Neutral Citation No: [2023] NICC 13	*Ref:* **[2023] NICC 13**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **11/05/2023**

IN THE CROWN COURT IN NORTHERN IRELAND SITTING AT BELFAST

_____

THE KING

v

LG

_____

HIS HONOUR JUDGE BABINGTON

The Court directed that the identities of the defendant and the injured party should not be disclosed or reported and that their identities should be anonymised. The defendant is known as LG and the injured party as F in these remarks.

[1] The defendant has pleaded guilty to the one count on this indictment that of inflicting grievous bodily harm upon his son, F, on 30 December 2017. At the time of the offence F was 12 weeks old. At that time the defendant was 39 years old. He was married to his wife in 2016 and F was their first child. His wife had previously suffered a miscarriage.

[2] On 30 December 2017 the defendant and his wife were at home in County Down. His wife made a 999 call at 04.14 hours. She told the emergency operator that her baby was not breathing properly. She said that his eyes were slightly open but he was not breathing and was unresponsive. Instructions were given to carry out CPR. It was said that F had milk in his mouth that he was trying to bring up and he was taking gasps. There is no doubt that the defendant himself carefully carried out the instructions regarding CPR and that his efforts at resuscitating F were genuine.

[3] Police arrived at 04.30 hours and one of the officers took over CPR duties. Paramedics arrived shortly afterwards and said they would be leaving for the hospital immediately. F was taken to the Ulster Hospital, and it was noted that he was in cardiac arrest. Indeed, the paramedics reported he was in cardiac arrest

when they arrived at the family home at 04.35 hours. On arrival at hospital, it was clear that F was not breathing by himself, his heart was beating but his blood pressure was low. He was unresponsive and hypothermic. He was placed on a ventilator and transferred to the Paediatric Intensive Care Unit of the Royal Victoria hospital at 07.10 hours. A doctor spoke to the defendant and his wife. The doctor believed that F had developed a cardiac arrest after choking at home. He did note that it was unusual for a baby to have a severe choking episode with no medical cause such as an infection or an underlying neurological condition.

[4] During the course of 31 December F was examined by a number of doctors including a consultant ophthalmologist who noted multi-layered haemorrhages in the retinal periphery. A report concluded that these findings can be seen in acceleration/deceleration injuries, but other causes had to be ruled out. A brain and spine MRI scan was requested. The scan showed extensive patchy infarctions with extensive subdural and subarachnoid haemorrhages and also a cerebellar haemorrhage. There was also evidence of hypoxic injury mainly in the middle cerebral artery tertiary with evidence of cortical infarction. The central area of this infarction was consistent with hypoxic ischaemia. Hypoxic being a reduction in the supply of oxygen to the brain and ischaemia being low blood flow to vital organs. However, it was felt that the distribution of the blood was more in keeping with traumatic injury. Dr O'Donoghue told F's parents on the evening of 31 December that non-accidental injury was being considered. On the following day sedation of F was stopped although he was being actively cooled as a neuroprotective measure. He remained intubated and ventilated.

[5] On 3 January 2018 a further EEG was carried out and the result of this was a note that there was no significant cortical function. At that time, it was felt that if F was to survive he would likely have four limb movement disorder consistent with dystonia and possibly dyskinetic cerebral palsy secondary to the acquired brain injury. It was noted that he was quite agitated. On 5 January 2018 he was extubated and transferred to a different ward. A further EEG was carried out on 11 January for diagnostic clarification. The background was grossly abnormal with no evidence of any cortical response. A skeletal survey was carried out on 8 January 2018 and again on 22 January 2018. No acute or healing fracture was noted. This was seen against the background of a witness statement from F's grandmother who confirmed that F and her daughter stayed with her on the night of 28 December. She said that F was given his normal feeds and there was nothing untoward about him. He was a little out of sorts and he was given some Calpol at about 10.30am/11.00am. She confirmed that he was just a little unsettled and had no injuries.

[6] F's parents were spoken to at the Ulster Hospital when F was first admitted. Police spoke to the defendant on the afternoon of 31 December when he provided a first account, and the defendant was spoken to by a doctor on the evening of 2 January. In broad terms the defendant said he fed F his bottle or at least some of it. He said that he lifted him and started to nurse him, rocking him over his shoulder. He then lifted him off his shoulder and noted that he appeared unresponsive. He

took him downstairs to the bathroom and placed him on the lid of the toilet. He was joined by his wife and his face was rubbed with cold water. It was noted that milk was coming out of his nose, and he was gasping. It was at this point that his wife called 999 and instructions were given in relation to CPR. The defendant said that F had been well the previous day when put to bed although perhaps slightly "gurney". The defendant was arrested on 3 January 2018 and interviewed. In essence he repeated his account of feeding F. He denied shouting at him and said he had never lost his temper with him. At all times he insisted he was calm and denied doing anything untoward to his son or indeed shaking him. He told police that he did the best that he could for his son to try and help. He was further interviewed on 15 March and generally repeated what he had already told the police.

[7] The various doctors who treated F and the expert witnesses, instructed by the police, came to similar conclusions in that the findings were in keeping with an acquired traumatic brain/spinal injury. A neuroradiology consultant, Dr Dawn Saunders, said that the findings were compatible with a shaking injury and the level of shaking required would be recognised as dangerous when witnessed by a competent adult carer. That is the normal test that is applied in these types of cases. It was noted that there was an absence of rib fractures and indeed other fractures and/or bruising and that suggests that the shaking was likely to have occurred following a momentary loss of control and not as part of repeated abusive injuries. The timing of the shaking was more than likely to have been around the time of his feed. She thought that the injuries to the brain were so severe that she would not have expected F to behave normally after they were inflicted. Likewise, the retinal haemorrhaging and cerebral haemorrhaging would have been caused by shaking. The consultant ophthalmic surgeon and paediatric ophthalmologist were of the opinion that the most likely cause was a non-accidental violent shaking type injury.

[8] The effect on F of what occurred has been very profound. The court has been furnished with a report from Dr Larkin, a consultant paediatrician who has known F since he was referred to her in June 2018. The court has also seen correspondence between Dr Larkin and various experts who are caring for F. He has the following medical issues:

i. An acquired brain injury

ii. Four limb movement disorder/cerebral palsy.

iii. Ongoing multidisciplinary input from speech and language therapy, occupational therapy and physiotherapy.

iv. He is fed via a PEG tube feeding device through the abdominal wall as his swallow is not safe.

v. His left hip is dislocated but is not for operative repair. There is input from staff in the neuro disability team at orthopaedics in relation to posture, tone and orthopaedic management.

vi. Cortical visual impairment – he has no demonstrable visual responses.

vii. He has a statement of educational needs as he is a profoundly disabled child and requires special education and significant adult input to support his care needs.

viii. Over this past winter he has been unwell and had been admitted to hospital on three occasions and his chest is becoming increasingly complex to manage.

[9] Unfortunately, he has a complex, profoundly disabling profile secondary to his acquired brain injury which impacts on all areas of his life and bodily systems.

[10] He has significant neurological impairment. He has minimal useful vision. His tone management is challenging in that his brain does not give the correct signals to his muscles. He requires highly specialist seating and sleeping arrangements in order to maintain him in a comfortable and safe position. His swallow is managed by a tube as this is the safest feeding option for him and unfortunately, he cannot enjoy oral feeds. His mother communicates with him, but he has no verbal communication. He communicates by crying and facial expression and is best cared for by those who know him best and can anticipate his needs. The cardiac arrest he suffered in December 2017 has had a very significant impact on F so that he requires 24-hour assistance with all his personal care and health needs. He attends special school which it is said that he enjoys.

[11] So far as the defendant is concerned, he was first arraigned on 21 September 2022 when he pleaded not guilty. The matter was fixed for trial on two occasions and prior to the second occasion, when the trial date was 6 March 2023, the defendant applied to be rearraigned on 3 March 2023 and pleaded guilty. A pre-sentence report was directed. He is now aged 45 and apart from one minor motoring matter has a completely clear record. He left school at 16 with some GCSEs and then attended a local college obtaining various qualifications. He has been in full-time employment since that time.

[12] There is no doubt that it has been difficult for the defendant to realise exactly what he did and also to accept that he is responsible for the injuries caused to his son. He told the author of the pre-sentence report that he was holding F and shook him only for a second. It is said that he made frequent reference to the period of time as being "just one moment". He did concede that by holding F as he did in failing to support his head this was more a gesture of frustration rather than proper care. It is of note that he firstly said he was a little frustrated but then went on to describe his frustration as being enormous. He said that he himself wanted to sleep

and felt unprepared for caring for a baby. Although acknowledging that his shaking of F was a deliberate act, he maintained he did not understand the potential consequences of his actions. It is said that he reflected that he was the father of F and was supposed to protect him – not injure him.

[13] The probation service has assessed him as posing a low likelihood of further offending. Protective factors are said to include that there has been no history of violence or aggression, there is family support, there is social services involvement and there is proper adherence to safety planning.

[14] There is no doubt that once the defendant realised that something was wrong with F, he and his wife did everything that they could to assist him by dialling 999 and by the defendant carrying out CPR as instructed. It is equally clear that since that night the defendant has acted as a loving father to F in many ways. I have listened carefully to everything that Mr Power KC, who together with Mr Gibson appeared for the defendant, has very appropriately said. I have also read two statements, which I can only describe as being very personal, emotional, and objective from his wife and sister. In addition I heard oral evidence from his wife, who together with her mother-in-law and sister-in-law came to court to support the defendant. Sadly, the various stresses that have been caused by this matter appears to be a major reason for her and the defendant separating although there is no doubt that the defendant remains as an integral and essential part of what I am going to call the care package for F. It is also abundantly clear that he contributes financially, and the couple have a daughter to look after as well. His wife described his participation as making a huge difference to her and said he is a big part of the children's lives.

[15] The offending in this case is aggravated by the devastating injuries sustained by F and also by the fact that the defendant was in a position of trust. He was effectively in charge as his wife was not particularly well that evening and was sleeping in another room. He has pleaded guilty to a most serious offence for a parent in relation to his child. That plea did not come immediately but it did come well before trial. Some of the factors relating to the offending are complex but the defendant has obviously taken advice, reflected on it and realised that what he did was wrong. In the view of the court, he is entitled to substantial credit. There is no doubt that his plea in this case indicates very substantial remorse.

[16] I have carefully considered all the circumstances giving rise to the offending in this case. I have also carefully listened to all that has been put before me in relation to the defendant since this incident. This defendant is quite clearly an integral and essential part of F's life. Indeed that is something that comes through very clearly from F's mother's evidence to the court. There is no doubt that should he be sent to prison it would make life much harder for F, his mother, the wider family and all who care for F. Everyone in this case has suffered and will suffer as time goes on.

[17] Ordinarily, as the Court of Appeal said in *Mitchell* [2005] NICA 30 a court must start, as a matter of principle, from the position that an immediate custodial sentence will nearly always be inevitable. These cases involve or can involve a loss of control for a very short time causing terrible consequences for the child involved. In *Anderson* (2011) NICC 28, a case in which I was involved the defendant received a sentence of five years imprisonment after a trial. There were other concerning features contributing to the sentencing in that case. That is the type of sentence that this defendant would have received had he contested the case and been found guilty by a jury.

[18] I have already said that this defendant is entitled to substantial credit. In all the circumstances this would bring the sentence down to one of two years imprisonment. It is suggested that this case in its factual matrix is exceptional. I have carefully considered the case of *Hendry* (2022) NICA 77 as well as the English case of *Rehman* (2006) 1 Cr App R(S) 77. It is clear that the court should adopt a holistic approach and take into account all that has occurred both at the time of offending and thereafter. Indeed in this case the relevant period of time continues to the present day. In this regard I consider that the evidence of F's mother is very significant. The court, after very careful consideration, has come to the conclusion that the appropriate sentence is one of a suspended nature. The defendant is sentenced to two years imprisonment but the operation of that sentence is suspended for a period of two years.