Case Name:

Children's Aid Society of the Districts of Sudbury and Manitoulin v. L.N.

Between
Children's Aid Society of the Districts of Sudbury and Manitoulin, Appellant, and
L.N., V.M., D.M., Respondent(s)

[2011] O.J. No. 5016

2011 ONSC 6521

Court File No. AP-32-11

Ontario Superior Court of Justice

R.D. Gordon J.

Heard: September 30, 2011.
Judgment: November 10, 2011.

(59 paras.)

Family law -- Child protection -- Protective agencies and institutions -- Supervision or guardianship -- Temporary appointment -- Termination of appointment -- Appeal by the Society from order that the two children be returned to their mother subject to supervision dismissed -- Children were apprehended in 2009 after youngest child suffered traumatic injury -- Trial judge found mother's spouse was responsible for injuries and that mother was not involved -- Although court admitted fresh evidence of older child that he had seen mother injure youngest child, evidence was not of sufficient veracity to impact trial judgment -- Evidence supported trial judge's conclusion that mother did not participate in injuries and was unaware of them.

Appeal by the Society form an order that the two children be returned to their mother subject to supervision. The children were apprehended in 2009 after the youngest child sustained significant injuries as a baby. The medical evidence established that the injuries were all due to traumatic injury which was not self-inflicted. The trial judge concluded that the child's injuries were caused by the mother's spouse and that it had not been proven that she had participated in or been aware of the injuries. He found that the mother's spouse had the opportunity and ability to inflict the injuries

and that he subsequently admitted responsibility for the injuries to the police. The Society now sought to adduce fresh evidence of the oldest child indicating in a police interview two years later that he had seen the mother injure the youngest child. The mother denied the child's evidence. The Society argued that the trial judge confused the issue of responsibility for the injuries with the need for an explanation for how the injuries were caused.

HELD: Appeal dismissed. The fresh evidence was admitted as it was highly relevant and was not available at trial. The fresh evidence was, however, not of sufficient veracity to impact the decision that was made. In view of the finding of the trial judge that the mother did not cause the injury and the specific finding that her spouse was the responsible party, an explanation of the injury was not required of her. Her inability to provide an explanation, at least on the facts of this case, did not lead to a child protection concern. The trial judge's conclusions regarding the cause of the child's injuries were open to him on the evidence. The evidence also supported the trial judge's finding that if the mother was not present when the child was injured and was not advised of the injury, the symptoms displayed by the child would not necessarily have alerted her to the child's injuries.

Counsel:

Dawn V. Dubois, for the Appellant.

Lance Carey Talbot, for L.N.

Gerald D. Brouillette, for V.M.

George Fournier, for D.M.

REASONS FOR JUDGMENT

R.D. GORDON J.:--

Overview

1 The Children's Aid Society of the Districts of Sudbury and Manitoulin (hereinafter referred to as "the CAS") appealed the decision of Justice M. McLeod made the 17th day of January, 2011 by which he ordered the return of the children L.M., born May 29, 2009 and K.N., born August 17, 2003, to their mother L.N. subject to the supervision of the CAS for a period of 12 months.

2 The appeal was heard on September 30, 2011. On October 1, 2011, I made an endorsement by which I admitted fresh evidence tendered by both the CAS and Ms. L.N. and dismissed the appeal. I indicated that reasons for my decisions would follow. These are my reasons.

Background

3 K.N. is the biological child of L.N. and V.M. L.M. is the biological child of L.N. and D.M. Both children were residing with L.N. and D.M. when they were apprehended by the CAS on June 29, 2009.

4 The apprehension arose out of the discovery by medical personnel that L.M. had suffered significant injuries during the first four weeks of his life. Those injuries included a disrupted

frenulum, a bruised cheek, metaphyseal fractures to the humerus in each arm, metaphyseal fractures to both femurs, metaphyseal fractures to both tibias just below the knee, metaphyseal fractures to both tibias just above the ankles, and fractures of the 7th and 9th ribs.

5 The medical evidence established that the injuries were all due to traumatic injury which was not self-inflicted. The injuries could not have been sustained through the routine handling of the child and required a significant degree of force. The degree of force required was such that a competent caregiver would know that he or she was inflicting harm.

6 The trial of this matter was conducted over four days. Much evidence was tendered by way of affidavit. On January 17, 2011 Justice McLeod delivered his decision orally. He found L.M.'s injuries to have been caused by D.M. He found that it had not been proven on a balance of probabilities that L.N. had participated in or been aware of the injuries. He was satisfied in all of the circumstances that Ms. L.N.'s failure to notice the injuries was not indicative of neglect on her part. He ordered the return of the children to her care.

Fresh Evidence

7 In child protection proceedings, where fresh evidence is relevant to the consideration of what is in the best interests of the child, the appeal court may exercise a discretion to admit the evidence after considering four factors: (1) Whether the evidence could previously have been adduced; (2) whether the evidence is highly relevant; (3) whether the evidence is potentially decisive to a best interest determination; and (4) whether the evidence is credible [*See Catholic Children's Aid Society of Metropolitan Toronto v. C.M.* [1994] 2 S.C.R. 165].

8 In the case before me, the fresh evidence is comprised primarily of a statement made some months after trial by the child K.N. that he had seen Ms. L.N. hurt L.M. K.N. was eventually interviewed by police and a copy of the video of the interview, along with a transcript of the interview was filed with the court. In brief, K.N. said that he was peeking in on his mother while she was changing L.M.'s diaper. L.M. was apparently crying and Ms. L.N. told him to shut up and banged his leg hard on the edge of the change table. K.N. made a further disclosure that on another occasion when he could not remember a word while doing his homework, Ms. L.N. said she would kick him in the head.

9 Ms. L.N. filed affidavit evidence completely denying the allegations made by K.N., questioning how he could physically have seen what he said he saw given the layout of L.M.'s room, and questioning whether this disclosure was the result of the influence of K.N.'s caregivers.

10 I have determined that the evidence should be admitted. The disclosure by K.N. did not exist when the trial took place and therefore could not have been adduced at trial. The evidence is highly relevant in that it speaks to the issue of who harmed L.M. and what is in his best interests. The evidence is potentially decisive to a best interest determination in that if I were to find, based on this evidence, that L.M. suffered his injuries at the hands of his mother the child would not be returned to her care. Lastly, I am satisfied that the evidence is credible. K.N. had nothing to gain by making this disclosure, was somewhat consistent in the substance of what he said happened, and at his age is unlikely to have had the capacity to devise or participate in a plan designed to prevent his return to Ms. L.N.

11 A further issue arises, however, due to the hearsay nature of proposed evidence. Counsel for Ms. L.N. has submitted that even if I otherwise find the evidence to be admissible as fresh evidence,

it should not be admitted because it is hearsay and does not meet the requirements of necessity and reliability.

12 In the case of *R. v. Khelawon* [2006] S.C.J. No. 57, the Supreme Court of Canada considered in great detail the principled exception to the hearsay rule and its underlying rationale. The Court set forth the approach to be undertaken and the requirements to be met when a court is asked to admit hearsay statements which do not fall under an established exception to the general rule that hearsay evidence is inadmissible.

13 The first requirement is a finding that the proposed evidence does indeed constitute hearsay. In the case before me I am satisfied that it does. It is a statement tendered by the CAS for the truth of its contents, and there was no contemporaneous opportunity to cross-examine when the statement was made.

14 The second requirement is a finding that the evidence would otherwise be admissible through the direct testimony of the declarant had he or she been available and competent to testify. It has not been suggested to me, and I can see no reason why, the evidence of K.N. would not otherwise be admissible.

15 The third requirement is a consideration of the issues in the case and an assessment of the potential impact of introducing the evidence in its hearsay form. This case involves a consideration of the best interests of the children and more particularly whether the children are at risk of harm from their mother if they are returned to her care. The potential impact of K.N.'s evidence is quite significant, as it suggests that Ms. L.N. physically abused her infant child.

16 The fourth requirement is a consideration of the inability to cross-examine K.N. and to what extent this limitation is of concern. In the case before me, this is a significant concern as K.N. was not challenged in any significant respect concerning his disclosure. There were some inconsistencies between his disclosure as related by the paternal grandmother and the statement as provided to the police officer. There are difficulties in understanding the perception of a child this age that will be left unexplored. There is an allegation that perhaps the child was coached to make the disclosure and there will be no opportunity to explore that issue with the child. In all, the lack of ability to cross-examine is a significant concern.

17 The fifth requirement is a finding that the person seeking to adduce the evidence has established on a balance of probabilities that it is necessary to adduce the evidence as requested and that it is being presented in its best possible form. In the context of children's evidence, "necessity" has been interpreted as "reasonably necessary". There was virtually no evidence lead by the CAS on the issue of necessity. I have no evidence that the child is not available and no independent evidence that the child would be traumatized by having to give the evidence orally in court. However, I must have an appreciation for the young age of the child and consider the child's evidence in the context of the dispute which is before the court. K.N. sees his mother regularly. By all accounts he has a good and loving relationship with her. For some two years now he has resided with his paternal grandparents and has a good and loving relationship with them. The relationship between Ms. L.N. and the paternal grandparents is understandably strained. In my view it would be unfair and potentially emotionally unhealthy in this atmosphere of conflicting allegiances to require him to appear in court and give evidence which is adverse to the interests of either. Although this should not be taken as a blanket endorsement of admitting hearsay statements of children, it is reasonably

necessary in the circumstances of this particular case and this particular child that his evidence be adduced in the manner sought by the CAS.

18 The sixth requirement is a finding that the person who seeks to adduce the evidence has established on a balance of probabilities that the inability to test the truth and accuracy of the statement is sufficiently overcome to justify receiving the evidence (generally known as establishing threshold reliability). In my view the CAS has met its onus. K.N. made the disclosure first to his paternal grandmother and subsequently to the police. Although there exists some not insignificant inconsistencies, he was reasonably consistent when describing the impugned actions of his mother. He is not of sufficient age or sophistication to have devised or knowingly participated in a scheme designed to mislead the court. Having viewed the video tape statement given to police it did not appear to me that he was being evasive or unclear in what he was relating. To the contrary, he clearly understood the difference between telling the truth and telling a lie, used language and actions appropriate to his age, and was able to effectively communicate answers to the questions posed to him. In all of the circumstances, I am content that threshold reliability has been met.

19 Lastly, the court is required to consider whether the probative value of the evidence is outweighed by its prejudicial effect. The evidence is of some probative value. There has been no suggestion that there is any prejudicial effect.

20 In all, and having considered all of the factors set out in Kehlawon, it is appropriate in the circumstances of this case that the hearsay evidence of K.N. be admitted.

21 Having determined that the evidence tendered by the CAS ought to be admitted as fresh evidence, it is also appropriate that the affidavit evidence of Ms. L.N. in answer be admitted. To decline its admission would render the process most unfair.

The Appeal

Standard of Review

22 The parties agree that the standard of review on a question of law is correctness, and that the standard of review on questions of fact or mixed fact and law is palpable and overriding error. Palpable means plain to see. Overriding means determinative, in the sense that the error affected the result.

23 It is generally accepted, particularly in family law cases, that a trial judge's decision should not be interfered with lightly.

The Grounds for the Appeal

24 The CAS advanced four grounds of appeal:

(1) That the trial judge erred in his understanding of the law as it pertains to **unexplained injuries** in child protection cases;
(2) That the trial judge made findings of fact which were not supported by the evidence;
(3) That the trial judge erred in law by applying one standard to the mother and reversing the standard for the father in relation to offering possible explanations for the cause of injuries;

(4) That the trial judge misapprehended the evidence with respect to the distress the infant would have exhibited as a result of the injuries he suffered.

I will consider each ground of appeal in turn.

1. Unexplained Injuries in Child Protection Cases

25 The CAS contends that case law pertaining to child protection matters has developed a fundamental proposition that injuries suffered by an infant which are of a serious nature and which remain unexplained are in and of themselves grounds for removal of a child and for the continuation of that removal.

26 In his decision, Justice McLeod considered the case law cited to him and agreed that such a fundamental proposition, which I will refer to as the "unexplained injury principle", is appropriate. However, he determined that there must first be a finding that the caregiver in question was responsible for the injury - that the probable culpability of the parent is a precondition to the requirement for an explanation. He put it as follows:

> In other words, where the web of circumstantial evidence assumes a shape and strength sufficient to enmesh a parent as the perpetrator of the abuse, his or her failure to step forward and provide an exculpatory explanation will be fatal. But the necessary precondition is that the evidence relied upon is sufficient to establish the probable culpability of the parent - because it is only at that stage that the failure to explain becomes a relevant consideration.

27 The CAS argued that the trial judge confused the issue of responsibility for the injuries with the need for an explanation for how the injuries were caused.

28 Although I agree with the trial judge that there must be some element of responsibility for the injury in order to require a parent to provide an explanation, I would phrase the preconditions to the applicability of the "unexplained injury principle" somewhat differently.

29 In my view the necessary preconditions are twofold: First, that the evidence is sufficient to establish on a balance of probabilities that the child's injury may have been caused by that parent; and second, that the evidence is not sufficient to establish on a balance of probabilities that the injury was caused by someone else.

30 In the present case there can be no doubt that L.M. experienced serious injury while in the care of his parents. Had the evidence established that Ms. L.N. may have been responsible for the injury and had the evidence not established that Mr. D.M. was the perpetrator, the "unexplained injury principle" would have required her to satisfy the court on a balance of probabilities that the injury was not intentionally caused, that there was a reasonable explanation of the circumstances in which the injury was sustained, and that those circumstances would again arise. However, in view of the finding of the trial judge that she did not cause the injury and the specific finding that Mr. D.M. was the responsible party, I fail to see why an explanation of the injury should be required of her. Her inability to provide an explanation, at least on the facts of this case, does not lead to a child protection concern.

31 What Justice McLeod determined is that the "unexplained injury principle" does not apply to someone who has been found not to be a party to the abuse. I see no error in his interpretation of the law in that regard.

Findings of Fact Not Supported by the Evidence

32 The CAS argued that the evidence at trial did not support the finding of the trial judge that D.M. was responsible for L.M.'s injuries.

33 The trial judge found that with respect to the injuries to L.M. which were discovered on June 29, 2009, the case against D.M. was overwhelming. He based that conclusion on the following evidence:

1. Mr. D.M's admission that he probably caused the fractures, albeit intentionally;
2. Evidence of medical experts that the injuries could have been caused in the ways suggested by Mr. D.M., but not unintentionally;
3. Mr. D.M. reluctance to have the child taken to the hospital immediately upon the recommendation of their family doctor;
4. Mr. D.M's disclosure of possible causes for the child's injuries before those injuries had been disclosed by the skeletal x-rays.
5. Mr. D.M. had never recanted or qualified his admissions

34 The trial judge summed up his findings in this regard as follows:

> D.M. had the opportunity to inflict these injuries on L.M.; he had the ability to do it; and he subsequently admitted to police that he did do it. He has never recanted or qualified those admissions. He says, I didn't mean to hurt L.M. He says, maybe I had become desensitized to the pain I was inflicting on my infant son. But in the context of a child protection trial, what do we care?

35 The CAS argued first that the medical evidence established that the injuries suffered by L.M. could not have been caused in the manner described by D.M. This same argument was put to the trial judge during submissions and dealt with by him as follows:

> It was suggested that the expert medical evidence established that the injuries to L.M. could not have been caused in the way described by Mr. D.M. and therefore the Court should reject D.M.'s admission that he caused the fractures to L.M.'s bones which were depicted on June 29, 2009. This argument was based on what I find to be a misinterpretation of the expert evidence. The expert opinion was that significant force would be required to fracture L.M.'s bones, well above what would normally occur in the care of an infant; and a mentally competent person who inflicted such force should have realized what he was doing and that he had hurt the child. Because Mr. D.M. is mentally competent, we should certainly question his assertion that he caused the injuries without realizing what he was doing or that injury had been sustained. However, it does not follow that Mr. D.M's statements should be disregarded in their entirety and we should proceed as if he had not admitted responsibility for causing the injuries.

36 Later in his reasons, the trial judge said: "The experts did not suggest to the Court that the injuries could not have been caused by Mr. D.M's application of substantial force in the ways he described to police."

37 The reasoning of the trial judge can be put thus: (1) D.M. admitted to probably being responsible for the child's injuries; (2) He described handling of the child which, if done with sufficient force, could have caused the injuries; (3) The medical evidence was that the force required would be well in excess of what would normally occur in the care of an infant; (4) One might reasonably question Mr. D.M's assertion that he caused the injuries without realizing it.

38 Having reviewed the evidence and the testimony of the experts, this interpretation of the evidence was available to the trial judge and is to be given deference.

39 The CAS next argued that the evidence did not establish that Mr. D.M. was hesitant to go to the hospital immediately for further testing of L.M. when advised to do so by Dr. Goodale. The evidence in this respect is found in the testimony of Dr. Goodale as follows: "So I told them that they needed to go to the hospital immediately, and I - I didn't put this in my note but I certainly recall vividly that L.N. immediately said, 'okay, we need to go now,' and the father made a comment about not having a car or not having a ride and 'could you go this afternoon,' and L.N. said, 'No, I'll take the bus if I have to.'" That Mr. D.M. was hesitant to go to the hospital is an inference that can reasonably be drawn from this evidence. There is no palpable error in the finding of the Judge. The contrast between Mr. D.M. reaction and Ms. L.N.'s wish to attend immediately as recommended also speaks to her lack of culpability. That is, she acted as one might expect a person who has no knowledge of or involvement in the injury of her child.

40 The CAS next points out that the trial judge erred in finding that Mr. D.M. offered an explanation for the child's injuries before the injuries had been discovered, thereby raising further suspicion. In his decision, the trial judge stated: "But in this case, Mr. D.M's reluctance to bring L.M. for a more extensive examination raises suspicion, because shortly after they arrived at the hospital he told Ms. L.N. about tripping and falling with L.M. in his arms, in circumstances which clearly suggest that Mr. D.M. was concerned that the skeletal survey, which was then underway, would reveal some injury." The transcript of the trial proceedings indicates that in fact this disclosure by Mr. D.M. came after the results of the skeletal survey had shown the many fractures which L.M. had suffered. I agree with the CAS that there exists a palpable error in this regard.

41 Lastly, the CAS argued that contrary to the trial judge's finding, Mr. D.M. had indeed recanted and qualified his admission of having harmed L.M. Again I agree with the CAS that the trial judge's finding in this regard constitutes a palpable error. In particular, although the affidavit of Mr. D.M. filed at trial contained his denial of having inflicted any "intentional harm" to L.M., at paragraph 26 of that same affidavit he went on to say that: "I categorically deny having inflicted any harm to L.M. ...". It also appears that he disavowed responsibility for the injuries during conversation with Ms. L.N., and indicated during pretrial questioning that he had no idea how L.M. sustained the fractures.

42 To succeed on this ground of appeal, the CAS must demonstrate errors of fact that are both palpable and overriding. Although I agree that the trial judge made two palpable errors I am not satisfied that the errors are overriding.

43 The injuries to L.M. had to have been caused by Mr. D.M., by Ms. L.N., or by them both. The trial judge found that there was no evidence against Ms. L.N. except that she was one of the two

persons with opportunity. The remaining evidence relative to Ms. L.N. would suggest that she had no involvement. The trial judge was of the view that the evidence against Mr. D.M. was overwhelming. He found that Mr. D.M. had the opportunity and ability to inflict the injuries and that he subsequently admitted responsibility for the injuries to the police. These findings are not significantly impacted by the errors that were made.

2. Application of Differing Standards

44 The CAS alleges that the trial judge erred in law by applying one standard to the mother and reversing the standard for the father in relation to possible explanations for the cause of the injuries.

45 When Ms. L.N. and Mr. D.M. attended with Dr. Goodale for the examination of L.M., he had a bruise on his right cheek. Ms. L.N. questioned whether it could have resulted from how she held him, after breast feeding, to burp him.

46 When Mr. D.M. was questioned by the police he said, "And, like, I know I'm most likely the culprit here for the injuries because I handle him rough" and he then went on to describe the various and sundry ways he handled L.M. roughly.

47 The argument seems to be that the trial judge summarily dismissed Ms. L.N.'s inquiry about the bruise to the child's cheek, but seized upon Mr. D.M. admission and by doing so applied different standards.

48 There was no error in law committed by the trial judge in this regard. He was entitled to assess the evidence and he did so. He obviously assessed Ms. L.N.'s query to the doctor and determined it had little relevance in the case. He did not make a finding that it enhanced her candor as suggested by the CAS. He assessed Mr. D.M's statement to the police and found in all of the circumstances that it amounted to an admission of responsibility. I fail to see how any there was an unfair application of standards to the parties.

3. Misapprehension of Evidence re Distress of the Child

49 It is clear that L.M. suffered significant and serious injury during the first month of his life. Ms. L.N. was his primary caregiver during that period of time. Even if she was not responsible for his injuries and could not be expected to provide a specific explanation of how the injuries were suffered, the CAS rightfully questioned how she could have failed to notice the injuries. The argument follows that by failing to recognize the injuries Ms. L.N. failed to obtain medical treatment for him and continued to put him at risk by allowing Mr. D.M. to continue to participate in his day to day care.

50 The trial judge found there was not sufficient evidence to establish that Ms. L.N. ought to have known of L.M.'s injuries because there had been no evidence that L.M. was in distress following any of his injuries. The CAS argued that the trial judge misapprehended the evidence with respect to the distress L.M. would have exhibited to the injuries inflicted. In this respect the trial judge stated as follows:

> Ms. L.N.'s contention that she observed nothing that struck her as unusual in L.M.'s behaviour is, therefore, supported by other evidence - particularly by the evidence from the doctors who, it must be noted, were specifically watching for

> signs of distress in the context of a physical exam to determine whether the infant had been abused.
>
> Further light is shed on this subject by the observations made surrounding the fractured leg which was found on May 5/6, 2010 - this was a serious fracture sustained by an older infant - albeit one who was not mobile - but one that would have been more active, more vocal and more responsive to other people than a newborn in the first month of life. The possibility of injury was first noted by the foster mother while changing the child. She was sufficiently concerned that she took the child to the emergency department. The child was examined by qualified medical personnel who sent him home, to be returned the following morning for examination by Dr. Murray. It seems unlikely that L.M. would have been sent home if the attending medical personnel thought he was in any distress as a result of a fractured leg. When L.M. was examined the following day by Dr. Murray, it was noted that he was "healthy and well in appearance ... very happy and socially interactive ..." It was only when Dr. Murray touched the lower left leg that any distress became apparent.
>
> I refer to the incidents of May 5/6, 2010, and the apparent lack of any signs of distress on the part of L.M. because the circumstances surrounding the detection of injury on that occasion points out the danger of assuming that there would have been some signs of distress associated with the injuries sustained by L.M. during his first month of life. We know from that later incident that even with a serious leg fracture and a much more interactive and aware infant, who was subject to close scrutiny because of the nature of the apprehension by the Society, there was an obvious absence of behaviour or signs of distress on the part of the infant, which a reasonably attentive person might find to be concerning.
>
> ... There is no evidence which directly impeaches Ms. L.N.'s assertion that she did not notice any signs of distress because there were no signs of distress. There is evidence which supports her assertion that it was reasonable for her to not suspect that L.M. had suffered bone fractures, because that is essentially the position of Dr. Goodale who examined him on June 29, 2009; and it is consistent with the lack of relevant observations surrounding the serious injury detected on May 5/6, 2010.
>
> There is, therefore, a lack of compelling evidence to support the Society's position that L.N. should be found to have either known of the injuries to L.M. found on June 29, 2009, or been wilfully blind as to their existence; and, therefore, failed in her responsibility as a parent.

51 The evidence of Dr. **Shouldice** established that with respect to the rib fractures there are rarely any external signs of injury and although at the time of the fractures it would be expected that the baby would cry or scream, after the initial period of crying, babies with rib fractures do not show much in the way of symptoms. Dr. **Shouldice** concluded that there are few symptoms associated with rib fractures after the initial fracture occurrence. With respect to the metaphyseal fractures the

doctor testified as follows: "I would expect a baby with this fracture, maybe to be a little more fussy than usual, in the interim, after the injury has occurred particularly when the arms or legs in the areas of the fracture were moved. But because of the age of this baby and the fact that fussiness in babies is fairly common at this age, those symptoms may be overlooked by someone who isn't aware of the injury event. And, again, these are the type of fractures that even a physician often would not be aware of on physical examination and are found, often, incidentally on x-rays." Towards the end of her cross-examination by Mr. Talbot, Dr. **Shouldice** stated: "There would - it's possible that someone who was not aware of the injuries may not notice or be aware that those injuries had occurred, based on the symptoms in the baby. Yes."

52 This evidence is precisely what the trial judge was saying in his decision. If Ms. L.N. was not present when the child was injured and was not advised of the injury, the symptoms displayed by the child would not necessarily have alerted her to the child's injuries.

53 The CAS also argued that contrary to the trial judge's finding above, L.M. did exhibit signs of distress in relation to the fracture suffered in May of 2010 and as such the trial judge misapprehended the evidence and erred in reasoning that because he showed no signs of distress on that occasion, it is likely that he showed no signs of distress when injured during the first month of his life. In support of their argument the CAS pointed to the evidence of the foster mother who first took the child to the hospital who testified that: "He had some discomfort. He wasn't acting like he normally did. And it was during the diaper change that we realized that something was wrong with his leg ... I would say within ten, 15 minutes we knew something was wrong with the leg". The CAS also pointed out the triage note in the hospital records which indicated: "Presenting Problem: Leg Swelling/Pain - unilateral".

54 The trial judge's finding with respect to the May 2010 incident was an apparent absence of *distress* arising out of a significant fracture which had been suffered. Persons who had the care of the child earlier that day had not noticed anything unusual. Upon return of the child to foster mother, she did not note that the child was in distress - only that the child *had some discomfort.* Although the hospital note reflects that the child was experiencing some pain and leg swelling, it does not say that the child was in distress and indeed as the trial judge noted had the child been in any significant distress it is unlikely the medical professionals would have sent him home.

55 The point being made by the trial judge was that this child, almost a year older than when the original injuries were inflicted and accordingly more developed and more active, did not respond to a significant fracture in a manner that caused anyone to believe he had been seriously injured. This led the trial judge to reason that the child may not, a year earlier, have acted in a way that would cause someone who was unaware of the injury to perceive that the child had been hurt. This finding is consistent with the conclusions reached by Dr. **Shouldice.** The trial judge found that it was also consistent with the testimony of Ms. L.N., whose evidence he accepted.

56 Lastly, the CAS argued that Ms. L.N. was in the home practically 24 hours a day during the first month of the child's life and so must have been present in the home when the child was injured. I suspect that is correct, but it does not follow necessarily that she had to have been aware of the injuries. Surely there were occasions when she had a shower that she would not be able to hear what was happening to L.M. Surely she slept at least on occasion during those four weeks. And even if she heard L.M. cry upon an injury being inflicted it does not necessarily follow that injury to him ought to have been expected. As we know, newborn babies cry for many reasons.

The Fresh Evidence

57 The fresh evidence is not of sufficient veracity to impact the decision that was made. Although it met the test for threshold reliability, the evidence should not be given significant weight for the following reasons:

1. The disclosure was made by K.N. for the first time when he was about 8 years of age and concerned an incident which took place over two years earlier. I have some concern about this child's ability to accurately recall what he saw in these circumstances. My concern in that regard is heightened by the child's mistaken use of gender pronouns which make it less clear who was doing what to whom.
2. K.N. did not disclose any other abuse of his brother by his mother and alleged no physical abuse to himself.
3. There was no medical evidence lead which would allow me to conclude that the incident alleged could have caused the injuries suffered by L.M.
4. I am hesitant to rely on K.N.'s perception of what he saw. Even if I accept at face value that K.N. saw his mother forcefully lower L.M.'s leg onto the edge of the change table, I have to bear in mind that the observations are being made from the perspective of a six hear old. What appears to be significant force to a six year old may not be the same as what is significant to an adult.
5. There is a significant discrepancy in the disclosure K.N. made to his grandmother and the statement he provided to the police. Specifically, he said to his grandmother that Ms. L.N. had shaken L.M. and his legs hit the table. In his video statement with the police there is no allegation of shaking and he is fairly emphatic that only one leg was banged onto the table.

58 In all, by itself or in concert with the palpable errors shown to have been made by the trial judge, K.N.'s recent disclosure is not sufficient to warrant interference with the decision of the trial judge.

Conclusion

59 I am not satisfied that the trial judge made any error of law, nor any error of fact or mixed fact and law that was both palpable and overriding. The fresh evidence is not such as to warrant interference with the trial judge's decision. It follows that the appeal is dismissed. If the parties are unable to agree on the issue of costs, they may make written submissions to me, not to exceed four pages in length each. The Respondent shall file her costs submissions within 45 days, the Appellant within 15 thereafter.

R.D. GORDON J.

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