IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Redden, 2005 NSPC 64

Date: 20050617
Docket: 1213202
Registry: Kentville

Between:

Her Majesty the Queen

v.

Jeffrey Ian Redden

Judge:	The Honourable Judge Alan T. Tufts
Heard:	June 13, 14, 15, 2005, in Windsor, Nova Scotia
Charge:	221 CC
Counsel:	William N. Fergusson, Q.C., for the Crown Craig M. Garson, Q.C., for the defence

By the Court (orally):

INTRODUCTION

[1] This is the matter of Regina v. Jeffrey Ian Redden. Mr. Redden is charged under s. 221 of the **Criminal Code**, particularly it is alleged that he, by criminal negligence, caused bodily harm to his ten week old step-son. As I will conclude, it appears that the accused was attempting to resuscitate this youngster when he shook him "hard" which it is agreed caused the baby to experience what both Dr. Morrison and Dr. Ferguson, the two medical experts who testified, described as Shaken Baby Syndrome. The baby has since "fully recovered".

[2] The Crown argues that the accused's actions, notwithstanding his motive, constituted criminal negligence defined in s. 219 of the **Criminal Code** and amounted to a wanton or reckless disregard for this baby's safety. It was, the Crown argues, a marked departure from the actions a reasonable person would take. The defence argues that the proper way to examine the actions of the accused is from the perspective of the accused at the time when the urgency of the situation presented itself to him. With this in mind the defence submits the accused's actions cannot be determined to be criminal.

[3] The issue raised in this proceeding goes to the very heart of the notion of criminal liability and engages fundamental principles surrounding the concept of *mens rea* and negligently-based criminal offences. The authorities are divided and conflicting and the subject generally is very complex. While counsel seem to suggest that the test can be easily stated and the law simply applied, in my view the principles needed to be explored require more than a simple reference.

[4] I have in the short time since the trial concluded read many of the leading authorities, various articles on the subject which I can list if necessary. While time will not permit me to do an exhaustive review of the law I will later in this decision be referring to the law at least in a cursory manner. I propose therefore to briefly summarize the testimony and other evidence; analyse the evidence and make findings of fact. I will then review the principles of law in the area as I just referred to and then apply that law to the facts as found. Given that the evidence is relatively fresh it is not my intention to repeat the evidence in detail. I will emphasize only those areas where there is a dispute or disagreement or lack of

agreement for the purposes of explaining my findings of fact in those areas. I will now start with a summary of the facts.

THE FACTS

[5] The events in question took place Sunday, June 16, 2002. It was Father's Day. The accused and his spouse, his two-year-old baby son by a previous marriage and his spouse's ten-week-old son were at home in their mobile mini home in Brooklyn, Hants County, Nova Scotia. There was no evidence that any alcohol was being consumed at all by any of the persons involved. It appears that while the couple was preparing for supper the accused's spouse left to get something - hot chocolate, from the store. It also appears that she was gone for approximately ten to fifteen minutes. When she returned she was confronted by the accused who informed her, in effect, the baby had fallen. The accused's mother was now at the residence, having arrived while the spouse was absent.

[6] The accused and his spouse took the baby to the Windsor hospital approximately a ten minute drive from their home. The baby was attended there by Dr. Fitz-clarke. Subsequently the baby was transferred approximately two hours later to the IWK Hospital in Halifax in an ambulance accompanied by Dr. Fitz-clarke and the accused's spouse. Dr. Fitz-clarke was the only physician in Windsor to examine the baby. He observed the baby's eyes were closed and needed to be pried open to be examined. The baby was crying in an abnormal high pitch. He said the baby's movements were jerky and that one of his legs would stiffen out periodically. He also noticed the baby's eyes pointed in one direction, which he conceded in cross-examination was to the left. He found no evidence of external signs of trauma or any fractures. At the IWK the baby was treated and an MRI was performed. A CT Scan appears to have been performed earlier either in Windsor or at the IWK.

[7] As a result of the examination there were no external signs of trauma or fracture. Dr. Smith, a pediatric radiologist, a qualified expert, opined that the injuries were not consistent with a fall but rather with the baby being shaken. Dr. Kathryn Morrison, a pediatric physician, was consulted to provide an opinion. At the time she was the Director of Child Protection Services at the IWK. She was qualified to give opinion evidence in the detection and diagnosis of child abuse, including Shaken Baby Syndrome. She examined the various tests, the CT Scan, and the MRI relative to this baby. She also reviewed the history of the events

leading up to the baby's admission. She was told the baby fell from a change table, although she later was told the baby fell from a chair. She spoke to the other physicians and nurses involved with this baby. She described the injuries to the baby including the blood over the baby's brain, including blood between the two brain hemispheres and the retinal bleeding. These in her opinion were consistent with the baby being shaken “violently” to use her words, or with high force with the baby's head moving circularly back and forth.

[8] She also testified that in fifty to seventy-five percent of cases evidence of rib fracture or shearing of bones of the arms or legs are present in cases of Shaken Baby Syndrome. This generally results from the baby being aggressively grabbed and fractures the ribs and damages the bones in the arms. From the legs flailing, damage may be caused to the legs. No injuries to the ribs, arms or legs were present with this baby.

[9] In Dr. Morrison's opinion the injuries sustained with this baby were consistent with the baby being shaken. In her opinion these injuries could not have been caused by the baby having fallen either from a change table or a chair. She also opined that the baby could not have sustained the injuries that the accused described after falling from the livingroom chair.

[10] I will now review the testimony of the spouse and the taped interviews of the accused. The accused gave two taped interviews with the police which were admitted by consent and with a waiver of *voir dire*. The accused's spouse also testified. In the taped interviews and the spouse's testimony it is acknowledged that both persons deceived the health authorities and in the accused's case, initially at least, the police. Both the accused and his spouse recounted that they were preparing supper when the spouse left to get something from the store. The spouse testified she was accustomed to having the baby lay sideways on a livingroom chair while the baby received a bottle. She indicated on this occasion she positioned the baby on the chair with the baby's head near the edge of the chair on the chair's cushion near the arm of the chair. The chair was a regular livingroom-style fully stuffed chair, i.e., not a wooden chair. The baby was facing outward and his feet angled slightly towards the rear of the chair but laterally across the chair's cushion. Behind the baby's back which faced the rear of the chair was a rolled up baby's receiving blanket to keep the baby from rolling onto its back. A similar blanket was folded and placed under the baby's bottle to keep it propped up so the

baby could feed on the bottle. She also described how the baby's movements at that age were limited to rolling from its side to its back.

[11] The accused's spouse testified she left the baby in this position when she left for the store. There was no evidence that she told the accused anything about any concerns she may have had about leaving the baby in this position nor was there any evidence at all of any discussion the couple had about the baby particularly before or as she left the home. She testified that she had positioned the baby in this way before. The spouse did however say that there was nothing unusual occurring at the home. There was no indication that there was any dispute ongoing between them or with or about the baby or the accused's two-year-old son or any other subject, for that matter. She also described at length that the baby was well-behaved and not a fussy baby. She added that the accused was a very supportive and attentive father to the baby and treated this child as his own and tended to changing and feeding the baby and getting up at nights to care for the baby. The accused's spouse was clearly supportive of the accused and gave every indication that there was nothing present to suggest that the baby was troublesome or that the accused was short-tempered or frustrated with the baby, the two-year-old or for any other reason.

[12] When the couple arrived at the hospital in Windsor they both indicated that the spouse was present when the child fell and each held the child and made efforts to revive it when it appeared stiff and unresponsive. They both later acknowledged that this was not true. Each testified that this was due to an attempt to appease the spouse's guilt for leaving the baby alone.

[13] The accused then spoke to the police a second time and detailed what is now suggested as what occurred. In the taped interview with the RCMPolice the accused was clearly distraught and emotional - he cried through much of the interview. He described how his spouse left to go to the store while he attended supper; his two-year-old son and the dog were present. He said that he was in the diningroom area or kitchen for a short period and when he either returned or looked into the livingroom the baby was on the floor. He described the baby as being stiff, his eyes closed “almost tight” and that in his opinion the baby was not breathing. He also said what part of the eyes that could be seen seemed to be rolled back and were “not normal”. He then said he shook the baby back and forth. He called his name in an effort to get the baby to respond. He said he “freaked out”. He said he wanted the baby to open his eyes. The baby then went limp. He

thought the baby may have choked on his tongue. He put his finger in the baby's mouth. He felt for a heartbeat.

[14] He called his mother who lived a short distance away and she arrived before the spouse returned. He told his mother what had happened. It is not clear what the timelines were precisely, that is how long after the spouse left when the mother arrived before the spouse returned. It is clear the spouse was gone only for approximately ten to fifteen minutes. In the video the accused was asked to describe how hard he shook the baby. The RCMP officer made two demonstrations exhibiting two degrees of force. The accused appears to agree to both.

[15] Dr. Charles Ferguson testified for the defence. His qualifications were impressive and too lengthy to repeat here. His *C.V.* is in evidence. He has practised in the field of pediatrics and the diagnosis of child maltreatment since 1969 and has been the Director of Child Protection Centre in Winnipeg, Manitoba since 1989. He has testified over five hundred times in court. He described in detail the Shaken Baby Syndrome. Because there is no real dispute on this aspect of the case it is not necessary for me to detail his evidence in this regard. He agreed that this baby experienced Shaken Baby Syndrome. In his opinion the injuries he reviewed from the examination of the file were consistent with the baby being shaken. He did however differ in his opinion from Dr. Morrison on the possible effects of a fall from a chair, as described by the accused. Dr. Morrision was of the view that such a fall could not cause the effects, i.e., the seizure-like symptoms, that the accused described.

[16] Dr. Ferguson however was of the opinion that the fall could have triggered what he described as pallid breath holding which can be brought on by a startle, a blow or a sudden change in environment, e.g., a fall. He said the symptoms described by the accused of the baby's condition when the accused found the baby on the floor were remarkably consistent with this phenomena. Dr. Ferguson also watched the portion of the video interview where the accused was asked about how hard he shook the baby. The RCMP officer demonstrated two degrees of shaking to determine from the accused how he actually shook the child. Dr. Ferguson indicated that either of these demonstrations could have caused the impugned injuries. Dr. Morrison declined to comment on the demonstration of shaking.

[17] I will now analyse the evidence and make findings of fact. Before doing so I wish to make a couple of observations. Dr. Ferguson testified at various times about factual issues which for reasons stated he had concluded. He commented at one point why he accepted the accused's version of certain events. Of course Dr. Ferguson's testimony in this regard is not, with respect, relevant or probative with respect to any findings of fact. In this respect his evidence will not be considered. This does not however affect my assessment of his opinion evidence otherwise, or his testimony which was properly within the area of expertise in which he was qualified to testify.

[18] The Court has also heard testimony from the accused's spouse as to what the two-year-old said after she returned from the store. Counsel agreed this should not be received for the truth of its contents, however this evidence has no real probative value and ultimately was not given any weight in my analysis of the facts found.

[19] I have certainly taken into account that the accused and his spouse lied to and deceived the hospital personnel and the police initially. This has caused me to examine their evidence with considerable care and skepticism and to certainly question every aspect of their testimony. In my view it is clear that the couple was at home making supper. The photograph confirms this and that the mother arrived on the scene shortly after. It is also evident the spouse left to go to the store, a fact which is easily contradicted and remains unrebutted. One of the photos shows a box of hot chocolate and an unopened candy bar on the counter. Clearly the accused was only alone with the child for a short period of time. There was simply no evidence whatsoever that the accused grabbed the child deliberately out of anger or frustration. No marks on the baby's torso or cracked ribs or like injuries were found. There was no evidence of a fussy baby or any reason for the accused to be angry or frustrated with this child. His explanation that he picked the child up to revive it is clearly a credible explanation for his actions, notwithstanding his earlier “story” to the police. Although even in the first account there was some acknowledgement of a fall and handing of the baby back and forth in an effort to revive it. Furthermore the symptoms he described when he found the baby on the floor are consistent with the breath holding phenomena which Dr. Ferguson described.

[20] All of the foregoing leads me to the conclusion that the baby fell from the chair, either on its own or the result of some action by the two-year-old or the dog

for that matter. The exact reason is not necessary to determine. I accept Dr. Ferguson's evidence about the possibility of the breath holding event. I prefer his evidence to that of Dr. Morrison on this point. His experience, knowledge and expertise in this area persuades me on this point and I have concluded that it is likely that some type of event as he described occurred here.

[21] Therefore I find as a fact that the baby fell from the chair, the baby's eyes were partially closed and were abnormal as described by the accused. I also accept that the accused honestly believed the baby had stopped breathing and that his efforts therefore were directed at trying to get a response from the baby to determine if the baby was okay and to assure himself the baby was breathing. I accept that the situation was of considerable urgency and presented considerable anxiety for the accused. While the accused described himself as “freaking out” and in submissions his actions were described as “panic”, I have determined this to mean that the accused was acting with instant urgency fuelled perhaps by adrenaline brought on by the highly stressful and urgent circumstances wherein the accused could not quickly discern what was wrong with the baby and why the baby was not immediately responding.

[22] It is difficult to determine precisely how the accused shook the baby and how long and precisely what degree of force he used. He described it as “hard” although this is a relative term which could describe a range of degrees of force, particularly when shaking a ten-week-old baby. The police demonstrated two degrees of force and while the accused agreed on the videotape to both demonstrations he was extremely distraught and crying when he was questioned on this topic. Clearly he shook the baby enough to cause the injury. Clearly he shook the baby in a manner that was too severe given the age and the baby's inherent frailties. However to adequately conclude what actual force was used and for how long and what image would have appeared to the accused while he shook the baby is difficult to conclude given that even the lower degree of force could have caused the injuries to which Dr. Ferguson testified. I will return to this point because it is important in terms of both the objective and limited subjective test used to judge the accused's conduct. I will conclude this aspect simply by stating that the accused's actions were reactive, they were sudden, and responsive to what he determined was an urgent situation. While it is simply impossible to precisely determine how long or what degree of force was used I can conclude that it was a relatively short interval - seconds, a few seconds, momentary, and that the force used was “hard” relative to a ten-week-old child.

THE LAW

[23] I will now briefly review the law as I mentioned above. Time does not allow me to exhaustively examine all of the authorities nor quote at length from the leading judgments. I will for the most part simply refer to the cases and articles I have read.

[24] Criminal negligence is defined in s. 219 of the **Criminal Code**. It says as follows:

> **219.** (1) Every one is criminally negligent who
>
> (*a*) in doing anything, or
>
> (*b*) in omitting to do anything that it is his duty to do,
>
> shows wanton or reckless disregard for the lives or safety of other persons.

The authorities which I have reviewed are as follows: **R. v. Sharp**, 1984 Ont. C.A.; **R. v. Barron**, 1985, Ont. C.A.; **R. v. Tutton**, [1989] 1 S.C.R. 1392 and **R. v. Waite** [1989] 1 S.C.R. 1436; **R. v. Anderson**, (1990), 75 C.R. (3d) 50; **R. v. Creighton**, [1993] 3 S.C.R. 3; **R. v. Ubhi**, [1994] B.C.J. No. 255; **R. v. Baldwin**, 2002 NSSC 073; **R. v. Sands-Way**, [2002] O.J. No. 3055; **R. v. J.R.B.** [2002] N.J. No. 296; **R. v. Temple**, [2004] N.S. J. No. 410. I have also reviewed articles from the 2004 and 2001 National Criminal Law Program: Criminal Negligence: Still Waite-ing? by Hilary McCormach, 2004; Criminal Negligence: Has the Minotaur found Ariadne's Clue, by Guy Cournoyer, 2001; Recklessness by Kenneth L. Campbell, 2004Negligence As a Basis of Criminal Liability, Mona T. Duckett, Q.C. 2004
and
Anderson: Making Time on a Step Back on Criminal Negligence, by Patrick Healy 75 C.R. (3rd) 58;The Creighton Quartet: Enigma Variations in a Lower Key, by Patrick Healy 23 C.R. (4th) 265

[25] The leading cases are **R. v. Tutton**, *supra* and **R. v. Waite**, *supra*, both decided together by the Supreme Court of Canada in 1989, and **R. v. Creighton**, which I have referred to above. Much of the debate in the law centres around whether the proper test for *mens rea* is a subjective analysis or an objective one. This debate is evident in the even-split decision in **Tutton** and the 5-4 split to some extent in **Creighton**. In **Tutton** Wilson, J. describes a limited subjective test. At para. 14 she says:

> In short, the phrase "wanton or reckless disregard for the lives or safety of other persons" signifies more than gross negligence in the objective sense. It requires some degree of awareness or advertence to the threat to the lives or safety of others or alternatively a wilful blindness to that threat which is culpable in light of the gravity of the risk that is prohibited.

MacIntyre, J. writing for himself and one other prefers an objective test. He says at para. 43:

> The test is that of reasonableness, and proof of conduct which reveals a marked and significant departure from the standard which could be expected of a reasonably prudent person in the circumstances will justify a conviction of criminal negligence.

He however notes that the surrounding circumstances are relevant. At para. 45 he says:

> The application of an objective test under s. 202 [now 219] of the Code, however, may not be made in a vacuum. Events occur within the framework of other events and actions and when deciding on the nature of the questioned conduct surrounding circumstances must be considered. The decision must be made on a consideration of the facts existing at the time and in relation to the accused's perception of those facts. Since the test is objective, the accused's perception of the facts is not to be considered for the purpose of assessing malice or intention on the accused's part but only to form a basis for a conclusion as to whether or not the accused's conduct, in view of his perception of the facts, was reasonable.

In **Creighton**, McLachlin, J. writing for the majority appears to adopt an objective test. This test concerned the constitutionality of unlawful act manslaughter, but it is generally agreed the case is authoritative on the subject of criminal negligence. At para. 111 she describes objective *mens rea*:

> Objective *mens rea*, on the other hand, is not concerned with what the accused intended or knew. Rather, the mental fault lies in failure to direct the mind to a risk which the reasonable person would have appreciated. Objective *mens rea* is not concerned with what was actually in the accused's mind, but with what should have been there, had the accused proceeded reasonably.

At para. 120, she continues:

> ...In my view, considerations of principle and policy dictate the maintenance of a single, uniform legal standard of care for such offences, subject to one exception: incapacity to appreciate the nature of the risk which the activity in question entails.

At para. 136 she distinguishes between regulated or licensed activities and unregulated ones. In licensed activities, e.g., driving, mostly, there must be basic knowledge and experience before permission is granted. In unregulated activities ordinary common sense is usually sufficient to permit anyone to appreciate risk and act accordingly. Much of the judgment concerns the notion of whether the test takes into account the personal characteristics of the accused, not directly an issue in this case. However, at para. 138 she confirms the *caveat* that MacIntyre, J. described earlier in **Tutton** that the surrounding circumstances need to be examined, and she says:

> This is not to say that the question of guilt is determined in a factual vacuum. While the legal duty of the accused is not particularized by his or her personal characteristics short of incapacity, it is particularized in application by the nature of the activity and the circumstances surrounding the accused's failure to take the requisite care

She continues in the same paragraph:

> The question is what the reasonably prudent person would have done in all the circumstances

and later at para. 139 she says:

> The legal standard of care is always the same -- what a reasonable person would have done in all the circumstances. The *de facto* or applied standard of care, however, may vary with the activity in question and the circumstances in the particular case.

[26] Many of the cases which I reviewed were in the motor vehicle driving context and while the principles are the same the application is different, in my view, because of the distinction noted above. The closest case to the one at bar is that referred to me by counsel, **R. v. Sands-Way**, *supra*. In fact it is remarkably similar to this case. In that case a one-year-old baby fell down the stairs. The accused became frantic and was bouncing the boy to help him awake while his head was unsupported. As a result he suffered Shaken Baby Syndrome and died. The Court referred specifically to the **Tutton** and **Creighton** cases and quoted at length from those decisions. The Court concluded that the appropriate question to ask was, "How would a reasonable person who finds himself or herself in the situation in which the accused found herself on the day in question have responded". There the Court concluded it could not be satisfied that the accused acted in a wanton or reckless disregard necessary to support criminal negligence.

APPLICATION TO CASE AT BAR

[27] I will now apply the above principles to this case. In order for the Crown to establish guilt the Court must be satisfied beyond a reasonable doubt that the accused acted in a wanton or reckless disregard for this baby's safety. It must be shown that the accused's actions were a marked and significant departure from what could be expected of a reasonable person in the same circumstances. The Crown argues that it would have been obvious to any reasonable person that to shake a ten-week-old baby a risk to its safety would be created. It would be common sense. It is suggested that the risk would have been clear from the baby's movements while the baby was shaken; a baby of that age not having the requisite neck muscles to prevent it was resisting the sudden acceleration and de-acceleration motion. The Crown argues that the accused's motivation is irrelevant; that if the accused's actions are to be forgiven because he was attempting to revive the baby he should not be given a "pass" on criminal negligence. In short the Crown argues that shaking a baby hard enough to cause these injuries amounts to criminal negligence, notwithstanding it was for the purported reason of reviving this baby.

[28] Before dealing with the defence position it should be clear that the burden is on the Crown to prove every element of the alleged offence beyond a reasonable doubt. This is a burden the Crown has throughout the trial and never shifts to the defence. There is no presumption just because the baby suffered an injury that criminal culpability follows necessarily.

[29] First of all I agree that the intention to cause bodily harm is not necessary for the Crown to establish. It is not necessary for the Crown to establish that the accused knew or intended the consequences of his actions.

[30] In my view whether one accepts the subjective or objective approach, the result is the same.

[31] The objective test requires an analysis of the surrounding circumstances and a determination of what a reasonable person might expect to have done. It is not so much what a reasonable person would have done but whether the accused's conduct represented a marked departure from that reasonable person's conduct and whether the Court is satisfied beyond a reasonable doubt that such a marked departure occurred to constitute a wanton or reckless disregard for the safety of this baby. It is therefore relevant that the accused acted in an urgent way; that the baby was not immediately responsive. Clearly the prudent and appropriate action would be not to have shaken the baby but simply to do nothing, as the baby would have responded eventually as Dr. Ferguson described. It may be that a reasonable person in the circumstances would have done nothing, but I cannot conclude this. I am not convinced a reasonable person would not have taken some kind of physical action to try to awake the baby or determine if it was responsive. Dr. Ferguson suggested in his experience that this reaction is not uncommon and while his testimony is not by any means determinative of a reasonable person's standard, I cannot conclude it would be unreasonable for a person in a similar circumstance to take some kind of physical action. Whether that included shaking the baby as the accused did is not necessary to determine. The issue is simply whether the accused's action represented a marked departure as I described. As I referred to earlier it is not really clear for how long or how hard the baby was shaken or precisely what the baby's movement would have looked like to the accused. It is clear the shaking was for a very short period of time.

[32] In my opinion given all the circumstances I described above I cannot conclude beyond a reasonable doubt the actions the accused took represented a

marked departure from what a reasonable person would have done in these particular and somewhat unique circumstances. His actions were all consistent with reviving the baby. Feeling for a heartbeat, examining the tongue, calling his mother - it is only the shaking which as it now is evident, was the incorrect response. But his responses otherwise were reasonable and one would expect for any reasonable prudent person and the shaking portion of his response in my opinion was not a marked departure from what an ordinary or reasonable person would have done in the circumstances. His response cannot be said to be a marked departure, as I indicated. Certainly I cannot conclude that beyond a reasonable doubt. The analysis applied here is, in my opinion, consistent with the objective test set out above. The limited subjective test is easier to decide because clearly there is not sufficient evidence that this accused averted to the risk,was aware of that or wilfully blind to the risk given the circumstances I described. In my opinion the Crown has not met the required test upon the required burden.

[33] The reality is that sometimes unfortunate things happen, that people will make errors in judgment especially when acting out of urgency in circumstances which they did not deliberately create and which after thoughtful consideration they may have done differently. This does not mean that their actions are criminal in the sense described at length in the many authorities I referred to above.

[34] In conclusion I have a reasonable doubt that the accused's action constituted a marked departure from the standard expected of a reasonable person in these circumstances. I have a reasonable doubt therefore that he acted in a wanton or reckless disregard for the life and or safety of this baby. He is therefore acquitted of this charge.

_____

ALAN T. TUFTS, J.P.C.