance of another opinion".

[31] Thereafter, the trial judge began his closing instructions to the jury. He said: "[I] am now going to give you a very brief statement of what I take to be the theory of … the Crown and the defence, and after that I will be sending you off …to begin your deliberations." The trial judge then outlined the Crown's theory. He followed this with a brief description of the theory of the defence that I reproduce in its entirety:

> The theory of the defence is that those four examinations were with consent of the patient and none was for a sexual purpose. The complainants' memories were challenged as faulty in every case because they do not square with the medical records made at the time of the events in question, and because the other visits to the clinics and to Dr. Li were forgotten or inaccurately remembered.
>
> The defence, Dr. Li, maintains that the examination of J.L. was appropriate in the circumstances, a truncated or shortened breast examination of a woman with a known lump undertaken essentially to reassure her. Dr. Li maintains that his performing this examination from behind was justified by his belief that he could make findings that way that might add to the knowledge gained by other practitioners who had already examined and advised her. He maintains that his hands were placed in no improper way on the patient's body and no sexual purpose was involved. Dr. Li maintains that the other patients mistook proper examinations for improper ones, that the contact with the breasts of M.S., C.Y., and B.K. was incidental in every case to proper examinations.

[32] The trial judge then sent the jury to deliberate, following which both Crown counsel and defence counsel made substantial objections to the trial judge's instructions. I will refer only to those objections relating to the instructions in regard to the offence concerning J.L.

[33] Defence counsel had two significant objections. The first was that the "effect of the charge considered as a whole … amounted to what I believe the jurors would hear … that the jurors would hear as an invitation to convict Dr. Li". Counsel pointed out that although the trial judge had carefully reviewed the testimony of the complainants and the Crown experts, he failed to provide a similar review of the appellant's testimony, his medical records of J.L.'s examination and the evidence of the Crown and defence experts capable of supporting the appellant's defence. In particular, defence counsel was critical of the trial judge's failure to mention Dr. Rudner's response to the hypothetical question that I have set out in para. 18. A transcript of the response had been given to the trial

judge at the pre-charge conference with the request that it be included in the trial judge's review of the evidence that supported Dr. Li's position.

[34] Defence counsel summarized this objection by submitting that "there was a notable absence of any reference to the significant evidence that would assist the defence on each of these counts, so that in essence my objection is that the theory of the defence was not squarely put" to the jury.

[35] The second objection flowed from the agreement of counsel that the central issue for the jury to decide was whether the appellant touched the complainant for a medical purpose or a sexual purpose. The Crown conceded that if the appellant touched a complainant for a medical purpose, the appellant was to be acquitted. At the pre-charge conference, defence counsel reminded the trial judge that the central issue was "whether or not the Crown has proven beyond a reasonable doubt that Dr. Li engaged in the touching for an honest medical purpose or for an improper or sexual purpose".

[36] Defence counsel objected that the trial judge had failed to put clearly to the jury the central issue in the case and also that his instructions on consent were wrong and confusing. Counsel complained that the trial judge's focus on whether the manner of the examination performed on J.L. conformed with the standard of the College invited the jury to convict on the basis that the examination failed to conform with that standard, whereas the real issue was whether the examination was performed for a medical or sexual purpose. Crown counsel agreed, stating "but I think that what it comes down to is [that] the jury has to decide whether the purpose of his touching each of those women was for a sexual purpose or a medical purpose". She added: "I think it's as simple as saying to the jury that … if they find that it was for a medical purpose, then [the complainants] did consent."

[37] The trial judge declined to re-charge the jury with respect to defence counsel's first objection, observing that "… while I think I can correct some errors in a charge, I don't know that I can do very much to erase the whole effect of the charge overall as a whole as you express it". However, he agreed to re-charge the jury on the central issue in the case and the meaning of consent.

[38] Although defence counsel's objection to the re-charge was limited to the trial judge's failure to conform to the requirements of *R. v. W. (D.)*, [1991] 1 S.C.C. 742, in this court it was submitted that the re-charge was far from clear.

[39] The appellant's defence was that although the manner in which he examined the breasts of J.L. was unorthodox and did not conform with the standard set by the College, he performed the examination solely for a medical purpose. The appellant contends that although the trial judge summarized the position of the defence at the conclusion of his instructions, he failed to provide the jury with a summary of his own testimony and that

he failed to relate for the jury the expert testimony that was capable of supporting his defence. Defence counsel objected to this omission at the conclusion of the trial judge's instructions. He contended that as the trial judge had elected to provide a detailed review of the evidence in support of the Crown's position, his failure to accord equal treatment to the appellant's position had resulted in an unbalanced charge and had thereby diminished the appellant's defence. The trial judge, although apparently recognizing the force of this objection, declined to re-charge the jury.

[40] In *R. v. MacKinnon* (1999), 132 C.C.C. (3d) 545 at 554-555 (Ont. C.A.) Doherty J.A. discussed the principles that apply in instructing a jury in respect to the position of the defence:

> The responsibility of the trial judge to relate the evidence to the issues raised by the defence is well established. In *Azoulay v. The Queen*, [1952] 2 S.C.R. 497-8, it was said:
>
> > The rule which has been laid down, and consistently followed, is that in a jury trial *the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence*, and how the law is to be applied to the facts as they find them. [Emphasis added.]
>
> In *R. v. Jacquard* (1997), 113 C.C.C. (3d) 1 (S.C.C.), the court reiterated the obligation set out in *Azoulay*. Lamer C.J.C. cautioned against a standard of perfection when reviewing trial judges' instructions and said, at p. 11:
>
> > As long as an appellate court, when looking at the trial judge's charge to the jury as a whole, *concludes that the jury was left with a sufficient understanding of the facts as they relate to the relevant issues, the charge is proper*. [Emphasis added.]
>
> Cory J., in *R. v. Cooper* (1993), 78 C.C.C. (3d) 289 (S.C.C.) at 301, made the same point when he observed:
>
> > At the end of the day, the question must be

> whether an appellate court is satisfied that the jurors would adequately understand the issues involved, the law relating to the charge the accused is facing, and the evidence they should consider in resolving the issues.
>
> In *Jacquard*, Lamer C.J.C. stressed that a functional approach must be taken when assessing the adequacy of jury instructions. I take this to mean that instructions must be tested against their ability to fulfil the purposes for which they are given and not by reference to whether any particular approach or formula has been used. By the end of the instructions, whatever approach is used, the jury must understand:
>
> - the factual issues which had to be resolved;
> - the law to be applied to those issues and the evidence;
> - the positions of the parties; and
> - the evidence relevant to the positions taken by the parties on the various issues.

[41] In this case, the trial judge fulfilled the first, second and third requirements of a proper jury charge. However, the fourth requirement, the relating of the evidence to the positions of the parties, was not achieved. Although the trial judge gave a lengthy review of the testimony of the complainants and the Crown experts, he did not review either the testimony of the appellant or that of the defence expert, Dr. Rudner. Nor did the trial judge review the testimony of the Crown expert, Dr. Chart, that was capable of supporting the appellant's defence. Consequently, the trial judge did not review any of the evidence relied on by Dr. Li to support his position that his examination of J.L. was performed for a medical purpose.

[42] What occurred in this case is that the trial judge gave the jury a detailed review of the evidence on behalf of the Crown and related relevant portions of the evidence to the Crown's position without any review of the evidence relied on by the appellant as capable of supporting his defence. Having chosen to review the Crown's evidence in substantial detail, the trial judge was obliged to provide a similar review of the defence evidence in order to maintain an appropriate balance. A trial judge's duty to give a jury balanced instructions is based on the need to ensure trial fairness. In my view, the trial

judge's failure to place the appellant's defence and the evidence capable of supporting it before the jury, undermined the defence and materially prejudiced the appellant.

[43] In addition, the trial judge failed to properly charge the jury concerning the heart of the appellant's defence. As I have stated, the appellant's defence was that even though his examination of J.L. did not conform with the standards set by the College, it was nevertheless a medical examination carried out for a medical purpose to which J.L. consented. In my view, had the trial judge maintained an appropriate balance to his instructions, necessarily he would have placed the central issue in the case before the jury.

[44] There is an unusual feature of this case that has caused me to stop short of founding my decision to order a new trial because of the flaws in the jury charge. The jury acquitted the appellant of the other three counts of sexual assault, notwithstanding that the inadequacies in the charge also applied to the appellant's defence to these charges. These acquittals suggest that the shortcomings in the charge may not have been fatal, although the acquittals may also be explained by the obvious difficulties with the credibility of the other three complainants. In addition, in none of these instances was a breast examination carried out while the appellant stood behind the patient. In any event, for the reasons that I have discussed there are significant deficiencies in the instructions concerning the appellant's defence to the charge of which he was convicted.

Result

[45] For the foregoing reasons, I would allow the appeal, set aside the appellant's conviction and order that there be a new trial.

RELEASED: February 26, 2004 ("DD")

"S. Borins J.A."
"I agree Doherty J.A."
"I agree E. A. Cronk J.A."