SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Maloney*, 2011 NSSC 477

Date: 20111222
Docket: CR. Am 346625
Registry: Amherst

Between:

Her Majesty the Queen

Plaintiff

v.

Lacy Maloney and Mitchell Chapman

Defendants

DECISION

Judge:	The Honourable Justice A. David MacAdam.
Heard:	November 7, 8, 9, 14, 15, 16, 17, 18, 21, 22, 23, 25, 2011, in Amherst, Nova Scotia
Final Written Submissions:	November 9, 2011
Written Decision:	December 22, 2011
Counsel:	Mary Ellen Nurse, for the Crown Stephanie Hillson, for the defendant, Lacy Maloney Kymberly Franklin for the defendant, Mitchell Chapman

By the Court:

[1] The accused, Lacy Maloney and Mitchell Chapman, are charged with failing to provide necessaries to a person under their charge, contrary to s. 215(2)(b) of the *Criminal Code*. They are also charged with aggravated assault, contrary to s. 268.

[2] Spencer Gary Maloney was born on December 4, 2009, at the Moncton Hospital. On December 29, 2009, Lacy Maloney, his mother, woke up to find a “boogie” in one of his nostrils, which appeared to be affecting his breathing. He appeared to be stuffed up. She thought he had a cold. After calling a public health nurse and her aunt, Joan Beliveau, she tried saline drops but found they did not help. She testified that Spencer appeared to be breathing hard. After speaking to Spencer’s father, Mitchell Chapman, who by then was at work, she decided to take him to the Cumberland Regional Hospital in Amherst, Nova Scotia.

[3] At the hospital a nurse informed Ms. Maloney that her son had had a seizure. Dr. Murray McCrossin determined that the child was obviously ill, although he was not certain of the diagnosis. He testified that the infant was having seizure disorders. On the hospital record he wrote question marks followed by the words "abuse" and "infection". When he first saw Spencer, although he was breathing he did not seem to be responding. His eyes were turned down, his colour was off, but the cause of the discolouration was not clear. Dr. McCrossin was concerned about the appearance of the eyes and the lack of reaction, and observed that the infant appeared to be working hard to breath. There were no obvious signs of trauma and the chest x-ray did not show anything acute. The only bruising he observed was on the infant's face. He decided to transfer the child to the hospital in Moncton, New Brunswick.

[4] During the ambulance ride to Moncton, the infant apparently had another seizure. In Moncton he was seen in outpatients by Dr. Heidi Carlson. Her initial reaction was that she was not sure what had happened. She concluded he was gravely ill. She arranged for him to receive anti-seizure medications intravenously. She carried out various tests and did a routine work up for evidence of infection. She noticed bruising on the face, including scratches, a bloody lesion on the side of his nostril and little spots of bleeding in his eyes. She testified that this was suggestive of "shaken baby syndrome".

[5] Dr. Carlson stated that in addition to scratches and bruising on Spencer's face she noticed a mark on the back of one of his knees. As he was on his back when she examined him, she did not observe whether there were any injuries on his back. She did observe marks on his chest. Dr. Carlson had seen Spencer prior to this, and stated that at that time he did not have the bruising, scratches or marks that she observed on December 29th.

[6] Dr. Carlson suspected a traumatic event, although the mother and father said they had not witnessed any trauma and denied leaving the child in the care of anyone who could have caused a trauma. She testified that the demeanor of the parents seemed a little bit odd, as usually parents were more upset than they were. Suspecting child abuse, she decided to transfer the child to the IWK hospital in Halifax, Nova Scotia. She told the parents that she was very concerned about the seizures but did not tell them that she suspected abuse.

[7] Several physicians saw Spencer at the IWK. Dr. Kim Blake, who was qualified as an expert in pediatrics with a subspecialty in childhood injuries and maltreatment of children, led the child protection team that investigated and assessed his condition. She arranged for consulting and reporting by other specialists. In her report she summarizes her assessment of the records on the infant's medical history and the various reports she received from the consultants. Her summary states:

> Summary
>
> At the age of 25 days, Spencer was found to have substantial subdural hemorrhages, a generalized hypoxic-ischemic brain insult, retinal hemorrhages and extensive facial and bodily bruising.
>
> There is no available history of significant accidental trauma that occurred prior to Spencer's presentation to hospital on December 29th, 2009. To date, medical testing is not suggestive of any underlying medical illness in Spencer, which might account for the above findings. Spencer does not have a coagulopathy (bleeding problem). Medical evaluation to date cannot explain his skull fracture, subdural hemorrhage, brain injury, bruising, and retinal hemorrhages.
>
> In the absence of a history of significant accidental trauma, the constellation of unexplained subdural hemorrhage with associated hypoxic ischemic insult to the

> brain, cavitation within the brain, retinal hemorrhages, unexplained bruising, and skull fracture in an infant with limited mobility lead to my diagnosis of recent and older inflicted trauma (non-accidental injury) in Spencer.
>
> Spencer's head injury and the hypoxic ischemic insult that he suffered involved a significant portion of the cortical or higher centers in the brain which are typically responsible for executive functioning, cognitive processing and motor commands. There is significant concern for Spencer's visual system as he is having problems with fixing and following objects. Because Spencer is still young and the brain is in the early stages of development, Spencer's long-term prognosis is not clear. Possibilities range from severe cognitive as well as physical disability (such as blindness and cerebral palsy), to a more benign outcome consisting of problems such as learning and language delay with or without motor handicaps. His prognosis will only become clearer over time.

[8] Dr. Ellen Wood was qualified as an expert in pediatrics, with a subspecialty in neurology, nonaccidental head injury and developmental medicine. She saw Spencer on December 30, 2009, when he was 26 days old, with later follow-ups in December 2010 and July 2011. In testifying about the swelling in his brain, and when the trauma causing this swelling could have occurred, she said:

> **Q.** Having regard to your observations as to the status of the swelling, based on the CT that, the CAT scan that you had seen, are you able to say when the event that would have led to the swelling would have occurred, the outside parameters? Is this the, what I'm referring to is that seven days, whether or not we are now in a different time frame.
>
> **A.** Absolutely. No I mean the swelling was there. It was a great deal of swelling. It clearly got worse, which necessitated the baby having to go on a ventilator. So at the absolute outset, I don't see that this could have been more than, than three days and I think that would, I think it was less than three days.
>
> **Q.** And that's the event that led to the swelling?
>
> **A.** Yes.

[9] In testifying about the more recent effects on Spencer, Dr. Wood said:

> **Q.** Okay. And with respect to all that you've reported, or you remember on the December 14th visit, were all of these things that you were observing because of the injuries you had seen on December the 29th?

A. Yes, they were definitely compatible with the injuries that I saw when I first met him, yes.

Q. Do you recall if you reviewed any CT or MRI scans prior to...

A. Yes, he had an MRI repeated in July of 2010, and I reviewed that at the visit. The swelling of course had long since gone, and that had gone before he left hospital, because again, the swelling only lasts for at most a week. The bleeding that was what we call subdural, which is bleeding between the brain and the skull, so in that space, that of course had also resolved. Again, that goes away quite easily. The areas where he had had bleeding inside his brain had scarred and basically shriveled (sic) up quite considerably, so the MRI showed a great deal of now permanent brain injury. The temporal lobe, sort of the area right there on either side were completely gone on both sides, and the front part of his brain on both sides was what we call atrophied, so again very scarred and shriveled (sic) up.

Q. And what does this affect in terms of his, his abilities? What will this affect?

A. The young brain can have the ability, if one part of it gets damaged, for other parts to take over. So language, for example, in anyone who is destined to be right handed, is in our left temporal lobe. That's where language develops in all of us. As an adult, if we injure that, then we'll lose our language. If a baby has an injury to that area, but all the other parts, particularly the other temporal lobe, are healthy, then there is a potential that language will move over and both continue to develop. In this baby's case, unfortunately both temporal lobes are completely destroyed. So language, spoken language is something that he may never develop. I never say never in medicine, but he has a severe risk of not developing normal language. As well, memory lives in that area as well, and if you only have injury on one side, you may be okay, but with both memory will be an issue. The frontal lobe's coordinate our attention, what we call our executive functionings, our ability to remember lots of things, to balance things, to prioritize, to make good decisions. They also help control our movements, and again he has significant injuries there.

Q. Okay. And did you see him again?

A. Yes, I saw him most recently on July 21st, 2011 when he was 19 months old.

Q. At that time was he talking, speaking?

> **A.** No, the only thing he could really say was a "bah" sound, and that was only if he was excited. It wasn't short for bottle, as near as we could tell. But he really had no language.

[10] I will now review the evidence advanced by the defence.

The Defence

[11] The accused, Lacy Maloney, testified that she did not hurt her son, she did not see Mitchell Chapman hurt him, and added that she did not think he would hurt Spencer. The only possible explanations for his injuries she offered were the unusual occurrences during his birth or that her other son, Ashton, could have caused them by accident. To similar effect, Mitchell Chapman, in his statement to the Amherst police in response to a question from the police officer as to who might have caused the injury if not Ms. Maloney or Mr. Chapman himself, also referred to what had happened to Spencer at birth and to the possibility it might have been Ashton. He appeared to suggest that the idea that it might have been Ashton was made to him by his father.

(A) ***Birth of Spencer***

[12] There is disputed evidence in respect to the circumstances of Spencer's birth. The delivery doctor, Dr. Brodie, and the attending nurse, Murielle LeBlanc, relying primarily on the hospital records, both testified that the delivery was uneventful. However, Ms. Maloney and Nicole Sears, who identified herself as Mr. Chapman's step-niece, and who was present at the birth, said there were two unusual occurrences during the birth. Ms. Sears testified that when the doctor came in, he seemed to be a funny guy and made them feel comfortable. As the delivery approached, Ms. Sears was on one side of Ms. Maloney and Mr. Chapman was on the other, each of them holding one of Ms. Maloney's hands and one of her legs. The doctor said he was ready. Ms. Maloney started to push. Ms. Sears saw Spencer's head come out to the bridge of his nose. The doctor then said he was not ready. She said he took two of his fingers and placed them on the head and pushed Spencer back into Ms. Maloney. The doctor then turned towards the tray with the instruments and put on his gloves. He made a joke saying he was ready. He then again turned towards the tray with the instruments and at this point Spencer came out. His head went into a stainless steel pan the doctor had placed next to Ms.

Maloney. Ms. Sears said the baby's legs buckled. The doctor then grabbed Spencer by his legs or arm. The nurse came and took the baby.

[13] Neither of these events are recorded in the hospital records of the delivery. Dr. Brodie denied that they happened, stating if they had he would have recalled it. He said he had some recollection of the circumstances of the birth because Ms. Maloney had been referred to the Moncton Hospital although she lived in Amherst. There had been a concern that the baby required assistance in Moncton because of its smaller size. On Ms. Maloney's arrival it was decided to induce labour and proceed with the delivery. He said that on the delivery of a smaller infant it is necessary to control the pace of the delivery but the head is not manipulated. He denied that the baby's head was forced back up into the vagina. He described the delivery as very easy. He denied the baby hit a metal pan. He said the baby did not slip and strike the pan. He said he checked the baby and he did not recall seeing any bruises on the infant.

(B) Ashton

[14] Ashton is the son of Lacy Maloney and Michael Vansnick. He was born August 29, 2005. Ms. Maloney and Mr. Vansnick separated a year or eighteen months after his birth. The breakup was not amicable. Ms. Maloney was looking for full custody but Mr. Vansnick would not agree and it took them approximately a year to work out shared access whereby Ashton spent alternate weekends with each parent and, during the week, alternate days as well. Ms. Maloney explained that if she had Ashton on a weekend, Michael or his mother would pick him up on the Sunday afternoon. Ashton would then be with his father the rest of Sunday and on Monday until he would be returned to her, or she would pick him up, on the Tuesday. If he had Ashton on the weekend, the exchanges would be reversed.

[15] Ms. Maloney lived with her mother, Betty Maloney, until she moved into an apartment with Mitchell Chapman. When she had Ashton initially, it would be at her mother's residence. When she moved out of her mother's residence, on the weekends she had Ashton, he often would stay with her mother on the Friday and be brought to her home on the Saturday.

[16] Betty Maloney said that early on Ashton would cry between six and seven in the evening. Ms. Maloney would walk the floor with him, and rock him. Sometimes Betty would take a turn to see if she could stop him from crying. She

said her daughter would try to soothe him. She said Ms. Maloney did not get upset. In a couple of weeks (she estimated) Ashton grew out of this crying spell. With that exception, he would only cry if he was told not to do something he was doing, or if he hurt himself or was hungry. Betty Maloney said that Ashton had a couple of seizures when he was around a year old; however, she said she did not see them herself. They did not know why he had them. She believed that one of them occurred when Ashton was with his father.

[17] Ms. Maloney described Ashton, at ages two to three, as outgoing, hyper, friendly and talkative. He would run around, play with toys, and had a lot of energy. She said he liked wrestling, but also had farm animals, went fishing and watched movies. When he turned four, his hobbies and behaviour were the same. He continued to like wrestling and remained hyper.

[18] Ms. Maloney said if Ashton threw something she would have him sit down and would tell him he could not do that and if it was a toy she would take it from him. She never physically disciplined him and added that neither did Mr. Chapman. Later on, she said she used "one, two and three" if he misbehaved. She would look at him and say "one", and then would say "two", and he would run over and give her a hug. She said she never got to "three". She also said she never explained to him what would happen if she had got to "three". She suggested that she might have had him sit on the couch as a timeout. There was similar evidence from Ms. Maloney's mother, who mentioned that Ms. Maloney always stayed calm around Ashton.

[19] On direct examination by her counsel as to who could have hurt Spencer, if it was not her or Mr. Chapman, Ms. Maloney said it could have been at birth when Dr. Brodie had pushed him back into her or when he came out and his head struck the pan, or it could have been Ashton, because he was really hyper. He might have done something by accident, trying to play with his toys with Spencer. She said she had not seen Ashton do anything to Spencer.

[20] Ms. Maloney was referred to the video of the interview of Ashton by the police and Children and Family Services personnel, and particularly to where Ashton held an officer's head and moved it up and down and side to side. Ms. Maloney said she had seen Ashton do this before. She said he always wanted to do wrestling moves. However, he did not mean to hurt. He had put her in a headlock.

She said she would tell him that she did not like wrestling. She also said she had seen him climb on people, repeating that he was very hyper.

[21] Ms. Maloney said when Ashton played rough she would sit him down and tell him not to do it. She would tell him that she did not like him playing rough. He would sit on the couch and think about it. She said that during the month of December she had supervised Spencer properly. She mentioned taking her children to the doctor when they were sick. She said that when Spencer and Ashton were in her care, they had a good level of supervision. Ashton always wanted to help with Spencer. She said she kept Spencer with her.

[22] In respect to Mitchell Chapman, Ms. Maloney said his supervision seemed good. If Ashton was present, they would take turns, with one of them playing with Ashton and the other with Spencer.

[23] On cross-examination Ms. Maloney said she never saw Ashton do anything to Spencer. She said that perhaps she could have turned her back and he might have wanted to play with Spencer. She repeated that he liked to run and was very hyper. Ashton never came to her and said look what I did to the baby. She was referred to the evidence of Nicole Sears that the first time she met Ashton he had climbed over her. Ms. Maloney agreed that this was consistent with how Ashton behaved. He climbed on people and gave them a “noogie” or put them in a headlock. She said a “noogie” involved Ashton taking his fist and rubbing it back and forth on the person’s head. In his police interview, Mr. Chapman indicated that they would “not intentionally” leave Spencer in a situation where Ashton could harm him. He said they might turn their back for an instant, but that “usually someone is there.”

[24] Ms. Maloney said Ashton was excited when she became pregnant. He could not wait for his little brother to come, and said his little brother would be able to play with his toys. Ashton first met Spencer on December 6th, two days after Spencer was born. Ms. Maloney said he was quite excited. He said he wanted to play with him but he was told that he was too young. He said he would play with Spencer when he was older. He would often try to help with the feeding by putting a hand over Ms. Maloney's hand while she was giving Spencer the bottle. He would not stay around when she was changing his diapers although he would get the diapers and wipes for her. He wanted to help. She initially said he never held Spencer, but she did acknowledge after viewing one of the photos, that while

Spencer was on the couch, Ashton did hold him for a short time. She watched while this occurred. Usually she would hold Spencer and Ashton would sit next to her and touch him. Ashton would bring over his dinky toys or farm animals and one day he brought over a couple of his wrestler toys to show Spencer.

[25] Nicole Sears said Mitchell Chapman is her step nephew. They grew up together. She testified that Ashton was very outgoing. She described him as a sweet kid. Even though he had never met her before, when she first met him he climbed on her. He was not shy. All he wanted to do was play. She said he was hyper and rambunctious. She said he would throw things. He liked wrestling, and a couple of times he wrestled with her or her brother. He would grab her arm. On examination by counsel for Mr. Chapman she said Ashton would wrestle with her and pull her hair. When he would try to climb on Ms. Maloney, she would say "no, no". Ms. Sears said that Mr. Chapman was patient with Ashton. When Ashton would try to climb on him Mitchell would say "no" he couldn't do that and would try to calm him down. She had seen Ashton climb on her own father and punch him in the nose. Ms. Sears said Ashton would put his hand on her forehead and push back, as well as pull her hair. She had seen him do this with Mr. Chapman as well. He would say "no" and tell Ashton that it was not right.

[26] Ms. Sears said Ashton had a plastic hammer that he liked to swing. She said it would blow up to 3 ½ to 4 feet long. She said she could squeeze it and that it was soft. On cross-examination by Crown counsel she said she did not know if the hammer was hard at the top. She said that when Ashton hit her with it, it did not really hurt, but she knew she had been hit. It did not leave a mark.

[27] After Spencer was born, Ms. Sears said, when she visited Ms. Maloney and Mr. Chapman’s home, and Ashton was there, she would still see him carrying on. They would tell him that he couldn't do things around the baby. If he tried to touch the baby "hard", Ms. Maloney would say he could not do that. She said that Ashton would get upset when he did not get his own way, to the point of throwing things.

[28] Ms. Sears said she saw the baby on December 7th or 8th at his parent’s home. Ashton was present. He was very excited. He was playing and running around. He would say Spencer's name. She said she never saw Ashton hold Spencer. Ms. Maloney and Mr. Chapman would not let him. She said that when Spencer cried, one of his parents would pick him up. Ms. Maloney showed no strong reaction to

the baby crying. She had seen the baby cry when Mr. Chapman was around as well. He reacted the same way. She said he was not a particularly fussy baby. Ms. Sears said that on December 17th he seemed fine to her.

[29] Ms. Sears said Ashton had told her that he would bring his wrestlers down to show Spencer. One or two of them were at Betty Maloney's house, the rest at his father's residence with his parents, the Vansnicks. He had four or five types of wrestling rings as well. His father and grandfather had taken him to a wrestling match in Moncton, where he got a wrestler's mask. This would have been after Spencer was born. In December 2009 he was interested in wrestling as much as he had been before. She said Mr. Chapman did not share this interest, only Ashton's father and grandfather. She said she did not recall Ashton ever bringing any of his wrestling figures to Spencer.

[30] According to Betty Maloney, Ms. Maloney's mother, Ashton was excited that he was going to be a big brother. He said he would share his toys. He would show Spencer his wrestlers. He would show him his movies. She did not know if he understood that it would be a while before Spencer was able to play with him. When Ashton first met his young brother he was excited; he gave him a kiss. He sat beside him on the couch. He said he would feed him, but he would not change his diapers. She said she did not believe he either held or fed Spencer.

[31] Betty Maloney testified that Ashton was always smiling and happy. He always wanted to play. She said he was a normal four-year-old boy, "on the go" and wanting to do things.

[32] Lacy Maloney testified that by December 24th, Spencer's sleeping habits had not changed. He slept during the day. He only woke up to be fed and changed. There was only about ten minutes when he would look around. It was the same overnight, that is, he would sleep except for feeding and changing. He did not drink more than three ounces. She was sure that he never drank more than four or five ounces, and if he did he would spit it all up. If he only took three to three and a half ounces he would only spit up a little bit when he was being burped. Ms. Maloney testified that the colour of the pupil of his eye stood out and there was a red rim on his eyes. On the right eye it was all around while on the left it was only halfway, like a half-moon, not reaching all the way to the bottom.

[33] Ms. Maloney said December 24th was an active day. They visited Michael Sears for dinner at noon and her mother's place that evening. Spencer was with her the whole day, including during the two visits. He slept at both places and cried to be fed, changed and then rocked back to sleep. She testified that during this day she did not observe anything unusual about Spencer's behaviour. She said he was still quiet.

[34] On Christmas Day Ms. Maloney went to her mother's. Although she was not certain, she believed she picked up Ashton at Julie Vansnick's residence. This would have been before noon. She had called Michael to get permission to pick Ashton up early. They went to her mother's, where they opened gifts. At this time Ashton was not feeling well. They then went to visit the Sear's home and unwrapped gifts, and then to Sackville, New Brunswick, to visit Mr. Chapman's father for supper. Ashton was not feeling well. They returned and visited Joan Belliveau. Ashton at this time fell asleep on Spencer's knee. He threw up that day, and in the evening she took him to outpatients at the hospital. She had Spencer with her. They were there a couple of hours and she learned that Ashton had the flu with a fever and stuffy nose.

[35] Betty Maloney said she saw Spencer on December 16th or 17th. She said his colour at that time was pink and the bruising was going away from his face. The bruising was then a very light blue colour, a fading blue. She had no concerns. She said he looked healthy. She saw him again on December 24th and said he seemed good; he was in his car seat asleep. He did not wake up until he was to be fed. He seemed content. She saw him once more on December 25th, and said he also seemed good at that time; there were no signs of his being sick.

[36] Betty Maloney was also aware of Ms. Maloney's visit with Spencer to the family doctor earlier in December, which she believed occurred when he was two or three weeks old. She understood from her daughter that Dr. Rubio-Reyes checked him over from head to toe and said he was good.

[37] On Boxing Day Ashton was still sick, so Ms. Maloney, Mr. Chapman, Spencer and Ashton remained at home. They watched movies that Ashton had received for Christmas. Ms. Maloney said someone had come to visit but she was not sure who it was. Spencer was still quiet and he had the ring around his eyes. He woke up to be fed, but did not drink more than three ounces. The only time he

got up was to be fed. She said she did not see anything of concern that day. He still had the red ring and the colour of his face also continued to concern her.

[38] During Boxing Day Ashton began to feel better. Initially he only sat on the couch and then in the afternoon he got up and went to get some of his toys. He started to become active. On December 27th Ashton returned to his father's. He was still a little queasy and weak. However, he had gotten up and started to play with his toys. There was nothing unusual about Spencer that day. He only woke up to be fed and then would drink the three ounces and spit up. Ms. Maloney and Mr. Chapman went to Moncton to do some shopping. Spencer was left with Karen Chapman. Ms. Maloney estimated her time away would have been no more than five hours. When she returned Spencer was crying a lot. Mr. Chapman tried to soothe him. After she changed him, he rocked Spencer and he fell asleep. She said Spencer was crying harder than she had heard before.

[39] Ms. Maloney said on the remainder of December 27th, about every three to four hours, Spencer would wake up to be fed. He would drink three to four ounces and she would change him. In the morning she had bathed him, and his eyes remained closed during the bathing. She stated that December 27th and 28th were the same, with him waking up every three to four hours for feeding. She said that nothing stood out on December 28th. The marks on the right side of his face remained there, but had faded. The pupils both still had the same red ring. He had two scratches on his chin and there was still a mark on his nostril. On the evening of December 28th she believed he was coming down with a cold. His nose was stuffed up and runny. She had no difficulty on the night of December 28th. On cross-examination Ms. Maloney said that although Mr. Chapman was up feeding Spencer twice on the night of December 28th to 29th, she also got up to change him. She, not Mr. Chapman, did the changing.

[40] It was on the morning of December 29th that Ms. Maloney took Spencer to emergency. She said he had a “booger” up his nose. As Mr. Chapman was working on December 29th, she surmised that he would also have been working on December 28th. Before going to work he had brought to her attention that Spencer’s nose was stuffed up. He told her that Spencer's eye was going downward and when she looked at it she agreed, concluding he had a "lazy eye." She said she had not seen this before. She called the public health nurse who suggested the use of saline drops or a ball to clear Spencer’s nose. Mr. Chapman went to get the drops. When he returned Mr. Chapman’s cousin was waiting to

take him to work. She estimated this would have been between 8:30 and 9:00 a.m. She put the saline drops in Spencer's nose, but they did not help. She did not want to use the ball. Before going to the hospital she fed him, changed him and bathed him. By this time Mr. Chapman had left. At the hospital she told the nurse that he had "boogies" up his nose and could not breathe properly.

[41] Betty Maloney stated that her daughter called her at work on December 29th. She told her that Spencer was having trouble breathing and it looked like he had a "boogie" up his nose. She asked if she could use saline drops. Since he was so small, Betty told her to take him to the hospital to find out. Later Ms. Maloney called and said they were rushing Spencer to Moncton, that he had had a seizure and she was not sure what was going on. She and Mr. Chapman were going to follow in their car after picking up clothes and diapers. The next day Ms. Maloney called her and told her that they airlifted Spencer to Halifax. He had had another seizure. Later in the morning, on the 30th, Ms. Maloney called her mother and said after doing some tests they said Spencer had a skull fracture. Betty Maloney said she was beside herself at what was happening.

[42] Betty Maloney has had custody of Spencer since September 2011. She received full custody of him several weeks prior to trial. She described him as loving, sweet and very smart. He is full of life and does what he is asked. He lacks in talking but he does say some words such as "poppa" and "mommy". He sounds letters. She described him as a smart boy for his age. There are number of support workers who provide assistance to Spencer and whose assistance she expects will be required for some time. In response to Crown counsel she said she was a proud grandmother and that Spencer was doing very well. Under the court order Ms. Maloney and Mr. Chapman are only permitted to see him on Tuesdays and Thursdays from 9 to 10 o'clock.

Analysis

[43] There are two fundamental principles that govern every criminal trial: the presumption of innocence and the requirement for a conviction to rest on proof beyond a reasonable doubt.

[44] The presumption of innocence remains with an accused throughout the trial. It only ceases to apply if, after considering all the evidence, the court is satisfied

beyond a reasonable doubt that the accused is guilty. The accused has no obligation to prove they are not guilty, nor have they any obligation to explain the evidence presented by the Crown. The law presumes them to be innocent until a court of law, having considered all of the evidence, is satisfied that the Crown has proven every element of the offence charged beyond a reasonable doubt.

[45] This burden of proof on the Crown marks the second fundamental principle in our criminal law. Proof on a balance of probabilities, the civil standard, is not sufficient. The offence must be proved beyond a reasonable doubt, a requirement that extends to every element of the offence charged. There is no burden on the accused. If the Crown fails to prove a single element beyond a reasonable doubt, then the accused must be acquitted. In considering the principle of reasonable doubt, regard must be had to its meaning, as outlined by Cory J. in *R. v. Lifchus*, [1997] 3 S.C.R. 320 at 336-337 and *R. v. Bisson*, [1998] 1 S.C.R. 306, and as expanded and clarified by Iacobucci J. in *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, at 265-269. Proof beyond a reasonable doubt is more than proof on a balance of probabilities and less than proof to an absolute certainty. But it is "much closer to absolute certainty than to proof on a balance of probabilities": *Starr* at 267.

[46] A reasonable doubt is a doubt based on reason, on the logical processes of the mind. It is logically connected to the evidence, including any conflicts which may exist, after having considered the evidence as a whole. In considering the evidence, including the exhibits, I recognize I do not necessarily have to accept or reject all the evidence of any witness. I am permitted to accept part of it. I am required to direct myself to all of the evidence bearing on the relevant issues in order to attribute the correct weight, recognizing that individual pieces of evidence must not be examined in isolation but must be considered in the context of the evidence as a whole.

[47] In considering the evidence of the various witnesses, I recognize that witnesses see and hear things differently and discrepancies do not necessarily mean that the testimony of a witness should be disregarded. Discrepancies in trivial matters are often unimportant. In assessing credibility, one must consider the opportunity the witnesses had to observe the events to which they testified, the extent to which the witnesses had any interest in the outcome of the trial or any motive for either injuring or favouring the accused. In doing so, I must consider

whether the witness is entirely independent and whether the testimony is reasonably internally consistent.

Credibility

[48] Essential in determining whether any accused is guilty of any offence is an assessment of the credibility of the various witnesses who have testified, including witnesses qualified as expert witnesses, together with any exhibits tendered during the course of the trial. In this case the accused Lacy Maloney called evidence and testified herself. The accused Mitchell Chapman neither testified nor called evidence, although his counsel, during cross-examination of a Crown witness, tendered his videotaped statement made to a member of the Amherst police force.

[49] It is clear the evidence favouring the Crown and that favouring the accused as to whether either or both of them harmed the infant, Spencer Maloney, or failed to provide him with the necessaries of life, cannot stand together. Since each version cannot be factually true, I must assess the credibility of the witnesses. I recognize; however, it is not a question of reducing the case to a simple credibility contest.

[50] It is also possible, even without believing the evidence on behalf of an accused on a vital issue, that I may be left with a reasonable doubt and in such a circumstance, such an accused is entitled to be acquitted as well. To summarize:

> 1. If I believe the evidence of the accused, Lacy Maloney, that she did not harm Spencer Maloney then I must acquit her of the offence of aggravated assault;
>
> 2. If I believe the statement by the accused, Mitchell Chapman, to the Amherst police officer that he did not harm Spencer Maloney, then I must acquit him of the offence of aggravated assault;
>
> 3. If, following careful consideration of all the evidence, I am unable to decide whether to believe them, then I must also acquit them of the offence of aggravated assault;
>
> 4. Even if I do not believe their evidence, but I am left in a reasonable doubt by it, I must acquit such an accused;

> 5. Finally, even if I am not left in doubt by the evidence on behalf of the accused, I must go on to ask myself whether, on the basis of all the evidence that I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused, or either of them, on the offence of aggravated assault.

[51] In respect to the offence of failing to provide the necessaries of life, in addition to assessing the credibility of the evidence, as noted above, I am entitled to also assess the evidence of the accused Lacy Maloney, and the statement to the police by the accused Mitchell Chapman, in respect to what they say they did in providing Spencer Maloney with the necessaries of life.

The Law

The Offences

[52] The offence of failing to provide the necessaries of life to an infant, and thereby endangering his life or causing or likely causing, the health of the infant to be injured permanently, requires the Crown to prove that the infant was under the charge of the accused, and was unable by reason of age to withdraw himself from their charge, and was not able himself to provide himself with the necessaries of life and as a consequence his life was endangered or his health was caused, or likely caused, to be permanently injured.

[53] The infant, Spencer Gary Maloney, was born on December 4, 2009, in Moncton, New Brunswick. He was 25 days old on December 29, 2009. As such he was an infant and unable himself to obtain for himself the necessaries of life. The accused Lacy Maloney was identified as his mother and the accused Mitchell Chapman was identified as his father. Spencer Gary Maloney was living with them, and was therefore, under their charge and because of age, unable to withdraw himself from their charge.

[54] This offence imposes liability on an objective basis. The Crown must prove a marked departure from the conduct of a reasonably prudent parent in circumstances where it was objectively foreseeable that the failure to provide the necessaries of life would lead to a risk of danger to the life, or risk of permanent endangerment to the health of the child.

[55] The standard is that of a reasonable person in the circumstances of the accused. Failing to provide the necessaries of life requires proof only that the conduct constituted a marked departure from the standard of care expected of a reasonably prudent person in all the circumstances. The failure to provide the necessaries of life requires proof that the accused's failure endangered the life of the person to whom he or she owed the duty or that the accused caused, or was likely to cause, the health of that person to be endangered permanently.

Aggravated assault

[56] The offence of aggravated assault requires the Crown to prove that the accused applied force to the infant and that the force applied endangered the life of the infant.

[57] The Crown maintains that the injuries documented by the medical professionals, commencing on the morning of December 29th, were the result of trauma inflicted on Spencer. The Crown introduced evidence that during the period of Mitchell Chapman's relationship with Lacy Maloney he had exhibited a temper on a number of occasions. Reference was made to an occasion, following the taking of Spencer by Children and Family Services, when Mr. Chapman attended at a bank in Amherst and had a temper tantrum that led to the police being called. There was also an occasion when he visited the Amherst police station and again had to be restrained. Other examples were directly or indirectly referenced in the evidence presented by the Crown.

[58] There was no evidence of either accused ever striking Spencer or in any way directly causing him physical injury. The only evidence presented was of caring parents who exhibited concern for their child's welfare. Although Mr. Chapman did not testify, there was evidence from Dr. Carlson that he and Ms. Maloney told her that they did not know who had caused the injury to the child. Additionally, there was evidence from Ms. Maloney that not only did she not hurt the child but that she had never seen Mr. Chapman do so either. She also stated her belief that he would not have done so. Both of them speculated on the possibility that Ashton may have caused the trauma that resulted in the injuries to Spencer. Mr. Chapman, in his interview, said it may have been Ashton, or injuries caused by his striking the pan at birth, while Ms. Maloney in her testimony also indicated that either Ashton or the alleged unusual circumstances of the birth could have been the cause.

[59] On the basis of Dr. Wood's evidence it is clear that at least some of the injuries could not have dated back to birth and were of more recent origin, in effect, not more then three days preceding the CT scan on December 30th.

[60] With the exception of Julie Vansnick, whose evidence I do not accept on this point, the witnesses who testified about Ashton indicated an outgoing, hyper, rambunctious and active personality who enjoyed wrestling, both watching and practising on others. His active personality is no better demonstrated than in the video of the interview by the Amherst police and Children and Family Services, where throughout the whole interview he did not remain still, and during a substantial period, engaged in twisting the head of the police officer, both back and forwards and sideways. The efforts of the police officer to have him desist, were of no avail. When he was not doing this he was climbing over the furniture and generally being active throughout the whole period of the interview.

[61] In *R. v. Incognito-Juachon*, [2008] O.J. No. 2856, 2008 CarswellOnt 5463, a five-month-old child was taken to hospital by her parents with a bruised and swollen left ankle and foot that was determined to be fractured. The accused parents were charged, *inter alia*, with aggravated assault and failure to provide necessaries of life. At issue was which accused parent had caused the injuries. The court accepted that Ms. Incognito-Juachon was the primary caregiver while Mr. Juachon was away at work. At paras. 140 to 144, Trotter J. concluded:

> 140 As I mentioned earlier in these reasons, there is an overwhelming temptation to conclude that because Mr. Juachon and Ms. Incognito-Juachon had almost exclusive access to Jhasmine for the first five months of her life, at the very least, one of them must be found guilty for her injuries. There is great power in this intuition, especially in a case as emotionally charged as one dealing with serious injuries to a helpless infant. However, cases cannot be decided on the basis of intuition. Cases must be decided on the basis of the evidence presented, and the inferences that may be reasonably drawn from the evidence, measured against the formidable reasonable doubt standard.
>
> 141 There have been cases where it was virtually certain that one of two parents caused injury or death to a child, but neither was found guilty because it could not be determined, beyond a reasonable doubt, who the actual perpetrator was. This is precisely what occurred in the cases of *R. v. Schell* and *R. v. Schell* (1977), 33 C.C.C. (2d) 422 (Ont. C.A.) and (*R. v. Schell (No. 2)* (1979). 47 C.C.C. (2d) 193 (Ont. C.A.).

> 142 The principle in these cases was recently restated in *R. v. K. (A.)* (2002), 169 C.C.C. (3d) 313 (Ont. C.A.). at pp. 319-320 where the court said:
>
> > *Schell and Paquette* established that if a jury is satisfied beyond a reasonable doubt in a murder prosecution that the victim was killed by one of two accused, but is unable to determine which one of them, then both accused are entitled to be acquitted.
>
> 143 On this issue, see the discussion in Glanville Williams, in the article, "Which Of You Did It?" (1989), 52 Modern Law Review 179, in which Professor Williams reviews examples of the application of this principle in cases involving violence by parents against their children.
>
> 144 I wish to be absolutely clear about the import of my findings in this case. On the basis of all of the evidence once presented in this case, I believe that is likely, highly likely, that Jhasmine's injuries were caused while in the care of her parents. That is, it is probably the case that one or both of them is somehow responsible for her injuries. However, I am not satisfied of my conclusion beyond a reasonable doubt.

[62] In the present case there is no evidence that the accused, Lacy Maloney, did anything physically harmful towards Spencer. The evidence, as noted earlier, is that she was a loving and caring parent who reacted well to her children. In respect to Mr. Chapman there is evidence of his temper and suggested propensity for violence but there is also no evidence that he ever struck Spencer or did him any harm. Evidence of temper and a possible propensity for violence is only evidence that he could have done something, not that he actually did anything to Spencer.

[63] As noted in *Incognito-Juachon*, *supra.*, the Ontario Court of Appeal held in *R. v. A.K.*, [2002] O.J. No. 5721, at para. 17, that where the finder of fact is satisfied that one of two accused caused the harm, but cannot determine which, both should be acquitted. Although *R. v. A.K.*, *supra.*, involved a preliminary hearing on a charge of murder, the principle remains that if there are two accused charged but it is unclear which of them committed the act, then both are entitled to be acquitted.

[64] Counsel on behalf of Ms. Maloney cites *R. v. V.I.*, [2008] O.J. No. 3640 (Sup. Ct. J.), as well as *R. v. Palombi*, 2007 ONCA 486, in support of the submission that guilt cannot attach to Ms. Maloney on the basis that she knew of

abuse by Mr. Chapman. I agree, in view of my factual finding that the evidence does not necessarily establish abuse by either of the accused. The Crown argues that these cases are distinguishable on the facts and, more particularly, on the basis that Ms. Maloney's evidence as to the timing of the child's injuries, as well as her evidence respecting the circumstances generally, should not be believed. There are clearly inconsistencies in Ms. Maloney's evidence, but this alone is not sufficient to make out the elements of aggravated assault.

[65] There is of course the possibility of the two accused forming the intention to carry out a common unlawful purpose, contrary to section 21(1) of the *Criminal Code*. However there is no evidence of any such common intention here.

[66] In view of the possibility that the trauma was caused by Ashton, the Crown has not established, to the extent of the burden resting upon it, that one or the other of the accused inflicted the trauma on Spencer. There was trauma but that is not sufficient to support a conviction of aggravated assault against persons who are not, on the evidence, whether direct or circumstantial, identified as the offender.

Necessaries of life

[67] The duty created by section 215(2)(b) is on the persons having charge of the infant. In this case those persons are the two accused. Necessaries of life include protection from physical harm, in the case of an infant less than 30 days old. Spencer was harmed; severely harmed. The only issue is whether those charged with his care failed in their duty. As with this offence, there is no compelling evidence that either of the two accused inflicted the child's injuries. The evidence is that he suffered trauma at some point between December 27 and the morning of December 29, 2009. Although not all his injuries can be identified as occurring in this time period, the ones that can be are sufficiently serious to conclude that Spencer was denied the essential necessaries of life in respect to protection from physical harm.

[68] As already noted, the accused, Ms. Maloney, in respect to her testimony at trial, as well as in earlier statements, and Mr. Chapman in respect to what he said to Dr. Carlson and during his interview, say that they did not harm the child. Such a conclusion is implicit from their response to Dr. Carlson, that they did not know who had harmed the child. Each of them suggests that it could have been Ashton, or injuries at birth. For reasons already reviewed I reject the suggestion that there

was no trauma resulting in injury visited on Spencer between December 27th and December 29th. As such, these injuries were not caused by the suggested events at his birth. Their answer as to the cause of these injuries to Spencer is; therefore, that it was Ashton.

[69] Dr. Wood in responding to the question of whether a four-year-old could have caused the trauma, said the injuries occurred no earlier than three days preceding the CT scan she examined. She also commented that to cause such injuries would take a significant amount of force. However, she did not appear to rule out the possibility that a four-year-old could have caused them.

[70] Accepting for this purpose, the statements by the accused that it was not them and having concluded that not all of the injuries could be traced back to Spencer's birth, the only conclusion is that it was Ashton who caused these injuries. If that was the case, has the Crown proven that the accused failed to meet their obligations under section 215(2)(b)?

[71] As extensively described in the evidence, Ashton, in December 2009, was an active, hyper, rambunctious child who enjoyed touching Spencer, showing him his toys, including some of his wrestling toys and wanting Spencer to play with him. The evidence of both Nicole Sears and Lacy Maloney is of a very hyper child, I am satisfied he was a child who should not be left alone with an infant of less than 30 days. Lacy Maloney testified, when asked how Ashton could have hurt Spencer, that she may have momentarily turned away. Mr. Chapman referred to the possibility they might have turned their back “for a second.” That explanation is simply not reasonable. The injuries inflicted on Spencer did not occur during a momentary lapse of attention by one of the parents. If they had, it would have been immediately evident that Ashton had inflicted some form of trauma on Spencer. The statements by the accused that it must, in effect, have been Ashton amount to an admission that they had failed in their duty to protect Spencer from physical harm. The personality of Ashton called for care to be taken to ensure that he did not have unsupervised access to Spencer at any time.

[72] Now if the accused are lying or misleading in suggesting Ashton caused the trauma to Spencer, then they are doing so, in concert, to avoid disclosure that they, or one of them, are the persons who hurt Spencer. As such they are also failing in their duty, by having caused the trauma to Spencer or by failing to disclose the conduct by the other. Failing to provide the necessaries of life includes not only

failure to avoid trauma, but also, failure to take reasonable and appropriate steps once it has occurred. If Ashton did not cause these injuries then one, or both of them did and in such a circumstance they have each failed in their duty to Spencer.

[73] It is not for the accused, having denied inflicting harm on Spencer, to allege that it was done by a four-year-old, and to then maintain they were not responsible, at least in the circumstances of the known personality and character of the four-year-old. Even in a criminal case, the accused are not entitled to have it both ways. They either inflicted the harm, which they deny, or having said it was the four-year-old, they must accept responsibility if in the circumstances it would have been reasonable to assume that there was such a risk. In these circumstances the failure to ensure that Ashton did not have unsupervised access to Spencer constitutes a marked departure from the standard of care expected of a reasonably prudent person in all the circumstances.

[74] On the evidence of Dr. Wood it is clear that Spencer's life was endangered by the trauma he received. It is also likely that it caused some permanent injury. On the evidence I am satisfied that all the elements of section 215(2)(b) have been established beyond a reasonable doubt. On the basis of their own admissions, as well as the evidence as a whole, I find the defendants guilty of the offence of failing to provide the necessaries of life, contrary to section 215(2)(b) of the *Criminal Code*.

MacAdam, J.