

A IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Allen, 2009 NSPC 43

Date: 20090914
Docket: 1520768
Registry: Truro

Between:

Her Majesty the Queen

v.

Terry Dean Allen

Judge: The Honourable Judge Alan T. Tufts

Heard: June 15-19, 22-29, 2009, in Truro, Nova Scotia

Charge: s. 236 (b) **Criminal Code**

Counsel: Diane McGrath, for the Crown
Darlene Oko, for the Crown
Donald Murray, Q.C., for the defence

By the Court:

I INTRODUCTION

[1] On March 1, 2005 Samantha Marie Mercer was tragically subjected to an impact to the top of her head. As a result she sustained a significant brain injury. Sadly she died of this injury two days later when she was removed from life support. She was approximately three and a half years of age at the time of her death.

[2] From the circumstances surrounding this fatal impact certain allegations arose against the accused, Terry Dean Allen, the boyfriend and companion of Samantha's mother. He was subsequently charged with manslaughter under s. 236(b) of the **Criminal Code**.

II SUMMARY OF FINDINGS AND CONCLUSIONS

[3] The accused was alone with Samantha at their home for approximately two and a half hours shortly after 4 p.m. to about 6:30 p.m. on the day in question. During that time Samantha sustained what the medical opinion evidence described as a "severe impact" to the vertex of her head. This caused diffuse axonal injury—nerve damage—which cut blood flow and oxygen to the brain and eventually caused her death.

[4] Samantha also presented with many bruises and other injuries when she was admitted to the hospital that same evening. Some of these bruises—on her forehead and cheek—were independently explained as having been caused by a number of other previous incidents. Some of these bruises were caused by medical intervention. In my opinion, other bruises on her lower back and legs were dated and pre-existing. Some smaller bruises were unexplained. However, other bruises to her left flank and elbow, a ring bruise on her back, and pattern bruises to her chin and forehead were clearly caused during the two and a half hour period. As well, compression fractures to her vertebrae and a buckle fracture to her left arm occurred during the same period. Other bruises to her right knee and the top of her left shoulder could not be determined as to the time of their cause.

[5] Some of the medical evidence presented by the Crown suggested that the only explanation for the fatal injury was the deliberate propelling of Samantha's head into the wall of her upstairs bedroom. Other medical and bio-medical engineering evidence left open the possibility that a stairway fall could have caused this injury. The Crown argues that the only reasonable inference to be drawn from all of the evidence is that the accused drove or slammed Samantha's head into the wall causing her death and on a number of occasions during the same period the accused threw her to the floor causing the other bruises and injuries or otherwise deliberately caused these injuries. This, the Crown argues, was after the accused hit Samantha on the back with a coffee cup while in the downstairs bathroom.

[6] Finally, the Crown argues that the totality of the evidence must be examined before drawing any inferences because of the multiplicity of injuries and the unlikelihood that a stairway fall could have caused the fatal impact. The Crown submission is that the accused "lost it". The only reasonable inference, the Crown argues, is that the injuries, including the fatal injuries, were inflicted by the accused.

[7] In my opinion, a close examination of the individual pieces of evidence, including the various injuries and bruises, is necessary before considering all of the evidence as a whole and before considering what, if any, inferences can be drawn. I have done this below. In my opinion, it is not reasonable to conclude that the accused slammed or drove Samantha's head into the wall as the Crown has argued. The layout of the bedroom furniture, the dimensions of the room, and the lack of evidence regarding the details of the dent above the bed in Samantha's room do not make that a reasonable inference to draw, let alone the only inference. Holding her upside down and thrusting her or throwing her into the wall as the Crown argues, in my opinion, is not a reasonable inference to be drawn from all of the evidence for the reasons I will explain later.

[8] In my opinion, it is likely Samantha was either thrown on the bed by the accused playfully or in frustration or she was bouncing on the bed and in any of those instances fell backwards and struck the vertex of her head towards its right side. It is likely the accused witnessed this. The layout of the room and the angle which her head would have hit the wall - on the right side together with the way the mattress on the bed was skewed are consistent with this conclusion. The medical evidence, however, suggests that this could not have been the fatal blow. It

is not possible to come to any conclusion on whether this was the fatal impact. It is simply not clear, although it seems likely Samantha hit her head this way, that it would have generated sufficient force to create the “severe impact” the medical evidence described as necessary to cause this type of brain injury.

[9] I cannot, however, exclude the possibility that Samantha fell down the stairs and in doing so sustained the fatal impact. The testimony of Dr. Pollanen and Dr. Van Ee support this possibility. In my analysis of all of the evidence I have also concluded that this is a possibility. The accused’s conduct after the event, albeit somewhat imprudent, together with all of the other circumstantial evidence, is consistent with conduct other than that which would support an inference of his guilt. I will explain this in detail below.

[10] Finally, while there are parts of the accused’s testimony I do not accept or believe, I cannot reject his testimony in its material aspects—his effective denial that he threw Samantha such that it was foreseeable her head would hit the wall or that it was otherwise dangerous, and his testimony that she fell downstairs.

[11] While in my analysis I opine about other reasonable or rational inferences which may explain what occurred, it is not the role of a trial judge to discover “what happened”. My role is clear. It is to determine whether the Crown has proven beyond a reasonable doubt that the only reasonable or rational inference from all of the circumstantial evidence is that the accused committed an unlawful act, objectively dangerous, which caused the death of Samantha Marie Mercer. The Crown failed to do this. For the reasons that I have more fully explained and described below I find the accused not guilty. He is acquitted.

[12] As I indicated above I will now detail and explain the reasons for the conclusions that I have reached and summarized above.

III THE CHARGE

[13] Terry Dean Allen is charged as follows:

It is alleged that Terry Dean Allen, on or about the 1st day of March, 2005 at, or near Truro, Colchester County, Nova Scotia, did unlawfully kill Samantha Marie Mercer and thereby commit manslaughter, contrary to s. 236(b) of the Criminal Code

[14] Specifically, the Crown alleges that the accused committed manslaughter by an unlawful act. The unlawful act alleged in this case is assault.

[15] Section 234 of the **Criminal Code** provides that culpable homicide which is neither murder or infanticide is manslaughter. Section 222 provides that homicide is committed when a person directly or indirectly by any means causes the death of a human being. Homicide which is not culpable is not an offence - s. 222(s). S. 222(5) provides that a person commits culpable homicide when he causes the death of a human being:

- (a) by means of a unlawful act,
- (b) by criminal negligence,
- (c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death, or
- (d) by wilfully frightening a human being, in the case of a child or sick person.

[16] The Crown is not alleging any other basis beyond the allegation of an unlawful act as the cause of death. Specifically, the Crown is not alleging that Terry Dean Allen caused the death of Samantha Mercer by criminal negligence by failing to prevent her injuries, or by failing to act promptly when she became injured.

[17] The Crown therefore must prove beyond a reasonable doubt each of the following essential elements:

1. That it was Terry Dean Allen who caused the offence - that is the identity of the accused as the offender.
2. The time and place of the alleged offence as set out in the Information.
3. That the accused committed an unlawful act, in this case an assault - both the *actus reus* and *mens rea* of the alleged assault.

4. That the assault committed by the accused was objectively dangerous¹, ie. that there was an objective foreseeability of risk of bodily harm which was neither transitory nor trivial in the context of a dangerous act. It is not necessary to establish that the accused foresaw or intended the bodily harm.

5. That the assault committed by the accused caused the death of Samantha Marie Mercer - that there is a causal connection between the predicate offence, in this case the assault, and the death of Samantha Marie Mercer such that the assault was a “significant contributing cause”².

[18] Here there is no issue that it was the accused who was the only person present during the material times when the injury which caused the death of Samantha Marie Mercer occurred. Similarly there is no dispute about the time and place of the alleged offence. As I will describe more fully below there is no real dispute that Samantha Marie Mercer’s death was the result of an impact to the top of her head resulting in a significant brain injury. All of the evidence suggests that this was a single impact injury.

IV THE ISSUE

[19] Accordingly the issue in this proceeding is whether the Crown has established beyond a reasonable doubt that the accused committed an unlawful act - an assault - which was objectively dangerous and which caused the impact to the vertex of the head of Samantha Marie Mercer resulting in her death.

V THE LAW

A. Criminal Burden of Proof

[20] As in all criminal trials the Crown carries the onus to prove the allegations beyond a reasonable doubt. This standard of proof is inextricably linked with the presumption of innocence. The burden rests on the Crown throughout the trial and never shifts to the accused. It does not, of course, require proof to an absolute certainty. It is not proof beyond any doubt. The doubt however cannot be based on

¹ *R. v. Creighton*, 83 C.C.C.(3d) 346 (S.C.C.)

² *R. v. Nette*, [2001] 158 C.C.C. (3d) 486 (S.C.C.)

sympathy or prejudice. It cannot be an imaginary or frivolous doubt. Any doubt must be based on common sense or reason and logically connected to the evidence or lack of evidence³.

[21] However, more is required than just probability. The accused must be acquitted if the Crown can only establish that he is probably guilty⁴. The standard of proof in a criminal trial is closer to certainty than proof on the balance of probabilities⁵.

[22] Because the accused testified in this proceeding it must be remembered that the principles set out in **R. v. W. (D.)**⁶ apply. Briefly this means that if the accused's testimony is believed or if not believed but raises a reasonable doubt about his guilt he must be acquitted. Notwithstanding either of these situations, the accused can only be convicted if the Crown has proven all of the elements of the offence as described earlier beyond a reasonable doubt after all the evidence has been considered.

[23] The Supreme Court of Canada has said that the essential principle about a criminal trial is a search for the truth⁷. However the primary cognitive virtue of any trial is said to be a search for proof⁸. This is linked inextricably with the presumption of innocence⁹. A criminal trial is therefore a search for proof more so than it is a search for doubt. A criminal trial starts with the presumption of innocence and proceeds with the proof or establishment of facts. In this sense facts are to be distinguished from that which is "assumed, suspected, alleged, believed,

³ *R. v. Lifchus*, [1997] 3 S.C.R. 320

⁴ *R. v. Avetysan* [2000] 2 S.C.R. 745

⁵ *R. v. Starr* [2000] 2 S.C.R. 144

⁶ [1991] 1 S.C.R. 742

⁷ *R. v. G. (B.)* [1999] 2 S.C.R. 475 at para 37

⁸ G.T.G. Seniuk and J.C. Yuille, Fact Finding & the Judiciary (Saskatoon Commonwealth of Learning 1996)

⁹ *R. v. W. (D.)* [1991] 1 S.C.R. 742

hoped, or feared to be so”¹⁰. Based on these facts reasonable or rational inferences may be made or drawn to arrive at conclusions which may lead to a finding of guilt. I will explain below how the law applies to proving guilt based on inferences in cases based on so-called “circumstantial evidence”. However, it is important to remember that a criminal trial is about determining if the required proof has been established beyond a reasonable doubt; that is, has the Crown shown a path of reasoning - reasonable or rational inferences - from innocence to guilt, and has it established beyond a reasonable doubt that guilt is the only reasonable inference which can be made.

[24] There is a difference between proof of guilt and consistency with guilt. Establishing that the evidence is only consistent with the guilt of the accused is offensive to the fundamental principle of justice of the presumption of innocence. Clearly, assuming guilt and working backwards to find a trail of evidence consistent with that assumption is not appropriate. It is understandable how a criminal investigation may operate in this manner when intuition suggests a crime has been committed and the focus is on finding evidence to support this conclusion. This may, in fact, lead to evidence which can provide the required proof. However, a criminal trial does not operate in this way. It starts with the presumption of innocence and moves forward to determine if guilt can be proven beyond a reasonable doubt. In cases where there is no direct evidence of an event other than from the accused whose evidence may not be accepted as being true, one must be careful not to assume or presume anything about the character of the impugned event. Therefore while most criminal trials surround the notion of reasonable doubt as I mentioned above, it is not about assuming guilt and looking for doubt and characterizing that doubt, it is about determining whether there is proof of guilt and whether that proof meets the required standard.

[25] Finally it should be remembered that proof comes from the evidence and the Court is limited to the examination of the evidence to determine whether the required proof is present. The following quote illustrates the distinction between

¹⁰ *supra*, note 7 quoting Allan R. White, Truth (Garden City: Doubleday, 1970) at 79

searching for the truth and searching for proof based on evidence: In **R. v. M.E.M.**¹¹ Vertes, J. says the following:

Many judges have often said that the law does not clothe a judge with divine insight into the hearts and minds of witnesses. We cannot profess to be able to determine absolute truth. All we can do is apply time-honoured means to determine whether an allegation has been proven to the standard that is the only one acceptable in criminal law, that being beyond a reasonable doubt.

Later he continues,

On a philosophical or practical level a trial should be a search for the truth. But judges are not detectives, they are judges. And what they must judge are not the individuals but the evidence.

B. Assessing Credibility

[26] There is a distinction between credibility in the sense of veracity or truthfulness and reliability. Both aspects are important in a criminal trial. Assessments of both can be difficult.

[27] Reliability is best assessed by examining the circumstances which surround a witness's ability to observe and to assess his or her ability to recall. Honest witnesses sometimes give unreliable testimony. Credibility or truthfulness is best determined by assessing the testimony in the context of other objective or verifiable evidence, whether the testimony is internally consistent, whether the witness displays any partiality to either party and whether the testimony is consistent with other statements made by the same witness. Consistency, however, is not necessarily a mark of truthfulness. Finally the Court can accept all, none, or part of any witness's testimony¹² and accord different weight to different parts of the evidence that it accepts.¹³ Relying on demeanour to assess credibility can be

¹¹ [1998] N.W.T. J. No. 50 (S.C.)

¹² *R. v. D.R.* [1996] 2 S.C.R. 291; [2008] *R. v. Hunter* O.J. No. 4089

¹³ *R. v. Howe* [2005] O.J. No. 29 (C.A.)

dangerous¹⁴ and should not be the only consideration¹⁵. The test for assessing the credibility of witnesses' testimony is whether it is in harmony with the preponderance of the probabilities that a practical and informed person would recognize as reasonable in the circumstances of the subject events. Is there a consistency with the probabilities that surround the currently existing conditions¹⁶?

[28] Assessing the credibility of the testimony of the accused raises other issues and considerations which I addressed earlier in relation to **R. v. W. (D.)**, *supra* and which I will analyze later in this decision.

[29] I should also distinguish for this purpose the difference between “believing” a witness - in this case the accused - and finding his evidence “believable, capable of belief, possibly true or raising a reasonable doubt” and rejecting his evidence entirely as to its material aspects.

[30] To “believe” the accused is to find or accept his evidence to be true. In this instance the accused would be acquitted if his testimony was exculpatory. However not believing the accused or disbelieving the accused simply means not accepting or finding the accused's testimony to be true. This, of course, does not mean it is not true and there is no burden on the accused to establish that. Determining that the accused's testimony is believable, capable of belief or is probably true in its material aspects or that it raises a reasonable doubt about the accused's guilt may all have subtle differences. However, they all require that the accused be acquitted. These situations should be distinguished from situations where the accused's evidence is rejected in its material aspects entirely and is not just not believed but is incapable of belief and does not raise a reasonable doubt.

C. Circumstantial Evidence

¹⁴ *R. v. E. (T.)* 2007 ONCA 891

¹⁵ *R. v. Jeng*, 2004 BCCA 464

¹⁶ *Faryna v. Chorny* [1952] 2 D.L.R. 354. See also *R. v. Pressley* [1948] B.C.J. No. 63 and *R. v. Logan* [1999] N.S.J. No. 473

[31] The Crown's case here is based on circumstantial evidence. It has no direct evidence of an assault committed by the accused which caused the death of Samantha Marie Mercer. The only direct evidence is the testimony of the accused. As I noted above if the accused's testimony is accepted as true, of course, he must be acquitted.

[32] The circumstantial evidence must be assessed in the context of the entire evidence. A finding of guilt can only be made where it has been demonstrated beyond a reasonable doubt that the only reasonable or rational inference drawn from the proven facts is the guilt of the accused¹⁷. The circumstantial evidence must be consistent with guilt and inconsistent with innocence¹⁸. It is not necessary to show that any "equally consistent" reasonable inference can be drawn. If other reasonable inferences can be drawn from the proven facts which are not consistent with guilt then a reasonable doubt exists. Of course, inferences which are not reasonable or rational cannot raise a reasonable doubt¹⁹.

[33] The accused does not have to prove anything. If there is a possibility the evidence is consistent with a conclusion other than guilt a reasonable doubt may exist. In **R. v. Robert** [2000] O.J. No. 688 it is said at ¶ 22:

There is no affirmative obligation on an accused to prove anything by way of reasonable conclusion or reasonable inference. As Martin, J.A. stated in *R. v. Campbell* [1977] 38 C.C.C. (2d) 6 (Ont. C.A.) at 22, "reasonable probabilities in the accused's favour may give rise to a reasonable doubt."

[34] In **R. v. Farah** [2002] O.J. No. 4936, the Court found that it is not for the accused to satisfy the trial judge that an accident was a reasonable inference. However, at the same time the trier of fact cannot speculate about mere possibilities²⁰. Certainty is not required²¹. The Crown must therefore establish that

¹⁷ *R. v. Cooper* [1978] 1 S.C.R. 860, *R. v. Griffin* 2009 SCC 28

¹⁸ *R v. Barrett*, 2004 NSCA 38; *R v. Yebes*, [1987] 2 S.C.R. 168 at para. 24

¹⁹ *R. v. Griffin, supra*

²⁰ *R. v. Gauthier* [2009] B.C.J. No. 102

²¹ *R. v. He* [2008] B.C.J. No. 2002

no reasonable inference consistent with innocence can be drawn or made from the proven facts. However, individual pieces of evidence or facts need not be established beyond a reasonable doubt²². The circumstantial “facts” need not be established beyond a reasonable doubt. It is only the ultimate issue of guilt to which the criminal burden applies²³ although weaknesses in the establishment of any piece of evidence or fact may make it impossible to conclude beyond a reasonable doubt that the only reasonable or rational inference is the guilt of the accused.

[35] Drawing or making reasonable inferences must be distinguished from speculating or making conjectures. An inference is a deduction of fact that may logically or reasonable be drawn from another fact or group of facts which have been established²⁴. Cacchione, J. described this in **R. v. Hobbs** 2008 NSSC 226 :

¶66 Because this case is a circumstantial case the defence also urges the Court not to engage in conjecture or speculation when drawing inferences. The process of drawing inferences is well known. It was aptly described by Doherty, J.A. in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont.C.A.) at p. 209 as follows:

A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from fact or a group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation ...

¶67 In *R. v. Katwaru* (2001), 153 C.C.C. (3d) 433 (Ont. C.A.) Moldaver J.A. stated at p. 444:

²² *R. v. Morin* [1988] 2 S.C.R. 345

²³ *R. v. Morin, supra*

²⁴ Watts Manual on Criminal Evidence (2006) David Watt, Carswell, Toronto p. 42

... In order to infer a fact from established facts, all that is required is that the inference be reasonable and logical.

¶168 These cases and others referred to in argument all make the point that drawing inferences cannot be based on conjecture or speculation but rather that inferences can only be drawn from proven facts.

[36] Finally it is impermissible to draw or make an inference of guilt from the simple fact that the accused is not believed.²⁵

D. Post-event Conduct

[37] Here there is considerable testimony about what the accused did after the injury occurred - “the event”. I will refer to this as “post-event” conduct. The Supreme Court of Canada refers to this as “after the fact conduct”²⁶. I have referred to this briefly above and will analyze it more fully later.

[38] What a person did or did not do or said or did not say may assist in determining that they committed the alleged offence or it may not. Post-event conduct is simply a kind of circumstantial evidence and must be weighed with all the other evidence²⁷. However, this evidence should only be used if it is capable of supporting a reasonable inference of guilt. It must be remembered that post-event conduct may be consistent with innocence or be evidence of consciousness of guilt for wrongful acts other than the alleged offence. Finally, like all circumstantial evidence, one cannot speculate or make conjectures about post-event conduct²⁸.

E. Expert Opinion Evidence

²⁵ *R. v. Hoben* 2009 NSCA 27

²⁶ *R. v. White* [1998] 2 S.C.R. 72

²⁷ *R. v. White, supra*

²⁸ *R. v. Sovojipour* [2005] C.C.C. (3d) 533

[39] The opinion testimony of expert witnesses, like other witnesses, can be accepted in whole or in part or not at all.²⁹ As a trier of fact, I can accept some, all, or part of an expert witness's testimony.

[40] In situations where there is a conflict in the evidence of different expert witnesses it is wrong simply to prefer the evidence of one over the other³⁰. Here all of the expert witnesses were found to be properly qualified to give opinion evidence after a *voir dire* to determine the admissibility of their testimony was conducted. The **Mohan**³¹ criteria were found to be satisfied. There was no real dispute by either party as to the qualifications of any of the expert witnesses. The only exception was the ability of Dr. Macaulay to give opinion evidence about the possible effects of stairway falls. His proposed testimony relating to that area was, I found, not admissible. Notwithstanding this, to assess the weight of an expert witness one must, in my opinion, examine the basis for the expert's opinion and the qualifications for giving that opinion. While the threshold test for the admissibility as to qualifications may be met the ultimate weight given to that testimony can in part be determined by the expert's qualifications. Finally, as a trier of fact I have an obligation to apply common sense to the findings of experts and to make my own findings about the ultimate reliability of the experts' testimony.³² I am not required to accept the expert's opinion even if there is no competing expert³³.

F. Use of the Accused's Record

²⁹ *R. v. Fisher, infra*

³⁰ *R. v. Parnell* (1983) 9 C.C.C. (3d) 353 (ONCA)

³¹ *R. v. Mohan* [1994] 2 S.C.R. 9

³² *R. v. Fisher* [1961] O.W.N. 94 (O.N.C.A.), affirmed [1961] S.C.R. 535

³³ *R. v. D.D.* [2000] 2 S.C.R. 275

[41] Here the accused testified about his own criminal record. His criminal record may be used to assess his credibility with respect to his testimony³⁴. However the accused's conduct cannot be used to infer that he is more likely to commit an unlawful act because he committed a similar offence previously. An accused's record for offences of dishonesty is more relevant than a record for other offences.

VI THE EVIDENCE

A. Factual Background

[42] Samantha Marie Mercer was born October 23, 2001 in St. John's, Newfoundland. Her mother, Alesha Mercer, had moved there after growing up in Truro, Nova Scotia. Alesha Mercer left Newfoundland in August of 2004 when she separated from Samantha's father. She and Samantha returned to the Truro area and lived with Samantha's mother, her two brothers, and her step-father. Later in October of the same year she met the accused through her brother Chris Mercer. She and the accused had known and dated each other when they were approximately fifteen years of age. Alesha Mercer is six or seven months older than the accused who was born May 26, 1981. In March of 2005 the accused was twenty-four years of age and Alesha was twenty-five.

[43] In the early part of 2005 Alesha Mercer and the accused began to date and shortly thereafter they arranged to move in with each other. Alesha arranged to rent a single family home at 341 Brunswick Street in Truro and on February 21, 2005 Alesha Mercer, her daughter Samantha, and the accused moved into this residence.

[44] Alesha Mercer was employed at a call centre in the Truro area. The accused was unemployed although he volunteered regularly and perhaps daily at the local food bank and as a result was able to obtain food and other household items including toys for Samantha from the food bank.

[45] Alesha Mercer was Samantha's primary caregiver although it appeared Samantha's grandmother also cared for the child on occasion. The accused had limited responsibility for the child although on very few occasions he looked after the child by himself. The accused's interaction with Samantha seemed unremarkable. The evidence was that he got along well with her. There was no

³⁴ *R. v. White* [2009] A.J. No. 322; *R. v. Corbett* [1988] 1 S.C.R. 670

evidence that he was short-tempered or inappropriate with her. Alesha Mercer testified that the accused never used physical force to discipline Samantha nor did he raise his voice towards her. She also said that he never showed any reluctance to care for Samantha. She testified: “He was really excellent”. Finally, she said that the accused would sometimes tickle the child but never wrestled with her or played “airplane games” or swung her around although the accused described various incidences when he would toss Samantha on the bed and couch and swing her around. He said the child enjoyed this and no complaints were ever made.

[46] Both Alesha Mercer and the accused testified that Samantha would be disciplined by sending her to a corner of the room. The only incident of physical discipline described was an incident when Samantha bit the accused’s nose and her mother spanked her bottom over the protests of the accused.

[47] The couple had a dog - a Rottweiler - which by all accounts was well-behaved and interacted well with Samantha.

B. Undisputed Facts Around the Critical Time Period

(i) Prior Marks and Bruises

[48] The time period giving rise to these allegations - “the critical time period” - was between shortly after 4 p.m. when the accused returned home with Samantha, and approximately 6:30 p.m. when Michele Bent and her friend Terrence Turnbull arrived at the accused’s home. Prior to that time, in the hours and days preceding, certain events occurred which are material to assessing these allegations.

[49] Particularly, on the day before the date in question Samantha had gone with her mother to the food bank where the accused volunteered. While she was in the care of Mary Deadder, another worker at the food bank, she sustained four bruises or marks on her face. On different occasions during this time she bumped her head on the right side on a chair causing a red welt or mark on her head which Ms. Deadder described as a “red lump with a tinge of blue”. She also described Samantha “whacking” her head on the left side on a table which she says left a visible mark but not a big welt. At one point in her testimony she described it as being a scrape. She also described that during the same time Samantha was playing with a wheelchair when she hit the handle of the chair in the centre of her head which again left a red spot in the centre of her forehead. Finally she described that

during the same time Samantha had an encounter with another child at the food bank during which time she was bitten on the left cheek on her face.

[50] Ms. Deadder identified the location of each of these marks and bruises on the pictures of Samantha which were taken at the I.W.K. Hospital by the police. Alesha Mercer did the same. It is clear that those bruises or marks shown in the photographs were caused by Samantha hitting the chairs and table at the food bank and being bitten by another child prior to the critical period after 4 p.m. on March 1, 2005. The only exception is the mark on the left side of her forehead which seems to have an additional pattern scrape or bruise over it which would not have been consistent with hitting a table, although Ms. Deadder did refer to the mark as a scrape. There is also some inconsistency in the evidence as to when these injuries did occur - Monday or early Tuesday, or some on each day. There is no need to review the evidence on this point as it is clear these marks were present and the causes of them are clear. The precise times as to when they occurred is not critical in my opinion. Also there is no dispute that on Sunday prior to the critical time period Samantha received two small round bruises about the size of a nickel or quarter on her lower back near her waist. These were again identified in the hospital photos.

(ii) Other Evidence

[51] Alesha Mercer testified that she did not notice or see any other marks on her daughter when she bathed her on the day prior to March 1, 2005. Alesha Mercer's mother testified to the same effect. Samantha was suffering from a cold or infection during the days before the incident. She was described as lethargic and her voice was affected. She was, however, recovering. She was taking medicine including Tylenol and other medication during this period.

[52] The house where Alesha Mercer, Samantha, and the accused lived and to where they had moved on February 21, 2005, was recently painted. I will describe this in more detail later. In particular the stairway and Samantha's bedroom were freshly painted. No marks or dents were present before they moved in. Alesha Mercer testified that she never saw any marks or dents in these areas and in particular never saw the dent discovered by the police on March 2, 2005 which I will describe in detail below. The accused testified to the same effect.

[53] This couple had no telephone - neither a landline nor a cellphone. They did, however, use the cellphone of Alesha Mercer's brother, Chris Mercer, regularly and in particular to make phone calls to Samantha's father in Newfoundland. These calls appear to have been made regularly on Tuesday evenings. In any event one such call was scheduled for the evening of Tuesday, March 1, 2005.

[54] There was considerable evidence about the accused's vehicle. It was unlicensed and uninsured and had mechanical difficulties. However, the accused regularly used it and in fact used it on March 1, 2005 prior to the events in question.

C. The Events of March 1, 2005 outside the Critical Time Period

[55] The events of the first part of March 1, 2005 were uneventful. Alesha Mercer, the accused, and Samantha arose that morning at approximately 8 a.m. Eventually all three went to the food bank in downtown Truro after doing some other errands, arriving there at approximately 10 to 10:30 a.m. They spent the day there until approximately 2 p.m. when Alesha Mercer and Samantha were driven home by another worker at the food bank. The accused stayed.

[56] When Alesha Mercer arrived home she cleaned the house and did dishes, made the beds, swept the carpet, tidied up Samantha's toys and got ready for work. At 3:30 p.m. the accused arrived home. The accused, accompanied by Samantha, drove Alesha Mercer to work at the call centre, which is described as being approximately a seven minute drive away by the accused, and a ten to fifteen minute drive by Alesha Mercer. Alesha described Samantha wearing "purple hangy pants" and a pink Winnie-the-Pooh shirt which she identified in the exhibit photos as being found on the bathroom floor the next day by the police. It appears that she was wearing a winter coat as well. The accused and Samantha dropped off Alesha Mercer at work at approximately 4 p.m. The accused then returned home with Samantha. I will describe below the accused's testimony about the events after he arrived home and before Michelle Bent arrived at approximately 6:30 p.m.

[57] As I indicated, Michelle Bent and Terrence Turnbull arrived at the 341 Brunswick Street house at approximately 6:30 p.m. This visit was unplanned and without any notice to the accused. The accused was not home. The couple entered the porch area and then opened the door into the downstairs hallway. The door was

unlocked. Michelle Bent testified she could hear the sound of heavy breathing coming from an upstairs bedroom. The accused's dog came to the door. Michelle Bent and Terrence Turnbull also had a dog with them. The couple stood at the bottom of the stairs. After approximately five to ten minutes they began to leave when the accused arrived. The accused was agitated, which was evidenced by his voice and "body language". He hit the wall or doorframe in the porch with his hand. The accused explained that Samantha had fallen down the stairs and explained his efforts to call Chris Mercer. He also described the circumstances surrounding Samantha's fall. Michelle Bent then saw the accused go upstairs to check on Samantha. She testified that he was gone for about thirty seconds to a minute. Michelle Bent and Terrence Turnbull remained downstairs. When the accused returned downstairs all three decided to go to the basement to smoke a marijuana cigarette, which Michelle Bent and Terrence Turnbull had brought with them. They went to the basement for approximately 10 to 15 minutes before returning upstairs. All three, according to Michelle Bent, went to the livingroom. The accused testified he went up a couple of stairs towards the second floor bedrooms and could still hear Samantha breathing. He returned to the livingroom. After a couple of minutes he returned to Samantha's bedroom. Michelle Bent testified the accused went directly to the bedroom rather than returning to the livingroom. Nothing appears to turn on this small discrepancy.

[58] Michelle Bent then heard the accused scream and witnessed the accused carrying the child down the stairs. He had his hands and arms under her bottom or upper legs and her head against his shoulder. The accused testified he fell on the stairs as he was carrying Samantha from the bedroom. Michelle Bent did not see this, although it is possible she was not in a position to observe this particular event. Michelle Bent did testify she saw two pink child's shoes on the stairs - one near the top and the other near the bottom. She also said that she saw Samantha's favourite puppet toy on the stairs as was shown in the police photos.

[59] As the accused came down the stairs it was clear that the child had to be taken to the hospital. Michelle Bent confirmed this. Samantha was wearing just pants and had no shirt on. Michelle Bent said that Samantha had "white" in her mouth and was not responding. All three together with Samantha went to Terrance Turnbull's car with the accused carrying Samantha. The accused fell with Samantha in his arms, after leaving the outside step as he was going down a muddy slope to where the car was parked. Michelle Bent witnessed this. She fell as

well. She also testified that there was mud in the car where Samantha was placed. This suggests that Samantha had contact with the ground as well. There was no evidence as to whether Samantha had mud on her when she arrived at the hospital. While at the residence Michelle Bent was never asked to look at Samantha nor was there any suggestion before the accused last visited the bedroom that the accused needed to take the child to the hospital.

[60] Michelle Bent, Terrence Turnbull, and the accused took Samantha directly to the hospital, arriving at approximately 7 p.m. Efforts were made then to insert a small breathing tube into Samantha's mouth. Her injuries were serious and a decision was made quickly to transport her to the I.W.K. Hospital in Halifax. In the meantime Alesha Mercer and Chris Mercer arrived at the hospital. Alesha Mercer, Michelle Bent, Terrence Turnbull, and the accused then went to the I.W.K. in Halifax.

[61] There is some discrepancy in the evidence about the route taken and what Michelle Bent and Terrence Turnbull did after arriving in Halifax. In my opinion the evidence of Michelle Bent is more reliable on this point. In any event nothing turns on this discrepancy except that the evidence of Alesha Mercer was clearly affected by the significant shock and impact of the events of that evening which may have affected her recollection.

[62] In any event Alesha Mercer and the accused did arrive at the I.W.K. Hospital. Both were interviewed by social workers at the hospital. Michelle Bent and Terrence Turnbull returned to the hospital after they dropped off a friend who had helped them locate the hospital. Alesha Mercer made no mention of this.

[63] The accused returned to Truro with Michelle Bent and Terrence Turnbull. There is a conflict in the evidence about how the accused came to leave. Alesha Mercer suggested in her testimony that the accused was reluctant to stay and anxious to leave. She said that Michelle Bent and Terrence Turnbull indicated that they had to go. Michelle Bent testified that Alesha Mercer asked her to take the accused home. The accused testified that Alesha Mercer wanted him to leave before her mother arrived. There was no contact between the accused and Alesha Mercer after that point. I accept that the accused left at the instigation of Michelle Bent and Alesha Mercer and that he was not necessarily reluctant to stay other than some reluctance to confront Alesha Mercer's mother and that Alesha Mercer was

content, although perhaps regretful, that he had to leave. Certainly no adverse inference can be drawn from anything that occurred at the hospital, in my opinion.

[64] Michelle Bent, Terrence Turnbull, and the accused returned to Truro where the accused spent the night at the home of Michelle Bent and Terrence Turnbull. The accused and Terrence Turnbull did return to the Brunswick Street residence that same night to get Michelle Bent's dog which was left there when they went to the hospital. Michelle Bent testified that the accused and Terrence Turnbull went into the residence for approximately five minutes. Terrence Turnbull was never called as a witness. The next morning Michelle Bent testified she took the accused to see a priest.

[65] It is clear the police became involved in this matter after the child arrived at the I.W.K. Hospital - certainly by the next morning when the police arrived at the Brunswick Street residence. It also appears that the accused was directed not to have any contact with Alesha Mercer or her family. This may explain the lack of any contact by the accused with Alesha Mercer after he left the I.W.K. Hospital. Certainly no adverse inference can be drawn from this circumstance.

[66] It is clear that when Samantha arrived at the I.W.K. Hospital she was suffering from a severe head injury and she was on "life support". She remained in that state it appears for the purpose of organ donation. She was taken off life support on Thursday, March 3, 2005. She died as a result of a head injury.

[67] Chris Mercer testified that he spoke to the accused by telephone in the late afternoon of March 1, 2005. This appears to have occurred just prior to Michelle Bent and Terrence Turnbull arriving at the Brunswick Street residence. I will review this phone conversation later when reviewing the accused's testimony. Chris Mercer was travelling to the Brunswick Street home when he was called by his mother and told that Samantha was at the hospital. He went directly to the hospital. There he saw the accused. He confirmed that the accused was not wearing a shirt. The accused told him to go back to the house to check on the dogs.

[68] Chris Mercer returned to the house. The house was open and all the lights were on. He testified that Samantha's favourite puppet was under the inside door in the hallway. He picked it up and placed it on the stairs as seen in the police photos. He also gathered up the pink child's open-toed shoes and took them to his mother

because the accused had mentioned them to him. They were later turned over to the police.

[69] He also went into the bathroom and reflected briefly by looking out the window. He confirmed the clothes were there as depicted in the police photos. It appears he was not there for a long time. He turned off the lights and left the dogs in the house. He testified the garbage in the downstairs residence as shown in the police photos was not there at that time.

D. The Accused's Testimony
i) Background

[70] The accused testified he had a criminal and youth record. His description of the background of his relationship with Alesha Mercer and her daughter is consistent with the testimony of the other witnesses. He explained that he took a Child Development course when he was in high school.

[71] The accused testified about his experiences with Samantha. He said he would play with her physically - sliding on the floor and at times swinging her by her arms and feet. He had some, albeit very limited, experience with caring for Samantha alone. He also explained the discipline regime which Alesha Mercer also described.

[72] The accused explained that there was a warrant outstanding for his arrest. He also said that his motor vehicle was not registered and that he had no license. He explained that he would use another license plate on his car to drive the vehicle different places.

ii) Critical Time Period - 4 p.m. to 6:30 p.m. March 1, 2005

[73] After the accused dropped off Alesha Mercer at work he and Samantha drove directly home. It appears that he would have arrived home at approximately 4:15 p.m. He said he took her inside in her snowsuit and placed her on the livingroom sofa while he prepared supper. He woke her and she ate supper and he

gave her her medication. He confirmed, as others had testified, that Samantha had not been feeling well.

[74] After supper he described that he was playing with Samantha in the kitchen with a small child-sized soccer ball. At this point Samantha had removed her shirt because she was hot. He was showing her how to kick the ball against the wall. At one point the accused described how he hit the ball hard against the wall and it bounced back and hit Samantha on her bare back. He said that she did not cry but showed some discomfort and he rubbed her back. This, the defence contends, explains the round or ring bruise on Samantha's back which was apparent in the hospital and autopsy photos. He specifically denied striking the child with a coffee cup which was in the bathroom and used for bathing or striking her with the plastic tobacco container which was used to keep crayons. Both of these items have similar dimensions and would have been capable of making similar marks or bruises on the child's back.

[75] The accused also described Samantha falling on the kitchen floor on her rear different times as a result of standing on the soccer ball. This happened while the accused was trying to show her how to play with the ball. After playing with the ball the accused put it on a shelf in the kitchen. The soccer ball was later seen by the police in the livingroom the next morning. Its dimensions are consistent with the mark on Samantha's back and the medical evidence confirms a ball striking her back may have been able to make such a mark.

[76] After playing with the soccer ball the accused described that he arranged for Samantha to play with a motorized plastic boat in the bathtub. This was one of the many toys he had brought home for her from the food bank. The boat was in the tub the next day when the police attended at the residence.

[77] The accused said he filled up the tub with cold water and left Samantha in the bathroom to play with the toy. At this point he described she was wearing a purple outfit. In cross-examination he said Samantha's shirt was placed on her although he did not explain whether this included the pink Winnie-the-Pooh shirt her mother confirmed she had on and the purple sweater seen in the bathroom. The accused could not say who put the shirt on her. He was never challenged as to why the shirt and the sweater went on at this point.

[78] The accused explained that he left Samantha in the bathroom while he returned to the livingroom to smoke a cigarette. He said he could hear her playing with the toy. When he went back to the bathroom to check on her he said that she had gotten in the tub and was completely wet. Because the water was cold Samantha was also cold. He pulled the plug on the tub and took the child out and removed her clothes. He said that he held her between his knees tightly as he removed her sweater and undershirt. He said it was particularly difficult to get the wet sweater off, the implication being that he had to hold her tightly with his knees which may have caused some bruising.

[79] He described the clothing in the police photos taken the next day. He also described his own shirt seen on the sink in the bathroom as shown in the police pictures. The accused confirmed that he had no shirt on but was never asked precisely when he removed it but did say he did not have a shirt on when he went to the livingroom when Samantha was in the bathroom playing with the boat. After the accused removed Samantha's clothing he went upstairs to get dry clothes for her. He said he got a purple sweater and a mismatched pair of pants. He said he was able to get pants on her but she removed her top. She was not wearing underwear at this point. It appears that this occurred downstairs as the accused said that she was at the bottom of the stairs when he came down with the clothes. It is not clear where the shirt Samantha removed went. He was never cross-examined on details of this event.

[80] Samantha did not want to wear the outfit the accused selected. This is why she removed the top. They both then went upstairs to find another outfit. The accused said that Samantha went first and that he followed. They went in to Samantha's bedroom. He said that she wanted a certain shirt - one with a deer on it. The accused could not find this particular shirt and assumed it was in the car with the dirty laundry. At this point the accused was looking in the closet in a plastic garbage bag for a shirt. He said that Samantha was still wrapped in a towel. He said that he was playing with her on the bed while he was looking in the closet. When asked, "Is that when the tossing on the bed happened?" he replied, "Yes, more tossing on the bed". He said he was slowly getting her clothes on. At this point in his testimony he specifically denied grabbing her by the pants and thrusting her head into the wall as the Crown had alleged.

[81] In cross-examination he conceded Samantha may have gone upstairs while the accused was possibly wringing out the clothes in the tub. In any event he said that when he went into the bedroom Samantha had a crayon in her hand and that when he entered the room she went to the corner, suggesting that she had done something wrong. He said he looked around the room but saw nothing. He said he thought this was rather odd.

[82] The accused was not cross-examined about the details of tossing Samantha on the bed, how it was done or whether she was still wrapped in a towel as he explained and why this was occurring when he was trying to get her dressed, except that he explained that he was doing this to, "Cheer her up". It was suggested to him that Samantha was controlling him - she was "running the show", to use the prosecutor's words. He denied this.

[83] The accused then said Samantha wanted to go outside. He told her, "No" but explained that he had a treat for her. The accused explained that he then went outside across the roadway or lane in front of the house and got some snow and packed it in a large snowball. He also explained that when he came back in he removed his shoes and placed them on the mailbox so he would not have to wash them off so he would, presumably, keep the house from getting dirty. He said he then allowed Samantha to play with the snow in the sill of her bedroom window. This he said went on for approximately ten minutes.

[84] It is not clear at what time this could have occurred. Given that the accused arrived home at approximately 4:15 to 4:20 and after the other activities I described it may very well have been between 5 and 5:30 at this point in the events, although it is not exactly clear.

[85] He then explained that he and Samantha went downstairs and curled up on the couch in a blanket. He said that Samantha wanted her own "froggy" blanket - a blanket which had frogs on it which again is shown to be on her bed in the police photos taken the next day. He said that Samantha went upstairs by herself followed by the dog. He then heard her ask to bring down a toy. He replied no. She then asked whether she could bring down her pink princess shoes, which were the plastic shoes which were described as being too large for her. He relented and agreed that she could bring them downstairs. At this point the accused is still on the couch and was not able to see Samantha or the dog on the upstairs landing. The

accused then described how he heard Samantha say, “Good girly”, a clear reference to the dog and heard the dog whine as if the dog was being touched on sores which the dog had on it. The accused then said he heard “Thump, thump”, that is two thumps. He assumed the child had “wiped out” to use his words. When he went out into the hallway he saw Samantha lying on the landing at the bottom of the stairs near the wall. In cross-examination he said he never saw her hit her head against the wall. He said she was positioned diagonally with her head closest to the wall at the point where the landing meets the hallway near the front door. Her feet were near the first step next to the wall along which the stairway ascends. She was face down. The accused said that she was “doing a humming noise”, something the child apparently often did to soothe herself.

[86] He picked her up, held her, and rocked her. He walked back and forth with her and eventually went back into the livingroom. He said her eyes were open but she looked upset. She had an unpleasant look on her face and looked like she was about to cry. He said that she was still holding on to the blanket. The pink shoes were on the stairs. He picked up the shoes and threw them against the wall explaining that he was of the belief that had she not worn the shoes she would not have fallen.

[87] The accused said he was shaken up because this had occurred when Samantha was in his care. He said she had carpet burn on her forehead and chin. He said he saw the pattern bruises which were shown in the police photos. He said however the bruising did not look as bad as in the photos. He estimated the time of the fall between 5:30pm and 6:30pm.

[88] He said he expected Alesha’s brother, Chris Mercer, to be coming over. The accused indicated that he had earlier asked Chris Mercer to babysit Samantha while the accused attended a meeting at the food bank and at the same time Samantha was scheduled to call her father using Chris’ cellphone.

[89] The accused decided to call Chris Mercer. Because the accused had no phone he planned to go to a nearby convenience store to use a pay phone outside that store. It is shown in the police photos. He went to his car to get some change for the pay phone. When he was there he noticed the keys were in the ignition and the battery was dead. There was no change to be found in the car.

[90] He returned to the house and got some change from Samantha's piggy bank. The police photos show coins on the table in the livingroom which appears to confirm this. The accused went to the pay phone three separate times. The first two times he got no response or answer. Michelle Bent said he told her he intended to call her and Terrence Turnbull. In cross-examination he said he could not get hold of either her, his father or Terrence Turnbull. He said it took him about five minutes to go to the store and back. After the second call he returned and took Samantha to her bedroom upstairs. He never really explained why he did this at this point other than to mention that she had fallen asleep. He then changed the battery in his car in order to make the car operative. He pointed out in the police photos where he left the old battery.

[91] He then went back to the store again to call Chris Mercer. At this point the accused concedes he wanted to take Samantha to the hospital and said he "wanted it documented" or to have "things documented" which he said in direct and cross-examination. He never explained precisely what he meant by this. He eventually spoke to Chris Mercer. He said he called the third time to tell Chris Mercer that he was going to the hospital. He said he told Chris Mercer that Samantha had fallen down the stairs and that she had a bruise on her chin and forehead from hitting the carpet. He told him he needed Samantha's birth certificate and health card. He said that there was an argument and eventually the accused hung up on Chris Mercer.

[92] Chris Mercer's recollection of the phone call differs from that of the accused. He said the accused was upset, loud, and panicked. He told Chris Mercer that he was never babysitting again. He did say Samantha fell downstairs about an hour to three-quarters of an hour previously and asked him to come over. He said her chin was bruised. He did confirm he got the call immediately after he plugged his phone in. He never mentioned anything about the accused asking for a health card or birth certificate or anything about the accused taking the child to the hospital.

[93] The accused returned to his house. He was still upset about the conversation with Chris Mercer. When he got back to the house he met Michelle Bent and Terrence Turnbull.

[94] What transpired thereafter was also described by the accused and by and large confirmed by other witnesses. Any discrepancies between what the accused described and the other witnesses was noted above.

[95] The accused said that when he went upstairs to Samantha's bedroom for the last time that she was lying on her back and that her legs were straight out and her arms were out as if she was indicating she wanted to be picked up. He heard her humming as he described earlier. He thought that she was awake. He then saw "bubbles" in her mouth. He thought something was wrong. He screamed. He attempted to open her mouth which did not open easily. He said he gave her air twice in the bedroom.

[96] The accused said that he picked Samantha up and then took her downstairs. He said his legs went like "jelly". He said he fell on the stairs. He confirmed he was wearing just pants - no shirt. Samantha also had no shirt. He grabbed a jacket and put it over her on the way out. He confirmed that he fell outside while carrying Samantha as described by Michelle Bent. He could not say if she hit the ground. The accused said he did not think there was any emergency until he saw Samantha for the last time when he went to her room. This he said explains why he did not call 911 or take her to the hospital in his own car before calling Chris Mercer again and why he did not leave before smoking a marijuana cigarette with Michelle Bent and Terrence Turnbull.

[97] At the I.W.K. Hospital the accused testified that Alesha Mercer asked him to leave before her mother arrived.

[98] In cross-examination the accused conceded he may have told someone to leave Samantha's puppet for "proof or evidence". When asked what proof or evidence was being referenced he said he could not "recall today".

[99] He also testified that he tried to call Chris Mercer later after he returned from the I.W.K. but could not reach him. He said he left a message.

E. Forensic Evidence - Non-medical

[100] The police went to the Brunswick Street residence and pictures were taken showing the interior of the residence. From the evidence it appears the house had

been entered on three brief occasions after the accused left with Samantha 6:30 p.m. the previous day: once by Chris Mercer to check on the dogs, once by the accused and Terrence Turnbull when they returned from the I.W.K. Hospital in the early morning of March 2, 2005 to get the Bent dog, and once by others to remove the accused's dog just prior to Chief Flemming entering on the morning of March 2, 2005 to take the police photos.

[101] It is quite clear that the dogs got into the garbage during the time that they were alone. Also the small soccer ball, which I will discuss later, is shown in the livingroom, not on the bookcase in the kitchen where the accused indicated he had placed it. It is certainly possible the dogs may have moved it as well.

[102] It is not possible to ascertain with any degree of confidence what changes may have occurred to the residence after the accused left with Samantha the night before, although the opportunities for any tampering with the items in the house are limited. This is because there is not enough objective evidence available to cover off all of the intervening time periods when others were in the house. I refer specifically to when the accused and Terrence Turnbull returned to get the Bent dog. Terrence Turnbull was not called as a witness. Also, those attending to remove the accused's dog were not called as witnesses. Accordingly, it is unknown what, if any, items may have been moved, although it appears the likelihood of any significant changes is limited. Given the importance to my analysis I will review the layout of the residence in considerable detail.

[103] The residence is a single family detached unit. It has two storeys together with a basement. Facing the front or west side of the house the entrance is on the right side where one enters into a finished porch approximately 6 3/4 feet deep by 6 1/2 feet wide. This porch is flush with the side of the building and does not protrude out. This is followed by an inside door straight through the porch which opens into a narrow hallway approximately 2 feet 8 inches wide. This hallway runs directly back to the only bathroom at the rear of the house. The stairway to the second floor is on the immediate right upon entering the inside door into the hallway. It consists of a landing approximately 3 feet square at the bottom with stairs descending directly up. There are twelve stairs. The stairs appear steep and were estimated to have a 41-42 degree incline. Midway down the hallway a 3 foot entrance on the left opens up to the kitchen and dining area directly and to the rear of the house. The livingroom is to the left of this entrance at the front of the house.

The livingroom is approximately 10 ½ feet square. The kitchen and dining area are approximately 18 feet running towards the rear of the house by 10 ½ feet wide.

[104] The dimensions of the house were presented in the form of a floor plan. From this floor plan and the photos it is clear that the stairway cannot be seen from the livingroom couch.

[105] Given the importance of the dimensions and layout of Samantha's second floor bedroom I have appended a copy of that floor plan as Appendix "A" to this decision. The dimensions are explained. It should be noted the scale of the drawing, as indicated, is incorrect but nothing turns on this.

[106] The police observed a dent in the wall of Samantha's bedroom above the side of her bed. The bed is located opposite the window in the bedroom with the head up against the 5 foot 7 inch wall next to the closet. The right side of the bed is up against the 4 foot 1 inch wall shown on the floor plan. This is where the dent is located. The bed was measured to be 12.5 cm or slightly over 4 inches off of the wall. The dent was measured to be 69 cm from the floor, 19 cm from the top of the mattress of the bed, measured without coverings and 58.2 cm from the outside corner of the wall and 65 cm from the inside corner of the wall.

[107] The mattress on the bed was observed to be slightly askew on the box spring with the head of the mattress slightly more towards the side wall with the foot projecting slightly in the opposite direction. The 4 foot 1 inch wall where the dent was seen was constructed of gyproc. No thickness was noted.

[108] The size of the dent was not mentioned, the size or depth of the dent was not measured and accordingly there was no evidence as to its precise dimensions or the extent of the indentation. The cardboard or paper of the gyproc was not broken, although the paint was cracked. The only possible indication of the dent size is that it was near a female plug outlet. The dent appeared to be approximately the same size as one of the female plugs and perhaps slightly larger.

[109] There was no evidence whether the dent was over a support stud nor was there any evidence of what was behind the gyproc - for example, plaster slats given that the plaster was seen in other parts of the house. There was evidence of a nail-pop on the other side of the plug outlet, suggesting that the stud was not behind the

dent. Chief Flemming testified that the dented portion of the gyproc containing the dent was seized but this was never tendered into evidence at the trial.

[110] The police observed hair lodged in the crack of the paint in the dent. DNA evidence confirmed that this was most likely Samantha's hair. There was a hair from an animal located there as well.

[111] There was no evidence as to the width of the bed although it appears to be a single or twin bed. In the photos however the bed appears to be at least 2/3 to 3/4 of the distance along the 5 foot 7 inch wall up against where the head of the bed was situate. This would appear to leave between two and three feet between the bed and the closet. The closet is about three feet square, leaving approximately five to six feet from the left side of the bed near the foot to the far wall. It is in this area that the accused would have had to stand when it is alleged he slammed or threw Samantha into the wall. However, there are no precise dimensions to determine exactly how large this area is.

[112] Leaving the bedroom and returning downstairs, near the bottom of the wall facing the stairway the police located and photographed a dent in the plaster wall. This is on the first floor of the house. It was 37 cm. from the floor and 25.5 cm. from the inside corner of the wall. Unlike the dent in the bedroom this dent was precisely measured. It was 4.5 cm. tall and 3 cm. wide and had a hairline crack down the middle of it. There was also another crack in the plaster extending down and away from this dent. There is a clear impression in the dent which slopes from either side into the middle of the dent.

[113] Finally, the police seized a coffee cup from the bathroom, a plastic tobacco container and a small plastic soccer ball. All of these had dimensions consistent with the ring bruise on Samantha's back. The coffee cup was found in the bathroom on the floor next to the tub. Alesha Mercer testified it was kept next to the tub faucet.

G. Forensic Evidence - Medical

[114] The Crown called five medical doctors to give opinion evidence and some of these witnesses described the various injuries and bruises which were present on

Samantha's body when she arrived at the I.W.K. Hospital. There was also detailed evidence regarding the fatal brain injury.

[115] Dr. Steven Bellemare is a paediatrician specializing in child maltreatment and was part of the Child Protection Team at the I.W.K. Hospital, joining that team in January 2005, just shortly before this incident.

[116] Dr. Bellemare was called to intervene in Samantha's case by Dr. Souter, the attending physician at the I.W.K. Hospital at approximately 11:00 p.m. on March 1, 2005, shortly after she arrived at the hospital at 8:50 p.m. He examined her the next day. He testified as to the result of his examination and opined about the cause of the fatal impact.

[117] Dr. Matthew Bowes, now the Chief Medical Examiner for the Province of Nova Scotia, was at that time a consulting forensic pathologist and medical examiner. He performed the autopsy on Samantha. His written report was presented into evidence. He also testified as to the results of his examination and opined about the cause of the fatal impact.

[118] Dr. Michael Pollanen is Chief Forensic Pathologist for the Province of Ontario and was engaged to provide a second opinion to the Public Prosecution Service and to give an opinion regarding the cause of the fatal impact. He examined the complete medical file, the police photos of Samantha and the house and the report of Dr. Chris Van Ee, which I will review in more detail below. His written report was presented in evidence.

[119] Dr. Robert Mcaulay is a neuropathologist at the Q.E. II Health Sciences Centre in Halifax, Nova Scotia. He was asked to examine Samantha's brain, spinal cord and eyes by Dr. Bowes after the autopsy. He also opined about a type of impact which could cause a fatal injury. In a separate mid-trial ruling he was not permitted to give an opinion about the effects of a possible stairway fall as a likely cause of the fatal impact to this child's head.

[120] Dr. Michael Howett was the attending physician at the Truro Emergency Hospital. He described the efforts used to resuscitate Samantha and to insert a tube into her mouth. He did not provide an opinion about the fatal injury.

[121] There is no dispute about what was the cause of Samantha's death. It was the result of an impact to the top of her head which resulted in diffuse axonal injury which resulted in an injury to her brain and eventually to her death. The real issue in this proceeding is – what caused that impact?

[122] I will describe briefly the finding of the neurologist, Dr. Mcaulay, regarding the brain injury. Because the other injuries and bruises are important to my analysis I will describe those in detail.

i. Bruises

[123] Dr. Bellemare described Samantha as having 57 bruises when he examined her on March 1, 2005. The “sheer number of bruises” was important to his opinion of how Samantha sustained the injuries she did. While the various bruises in the police photos were described by Dr. Bellemare there was no attempt to number them, for example 1 to 57 so reference to them is awkward. It is clear though that some of these 57 bruises were pre-existing and independently explained. Others were the result of medical intervention. Further, there were many bruises which were very small or faint and some which pre-dated the time period in question.

a) Independently Explained Bruises

[124] As I described above Samantha sustained three bruises to her forehead and a bite mark to her left cheek. There was, however, a pattern bruise over the bruise on her left forehead. Also the bruising behind her ears appears to be tracking of blood from her brain injury. The three marks under her chin appear to have been caused by medical intervention when efforts were made to insert a breathing tube into her mouth at the Truro Hospital. There is a small bruise on her toe as a result of medical intervention to test her sensitivity to pain.

[125] The two coin-shaped bruises or marks on her back near her waist appear to have been the result of sliding on the kitchen floor, which her mother and the accused both described.

b) Other Bruises

[126] The remaining bruises I would categorize as significant, less significant and minor. The significant bruises include the following:

1. A round bruise on Samantha's back about 8 cm. in diameter, which the accused maintains resulted from being hit with the soccer ball. The Crown alleges this was the result of being hit by the coffee cup.
2. A large, prominent, and pattern bruise on her chin, which appears to have resulted in the reddening of her entire chin.
3. A pattern bruise on her left forehead which appears to be over a pre-existing mark.
4. A series of blueish marks on her left flank or leg between her knee and thigh.
5. A series of marks on her left arm at or near her elbow.

[127] Other less significant bruises include the following:

1. Two bruises on the outside of her right leg an inch or two apart at the knee.
2. A small brown mark on her left thigh.
3. A small mark at the bottom of her left buttock.
4. Two small bruises on her left side below her waist in the front.
5. A bruise on her right buttock.
6. A bruise on the top of her left shoulder.
7. A small brown triangular mark on her back above the ring bruise and what may be a linear bruise between the triangular and circular bruise.

[128] There are several other bruises which I would describe as minor. Many of these are very faint and could be pre-existing. These include faint marks on her left leg, inside the elbow, top of the foot, and on the ankle and toe. Also, there are some scrapes on the knee and elbow. I have not attempted to describe in detail every single mark.

[129] There was no colour-code or colour-bar in the photos presented into evidence to verify the colouring on the bruises to ensure the likeness in the photos are the same as what the photographers and the physicians observed. Also the physicians agreed that while bruises change in shape and colour over time one

cannot place too much significance on colour to determine the timing of bruises. There was no evidence about how much impact is required to cause a bruise on a child or whether different children bruise differently.

[130] Drs. Bellemare and Bowes suggested the bruising on Samantha was in places which are not ordinarily found on a child, although there was no attempt to specify precisely which bruises fell in or out of that category, or to explain how one could come to such a conclusion. Clearly there were a number of bruises which are associated with a child's ordinary activities. I will discuss those below. However, many of the "minor" bruises and some of the "less significant" I described above would be consistent with an active child's everyday activities. Some of these bruises and scrapes were clearly pre-existing.

[131] Alesha Mercer testified that when she bathed Samantha the day before she did not notice any marks or bruises other than those she sustained at the food bank. In my opinion, it is very likely that Samantha would have many of these minor bruises on her, especially those on her legs, knees, ankles and elbows. This would not be a significant phenomena. It would not necessarily attract a mother's attention.

ii. Other Injuries

[132] Drs. Bellemare and Bowes both described a buckle fracture on Samantha's left arm or humerus, between her elbow and shoulder. It was explained that this was most likely caused by an axial load - a force acting on the long part of the arm, or impact to either the palm of the hand or the elbow. Dr. Pollanen said this may have been caused by a blow to the side of the arm. If this injury was the result of an axial load it would appear most likely to result from an impact to the elbow. Otherwise it was suggested her wrist would have been broken had the impact been to her hand. As there was no evidence of healing this injury appears to have been recent and undoubtedly occurred during the time period in question.

[133] Samantha also had six of her twelve thoracic vertebrae compressed. Dr. Pollanen indicated it was nine compressed vertebrae. The discrepancy appears to have been a result of more accurate findings through the autopsy rather than CT imaging done previously. This injury could have been caused either by an impact to the head or by her bottom impacting a hard surface. There was no neck injury.

Dr. Bellemare suggested the compression fractures occurred as a result of her head impacting a hard surface with her head down. This, he opined, would explain the location of the compressed fractured vertebrae. Dr. Pollanen suggested it was likely caused by a impact to her tailbone because of the absence of a neck injury “tends to make the cervical loading a less likely explanation”. The compressed fractured vertebrae could be asymptomatic.

[134] There was no evidence of precisely how much impact would be required to produce this type of injury although Dr. Pollanen indicated it would require a fall from height to a hard surface. The compression fractures as with the humerus fracture were described as recent and may have occurred during the time period in question. There was no evidence of any tissue or muscle damage.

iii. Fatal Injury

[135] Samantha’s brain was examined by Dr. Mcaulay at the request of Dr. Bowes. Dr. Mcaulay testified and explained his findings. His written report was entered into evidence. It was summarized by Dr. Pollanen. Dr. Mcaulay’s examination showed a bilateral subdural and patchy subarachnoid haemorrhage. His report also revealed a recent bilateral optic nerve sheath and retinal haemorrhages, focal contusion of right gyrus retus and petechial haemorrhages of the splenium and brainstem. The report said that there was evidence of diffuse axonal injury.

[136] Dr. Mcaulay testified this injury resulted from a significant impact to the vertex - top - of Samantha’s head. He explained that this in effect sent a “shockwave” which damaged the axons which caused blood supply and oxygen to the brain’s critical function to be cut off. Her brain therefore swelled and was damaged irreparably. The pituitary gland was pulled off and damaged as a result. This injury caused “brain death”. She died when taken off life support.

[137] Dr. Pollanen observed that the bilateral acute subdural haemorrhage seemed to be more extensive on the right side compared to the left side. Whether this suggests the fatal impact was more to the right of the vertex is not clear but seems to be consistent with that conclusion. Dr. Bowes testified that the CTC scan performed by Dr. Riding showed soft tissue swelling over the right parietal area of

the head, which again is suggestive that the impact may have been to the right side of the head.

iv. Medical and Bio-Engineering Opinion Evidence
a) Dr. Steven Bellemare

[138] Dr. Steven Bellemare was qualified to give opinion evidence in the area of paediatric child maltreatment and neglect with respect to injury interpretation. He was examined and cross-examined regarding stairway falls. There was no dispute about his qualifications to give opinion evidence.

[139] In Dr. Bellemare's opinion Samantha died as a result of a significant high force impact to the top of her head with an object or onto a surface. Considering the fractured thoracic vertebrae it was his opinion that she was slammed into the wall face down while being held by the seat of her pants and the neck of her clothing. At one point Dr. Bellemare stood up in the witness box and demonstrated this by showing how one could use the force of one's body to drive a child's head into the wall. His demonstration resembled the use of a battering ram.

[140] He further opined that the dent in the wall in Samantha's room as shown in the police photos was consistent with the type of impact which may have caused this injury. He testified he in fact was shown a 30 cm. square piece of gyproc which apparently was a portion of the wall in question. Remarkably this was never introduced into evidence.

[141] Dr. Bellemare suggested that Samantha was facing downward when this impact occurred as this would better explain her fractured vertebrae.

[142] He based his opinion on a number of factors. Firstly, in his opinion, the type of injuries Samantha had and the severity of her head injury could not have been caused by a fall down the stairs. He said: "We know that children who fall down stairs typically do not injure themselves very seriously". He based this on "years and years of direct experience with children who fall down stairs" and from "research papers which outline the type of injuries" children who fall down stairs sustain.

[143] He also referred to “numerous other bruises around the head area and all over her body” together with the fractured arm and vertebrae as indications that the fatal injury was not caused by what Dr. Bellemare referred to as a “simple fall down stairs”. He said “simple falls down stairs simply don’t cause, typically, injuries to so many body areas in different locations and not in that severity”. He said typically it is one injury to the head or neck or “maybe a few bruises, abrasions or lacerations, cuts to the skin and may on occasion get bruises in other parts of the body”.

[144] The most concerning injury which he listed is, obviously, the bruise to the top of the head - the fatal impact. He also referred to the circular bruise on her back and the blueish marks on the left leg between the thigh and the knee which I described above. He maintained that these appeared to be the result of an impact from a linear shaped object up to eight times. He referred also to the bruise on the left elbow although he conceded this could be accidental or the result of grabbing.

[145] His opinion that it was a significant impact was based in part on the retinal haemorrhages isolated in the back of the eye. In direct examination Dr. Bellemare testified that a child with this type of injury would likely be unconscious immediately or shortly after impact, although in cross-examination he agreed that there is controversy about whether someone can appear normal after a significant head injury. He conceded that it is possible a person could be awake and “gradually get worse”.

b) Dr. Matthews Bowes

[146] Dr. Matthew Bowes was qualified to give opinion evidence in the field of pathology, the investigation of death and means, mechanisms, and causes of death. He performed the autopsy on Samantha. His report was entered into evidence.

[147] In his opinion the most significant aspect of Dr. Macauley’s report was the finding of “diffuse axonal injury, cerebrum, brain stem and spinal cord” - see Dr. Macaulay’s report under Diagnosis. In his opinion this would require much higher energy for this type of injury. A fall, for example, from one’s own height may be fatal, but for different reasons. The type of injury seen here could only be produced by a high energy impact. He used the same descriptors as did Dr. Macaulay, ie.

motor vehicle accident, fall from a significant height or the result of a violent assault.

[148] In Dr. Bowes' opinion a fall down stairs is not a credible explanation for the head injury described in this case. He based his opinion on his understanding that most stairway falls for children are benign and that the incidences of severe life-threatening injuries from stairway falls for children are "very, very, very low" and it usually occurs while the child is in the parent's arms or the child is in a walker and is restricted from protecting themselves. He conceded however in cross-examination that while being very rare it is not impossible for such injuries to occur. This was in turn based on literature on stairway falls and on "a body of opinion" that supports this conclusion. In cross-examination he acknowledged that the literature studies are clinically descriptive and are not biomechanical analyses.

[149] Dr. Bowes also based his opinion in part on the multiplicity of injuries that were present here. He noted that in most stairway falls one tends not to have more than one part of the body injured. In cross-examination he indicated he assumed that all of the injuries occurred at the same time. It is not clear whether he was referring to the injuries occurring during the same traumatic event or during the same time period.

[150] Dr. Bowes concluded that the force to the vertex of the head was on the long axis of the body as that would explain the compression and decompression wave that went through the brain and spinal column. He agreed that this would be equivalent force to falling from a great height but cautioned about agreeing to specific distances in feet. He said: "I prefer not to subscribe to hard and fast numbers".

[151] He indicated that this head injury would likely be immediately symptomatic but that the child would not necessarily be unconscious. He agreed that one could look "stunned" to a layperson.

[152] Regarding the bruises, in his opinion the pattern bruises, groups of bruises and bruises in places not where a child normally would expect to be bruised, are all thought to be suspicious. He noted a single fall on the stairway would not account for all of these bruises. He did acknowledge that bruises change size and shape over time and that dating of bruises using the colour of bruising is problematic. In

his opinion there were eight compression fractures of the thoracic vertebrae. He explained an autopsy can be more accurate than the CT imaging which suggested only six fractures. He indicated that the force required to produce such fractures was “not that great as you might expect”. He indicated a firm fall on the bottom could produce this injury.

[153] He said that there were two explanations for these fractures - axial loading or hyperflexion - where the head goes forward toward the knees. He said this injury could not be produced by extension - bending backwards - because this would not produce compression but the opposite effect - the vertebrae coming apart. He said he could not confidently place the timing of the compression fractures in the time period in question.

[154] He also opined about the absence of a neck injury. There was no damage to the seven cervical vertebrae located at the base of the skull to the shoulder blades. He said there were different ways an impact to the vertex could occur without compression to the neck. One way he said would be if the child fell from height on her back onto the floor and went back into a wall. Although Dr. Bowes cautioned that young people are very pliable because of the presence of more cartilage than adults. He noted one cannot draw too much from the fact that there was no neck injury.

[155] Regarding the left humerus fracture, it was his opinion that this was most likely caused by an axial load to the elbow, although it could have occurred by impact to the wrist. He did not think the latter was likely as that most often results in a wrist fracture, which did not occur here. Finally he thought it logical that the bruises on the left arm were associated with that injury although he conceded that that was not necessarily the case.

[156] He said he noticed some evidence of repair and healing in the fracture to the left humerus.

c) Dr. Michael Pollanen

[157] Dr. Michael Pollanen is an expert in forensic pathology and was qualified to give expert opinion evidence in the fields of pathology, in the investigation of death and the means and causes of death. He was asked by the Public Prosecution Service to give a second opinion in this case. He reviewed all the written medical reports, the scene, hospital and autopsy photos taken by the police, as well as Dr. Van Ee's report. He did not examine Samantha. He also filed a written report which was presented into evidence.

[158] Dr. Pollanen was able to confirm the findings made by the other medical witnesses and described the injuries and bruises which were detailed above. In particular, he confirmed the details of the head injury. In his opinion this was the result of a "major impact" to the head which was the result of the head colliding with a stationary object. He indicated that "we are certain of this". He said there was no indication that she was hit by an object. This was the fatal injury. It caused a scalp bruise and bleeding on the top of the brain which caused pressure. There was swelling of the brain which led to progressive deterioration and death. He confirmed the retinal haemorrhages. He described it as a serious head injury. His report says the subdural haemorrhage is more extensive on the right side compared to the left side of the vertex.

[159] Dr. Pollanen testified that this was the type of injury which would cause rapid deterioration. However there could be a short period of lucidity although the person would not be entirely normal. There would be a "sliding down" to unconsciousness. Although he indicated it is difficult to work backwards the deterioration would not be over days but over a much shorter interval.

[160] Dr. Pollanen described the compression fractures. He said it was difficult to quantify the impact required to cause this injury, however he indicated it was not the result of a trivial impact. It required a substantial amount of force transmitted by the spine. He said these fractures were most likely caused by landing on the tailbone and that, while it was possible it could be the result of force from the top of the head, he noted there were no neck injuries which would make that latter cause less likely.

[161] He described the fracture to the left arm. He agreed it could be the result of an axial load to the elbow or a side impact to the arm.

[162] He described the round or ring bruise on the back. He described how this could be caused by an impact from a ball and in particular the toy soccer ball identified by the accused as the cause of the injury. He agreed that the impact from the other objects - the cup and the plastic container, could also cause the same bruise. He explained how a ball can create a ring impression as opposed to a solid round bruise. He explained that an inflatable plastic ball can flatten out on impact which causes the ring effect. In his report he says “there is an annular bruise [ring bruise] on the back that I believe is well-explained by the history of a soccer ball impact. It is well documented that impacts with deformable spheres cause annular bruises”.

[163] He also described the bruises which I had detailed earlier. The bruises on the face, he suggested, were caused shortly before admission. Other bruises were dated. He discussed in general changes in colouring of bruises over time although cautioned that the aging of bruises still occurs while a patient is on life support. He said there are many bruises on the lower back and legs which appear to be dated.

[164] Dr. Pollanen was asked to give his opinion about the cause of the fatal head injury. In the course of providing this opinion he discussed and described his methodology and his approach to forensic pathology and its interaction with the criminal justice system. It is obvious that Dr. Pollanen is well-aware of the findings and recommendations of the **Goudge** inquiry.³⁵

[165] He identified three areas that needed to be examined:

1. Circumstantial evidence - witness statements and police investigation
2. Medical reports including autopsy reports, and
3. Scientific data - in this case bio-engineering reports.

Dr. Pollanen indicated his focus was on the medical reports but, as I will describe later, all three areas need to be examined. He explained he does not make judgments on witness statements and indicated that this is more valuable to the trier of fact.

He said there are three possible scenarios which could explain the head injury:

³⁵ Inquiry into Paediatric Forensic Pathology in Ontario, the Honourable Stephen J. Goudge, Commissioner, 2008

1. A stairway fall,
2. A drop from an eight foot height, and
3. The head being slammed into a firm surface.

He said the head injury itself could not indicate which scenario was the most likely or the actual cause. He indicated one needs to look at the other areas of examination.

[166] Dr. Pollanen described and distinguished between what he referred to as the “authoritative approach” or the “in my opinion approach” as opposed to the “evidence-based approach” to providing a forensic assessment. He preferred the “evidence-based approach”. In this approach the emphasis is on empirical and published data and examination of objective evidence and analysis which is scientific. This was the approach endorsed by the **Goudge** inquiry.³⁶ This is in contrast to the opinion based on anecdotes or experience.

[167] In Dr. Pollanen’s view the evidence-based approach is preferable because it is more amenable to scientific analysis and is more transparent and capable of being cross-examined. The “my opinion approach” is impenetrable to analysis, in Dr. Pollanen’s view.

[168] In Dr. Pollanen’s opinion one needs to look at all of the other evidence including the other medical evidence - the bruises and other injuries, the scientific reports and other circumstantial evidence. In this latter regard, Dr. Pollanen indicated that “every body comes from a scene”. Therefore one cannot understand an autopsy report without understanding the scene. They are “naturally married together”. He described this as a very important concept in forensic pathology.

[169] Finally, Dr. Pollanen opined that when one adds in the other injuries and bruises it does not determine the issue as to which scenario is the cause of the head injury. He asked “what does it tell us” about whether this was the result of a stairway fall? He concluded: “not a lot”. He did allow that generally adults are more likely to be killed from stairway falls than children. He could not say though that the other injuries were the result of a multiple impact fall on the stairs or multiple other impacts.

³⁶ Note 35, *supra*

[170] He did concede that the dent in Samantha's bedroom wall could have been the location of the impact of the fatal injury because, as he said in cross-examination: "It is a wall and walls are firm enough to cause tissue damage".

[171] Finally, based on all of the medical evidence, the scientific report of Dr. Van Ee and the police photos, Dr. Pollanen could not exclude any of the three scenarios he proffered as possible causes of the fatal injury, including a stairway fall.

d) Dr. Christopher Van Ee

[172] Dr. Christopher Van Ee is a biomedical engineer and was qualified to give opinion evidence in relation to the mechanisms of injury to the human body and the calculation of physical forces capable of producing certain kinds of injuries to the human body. Dr. Van Ee was retained by the accused and testified for the defence. He examined the medical reports referred to earlier (except for the report of Dr. Pollanen), the police documents and photos, and an excerpt from the accused's interrogation. He also reviewed other reports which did not affect his report - a report from Lawrence E. Holt and a report from Gary Roberts Associates. Dr. Van Ee provided two reports, both of which were presented into evidence.

[173] Dr. Van Ee works primarily in the automobile industry in the United States and does research into injuries resulting from car crashes. He is familiar with injuries from head impact and in particular with diffuse axonal injuries. He did two sets of experiments, the results of which are contained in his two reports. In the first set of experiments he attempted to replicate the action of a stairway fall.

[174] He constructed a stairway with a similar number of stairs and pitch as the set of stairs in question. He then employed an anthropomorphic test device (A.T.D.) which was similar in size and shape to Samantha Mercer. This device was outfitted on the head with sensors which measured the force of impact to the head and the device was allowed to fall downstairs unpropelled from a standing position. In all Dr. Van Ee conducted 18 trials, the results of which were detailed in his report. In each case the device measured "g" values and "HIC" values. Dr. Van Ee explained the g value is the measure of acceleration or gravitational force. One g is 9.8 m/sec^2 . or approximately 32 ft./sec^2 . HIC or Head Injury Criteria, which is a widely-used standard, measures head injury threshold impact. It is a complicated formula which is a function of acceleration and time and calculates the maximum

value of the integral of this function. Dr. Van Ee explained this with the use of a graph demonstrating how a basketball, for example, impacts a hard surface and accelerates and de-accelerates during and after impact. In effect the HIC measures the maximum head impact.

[175] Dr. Van Ee explained that the g values of 175 and HIC values of 570 create a 5% risk of serious head injury. He referred to the injury assessment reference values (I.A.R.V.'s) published in the literature. In one of the experimental falls the head impacted with 218 g's and an HIC of 896, which he concluded exceeded the I.A.R.V.'s resulting in a prediction of significant risk of head injury. He described this to be a 5-20% risk. He also noted that two other falls produced results close to the I.A.R.V. One fall had 151 g's and an HIC of 457 and the other had 166 g's and an HIC of 545. These falls could also produce a risk of serious head injury.

[176] In Dr. Van Ee's opinion it is possible that a child tumbling down a stairway could result in a high force impact which would be consistent with a serious head injury such as the one which Samantha Mercer sustained.

[177] Dr. Van Ee also performed two other sets of experiments. Again using the same A.T.D. he measured the impact of a drop from 8 feet onto a half-inch piece of gyproc. The gyproc sheets were 32 inches wide and mounted on a frame of 2x4s with a 16 inch centre. The gyproc frame was laid flat on a concrete floor and the A.T.D. was dropped head first. In the first fall the device struck the frame on the gyproc over a stud. It left an indentation in the gyproc of 2 3/4 inches by 2 1/2 inches with the apparent breaking of the cardboard surface of the gyproc. In the second fall the A.T.D. missed the stud causing the head of the A.T.D. to completely break through the gyproc to the floor, producing a hole approximately 7 inches by 6 inches. In both cases the g and HIC values were well above the I.A.R.V. criteria - in the first fall the g value was 345 and the HIC 4,739 and in the second the g value was 359 and the HIC 5,142. This indicated a significant impact.

[178] In the remaining experiment Dr. Van Ee drove or slammed the A.T.D. into the same gyproc frame, this time while it was positioned against a brick wall. In this experiment Dr. Van Ee, while holding the device, slammed it headfirst into the gyproc over the stud. In one instance it left a 1 3/4 by 2 3/8 inch impression on the gyproc and in the second a 3 inch by 3 inch impression. At least in the second

occasion it is apparent from the photos that the gyproc cardboard was again broken.

[179] In these experiments the g and HIC values were much less. For the inflicted impact the values were 97 g's and HIC of 250 and 90 g's and 315 HIC respectively. While these values were less than the I.A.R. values Dr. Van Ee testified that these impacts could produce serious injury and under-represent the potential impact.

[180] Dr. Van Ee also referred to other documented incidences where low level falls can produce fatal head injuries. In one case he was able to replicate the same fall from a child's plastic climbing play structure. Again using the same A.T.D. the g and HIC values exceeded the I.A.R. value indicating a significant risk of serious head injury. In the final analysis it was Dr. Van Ee's opinion that a fatal injury could have resulted from a stairway fall. He acknowledged that this would be a rare event and that most falls by children are benign. He concluded that a fall from eight feet produced the greatest impact but that the most severe stairway fall impact exceeded the inflicted impact into the wall while the least severe stairway fall was much less severe than any other measured impact.

VII PARTY SUBMISSIONS

A. The Crown Submissions

[181] The Crown argues that the evidence supports only one reasonable inference and that is the accused assaulted Samantha in a manner that was objectively dangerous and that this assault caused her death. The Crown argues specifically that the accused slammed or drove Samantha's head into the wall in her upstairs bedroom leaving the dent identified in a photograph taken by the police.

[182] The Crown says that the totality of the evidence needs to be examined. It points specifically to the many injuries and bruises on Samantha's body and argues that these injuries could not be inflicted by accident and because of the nature of the fractures and the multiplicity and location of the bruises the only reasonable or rational inference is that they were inflicted injuries. The improbability of this many "accidents" makes it impossible that this was anything other than a case of intentionally inflicted injuries. The Crown argues that a fall down stairs could not have caused the fatal injury or that such an event is so rare that it could not be

considered a possibility given the other circumstantial evidence. The accused's own testimony that he heard "thump, thump" would suggest Samantha could only have impacted the stairs twice which is not consistent with all of the bruises and other injuries.

[183] Further, the Crown says that the accused's evidence is not believable and should be rejected and is not capable of raising a reasonable doubt about his guilt. The Crown argues that the accused's testimony that he told Michelle Bent that Samantha sat up and ate chips is simply not possible when the medical evidence suggests that Samantha would have been immediately symptomatic. It also argues that the accused's testimony that he moved Samantha upstairs to her bed indicates that he had no intention of taking Samantha to the hospital and that he knew Chris Mercer was about to arrive and wanted her upstairs. Having Samantha in the bathroom playing with the boat while he sat in the livingroom is not credible, the Crown argues, because it simply does not make sense.

[184] The Crown argues that the accused's action after the fatal impact is probative of his guilt. He did not call 911. He did not immediately arrange to get his vehicle operational and drive Samantha to the hospital. He smoked a joint.

[185] The Crown also argues that Dr. Bowes did not acknowledge that Samantha could have landed on her rear and been propelled backwards into the wall. The Crown also argues that both Dr. Bellemare and Dr. Bowes indicated that their opinions were unchanged because there was no neck injury.

[186] The ring bruise, the Crown argues, was caused by the accused hitting Samantha with a coffee cup in the bathroom. The marks on her thigh and flank were caused by the accused striking her with something and that the other injuries were caused by him throwing her to the floor. The Crown also refers to the accused's demeanour while testifying. The Crown argues that the accused was at times condescending. This, it argues, makes his testimony less credible.

[187] Finally the Crown argues that all of the evidence suggests that the accused became frustrated with Samantha when she became difficult during the period between 4:30 and 6:30 that evening. It began when she crawled into the tub and continued upstairs. The Crown argues the accused hit Samantha with a coffee cup in the bathroom and when she became difficult upstairs while trying to get her

dressed he lost his temper. The Crown argues he grabbed her, struck her with objects, threw her to the carpeted floor repeatedly and finally drove her head into the bedroom wall causing the fatal blow. The Crown maintains that Samantha never fell down stairs and any evidence to the contrary should be rejected.

B. Defence Submissions

[188] The Defence argues that the fatal injury which caused Samantha's death occurred when Samantha fell down stairs and struck the plaster wall at the lower landing causing the dent which the police photographed. This, it is argued, explains some of the injuries on Samantha's chin, forehead and possibly the compression fracture and the buckle fracture to her arm. Defence also points out that Samantha had fallen on her rear in the kitchen earlier and fell twice while in the accused's arms - once when coming down the stairs and once outside, witnessed by Michelle Bent.

[189] The ring bruise was caused by the soccer ball and the bruises on her left flank and elbow, it was argued, were caused by the accused grabbing her after picking her up from the bedroom and carrying her to the car. The Defence acknowledges that the accused may not have acted, in hindsight, with the greatest of prudence after the injury. However, his actions were not inconsistent with the explanation he provided about how the injury occurred. The symptoms which the accused observed including the periods of lucidity, are consistent with the medical testimony about the progressive effects from the impact.

[190] Finally, the defence argues that, apart from the head injury, there was no tissue injury to suggest Samantha was punched or hit with any force. Also, there were no injuries to the nose, teeth, ears or ribs which are more representative of locations where inflicted abuse occurs. The location of the bruises and the fractures are all indications of "non-human" contact, the Defence argues.

VIII ANALYSIS

A. Do I believe the Accused?

[191] The Crown argues that the principles set out in **R. v. W. (D.)** *supra* apply such that if the accused is believed he must be acquitted. The Crown argues that,

not only should the accused not be believed, his testimony should be rejected and does not raise a reasonable doubt.

[192] I cannot simply believe the accused; that is, accept his evidence as being true such that this case can be resolved on that basis. He cannot “obviously be acquitted” to use Justice Corey’s words in **R. v. W. (D.)** *supra*. However, not believing the accused does not necessarily mean that all or part of his testimony is not true. It simply means that it is necessary to consider all the evidence to decide if the required burden of proof has been established.

[193] I will explain why I do not necessarily accept what the accused said. First of all I found his description of getting the snow for Samantha to play with to make no sense. His assertion that she wanted to go outside and play in the snow when at the same time she had no shirt on and was very fussy about finding the right thing to wear was difficult to believe. At one point he said she wanted to wear a bathing suit. I accept that he did go outside to get the snow but not for that reason.

[194] It was highly probable that the accused would have been observed in a very built-up area of the community near a convenience store at suppertime. Aerial photographs in evidence showed the neighbourhood to be built up. The accused had no shirt on. He needed to explain why he was outside.

[195] His testimony about seeing the crayons and Samantha going to the corner suggesting she had made a mark on the wall also seemed improbable. The police photographs did not show any crayons in the bedroom as the accused described.

[196] His testimony that Samantha took off her shirt before playing with the soccer ball and then put on both a shirt and sweatshirt seemed also to be implausible.

[197] The details he described about tossing Samantha on the bed in her upstairs room were unconvincing. As I describe later, I accept that Samantha was on the bed but the accused’s testimony about the details and circumstances did not seem compelling or credible. I want to be clear here, there is no burden on the accused to be “convincing”. The burden rests with the Crown. My purpose here is to determine only if the accused’s testimony is true.

[198] This, of course, is not to say that all of the above is not true; however, I simply cannot accept this as being true. Along with the other bruises and injuries I agree that there are very suspicious circumstances existing and the whole of the evidence including the accused's testimony needs to be examined.

B. Circumstantial Evidence - what are the circumstances?

[199] As I explained above in a case involving circumstantial evidence one is required to determine what reasonable or rational inferences can be drawn from the facts as they are found. This requires analyzing the facts and in some cases making findings of facts. Some facts are undisputed, others are easily determined and finally the finding of other facts require more analysis.

i. What facts are known?

- (A) The accused was alone with Samantha for approximately two and a half hours;
- (B) Samantha died as a result of the impact to the top of her head;
- (C) There was a dent in the bedroom wall 19 cm. above the side of the bed containing Samantha's hair;
- (D) Samantha had pattern bruises to her chin and forehead, a ring bruise to her back, bruises to her left flank and elbow which clearly occurred in the impugned time period;
- (E) Compression fractures likely occurred in the same time frame;
- (F) A buckle fracture to her left elbow occurred during the same time period;
- (G) Fatal stairway falls are rare, however it is possible to sustain a fatal injury from an unassisted fall down stairs;
- (H) The medical evidence is not conclusive as to the cause of the fatal impact;
- (I) Bruises to Samantha's forehead and cheek are explained and did not occur during the time frame in question;

ii. Facts which can be determined

A. In my opinion, the ring bruise was caused by the soccer ball. All the medical evidence confirms that that is possible. Dr. Pollanen concluded the ring was "well-explained by the history of the soccer ball impact". The suggestion that this bruise

was caused by the accused hitting Samantha with a coffee cup in the downstairs bathroom, in my opinion, does not make sense.

B. The pattern bruises and fractures were caused by impacts to the floor and were not the result of Samantha being hit by an object or struck by the accused. The medical evidence suggests that the pattern bruises were consistent with contact with the carpet and would not have likely been the result of impact from a blow. The weight of the medical evidence suggests that the compression fractures are the result of a fall from height to the tailbone and the buckle fracture resulted from an axial load to the elbow.

C. The dent in the wall was, in my opinion, the result of Samantha's head making contact with that surface, which occurred during the period in question. I will explain this more in detail below.

D. I find as a fact that the three bruises under the chin were the result of medical intervention - the result of intubation. Again the weight of the medical evidence supports this conclusion. The redness behind the ears was the result of blood tracking from the brain injury.

E. The bruises on the lower back and buttocks and legs were dated and likely did not occur in the time frame in question except for the two small bruises on the right knee, the bruises on the top of the left shoulder and the small dark bruise above the ring bruise. The cause of these cannot be determined but do not appear to be the result of a blow struck to her. Many of these were, in my opinion, the result of an active child's ordinary activities. Samantha was an active child.

F. The accused made three attempts to call Chris Mercer from the convenience store. This was unrebutted and could have been easily contradicted. The accused disclosed to Chris Mercer when he finally contacted him that Samantha had fallen down the stairs. There is a dispute about what else was said during the conversation. Neither witness was reliable, in my opinion. I make no finding of fact as to what else was actually said.

C. Inferences to be drawn

[200] With the facts known and those which I have found to be proven what, if any, inference can be drawn? The Crown says from these facts the only reasonable inference is that the accused slammed or drove Samantha's head into the wall. Is this a reasonable inference?

[201] In my opinion, not only is this not the only reasonable or rational inference, it is not a reasonable inference at all. In my opinion, it is unlikely this occurred. Firstly, what Dr. Bellemare described - driving Samantha's head into the wall at the location of the dent in her bedroom while holding her by her clothing could not have occurred. It is likely Samantha did not have a shirt on when she was in the bedroom. She went to the hospital without a shirt and no shirt was seen in the bedroom. The only one she wore was in the bathroom. The accused could not have held her by her collar the way Dr. Bellemare suggested. She had pyjama bottoms on with no underwear. It seems unlikely that the accused could have grabbed her by this clothing effectively to thrust her or throw her against the wall the way Dr. Bellemare described.

[202] Samantha was 98 cm. tall - about three feet. The bed appeared to be at least three feet wide. The accused could not have held her and still made contact with the wall as the Crown suggested thrusting her against the wall while grasping her collar and her pants. There was no evidence the bed was moved. It is simply impossible that the accused could have stood in this area given the configuration of the furniture and effected the impact the Crown suggests.

[203] It seems impossible as well that the accused could have thrown Samantha against the wall, at least from a perpendicular angle to the wall next to the bed, given the small distance between the bed and the closet. He may have been able to throw her across the bed from the side of the bed towards the foot. However, if she was face down as Dr. Bellemare suggested it would have been the left side of her head which would have been more impacted. The medical evidence suggested that the bruise was more to the right side of the vertex of her head. If she was thrown it is likely her arms and legs would have contacted the bed before she hit the wall.

[204] Finally, there is simply no evidence about the precise details of the dent to determine if this could be the point of the fatal impact. The size and depth of the dent is unknown. The evidence is that only the paint was cracked and the gyproc board was dented. There is no evidence of the thickness of the gyproc or what, if anything, was behind it. Was the gyproc over plaster slats, for example? This is unknown. Was the dent on a stud? There is no direct evidence on that point. The only evidence was the presence of a "nail pop" on the other side of the electrical unit which suggests that the dent was not over a stud. There was no evidence about

how much force would be required to cause the dent in question and whether that could constitute a “severe impact” - the way that term was described by the medical experts - capable of being the fatal impact.

[205] While the medical evidence suggested that Samantha could have sustained the fatal injury by being thrust into this particular dent, there was no scientific evidence indicating what force would be required to make this dent and whether that force was sufficient to cause a severe impact to Samantha’s head. The evidence from Dr. Van Ee is the only quantitative evidence which gave any indication of the results of different impacts. It is impossible to determine what type of impact - in the sense of the amount of force - would be necessary to create this dent.

[206] In my opinion, it is not possible to reasonably infer that Samantha’s head was propelled into the wall as the Crown has argued, either while the accused was holding her or by throwing her across the width of the bed on the “long axis”.

[207] The Crown, however, is not limited to only one explanation for the accused’s guilt. If the evidence establishes beyond a reasonable doubt that, notwithstanding the Crown’s argued theory, there is only one reasonable or rational inference which is that the accused committed an unlawful act causing Samantha’s death then the accused could be found guilty. I cannot, however, conclude beyond a reasonable doubt that the only reasonable and rational inference is that the accused is guilty of the alleged offence. I will explain my reasons for reaching this conclusion by analyzing the evidence I described above. Before doing so it is important to note that the accused is under no obligation to prove what occurred was an accident or to establish an innocent explanation for the tragedy. The burden, as I explained above, is on the Crown. Further, the role of a judge is not necessarily to determine “what happened”. It is, as I explained before, simply to determine if the Crown has met the required burden.

[208] However, I have examined other inferences which can be drawn from the evidence which do not necessarily lead to a finding of guilt and which also provide an innocent explanation for what occurred. Finally, I will describe why the accused’s own testimony raises a reasonable doubt about his guilt.

[209] There are, in my opinion, a number of reasonable inferences that can be drawn from the facts as I have found them.

[210] I agree that it is reasonable to infer that the accused became frustrated with Samantha in the bedroom when she would not wear the clothes that he had found for her to wear. Her insistence on wearing a bathing suit may have added to this frustration. It is reasonable to conclude that he threw her on the bed in anger - by throwing her by her sides and landing her on her feet or bottom onto the bed. As a result it is reasonable to conclude that she fell backwards and hit the wall. The layout of the room and the skewing of the mattress on the bed suggests this occurred with the accused near the foot of the bed and throwing or tossing Samantha towards the middle of the bed or at least she was falling back toward the middle of the bed near the wall. Whether this was an objectively dangerous action is not clear. If she fell backwards in this fashion and if she was thrown onto the bed at its side towards the foot her head could have hit on the right side of the vertex of her head, consistent with the medical evidence. However the dent provides no evidence about the amount of force used. Also, there were no symmetrical bruising on her sides or damage to her ribs which would suggest the accused grabbed her in a strong or forceful manner. While I found his evidence about tossing her on the bed unconvincing I could not say that he did not toss her in a playful manner onto the bed. In any event there is not sufficient evidence to conclude that the force used would constitute an assault.

[211] It is probable, in my opinion, that the dent in the bedroom wall occurred during the period in question. Alesha Mercer made the bed shortly before she went out and saw nothing. Given the recent fresh paint and clean look it is reasonable that she would have noticed this mark. I can only conclude that the dent happened some time after the accused returned home with Samantha on March 1, 2005.

[212] The accused was with Samantha for almost the entire time according to his own testimony. She was only in the room for short periods of time alone - when she proceeded upstairs to look for the shirt, when he went to get snow, and after she went upstairs to get her "froggy blanket". These were all short periods of time during which it is unlikely that she would have been bouncing on the bed, although he was never cross-examined as to the precise limits of these time periods. Therefore, it is reasonable to infer that he was present when she was bouncing on

the bed or was thrown onto the bed and hit her head. This most likely occurred when they were in the bedroom looking for a top for her.

[213] However, whether she was bouncing on the bed herself or was thrown to the bed either playfully or in frustration, there is not sufficient evidence to conclude that this impact constituted the fatal impact. While it seems to me that a strong inference exists that this could have been the fatal impact, the medical evidence does not support this conclusion. The lack of evidence regarding the dent itself makes it impossible to conclude that this dent was created with sufficient impact to cause the brain injury.

[214] The Crown's medical experts describe the impact which caused the fatal injury as severe. The examples suggested were "motor vehicle crash, fall from an 8 - 10 foot height and a violent attack". The engineering evidence describe quantitatively what a fall from eight feet would represent in terms of impact. The medical evidence also suggests that the impact would be along the "long axis" to cause diffuse axonal injury. It is not clear that bouncing on the bed after being thrown backwards would create enough force to create a "severe impact" to the degree necessary to cause this type of brain injury. Nor would the impact force be necessarily distributed correctly to cause this particular type of injury.

[215] In any event there was no evidence of the force created if Samantha was thrown to the bed, bounced and was propelled backwards to the wall. None of the medical experts nor the bioengineering expert were asked to opine about that possibility. Accordingly, it would be impossible to draw any reasonable or rational inference in that regard.

[216] In my opinion, for the reasons I stated above, Samantha's head was not smashed or driven into the wall the way Dr. Bellemare described and in the way the Crown has asked me to accept.

[217] In short, I cannot conclude that any contact that Samantha had with the wall which created this dent resulted in her death.

[218] It is, however, reasonable to infer that after contact with the wall Samantha may have fallen from the bed which could have explained the compression fractures or chin injury. However, it would not explain all of the other injuries,

although it may explain why the accused went to get snow or ice. She could have fallen down the stairs as well. However, again the accused was never cross-examined on this explanation and for that reason it is difficult to make any conclusive determination in this regard.

[219] In my opinion, there is, at the very least, a reasonable doubt that the accused inflicted the various bruises and injuries identified. First of all, most of the bruises and injuries appear to be the result of “non-human” contact, to use Mr. Murray’s words. They were the result of impact with a surface. I refer to the pattern bruise on the chin and left forehead, the fractured elbow, and the compression fractures. The bruises on the side of the right knee are difficult to explain. They do not appear to be the result of a grab or a striking by an object. The same is true of the top of the left shoulder. I have already accepted that the ring bruise was caused by the soccer ball. The bruises on the left flank and elbow were caused, in my opinion, when the accused picked Samantha up in the bedroom and carried her downstairs. He was panicked and it may explain his very firm grip which may have resulted in this injury. He fell at least once and perhaps twice. All of this was witnessed by Michelle Bent. It is very likely that these bruises were caused when he grabbed her and grabbed her tightly as he began to fall.

[220] While there is some evidence that the accused was short-tempered and capable of short outbursts - hitting the wall after speaking with Chris Mercer and throwing the pink toy shoes against the wall - there is no evidence that he was abusive or short-tempered or impatient towards Samantha. In fact, the evidence supports the opposite. There is no evidence he struck her. There are no injuries to her nose, ears, mouth or ribs. There is no evidence of any sudden outbursts which resulted in any physical contact to her person by any inflicted blow of his hand. Dr. Bellemare suggested that the bruises on her flank were the result of being struck a number of times. I do not accept this explanation.

[221] I cannot conclude that the accused repeatedly threw Samantha to the floor as many as four times, in some cases forcibly, to cause the impact bruises and injuries I described above. The context of the entire circumstance of the day and his relationship with her previously does not make that probable, in my opinion.

[222] The other reasonable inference that can be drawn from the circumstances is that Samantha also fell down stairs. The Crown argues that this did not happen

because of the rarity of fatal injuries occurring in this way and the presence of other injuries. Dr. Pollanen and Dr. Van Ee both testified that this possibility could not be excluded. Dr. Pollanen based his conclusions primarily on the medical evidence. Dr. Van Ee based his opinion on the bioengineering analysis which was contained in his report. Dr. Pollanen testified that one needs to look at the entirety of the evidence to make any final determination.

[223] The difficulty I have with the Crown's argument is that it assumes that most of the other injuries would have had to have been caused by the stairway fall. This is not necessarily the case. The ring bruise and the bruises on the flank and elbow could have been caused otherwise as I explained above. Other bruises were dated or otherwise explained. Also, the accused fell outside with Samantha which may explain at least one of the fractures and he testified he fell on the stairway. A fall down the stairs could have easily caused the chin and forehead pattern bruises and at least one of the fractures as well as some of the other smaller bruises. It is also possible, in my opinion, that Samantha fell from the bed after she struck her head creating the dent. On the whole of the evidence it is a reasonable inference that Samantha also fell down the stairs.

[224] The Crown argued that the accused's conduct after the injury is probative of his guilt. Reference is made to his failure to immediately call 911 or take Samantha to the hospital. The Crown asks why, if Samantha did in fact fall down stairs, would the accused not have appreciated the apparent seriousness of such an event? The Crown argues that the only explanation is because he inflicted the injury and wanted to conceal it, particularly from Chris Mercer who he knew would be coming to babysit that evening. He acted, it is argued, in a way deliberately avoiding his responsibility because he was attempting to avoid detection of his conduct. I agree that the accused acted imprudently. However, his conduct is not inconsistent with an innocent explanation for which he may have still felt some guilt. Whether the injury occurred on the stairs or from falling backwards on the bed it is understandable that he may have felt some responsibility and wanted to at least immediately avoid accepting responsibility. His conduct is not consistent only with guilty conduct which would establish manslaughter. Further, the period of lucidity which he described is not inconsistent with what the medical evidence suggests could be possible following a severe impact to the head which caused a brain injury. It is possible the injury, albeit concerning and one for which a prudent person would have sought medical attention, did not present in a way which

immediately called for emergency action. Indeed, when the accused finally discovered Samantha was seriously injured, when he went to the bedroom after Michelle Bent and Terrence Turnbull were there, he acted with haste and in an exigent fashion. The way he described this event, together with the testimony of Michelle Bent describing the same action, was compelling and convincing. It was consistent with his discovering for the first time the very serious nature of this injury.

D. Does the accused testimony raise a reasonable doubt?

[225] Finally, while there are parts of the accused's testimony I was not prepared to believe or accept as true, which I described above, I cannot reject his testimony in its entirety. I cannot, in particular, reject his denial that he caused the fatal injury by committing an assault and I cannot reject his testimony that Samantha Mercer fell down the stairs.

[226] First of all, the accused's testimony was never contradicted by any other objective evidence in a material way. The medical evidence suggesting that a stairway fall is rare, for the reasons that I explained, does not provide that contradiction. His testimony was internally consistent. He was never challenged by any previous statement he made to any other person. I recognize that prior consistent statements do not enhance the credibility of a witness and therefore do not place any weight on the accused's statements to Michelle Bent or Chris Mercer that Samantha had fallen down the stairs. However, to reject an accused's testimony one has to point to a reason to do so. I cannot point to such a reason.

[227] I do not attach any significance to any discrepancy between what Michelle Bent said the accused told her and what he described in his testimony. Michelle Bent's recollection was not completely accurate. She was mistaken in her testimony that the puppet was on the stairs as Chris Mercer clearly placed it there after she had left. Her testimony that the accused told her Samantha ate potato chips is, therefore, not completely reliable. This is not a discrepancy upon which I would be prepared to discredit the accused's testimony as the Crown argued.

[228] Finally, the Crown argues that the accused's demeanour detracted from his credibility. The Crown argued he was condescending. I agree that the accused became sharp after being pointedly cross-examined. Also, on a couple of

occasions he inappropriately referred to the prosecutor as “dear”, which certainly could be considered condescending. He also exhibited at times some different speech patterns. None of these, in my opinion, had any impact on his credibility and perhaps spoke more of his lack of sophistication.

[229] The only time when the delivery of his testimony had any impact on me was when the accused was questioned about the tossing on the bed, whether Samantha was thrown to the wall, and whether he drove her body head first into the wall as Dr. Bellemare opined. He seemed to equivocate about the tossing on the bed and when asked about the dent in the bedroom wall. He was never, however, cross-examined further on these points. When asked directly about whether he slammed Samantha’s head into the wall his denial seemed very convincing.

[230] However, as I indicated above, demeanour alone cannot be determinative. Certainly not so in this case. The aspects of the accused’s demeanour that I have commented upon provided little weight and were certainly not determinative of his credibility.

[231] In my opinion the accused’s testimony cannot be rejected. His testimony raises a reasonable doubt that his conduct constituted the offence alleged.

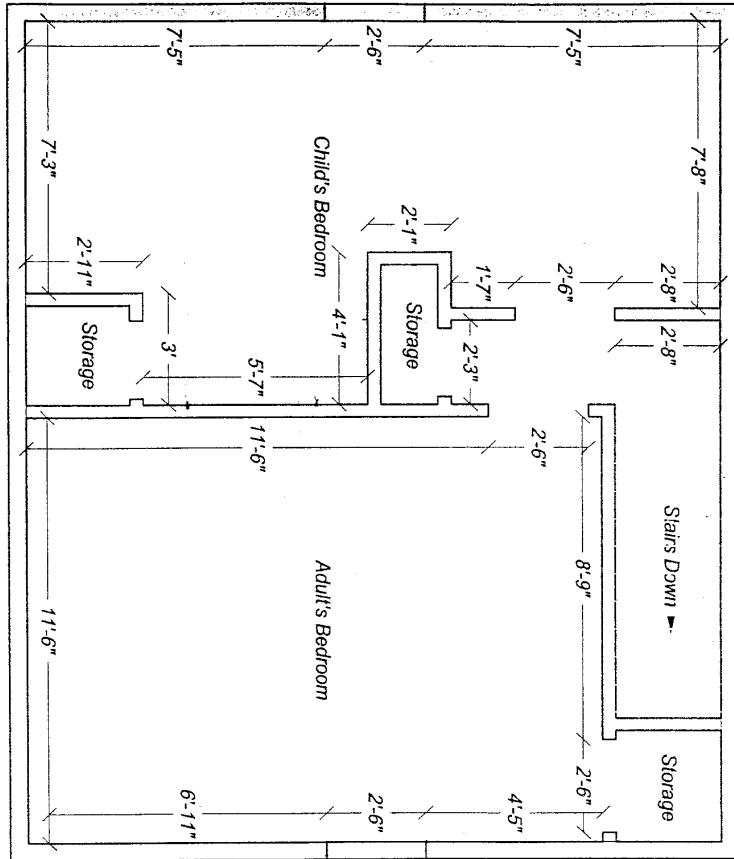
IX CONCLUSION

[232] The sudden and unexpected death of a child is a devastating event.³⁷ Samantha’s death is such a case. It is particularly difficult when the circumstances are not easily understood because of the multiplicity of the bruises, the presence of other injuries and the rarity of a fatal impact from a stairway fall. In the end there may never be any clear answer as to precisely what occurred. The evidence supports more than one explanation. My duty and responsibility is to determine whether it has been proven beyond a reasonable doubt that Terry Dean Allen caused the death of Samantha Mercer by an unlawful act; that is, an act which was objectively dangerous. In my judgment the Crown has not met that burden. Accordingly the accused is found not guilty and he is acquitted.

³⁷ Note 35 *supra*, at Pg. 3

TUFTS, J.P.C.

Appendix "A"



Second Floor Plan

<p>Town of Truro Engineering Department</p>	
<p>PLAN SHOWING SECOND FLOOR PLAN</p>	
<p>LOCATED AT 341 BRUNSWICK ST., TRURO</p>	
DATE	DWN
NOV. 2005	SJC
SCALE	SHEET
3/8" = 1'-0"	4 of 5
<p>DWG. NO. TPS-BRUNS-D</p>	

