NOVA SCOTIA COURT OF APPEAL
Citation: ***F.M. v. Nova Scotia (Community Services)***,
2010 NSCA 37

Date: 20100429
Docket: CA 321159
Registry: Halifax

Between:

F.M. and M.R.

Appellants

v.

Minister of Community Services

Respondent

Editorial Notices

Identifying information has been removed from this electronic version of the judgment.

Publication Ban:	**pursuant to s. 94(1) of the Children and Family Services Act**
Judges:	Saunders, Hamilton and Fichaud, JJ.A.
Appeal Heard:	April 16, 2010, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Hamilton and Fichaud, JJ.A. concurring.
Counsel:	Eugene Y.S. Tan, for the appellants Pamela J. MacKeigan, for the respondent

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

Reasons for judgment:

[1] This appeal concerns custody of two young brothers, J.R. born May *, 2007, and N.R. born April *, 2008. The named appellants, F.M. and M.R. are the biological parents of the boys who were placed in the permanent care and custody of the Minister of Community Services by decision and collateral orders of Nova Scotia Supreme Court (Family Division) Justice Deborah Gass.

[2] While the parents were represented by separate counsel at trial, they are now represented by the same counsel on appeal who, in answer to the Court's inquiry, advised:

> I am representing both of the Appellants in this appeal, as both are unified in interest in relation to the issues on appeal.

[3] The appellants allege various errors of law and fact by the trial judge and ask us to allow the appeal, "quash" the permanent placement orders (presumably then requiring the Agency to arrange for a transitional transfer of the boys to the care of their parents) or, alternatively, to order a new trial. For the reasons that follow I would dismiss the appeal.

Background

[4] The unique and difficult circumstances surrounding this family, as well as the particular challenges associated with rearing J.R. and N.R. are thoroughly reviewed by Justice Gass in her comprehensive decision now reported at 2009 NSSC 366. I need not repeat them here. Rather, I will emphasize certain details when I consider the appellant's submissions.

[5] It is important to observe that Gass J. was intimately familiar with the significant burdens facing this family, having presided over a number of hearings of several days' duration. Justice Gass acknowledged struggling with her decision, as is obvious from her painstaking review of the evidence, her careful assessment of the parents' positions at trial, and her thoughtful consideration of the kind of disposition which would be necessary to achieve and protect the best interests of each of these children.

[6] To set the stage and describe the incident which triggered the intervention of the Minister, I will at this point provide a brief introduction. Following his admission to the IWK Hospital around midnight on June 12, 2008, N.R. – then only two months old – was assessed by a team of physicians and other health care professionals for his injuries and a variety of other serious medical challenges. Subsequent investigations were carried out involving several medical specialities including pediatrics, genetics, neurology, and neurosurgery. He had significant bleeding in the brain and behind the left eye. He suffered seizures. Fluid had to be drained to reduce swelling. He required blood transfusions. He suffered frequent bouts of vomiting on account of gastroesophageal reflux, and consequently was under nourished and under weight.

[7] N.R. was also diagnosed as having two pre-existing congenital defects occurring at conception or early after conception: gray nodular heterotopia and 22 QII microdeletion syndrome. These conditions are implicated in causing developmental delay for some children. N.R.'s condition upon arrival at hospital and subsequent observations by medical staff put the Child Protection Team at the IWK Health Centre on alert. Dr. Steven Bellemare, an Assistant Professor of Pedeatrics at Dalhousie University and a pediatrician with the Child Protection Team, took charge. Later in the day he arranged a telephone conference with N.R.'s parents. Joining Dr. Bellemare on the call was Ms. Joan Rankin, a social worker. They asked the parents to provide them with a history to explain why N.R. presented at the hospital in the way that he did. Dr. Bellemare was not satisfied with what he heard.

[8] At trial Dr. Bellemare was qualified as an expert in pediatrics with special expertise in child maltreatment, neglect and injury interpretation. With respect to the injury to N.R., Dr. Bellemare filed two reports with the court, the first dated August 5, 2008 containing the following conclusion:

> At the age of two months, [N.] presented to hospital with severe heterogeneous bilateral subdural hemorrhages and unilateral retinal hemorrhages, which extended involved multiple retinal layers, were too numerous to count and extended to the ora serrata. No medical condition was found to explain [N.]'s subdural and retinal hemorrhages. No history of trauma was initially provided to explain [N.]'s injuries, although [N.]'s father stated that he was not always gentle with him. Eventually a history of [N.]'s head having been bumped into a doorframe was provided, although this was not felt to appropriately explain the subdural and retinal hemorrhages. In light of these features, an inflicted traumatic

> brain injury is suspected, which may not have been a solitary event. Although dating cannot be done with certainty, the initial injury is likely to have occurred a few weeks before [N.] presented to hospital and may have been repeated on or about June 13, 2008, to precipitate his seizures and altered level of consciousness.

[9] Dr. Bellemare prepared a second report dated August 12, 2009 in response to a series of questions posed by counsel for the appellants. This report dealt with N.R.'s two existing congenital defects, gray nodular heterotopia and 22 QII microdeletion syndrome. Dr. Bellemare reported that these conditions were unrelated to the child's injuries as far as etiology/susceptibility was concerned and the importance of these medical issues pertained to the child's prognosis with respect to how he would do in the future and his expected developmental outcomes.

[10] During his testimony at trial, Dr. Bellemare went on to explain in detail the basis for his opinions.

[11] What happened as a result of N.R.'s hospitalization and treatment is described by Justice Gass:

> [11] A Notice of Taking into Care was issued on June 13, 2008 as a result of the concerns raised about the severe injuries to N. and he was taken into care on that date along with his brother J.. Both children were found to be in need of protective services and a temporary care and custody order was granted and continued right through with the first disposition order being made November 10, 2008, which was a temporary care and custody order.

Issues

[12] In their notice of appeal filed December 9, 2009, the appellants list the following alleged errors:

> (1) The Learned Trial Judge erred in law by failing to examine whether any injuries sustained by one or both children were intentional or unintentional, and therefore incompletely analyzed the risk of future harm;
>
> (2) The Learned Trial Judge erred in law in relying upon, either directly or by analogy, the doctrine of *Res Ipsa Loquitur*;

(3) The Learned Trial Judge committed a manifest or palpable error of fact in finding that one or both children had been harmed, and were at risk of future harm, for the following reasons,

a. The Learned Trial Judge inadequately considered the effect of certain pre-existing genetic disorders,

b. The Learned Trial Judge made no reference at all and failed to consider to the evidence of the Appellants with respect to their (then) current relationship, and

c. The Learned Trial Judge accepted or placed too much weight on hearsay evidence with respect to past or future harm; and

(4) Any other grounds that may become apparent upon a review of the transcript of the proceedings.

[13] Those grounds of appeal are restated and reorganized in the appellants' factum . At para. 16 the appellants write:

16) The issues/grounds of appeal were raised by the Notice of Appeal dated December 9, 2009. To ensure the natural flow of argument, the issues will be addressed in the manner and order noted as follows:

a) The Learned Trial Judge erred in law in relying upon, either directly or by analogy, the doctrine of Res Ipsa Loquitur;

b) As a result, the Learned Trial Judge erred in law by failing to examine whether any injuries sustained by one or both children were intentional or unintentional, and therefore incompletely analyzed the risk of future harm;

c) The Learned Trial Judge accepted or placed too much weight on hearsay evidence with respect to past or future harm (previously suggested a ground of appeal based on manifest or palpable error of fact);

d) The Learned Trial Judge committed a manifest or palpable error of fact by failing to take into account the Appellants' response to some allegations raised in the Parental Capacity Assessment Report, and in finding that one or both children had been harmed while in the exclusive care of the Appellants.

[14] In my view, the various grounds and issues raised by the appellants, as well as the individual arguments to which they relate can best be addressed by posing two questions:

(i) Did the trial judge err in law in her application of the proper standard and burden of proof?

(ii) Did the trial judge err in law or in fact in her consideration of the evidence?

[15] For reasons I will now develop I would answer both questions in the negative, and would dismiss the appeal.

Standard of Review

[16] The issues and arguments advanced by the appellants raise questions of law, and of fact. Each draws its own distinct standard of review. As this Court observed in **2703203 Manitoba Inc. v. Parks**, 2007 NSCA 36:

> [27] To summarize then, on questions of law the judge must be right. Such questions are tested on a standard of correctness. Matters of fact, or inferences drawn from facts are owed a high degree of deference and will not be disturbed unless they resulted from palpable and overriding error. Matters said to be mixed questions of fact and law are also tested using the palpable and overriding error standard, unless the mistake can be easily linked to a particular and extricable legal principle, which will then attract a correctness standard. Where, however, the legal principle is not readily extricable, the question of mixed law and fact will be reviewable on the standard of palpable and overriding error.

[17] In addition, proof that the trial judge missed, ignored or misapprehended important evidence, leading to an error of law, will warrant appellate intervention. **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 at para. 80; **Housen v. Nikolaisen**, 2002 SCC 33 at para. 46 and **Young v. Meery**, 2009 NSCA 47 at para. 20.

[18] Finally, it bears repeating that an appeal is not a retrial. Considerable deference is paid to the findings of a trial judge who enjoys the advantages of hearing the witnesses, appreciating the nuances of the evidence, and "weighing the many dimensions of the relevant statutory considerations". Absent error in law or

palpable and overriding error in fact we will not intervene. **Children's Aid Society of Cape Breton-Victoria v. A.M.**, 2005 NSCA 58; **L.D. v. Children's Aid Society of Cape Breton-Victoria**, 2010 NSCA 20.

[19] I will apply these principles to my analysis in this case.

Analysis

(i) Did the trial judge err in law in her application of the proper standard and burden of proof?

[20] Here the appellants advance two principal arguments. First, the appellants say the "evidentiary rule" of *res ipsa loquitur* was abolished by the Supreme Court of Canada in **Fontaine v. British Columbia**, [1998] 1 S.C.R. 424". They allege the trial judge's application of this maxim was in error and "... akin to imposing a standard of strict liability." Second, the appellants say the judge failed to make a finding as to whether the injury sustained by N.R. was "unintentional or deliberate" which – it is argued – made it impossible for the judge "... to assess the risk of future harm from this type of injury if the cause of past or current harm has not been established". Accordingly, the appellants say the judge "made a manifest error" and could not have properly determined that "N.R. was at risk for another, similar accident in order to justify the order for permanent care."

[21] In my view, these complaints can best be characterized as relating to the standard, and the burden, of proof.

[22] It is trite to observe that the identification and application of the proper standard and burden of proof, is a question of law to which a standard of correctness will be applied. **Housen , supra**.

[23] With respect, I see no merit to the appellants' submissions. At about the mid way point of her decision, Justice Gass said:

> [36] So, certainly, there is absolutely no doubt that the child actually suffered physical harm while in the care of his parents. Whether or not that injury to N. was intentional, or whether it was unintentional and in a moment or during moments of frustration when a parent might have lost his or her temper, the fact remains that N. was seriously injured while in his parents' care. The injury was

> inflicted while in their care, there were no other caregivers, so that the only conclusion is that it had to be inflicted by one of the parents and that the other parent did not, would not or could not protect the child from physical harm by the other parent. There is the maxim that counsel would be familiar with, *res ipsa loquitur* - the thing speaks for itself.

[24] This was the trial judge's only reference to the phrase *res ipsa loquitur* throughout the course of her lengthy judgment. In my respectful view she never "relied upon" or applied "the maxim" as any kind of shortcut to her analysis or reasoning process. It may have been a poor choice of words, but I see it as nothing more than a label or expression to illustrate the point she was trying to make for counsel.

[25] As the Supreme Court of Canada made clear in **Fontaine, supra**, the Latin phrase *res ipsa loquitur* (the thing speaks for itself) is no longer a valid legal "doctrine" (if it ever were). Historically it appeared in cases where the facts permitted an inference of negligence when there was no other reasonable explanation for the accident. Major J., writing for the Court, put it this way:

> 27 It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a prima facie case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.
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> ...
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> 28 In this appeal, the trial judge had to consider whether there was direct evidence from which the cause of the accident could be determined, or, failing that, whether there was circumstantial evidence from which it could be inferred that the accident was caused by negligence attributable to Loewen.

[26] The Supreme Court of Canada's rejection of *res ipsa loquitur* as a useful maxim was not intended to supplant the reasoning process by which circumstantial evidence is to be assessed. In such cases the trier is still compelled to weigh the

circumstantial evidence in order to determine if it is sufficient to support the inference urged by its proponent.

[27] That is precisely the kind of analysis undertaken by Justice Gass in this case. She was obliged to decide the merits of the application brought by the Minister of Community Services for an order for permanent care and custody of the two children, J.R. and N.R. She correctly described the burden of proof as resting with the Minister, it being the civil standard based on proof on a balance of probabilities.

[28] In a case such as this, the applicant will point to either the direct evidence from which the cause of the event can be determined, or, to the circumstantial evidence from which the cause of that same event may be inferred as being attributable to the parent(s). In cases involving injury to young children who are unable to speak for themselves, one might expect the evidence to be primarily circumstantial in nature. Whether an inference can legitimately be drawn from the evidence will of course be highly dependent upon the circumstances of each case. I see no error in the trial judge's reasoning or analysis.

[29] Contrary to the appellants' submission it was not incumbent upon the trial judge to determine whether the injury to N.R. was intentional or unintentional. Such an inquiry would be the subject of criminal proceedings where the Crown would be obliged to prove guilt beyond a reasonable doubt. Those differences were clearly understood by the trial judge. Justice Gass focussed on the fact that N.R. had suffered serious and permanent injury while in the care of his parents, at a time when there were no other caregivers. Gass J. acknowledged the fact that N.R. had been hospitalized for three days in May (and consequently was not in the care of his parents) for a urinary tract infection. However, there was not a shred of evidence to suggest that he was in any way harmed during that hospitalization, or that, upon release from the hospital in May, the child presented with the injuries observed on the night of June 12. Accordingly, on the evidence, Gass J. was entitled to find, as she did, that:

> [36] So, certainly, there is absolutely no doubt that the child actually suffered physical harm while in the care of his parents. ...

This finding forced her to deal with the critical question: could these parents protect N.R., and his brother J.R., from physical harm while in their care?

[30] The evidence of Dr. Bellemare was clear and compelling. His opinions were not shaken on cross-examination. He considered and rejected each of the parents' "explanations" for N.R.'s difficulties. We see this exchange which is reflective of Dr. Bellemare's overall assessment:

> Q. And were the parents able to identify any medical condition or incident that could have led to the trauma?
> A. No. In the end, there was nothing that we discussed that, in my mind, adequately explained [N]'s injuries.

[31] One cannot fault the manner in which the trial judge analyzed the evidence or applied that analysis to the issues before her. After rejecting the "explanations" offered by the appellants, Gass J. went on to ask herself, on the basis of the circumstantial evidence she did accept, whether she could reasonably draw the inference that N.R.'s injuries had to have been inflicted by one of the parents and that the other parent had not, would not or could not protect the child from physical harm by the other.

[32] Her unambiguous and strong findings of fact reflect the trial judge's careful evaluation of the evidence surrounding these episodes with N.R. To illustrate I will refer to the following extracts:

> [33] Turning to the injury again, the evidence was that N. suffered inflicted head trauma. I will emphasize that this is not a criminal trial and the standard of proof is different here. It is not proof beyond a reasonable doubt, rather it is the balance of probabilities. It is clear from the evidence that the child N. did suffer serious injuries and that there is no adequate explanation for those injuries. The evidence which is un-refuted is that they were inflicted and because there were no others caring for the child they were incurred by N. while he was in the care of his parents.
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> [34] The father denies doing anything deliberately to the child which would cause this level of trauma. The explanations the parents have given, and there were a number of them, were ruled out as being insufficient to cause the injuries the child sustained. There was a frank admission by Dad of some frustration with N.. He was very forthright about that in terms of the frustration with feeding, etc., and he did acknowledge that on one occasion he held him up in front of him and told him to shut up and he demonstrated how he did that. However, at another point in his evidence he said that N. did not cry loudly. He also dropped N. on the bed, I believe it was June the 11th, where his mother was lying, dropped him

from the standing position and N.'s head hit his mother's arm, but that was not considered to be something that would be significant enough in and of itself to sustain that kind of injury. There was also the evidence of the mother rushing into the bathroom with N. in her arms and accidentally banging his head on the side of the door. And, as well, there was some reference to him having excessively forceful bowel movements and they thought the strain might have contributed to his injuries. But none of those explanations explained the degree of injury that the child sustained. Those injuries were so significant and so severe that none of those incidents would be sufficient to explain it.

[35] There was also some suggestion of J. throwing toys at him, dropping them on him in the crib, but that too was not an explanation.

[36] So, certainly, there is absolutely no doubt that the child actually suffered physical harm while in the care of his parents. Whether or not that injury to N. was intentional, or whether it was unintentional and in a moment or during moments of frustration when a parent might have lost his or her temper, the fact remains that N. was seriously injured while in his parents' care. The injury was inflicted while in their care, there were no other caregivers, so that the only conclusion is that it had to be inflicted by one of the parents and that the other parent did not, would not or could not protect the child from physical harm by the other parent. There is the maxim that counsel would be familiar with, *res ipsa loquitur* - the thing speaks for itself.

...

[38] What we do know is that Ms. M. and Mr. R. were a young, isolated couple with an eleven month old child, living in an apartment and they had another child born within a year of the birth of their first child. There were significant problems in their relationship. It was strained to begin with and one can only imagine how stressful it was after the birth of N.. This new baby suffered significant difficulties in terms of feeding, etc., and then eventually sustained this significant brain injury that presented at the hospital, which occurred at the hands of one or both of his parents in the family home, with the other parent seemingly unable to protect the child from harm.

[39] Because of this serious inflicted brain injury, and I make no determination on how it came to be, whether it was unintentional or deliberate, and how it occurred, the result is that we have an infant with some very high needs.

[40] Ms. M. and Mr. R. have another child, a toddler, J., and they are about to have a third child and it will be their third child in less than two and a half years. I have been somewhat repetitive in working through this but I will say it again: the child has suffered the physical harm and that, coupled with his congenital

> problems, requires significant parental and professional intervention and treatment. In listening to the evidence, he requires extraordinary parenting. Ms. M. and Mr. R. have little in the way of community and family support to assist them with the extreme demands of parenting these two young children. They also have work demands. The child also has some significant developmental conditions which will require ongoing intensive care and supervision. When one considers the task of doing that with two small children, it would be virtually impossible to meet the needs of N. with three small children under the age of three.
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> [41] The mother acknowledged in her evidence that the father would become frustrated with N. and she would encourage him to be gentler or she would take over to alleviate his frustration. She has also indicated that she is very committed to her relationship with Mr. R. and has no intention of leaving the relationship. Therefore, I can only conclude that the child N. has not been adequately protected while in their care, and there does not appear to be any evidence of insight or changes in their approach to parenting which would suggest that N. could be adequately protected in their care. Because there is no acknowledgement of a problem, there are no services and there have not been services in place to address the problems. There are no alternative family or community placements and it would appear that no consideration of leaving Mr. R. and going to * with the children has been given any real consideration by the mother.
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> [42] So the circumstances that led to the child N. being taken into care have not really changed. There is no acknowledgement that anything untoward happened and therefore no reason for remedial action to be taken.
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> ...
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> [46] Having said all of that, there is no question in my mind that the best interests of the child N. can only be met by an order for permanent care. I am not satisfied that the circumstances that caused N. to be brought into care have been alleviated or ameliorated by the parents. He has already suffered significant physical harm and the parents are not able to protect him from harm. There is no alternate placement available to him and the circumstances that caused him to be brought into care do not appear to have changed in any way and certainly will not change within the time frame set out in the legislation.

[33] After deciding that N.R.'s best interests could only be met by placing him in the permanent care of the Minister, the trial judge then turned her attention to his older brother J.R. She recognized that their circumstances were very different and that his situation had to be evaluated, separately. She said, in part:

[47] The child J.'s circumstances were and are different from those of N.. There is no medical evidence of any concerns regarding J.. The parental capacity assessment noted that there was some developmental delay with J. in that at the age of 22 months he was not speaking and at the age of 13 months he had not been introduced to solid foods, although there was some suggestion that the parents were about to do that when he was taken into care.

[48] There was evidence that he was more comfortable in his crib and did not want out of his crib when he went into foster care, and there would be some question about whether that was a comfort thing for him. However, at the same time there was evidence, and it was evidence from the parents themselves, that he was essentially left often to entertain himself while they played video games and he was barricaded in the living room. ... The overall picture that was left with the court was that the child was, to a large extent, left on his own. It was noted as well by the foster mother that he really did not know what to do with toys; that he did not engage in eye to eye contact; that he really did not seem to know how to play, and that he basically was more comfortable just being left alone in his crib. ... There were language delays, but at the same time we are dealing with a child who, at that point when he was taken into care, was 13 months of age, and he couldn't hold his own bottle. ...

[50] The court struggles more with the situation with respect to J. because it was not his circumstance that brought the children into care; it was the circumstances with respect to N.. However, there was a lot of evidence that indicates that the parents do not put the children's needs ahead of their own and that to some extent they see their children as possessions or as objects of pride. ...

[52] As well, there was in the evidence a concern that the mother demonstrated a lack of appreciation and understanding of J.'s personality and his development. That came out in the psychological assessment, and it appeared from those reports that the children were seen to meet the parents' own emotional needs versus them meeting the children's emotional needs. ...

[53] There was also evidence that the emotional environment for J. in the household of his parents is one full of anxiety and unpredictability with the uncertainty of his parents' relationship. He had been exposed to arguing and tension in his parents' relationship and it is acknowledged that while Mom was pregnant with N., Dad was involved in another relationship and that there has been incredible stress in their relationship.

[54] While they did acknowledge the need for structure for their children, it did appear that rather than the parents' schedule revolving around the children, and in this case I'm speaking of J. because he was with them for a longer period of time, it seemed that J.'s schedule revolved around his parents' schedule.

...

> [56] So the court then has to take all of that information with respect to J. and determine what is in his best interests. Certainly the preservation of the family unit is the goal if it is in the best interests of a child and not contrary to it. The court is handicapped in that we don't know anything about their family situation except what we have learned from them. J. is just two years of age, he is non-verbal, he is a fragile child and he is totally dependent on his parents for his well-being.

[34] As required, the trial judge considered less intrusive options, other alternative family or community placements, as well as the likelihood of positive change within the time frames prescribed by statute. She looked at the parents' plan which was to have both children returned to their care. She found as a fact that these two little brothers had formed "significant attachment" and "a very loving and nurturing relationship" with each other. While recognizing that she could not force the Agency, subsequent to a permanent care order, to keep the children together, the judge emphasized the Agency's clear intention to do so in pursuing a plan for adoption of the siblings, together. Justice Gass concluded:

> [62] ... In my view, looking at all of the circumstances and what is in the best interests of J., it is my view that the risk to J. emotionally and physically of splitting him from his sibling and returning him to the care of his parents outweigh any benefits of returning him to his parents under the present circumstances. The possible long-term risk of eventual separation is out-weighed by the benefit of the Minister being able to pursue its plan for adoption. The court doesn't have a crystal ball, but these two children are very young so there is a greater chance of adoption together at this point and the court is not in a position to experiment with the fact that it <u>might</u> work out with J. returning to his parents' care. That prospect is also tempered by the fact that the birth of another child is imminent and what impact that would have.
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> [63] I am satisfied that there continues to be a risk of harm for J., even though he was not injured while in the care of his parents. He has some challenges and there will be ongoing challenges in parenting J. as he gets older and can't be as easily contained as he was during the first 13 months of his life in the care of his parents. There are some ongoing issues of behaviour, aggression and anger that will require some concerted, patient parenting and the ongoing instability of the parent's relationship will impact on his emotional well-being.
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> ...

> [65] The decision I am making therefore is premised on the understanding that the agency will move towards the adoption of both siblings together. ... Therefore, I am satisfied that it is in the best interests of J. for him to be placed in the permanent care of the agency along with his brother N. with a plan for adoption of the siblings together. And I will make that order.
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> ...
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> [68] I have struggled with this decision, and I have very carefully weighed all of the evidence in coming to this conclusion and I am satisfied that the best interests of the children require this very difficult decision today.

[35] For all of these reasons I am satisfied that Justice Gass correctly applied the law to her analysis of the evidence and the issues in deciding that an order of permanent care was required to satisfy and protect the best interests of both N.R. and J.R.

[36] I will turn now to a consideration of the second question I posed.

(ii) Did the trial judge err in law or in fact in her consideration of the evidence?

[37] Here, there are three central aspects to the appellants' grounds of appeal. First, they dispute the trial judge's assessment of J.R.'s challenges by stating in their factum "the only evidence of these needs was contained as hearsay evidence in the Parental Capacity Assessment Report ....". Second, they say the judge did not appear to consider their evidence offering "plausible" explanations for N.R.'s condition, or that her reasons were inadequate to test the correctness of her conclusions. The appellants' third complaint is that the trial judge over-emphasized the difficulties they had experienced early on in their marriage while effectively ignoring "the quality of the relationship" at time of trial, and their prospects for the future.

[38] With respect I would reject each of these allegations.

[39] The appellants challenge to the trial judge's "reliance on hearsay evidence" is in reference to certain information contained in the Parental Assessment Report

prepared by Linda MacEachern, Social Worker, and Heather Cake, Psychologist, of the IWK Health Centre, Assessment Services. During argument at the hearing appellants' counsel could refer us to only two paragraphs in the 41-page report which he said constituted hearsay and ought not to have been accepted by the trial judge. These paragraphs report comments made by J.R.'s foster parent raising concerns about J.R.'s developmental delay and aggressive behaviour. At the hearing counsel for the appellants argued that these comments featured prominently in the trial judge's decision which then led her to erroneously conclude that J.R. was at risk in the appellants' care. With respect, I cannot accept the appellants' submission.

[40] It is well settled that an expert opinion is not inadmissible merely because the expert relied on hearsay in the formulation of his or her opinion. It then becomes a question of what weight ought to be attached to such evidence by the trier of fact. See for example, **R. v. Abbey**, [1982] 2 S.C.R. 24; **R. v. Lavallee**, [1990] 1 S.C.R. 852 and **R. v. Gibson**, 2008 SCC 16.

[41] Ms. MacEachern and Ms. Cake were both qualified with the consent of counsel to give expert opinion evidence at trial. No objection was made concerning the "hearsay" contained in their report, and their report was admitted in evidence by consent. Had there been any objection to their qualifications; or to the opinions they expressed; or to the facts, commentary, inferences and assumptions upon which such opinions were based; objection ought to have been raised at trial. A review of the transcript of these lengthy proceedings shows that all of the evidence was admitted without objection, with the single exception on account of hearsay, relating to a conversation between a child care worker and an attending physician, a matter which has nothing to do with the appellants' present argument on appeal. At the hearing, counsel for the appellants conceded that he had not urged Gass J. to ignore the two impugned paragraphs from the 41-page report. Neither had he sought to subpoena the foster parent to cross-examine her and challenge her evidence.

[42] I am not persuaded that Gass J. erred by possibly considering those few comments attributed to the foster mother, in her overall assessment of J.R.'s ongoing needs. In any event, those comments were but one of several sources, which led to the trial judge's conclusions. For example, in assessing J.R.'s needs Gass J. emphasized the evidence of the appellants themselves. The judge had Dr.

Bellemare's detailed written opinions on both brothers. She had the evidence of other pediatricians who were involved in J.R.'s assessment. Gass J. was aware of J.R.'s own mother's psychological assessment; the emotional environment surrounding J.R.; the lack of structure in his own daily schedule, the numerous stressors in his parents' lives; all these facts were taken into account by the judge in reaching her conclusion that:

> J. is just two years of ago, he is non-verbal, he is a fragile child and he is totally dependent on his parents for his well-being.

[43] Finally, Gass J. focussed on the significant bond between the brothers and the very loving and nurturing relationship they enjoyed which led her to ultimately conclude:

> ... that the risk to J. emotionally and physically of splitting him from his sibling and returning him to the care of his parents outweigh any benefits of returning him to his parents under the present circumstances.

[44] For all these reasons I see no merit to this submission of the appellants.

[45] Turning now to the appellants' second complaint it cannot be seriously suggested that the trial judge failed to consider the appellants' evidence, or the medical evidence concerning the cause of N.R.'s injuries and his future needs. It is obvious that Gass J. conducted a masterful review of the evidence in her evaluation and subsequent rejection of the parents' "explanations" for N.R.'s injury, whether said to stem from his significant congenital problems and complex medical history, or otherwise. Her reasons were perfectly adequate to permit appellate review.

[46] Finally, the appellants cannot suggest or infer that the trial judge overemphasized their past difficulties and failed to assess the "quality" of their relationship at the time of trial, or in future. On the contrary, Justice Gass made frequent references to each parent's testimony concerning their relationship. In fact, the judge expressed her frustrations at the lack of evidence put forward by the parents which might indicate their understanding of the monumental parenting challenges they faced, or offer some insight into how they proposed to rectify their very difficult situation. For example, she said at para. 37:

> ... There is very little evidence as to how the respondents parented their children in the home. The only information the court has available to it is what the parents provided themselves. ...

[47] She went on to say at para. 41 of the decision:

> ...Therefore, I can only conclude that the child N. has not been adequately protected while in their care, and there does not appear to be any evidence of insight or changes in their approach to parenting which would suggest that N. could be adequately protected in their care. Because there is no acknowledgement of a problem, there are no services and there have not been services in place to address the problems. There are no alternative family or community placements and it would appear that no consideration of leaving Mr. R. and going to * with the children has been given any real consideration by the mother.
>
> [42] So the circumstances that led to the child N. being taken into care have not really changed. ...

[48] The judge could not predict any improvement in future:

> [44] ...yet the parents circumstances do not appear to have changed. ... They don't have much in the way of support and their own relationship is very tenuous. Again, had mother formulated a plan to go to * with the family, that might have demonstrated some insight and recognition that some changes need to occur.

[49] And further at para. 50 we see this:

> ... However, there was a lot of evidence that indicates that the parents do not put the children's needs ahead of their own and that to some extent they see their children as possessions or as objects of pride. ...

[50] Gass J. recognized the incredible stress in these parents' relationship. The judge also found as a fact that the variety of challenges posed by the two boys, with a third child on the way, had not diminished. In fact they were ongoing. She said at para. 55:

> ...the instability in their relationship which continues, the financial stresses, the stress of N.'s condition that they were living with for several months, Mother's own health, the fact that they are expecting a third child, their continued isolation, there was not much by way of compelling evidence on the part of either the mother and the father of any real interaction outside the family unit..... The mother's continued loyalty to the father, her dependence on him, and the father's

> continued expression of not liking people and his world being that of F.M. and the two children. So the lack of external support still appears to be very evident and it appears that the mind set is such that their ability to move outside the sphere of their family and seek outside support is very, very limited.

[51] In summary I am not persuaded the trial judge missed, ignored or misapprehended the evidence, leading to an error of law. Rather, I am satisfied that Gass J. conducted a fair and diligent review of the evidence searching for something which might demonstrate that the best interests of these two little boys would be served by returning them to the care of their parents. Her search was in vain.

Conclusion

[52] The evidence at trial supported the judge's conclusion that N.R. and J.R. continued to be children in need of protective services and that they would be at risk of physical and emotional harm if left in the care of their parents. M.R.'s frustration and anger; F.M.'s loyalty to her husband; their failure to acknowledge that anything untoward had happened; their lack of insight or acknowledgement of the need for change; and the absence of any meaningful family or outside support; were all significant factors supporting the trial judge's finding that these children could not be adequately protected in their parents' care.

[53] None of the trial judge's strong findings of fact were the result of palpable and overriding error. She did not overlook or misconstrue important evidence, leading to an error of law. She correctly applied the law in her analysis and reasoning process. She properly considered the statutory requirements of the **Children and Family Services Act**, S.N.S. 1990,c. 5. There is no basis for us to intervene.

[54] For all of these reasons I would dismiss the appeal.

Saunders, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.