

INQUEST INTO THE DEATH OF

L I S A S H O R E

LEGAL ARGUMENT

TAKEN NOVEMBER 9, 1999

BEFORE DR. JAMES CAIRNS, DEPUTY CHIEF CORONER

CORONER'S COURT, TORONTO

A P P E A R A N C E S:

Counsel for the Coroner	MARGARET BROWNE, MS.
Counsel for the Shore Family	FRANK K. GOMBERG, ESQ.
Counsel for the Hospital for Sick Children, et al	PATRICK HAWKINS, ESQ. RENEE A. KOPP, MS.
Counsel for Dr. M. Schily and Dr. M. Catre	ANNE POSNO, ESQ.

REPORTING PLUS
(905) 477-0126

1 THE CORONER: Mr. Gomberg?

2 MR. GOMBERG: Deputy Chief Coroner, I say
3 this with the greatest of respect: this is
4 outrageous. This is a theory that nobody has
5 ever heard anything about. There are no
6 expert reports that have been served on
7 anyone, this is a Coroner's Inquest, so we
8 have some latitude. To come up with the
9 theory that nobody, including the Chief
10 Coroner's Office, the Deputy Chief Coroner or
11 the Crown Attorney, my friend Ms. Posno or I
12 have heard anything about in the middle of a
13 Coroner's Inquest, for an experienced
14 litigation lawyer like my friend, is
15 outrageous. I furnished a witness statement
16 and he -- a will say statement and he
17 complains about that, and he now calls a
18 witness to give evidence that her heart,
19 though it wasn't beating, was giving off some
20 signals and that that explains why the
21 Corometric, the heart part, didn't operate,
22 it's outrageous. This is the fourth or fifth
23 inquest I've done in the last two years; I've
24 never heard of anything like this. It is

1 outrageous. We have written answers from
2 the hospital to questions that were posed
3 that say we don't know why that monitor
4 didn't work. And, now, in the middle of a
5 Coroner's Inquest, he comes up with a theory,
6 it's outrageous. Those are my submissions.

7 THE CORONER: Ms. Posno?

8 MS. POSNO: We have no comments on this.

9 MR. GOMBERG: Of course not.

10 THE CORONER: Ms. Browne?

11 MS. BROWNE: I have a problem, I have a
12 problem, I don't know what the theory is, I'm
13 listening along with the jurors who are
14 listening for the first time to this, but
15 it's my understanding that an inquest should
16 be helping to explain something, to lead
17 towards recommendations; it's my
18 understanding that it is different from a
19 criminal or a civil trial because there are
20 no adversaries. In my submission, Mr.
21 Coroner, this looks like an adversarial
22 tactic. It may be that the hospital is
23 feeling that it's being questioned too much,
24 I have no idea, but I would have appreciated
25 as your Counsel -- I have nothing to win or

1 lose in this inquest except to assist the
2 jury to come to recommendations. I would
3 have appreciated having all this beforehand;
4 I'm having trouble with this technical stuff,
5 and I would really have liked to maybe have
6 it given to us yesterday or -- maybe it's
7 relevant, I don't know. This was not put to
8 me when I put to you, Sir, that Mr. Hawkins
9 could go first, I didn't -- I thought he was
10 just going to explain that monitor thing, but
11 -- that's it.

12 THE CORONER: Mr. Hawkins?

13 MR. HAWKINS: Following Lisa Shore's death,
14 the Coroner's office was given every
15 opportunity to meet with staff at the
16 Hospital for Sick Children, including staff
17 at the biomedical engineering department.
18 Every single question that was asked of them
19 was answered; every single request for
20 production that was ever made by the
21 Coroner's Office was answered. Similarly, I
22 myself extended the same offer to Mr.
23 Gomberg, to the family, if they wished to
24 meet the personnel at the Hospital for Sick
25 Children, they had every opportunity to do

1 so, if they wished.

2 The inquest was called, Mr. Bauer has
3 been called here to testify today on the
4 working of the Corometric monitor. He has
5 been asked if he has an explanation as to
6 why. He has come down to and he is in the
7 process of talking about the various
8 different possibilities. That is most
9 relevant to the purposes of the inquest. I
10 think as we well know, this isn't likely to
11 come down to one answer, it's not likely to
12 come down to maybe even two answers, it comes
13 down to a number of possibilities.

14 In terms of production at this inquest,
15 I stand by the fact that my client and myself
16 have answered every single question that's
17 been posed of us. We extended offers which
18 were taken up by the Coroner's Office to meet
19 with people at the Hospital, we extended the
20 same offer to the Shore family, which was not
21 taken up. I have complied with my
22 obligations, as has the Hospital.

23 I would remind the Coroner's Office that
24 as that we all received the inquest brief on
25 Wednesday, since that time, I understand the

1 Coroner's Office is continuing its
2 investigations. There are witness statements
3 outstanding. As of yesterday morning, or was
4 it this morning, as of this morning, we
5 received the report of Dr. McLeod.
6 Disclosure is ongoing, on an ongoing basis.
7 And I repeat that I have complied with every
8 obligation that I have to answer questions by
9 the Coroner's Office and I repeat that
10 invitations were extended to meet with
11 various people at the hospital, which were
12 taken up by some people.

13 THE CORONER: Mr. Hawkins, can I ask you a
14 question? Are you telling me that until this
15 afternoon, you were not aware what this
16 witness might say on the witness stand with
17 regard to a possible way that this monitor
18 could have malfunctioned; that the first you
19 knew about it was this afternoon or this
20 morning? I will agree and put on the record
21 that you have had expert opinions from our
22 office as late as this morning, but that
23 witness was not called this morning, that
24 witness will be called next week, and if you
25 feel there's not sufficient time for your

1 experts to review that, that witness will be
2 called in three weeks' time or this inquest
3 will be put off until after Christmas, if
4 necessary.

5 What I do not appreciate is suddenly
6 being absolutely bamboozled by something that
7 we've had absolutely no indication, and this
8 is not a trial, this is to try and look into
9 a child's death, and as a result of looking
10 into that child's death, make reasonable
11 recommendations to try and prevent it in the
12 future. I've got a lay jury that need to
13 understand complex medical stuff. The more
14 advance notice we have and the more we reduce
15 that to simple lay terms that they can
16 understand, the better. I am well aware that
17 all Counsel here are quite familiar with the
18 details of this inquest, and yet all Counsel,
19 myself included who is familiar, are
20 completely confused at this stage with regard
21 to an understanding of what this witness is
22 saying.

23 And I do not find that an acceptable
24 situation at this hearing, that we're getting
25 this at this stage. If you had indicated to

1 me in advance that you had, as late as last
2 night, discovered something, then I would
3 say, fine, give us some indication of what it
4 is and we will put this witness off to some
5 other time so at that time we can look into
6 it. We're going to be talking later in this
7 inquest about computers, about many things.
8 I feel at a Coroner's Inquest we have a
9 responsibility to have all parties
10 participating and if our office does not have
11 the expertise to know of something that you
12 know of, I would expect that an institution
13 the size of the Hospital for Sick Kids and
14 with their responsibility is at least going
15 to make me aware of that information.

16 MR. GOMBERG: Can I say something, please?
17 Mr. Hawkins, we're in a courtroom, and that
18 doesn't mean that we're in Alice in
19 Wonderland or in fantasy land. Mr. Hawkins
20 has pulled a sleazy, cheap trick. Now, Mr.
21 Hawkins is telling you things that are not
22 true, because we had a meeting at the
23 Hospital for Sick Children and we had an
24 opportunity to talk to the doctors, and I'm
25 talking about Dr. Roy, who is the head of

1 anaesthesiology, I'm talking about Dr. Reeder
2 (ph.), who is he head of nursing and I'm
3 talking about the head of surgery, Dr. Wedge
4 (ph.), who as I understand it, is one of the
5 chief doctors in the hospital. Not once did
6 anybody say anything about this. Mr. Hawkins
7 is not telling the truth.

8 MR. HAWKINS: I object most strongly to
9 that.

10 MR. GOMBERG: You can object all you like.

11 MR. HAWKINS: Mr. Bauer has clearly
12 indicated that he was first shown last
13 Wednesday these wave forms. As of Friday, he
14 ran these wave forms through the computer,
15 and that's what he has produced here today.

16 MR. GOMBERG: Well, what are you talking
17 about meetings that we had?

18 MR. HAWKINS: He is not under any
19 circumstances offering an absolute answer to
20 anything that happened, he was called upon to
21 explain the Corometric monitor and that's
22 what he is explaining, and if he takes you to
23 the chart and if you look at the chart, that
24 will explain exactly how this rhythm
25 formation was interpreted by the monitor used

1 during the cardiac arrest to show a heart
2 rate. And so I repeat, I object most
3 strongly to Mr. Gomberg's characterizations.

4 I have complied with, my client has complied
5 with all of its obligations under the
6 Coroner's Act in terms of providing
7 information and answers to questions.

8 THE CORONER: You are indicating that the
9 Hospital was completely unaware of this -- I
10 think if I'm correct, Mr. Bauer has indicated
11 in his evidence that the heart rate alarm
12 will not go off if the alarm itself is
13 broken, if the machine is turned off or if
14 the monitor mistakes some other electrical
15 activity as a signal, and that in the interim
16 period that sometime since last Wednesday,
17 but not before that, he has discovered
18 something that can do that; am I correct in
19 that statement?

20 MR. HAWKINS: He has simply taken the wave
21 form or one of the wave forms that are shown
22 in the chart as produced after the arrest, he
23 has run that through the Corometric monitor
24 and as I understand it, it is simply a
25 limitation of the technology and the EKG

1 strips that are shown in the chart clearly
2 show that during the arrest protocol itself,
3 when there is obviously no pulse, the EKG
4 monitor is also displaying a heart rate on
5 occasion. It is simply a limitation of the
6 technology. Mr. Bauer isn't in a position,
7 nor am I, to say that this did or didn't
8 happen. He is simply saying that this is one
9 of the possibilities as to what may happen
10 and he is ---

11 THE CORONER: That's not what I'm -- that's
12 not what I'm asking you. I'm interpreting,
13 Mr. Hawkins, that as of last Wednesday Mr.
14 Bauer was not aware of this theoretical
15 possibility.

16 MR. HAWKINS: Yes.

17 THE CORONER: But at sometime late last
18 week, he became aware of this theoretical
19 possibility, that today that theoretical
20 possibility is being presented as one of the
21 potential reasons why this alarm did not go
22 off and I cannot, from the detail of the
23 presentation, assume that this was suddenly
24 made up this morning, so that what I'm
25 objecting to is the lack of prior

1 notification of this issue.

2 We can argue this issue appropriately
3 with proper production of material in
4 advance, but I don't see how we can possibly
5 pursue this particular item with this
6 particular witness at this particular time,
7 since we have had no production. I would
8 want this reduced to writing and I would want
9 to be able to get independent experts to
10 review this, if that is a line that you're
11 intending to take along. I must say, I,
12 personally, unless you've got a different
13 explanation, I consider this an ambush of the
14 process.

15 MR. HAWKINS: I have indicated to you and
16 I'll repeat and Mr. Bauer has testified that
17 he was first shown the wave strips on
18 Wednesday. He reproduced the wave strip and
19 ran it through the monitor on Friday and that
20 is what leads to this process.

21 THE CORONER: I have no problem with that.
22 About 12 years ago, I did -- presided over an
23 inquest into traffic lights, where seven
24 people were killed and no one had an
25 explanation for how those traffic lights

1 malfunctioned and during the inquest, the
2 scientist who was working on them suddenly
3 discovered a flaw that had not been
4 discovered previously, not through any
5 malicious intent of anyone, but when the
6 machinery was moved, they discovered
7 something was loose. That scientist then
8 prepared a report, he did not come up on the
9 stand the next day, he prepared a report, it
10 was given to the Coroner's Office, it was
11 produced to all Counsel and sufficient time
12 was given for all Counsel to re-evaluate what
13 an impact that was going to have on the
14 future course of the inquest. That is my
15 only concern. I have no objection to you
16 coming up with a possibility of what may have
17 happened providing it's done at the
18 appropriate time with the appropriate
19 warning.

20 I don't know how any of the other
21 Counsel can ask questions on this, because I
22 quite honestly felt I understood sufficient
23 about Corometric monitorings from talking to
24 the officials at the Hospital for Sick Kids,
25 that I would be able to preside over this

1 inquest and ensure that a lay jury would,
2 having heard the evidence, be reasonably able
3 to understand that evidence. I cannot and
4 will not, with my responsibility for such a
5 serious matter and, in fact, perhaps, you are
6 raising this as an even more serious matter,
7 I cannot proceed with the evidence of this
8 witness at this time without production of
9 what he is saying and what further he's going
10 to say without that in advance.

11 MR. HAWKINS: This witness is simply doing
12 no more than raising a possibility. This
13 witness is not in a position to state what
14 may or may not have happened in the rhythm
15 strip before it is produced and printed
16 during the cardiac arrest.

17 THE CORONER: Well, for the purpose of --

18 MR. HAWKINS: He is simply raising one of a
19 number of possibilities and that's all that
20 this is offered for. He is simply explaining
21 the technology and he is explaining the
22 limitations of that technology.

23 THE CORONER: For the purposes of this
24 inquest, I wish that he put in writing so
25 that a copy can come to us, what, in fact, he

1 his trying to put forward as a theory and I
2 need that in sufficient advance that both our
3 office and the other Counsel can decide what
4 they wish to do with regard to cross-
5 examination. You cannot cross-examine
6 someone if you have no idea of the principles
7 involved, and we are getting into very
8 technical areas. I can understand cross-
9 examination of what a witness did or didn't
10 say, that is, I think, most lawyers are quite
11 capable of doing that sort of cross-
12 examination. When they get to technical
13 matters, I think it is imperative that we are
14 aware of what the technical issues are so
15 that they can be properly addressed.

16 My ruling on this situation, and I'm
17 going to rule strongly on it, now, is that I
18 am not going to hear any more evidence from
19 this witness at this time and will hear
20 evidence from this witness at a later time
21 when something has been reduced to writing
22 that will not give me any surprises into what
23 this witness is going to say, at which time
24 then we will have to consider whether it's
25 necessary to have some other expert evaluate

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this or not.

MS. BROWNE: May I put something on the record also?

THE CORONER: Ms. Browne?

MS. BROWNE: I'd just like to put on the record that we have had a book which contains the evidence anticipated, it's gone out to Counsel, before -- last week, it went out. And it was put together by the officers working under your direction. It includes something that we expected to hear from Mr. Bauer, with regard to taking instruments right after this, sending them to a place to be analyzed and introducing two reports. That is what we expected to have from Mr. Bauer. We did not expect to be "sandbagged" by this and I'm going to suggest also that if there's any more coming, could we please have that, too? I would put on the record that the witnesses from Sick Children's Hospital, all of them, did not want to be interviewed by your officers. They wished not to say a statement. They wished, instead, I guess, to come and sort of come up with something. We have no idea, yet, with the rest of the

1 witnesses from Sick Children's Hospital what
2 they intend to say, but I'm getting very
3 worried now. Thank you.

4 MR. HAWKINS: I object most strongly to that
5 categorization. No one is under any
6 obligation to provide a statement to the
7 Coroner's Office. Dr. Schily did not;
8 basically none of the witnesses to this
9 inquest except for the Shore family have done
10 so. That includes, in some circumstances,
11 until quite recently, the experts retained by
12 the Coroner's Office. The summary that was
13 produced by the Coroner's Office of what Mr.
14 Bauer would have to say is regarding how a
15 Corometric monitor works and will demonstrate
16 this at the inquest. That is quite simply
17 what he is doing.

18 MR. GOMBERG: You see, Mr. Coroner, Mr.
19 Hawkins is very adept at taking things out of
20 context, for this reason, sir: as lawyers,
21 we have some obligations, too, which
22 transcend what's in the Coroner's Act. And
23 Mr. Hawkins has just violated a bunch of
24 them. So it's not appropriate for Mr.
25 Hawkins to come in and say, "Well, strictly

1 within the parameters of the Coroner's Act,
2 we did everything right," because they didn't
3 do everything right, they did a lot of things
4 that were wrong. And Mr. Hawkins is well
5 aware of them, and he's just gone a little
6 bit too far, and he's out on the advocacy
7 limb and he may find that bad things happen
8 to him. It's completely inappropriate what
9 he's done today and he knows it.

10 THE CORONER: As far as this witness is
11 concerned, I am not at this time prepared to
12 hear any further evidence from this witness,
13 but I do wish to be put into writing --
14 particularly, I expect this witness to come
15 back and at that time, show us how a
16 Corometric monitor works, as he has been
17 doing appropriately, when it's switched on,
18 what the alarms are, et cetera; to tell us
19 how it may malfunction, with a detail of a
20 theory that he has about how it may
21 malfunction.

22 And, in addition, I expect him to give
23 evidence on has -- and he has already touched
24 on this -- have any monitors been found in
25 Sick Kids since this incident that were found

1 to have a malfunction and to be able to
2 interpret in simple language for the jury the
3 results of the specialized testing that was
4 done in the United States on the PCA pump,
5 which, at this time, I am not aware and all
6 Counsel at this time had agreed that if the
7 report was translated by someone of his
8 experience to the jury in lay language, that
9 that was not going to be an issue, but this
10 very much is an issue, so when we have Mr.
11 Bauer back, I do not know, but if I was aware
12 of this, I would be having the same
13 independent testing done of the Corometric
14 monitor as I had done of the PCA pump.

15 So I am not going to hear any further
16 evidence from Mr. Bauer at this time, and
17 will reserve judgment as to when we call him
18 back, when I'm satisfied that I have and have
19 been able to produce to other Counsel
20 sufficient material to make his evidence
21 understandable by a jury and being able to be
22 able to be cross-examined by all the Counsel
23 that are present.

24 MR. HAWKINS: Might I suggest, Dr. Cairns,
25 if your simple objection is to this

1 possibility that he is raising, he has
2 explained the Corometric to the jury, he can
3 continue without reference to this
4 possibility to give the rest of his evidence
5 to the jury on the pumps, on the
6 investigations that were done at the Hospital
7 subsequent to the incident into the
8 Corometric and malfunction or not, and that
9 was all something that the Coroner's Office
10 was absolutely more than prepared to proceed
11 with on that basis without a statement from
12 Mr. Bauer and based on your own or someone
13 else from your office's discussions with Mr.
14 Bauer.

15 If the only concern is this possibility
16 that he is raising, Mr. Bauer can reduce that
17 to writing and the rest of his testimony,
18 save and except that possibility, can be
19 concluded today, because that was clearly the
20 basis upon which he was going to testify
21 today and I don't hear any objection to
22 anything he said.

23 Everybody, the jury and Counsel
24 included, listened with great interest to Mr.
25 Bauer's explanation of the working of the

1 Corometric.

2 MR. GOMBERG: Well, I object to it and I'll
3 tell you why: I'm not going to cross-examine
4 him in pieces, so the burden that Mr. Hawkins
5 bears for what I've called a sleazy, cheap
6 trick, is that I'm not cross-examining him in
7 pieces subject to what you rule. It's
8 inappropriate, it's wrong, I have to work out
9 a cross-examination and I won't do it
10 piecemeal, and that's the price lawyers pay
11 when they fool around go too far.

12 MR. HAWKINS: I object completely to what
13 Mr. Gomberg has to say.

14 MR. GOMBERG: Oh, you keep objecting ...

15 MR. HAWKINS: And he can say whatever he
16 wants and if he has issues with it, he can
17 take it up with the appropriate authorities.

18 MR. GOMBERG: And I will.

19 MR. HAWKINS: I have complied with every
20 obligation that I have.

21 THE CORONER: Ms. Browne, have you any other
22 comments to make?

23 MS. BROWNE: I would prefer not to hear this
24 gentleman today, as I would like to be more
25 informed about what he is going to say. You

1 can't un-ring a bell and if I'm going to ask
2 him questions about all of these charts, I'm
3 going to need time.

4 THE CORONER: Ms. Posno?

5 MS. POSNO: With respect, Dr. Cairns, I
6 think it may be easiest for all Counsel,
7 including the jury, to follow if we hear Mr.
8 Bauer at one time.

9 THE CORONER: I must say that I concur. I
10 think that people's temperature has been
11 raised significantly in the last ten minutes,
12 and I do not want this witness to, as well as
13 giving the information, to bear the brunt of
14 this. I think it should be done coolly, when
15 tempers have had time to settle down and I
16 don't want to split this witness up. This
17 jury are confused about what he has said, it
18 is already out, I can't put it back and
19 therefore I want it done all in one piece, so
20 my ruling is that I will excuse this witness
21 at this time and request his appearance at a
22 future date, yet to be determined when we're
23 all satisfied that we are in a position to
24 examine and cross-examine the witness, so I
25 will excuse the witness at this time.

1 MS. POSNO: Dr. Cairns, just with respect to
2 clarifying for the record, there was a
3 comment about Dr. Schily not giving a
4 statement. To my knowledge, and I became
5 involved in this later in the case, Dr.
6 Schily was not asked for a statement and did
7 not refuse to give one. I just want that
8 clear on the record.

9 THE CORONER: Thank you.

10 MR. GOMBERG: And I agree with that.

11 THE CORONER: I think also this might be an
12 appropriate time to take a 15 minute break.
13 It may be appropriate for everybody to go to
14 the bar for 15 minutes, but we'll break for
15 15 minutes.

16
17 --- A BRIEF RECESS

18
19 THE CORONER: Ladies and gentlemen of the
20 jury, you were asked to go back to the jury
21 room while certain legal arguments were being
22 held with regard to Mr. Bauer's evidence. I
23 do not need to in any way indicate to you
24 what those legal arguments were at this time.
25 I have made a decision as a result of those

1 legal arguments that Mr. Bauer's evidence
2 will not be continued to be heard at this
3 time, but his evidence will be heard at a
4 later time in the inquest for reasons that I
5 can explain to you at that later time.
6 Suffice to say I've decided it is not
7 appropriate for him to continue giving his
8 evidence now, but he will be back to give his
9 evidence in full at a later stage in the
10 proceedings.

11 I would particularly caution you that
12 some of the issues as to why he is not
13 continuing to give his evidence today may
14 well be reported by the media; that is their
15 right, and I would ask you in the spirit of
16 rendering your verdict based only on what
17 you've heard in court, to do all in your
18 power to not read newspapers, listen to radio
19 or television on that point.

20 As a result of the issues that have
21 arisen this afternoon, I've also decided it
22 would be appropriate to adjourn the inquest
23 for today at this time, and we'll be recessed
24 or adjourned until Friday morning at 9:30. I
25 did mention to you that I have a subpoena to

1 be in a different court myself tomorrow; I
2 apologize for that inconvenience to you.
3 Thursday is Remembrance Day and the courts
4 are closed, so it would be the intention to,
5 depending on certain things that may happen
6 in the interim period, to reconvene on
7 Friday.

8 I cannot tell you with the reconvening
9 on Friday whether that will a reconvening to
10 hear evidence at that time or whether it will
11 be reconvening for a further adjournment as a
12 result of issues that have been raised, but
13 I'll be in a position to hopeful explain that
14 to you at that time. I'm sorry to be cryptic
15 at this time, but I want to keep your minds
16 as clean and as fresh and as away from the
17 legal arguments that are going on as
18 possible, so that you will be able to render
19 your verdict on the evidence. So if you
20 could -- we'll adjourn until 9:30 on Friday
21 morning.

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24 --- ADJOURNED.
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THIS IS TO CERTIFY that the foregoing
is a true and accurate transcription
of my recordings and notes, to the best
of my skill and ability.

Barbara A. Pollard
Certified Court Reporter

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