SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT STIRLING

[2018] SC STI 37

B103/18

JUDGMENT OF SUMMARY SHERIFF JAMES MACDONALD, ADVOCATE

in the Children's Referral

for the case of

the child S (17 December 2013)

For the Reporter: Sime;
For the mother: Rodger;
For the father: Marsh;
Safeguarder: Crabbe;

Stirling, 5 June 2018

Summary of findings

Findings in Fact:

1. That on 7 November 2017 at Plean Pharmacy, Main Street, Plean, the child's mother KR struck the child S to the side of her head with her open hand once, using moderate force.
2. That the child was neither injured by being struck as described above, nor was she distressed.
3. That, immediately prior to the strike mentioned above, the child had bitten KR on the arm.

Findings in law:

1. That the offence prescribed within section 12 of the 1937 Act falls within Schedule 1 to the Criminal Law (Consolidation) (Scotland) Act 1995 ("Schedule 1").

2. That the action of the mother referred to in finding in fact one was deliberate conduct that amounted to ill treatment.
3. That the action of the mother referred to in finding in fact one was not one that was likely to cause the child unnecessary suffering or injury to health.
4. That the circumstances described above do not amount to a contravention of section 12 of the Children and Young Persons (Scotland) Act 1937.

Disposal

1. Of consent finds Grounds 1 and 3 of the Grounds of Referral established.
2. Of consent finds Paragraphs 1, 2, 5, 6, 7 and 8 of the amended statement of supporting facts established.
3. Finds paragraph 3 of the statement of supporting facts established.
4. Remits the case to the Scottish Children's Reporter Administration to convene a Children's Hearing.

Introduction

[1] This case concerns a 4 year old child, S. The child's mother is KR and her father RL. In these proceedings each was separately represented. Mr Rodger, Solicitor appeared for the mother and Mr Marsh, Solicitor, for the father. The Court had earlier appointed a safeguarder, Mr Crabbe.

[2] There are three grounds of referral, namely:

a. That in terms of section 67(2)(a) of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"), the child is likely to suffer unnecessarily or her health or development is likely to be seriously impaired, due to a lack of parental care;

b. That in terms of section 67(2)(b) of the 2011 Act, a Schedule 1 offence has been committed in respect of [the child]; and

c. That in terms of section 67(2)(c) of the 2011 Act the child has or is likely to have, a close connection with a person who has committed a schedule 1 offence.

[3] At the outset of the hearing before me, I was informed that agreement had been reached on the vast majority of the factual issues in the case. I was presented with a joint minute of admissions and an amended statement of supporting facts. This allowed me to find grounds 1 and 3 of the grounds of referral in this case established by virtue of all bar paragraphs 3 and 4 of the amended statement of supporting facts.

[4] I was informed by Miss Sime for the Locality Reporter ("the Reporter") that paragraphs 3 and 4 of the amended statement of supporting facts were relied upon for the establishment of ground 2.

[5] The Reporter relied upon the evidence of two witnesses:

i. Mrs Shirley Swan, who was at the material time employed at Plean Pharmacy; and

ii. Detective Constable Rory Bateman.

[6] In addition the Reporter relied upon various productions. Most notably, there was a DVD recording of a police interview of the mother pertaining to the facts alleged in paragraph 3.

[7] The father and the safeguarder did not offer any evidence.

[8] Mr Rodger for the mother informed me that KR would rely upon her answers to police questions in the DVD recording as a statement of her position. In addition, the mother relied upon the evidence of Miss Leanne Bryce, a friend of KR who had been present at Plean Pharmacy on 7 November 2017.

Summary of the evidence

Mrs Swan

[9] Mrs Swan was formerly employed as a pharmacy assistant at the Plean Pharmacy, but is no longer so. Mrs Swan stated that she had extensive experience of dealing with the public in her role at the pharmacy.

[10] Mrs Swan knew KR as a previous customer of the pharmacy.

[11] Mrs Swan was working behind the counter of the pharmacy on 7 November 2017. KR entered the pharmacy with the child and also a friend (Miss Bryce). Mrs Swan served KR. KR asked Mrs Swan to look at a rash that was apparent on S. S was however wandering around the shop and was away from the counter. Mrs Swan described the child as being curious "like any other kid". KR grabbed the child and pulled her towards her and over her knee to enable Mrs Swan to look at the child's rash. Mrs Swan described how both she and KR crouched down at the end of the counter to facilitate this examination of the child.

[12] Once the child was in KR's arms and over her knee, she appeared to bite her mother on the arm. KR "smacked her across the head right after". Mrs Swan could not recall which hand KR had used. Mrs Swan confirmed that this slap had been an "instant reaction". Mrs Swan described the slap as "quite forceful". She explained that she had noticed the child's head move in a direction consistent with the direction of travel of the slap.

[13] Having been slapped, the child did not cry. The child got up from her mother's knee and "toddled back around the pharmacy".

[14] Mrs Swan then went behind the counter to locate appropriate medication for the rash. When she returned to the counter, she explained to KR how to use it. In the course of this conversation Mrs Swan whispered to KR that she should not hit a child across the head. KR replied to the effect of "who do you think you are". KR then said that she had slapped

the child because "she bit me". Mrs Swan felt quite angry, physically sick and felt the need to walk away.

[15] Mrs Swan went on to describe how the event had disturbed her overnight. She discussed the matter with colleagues and thereafter with a health visitor named "Agnes" based in Bannockburn. The health visitor advised her to inform the police.

[16] In answer to questions put by Mr Marsh, Mrs Swan stated that she knew KR's friend to be Leanne Bryce, whom she knows from living in the same street.

[17] In answer to questions put by Mr Rodger, Mrs Swan described S as very active and boisterous on 7 November 2017. She described KR calling her over and S not obliging. This was why her mother had pulled her across her knee as described earlier. This appeared to be frustrating for KR who clearly just wanted to get her visit to the pharmacy over as quickly as possible.

[18] With regard to strike by KR, Mrs Swan rejected the propositions that this could be viewed as a "flick" or a "tap". She explained that she had seen the child's head move. The slap had occurred once the child had stood up again after being pulled across her mother's knee. Mrs Swan described how the child had then "went away happily".

[19] Mrs Swan explained that she did not actually see the child bite KR, but agreed that the child was in sufficiently close proximity to have the opportunity to do so. KR had stated that she had been bitten.

[20] In reply to questions put by Mr Crabbe, Mrs Swan explained that she had worked at the pharmacy for fourteen and a half years. This was the only incident in her working life at that employment which she had lost sleep over. She had never previously felt the need to report any incident involving a child at the shop to the police. She affirmed that she was not in the habit of reporting matters to the police.

[21] In answer to supplementary questions from the Court, Mrs Swan clarified that, having whispered to KR that she should not hit a child on the head, KR had replied that [the child] "fucking deserved it because she bit me".

[22] Mrs Swan confirmed that the slap had made contact with the right side of the child's head around her ear. She however saw no injury or redness to the child's head as a consequence of the slap.

DC Bateman

[23] DC Bateman is a Detective Constable with the Police Service of Scotland, based in the Family Protection Unit at Larbert Police Office. The officer gave evidence primarily relating to an interview which he carried out with KR in the company of another officer regarding the investigation of what was at the time an allegation of assault of the child on 7 November 2017. This interview took place under caution on 8 November 2017.

[24] The officer described KR as fully cooperative during the interview process. The interview was conducted under caution and was both audio and video recorded.

The interview of KR

[25] KR denied assaulting S. She said that she was holding the child because S had been running about. She then stated "S bit me" and further "I didn't hit her but I flicked her". KR indicated that this was to the side of S's head. She added that S had run away laughing.

[26] KR explained further that S had bitten her on the arm while KR had been holding her in both arms. She explained that she "never walloped her. It was more of a flick than a slap. I just says not to bite. It wasn't a punch or a slap or anything like that. I said I was getting sick

of it". The officers put to her that S's head had been seen to move as a result of the blow. KR replied that she could not remember that occurring.

[27] DC Bateman then put to KR that she may have used the phrase "wait until I get you home" when addressing the child. KR responded that "No, I said I was sick of that. I was worked up but I never … If I did I didn't mean anything by it."

[28] Later in the interview KR explained that she had suffered a number of bereavements of close family members in the recent past including the sudden death of her father earlier in 2017.

[29] KR was cautioned and charged with an assault upon S on 7 November 2017. She made no reply.

Miss Bryce

[30] Miss Bryce stated that she had been a friend of KR for some months prior to 7 November 2017. She explained that she had been with KR and S at the pharmacy on 7 November 2017. Indeed, the visit to the pharmacy had been precipitated by Miss Bryce who had advised that S's rash ought to be "looked at". In addition she also had to attend the pharmacy to uplift a prescription for her son.

[31] Miss Bryce described S as "running around [the pharmacy] – as kids do." She described KR as trying to prevent S from venturing behind the counter. She described that she had been "standing minding my own business" as KR had spoken to the pharmacy assistant. She accepted that her attention had been "everywhere" and was not focused upon this interaction. She did however recall KR saying to S "don't bite me". She said this with a "slightly raised voice". She did not shout.

[32] Miss Bryce then stated that she was not sure what exactly she saw next. It however appeared that S went to bite KR to which KR responded by putting her hand up to prevent this from occurring, or to move S away. She saw some contact between the two. This had been a "gentle tap" or a "moving off". It was not a forcible contact. S was not adversely affected. Miss Bryce added that S was still "laughing and carrying on".

[33] In answer to questions put by Mr Crabbe, Miss Bryce accepted that she had repeatedly used the word "hit" to describe KR's action in the course of her police witness statement. She affirmed however that what she had seen had definitely been a gentle tap. It was not a hit. She however accepted that the word "hit" had been hers .This had been, she said, a poor choice of words on her part.

[34] In answer to questions put by the Reporter, Miss Bryce accepted that she probably did read her police statement before signing it, but added that she may also have been distracted at the time and did not afford the document her full attention.

Summary of submissions

For the Reporter

[35] Miss Sime reminded me that the requisite standard of proof was the balance of probabilities (*McGregor* v *D* 1977 ST 182, per Lord President Emslie at 185). There was no requirement for corroboration, notwithstanding the reference in the disputed paragraphs of the statement of supporting facts to commission of a criminal offence.

[36] Miss Sime added that, if I were satisfied that a contravention of section 12 of the 1937 Act had been committed, I must find ground 2 established as this would be a Schedule 1 offence.

[37] With regard to section 12, Miss Sime submitted that there were four essential elements:

a. The person who commits the offence must be in *de facto* charge of the child;

b. There must be *inter alia* ill-treatment. This has no judicial or statutory definition;

c. The standard to be applied in evaluating the ill-treatment was that of a reasonable parent (*M* v *Locality Reporter* 2015 ST 543, paragraph 51);

d. The ill-treatment or conduct must be likely to cause unnecessary suffering or injury. There must be evidence to support that conclusion, and this should not be left to speculation (*H* v *Lees* 1993 JC 238). "Likely" should be construed as meaning a real and substantial risk of occurrence (*Dunn* v *McDonald* 2013 ST, Sh Ct 34, *paragraph 47*).

[38] Miss Sime submitted that the mother in the present case had wilfully and deliberately struck the child. This, she submitted, amounted to ill treatment. She accepted that the case turned on the issue of whether this was "likely" to cause unnecessary suffering or injury to health.

[39] It was submitted that it was, and is, unnecessary for evidence to be led as to the likelihood of injury, and the nature thereof arising from such an act. Miss Sime submitted that this lay within judicial knowledge. The evidential basis referred to in *H* v *Lees* was that of Mrs Swan. She had been concerned at the conduct. The blow had sufficient force to move S's head. In addition, Miss Sime submitted that I could find support from section 51 of the Criminal Justice (Scotland) Act 2003, which removed from consideration of justifiable assaults on the grounds of reasonable chastisement of children any blow to the head of a child.

For the father

[40] Mr Marsh stated at the outset of the hearing that he had no view as to the facts of the 7 November 2017 incident but at the conclusion invited me to hold ground 2 established. His submission was that if I accepted the evidence of Mrs Swan the risk of injury to health was so self-evident that I must hold the likelihood aspect of the statutory test established.

For the mother

[41] Mr Rodger invited me not to hold Ground 2 established.

[42] On the evidence, he invited me to prefer the accounts of both KR and Miss Bryce to that of Mrs Swan regarding the level of force used by KR.

[43] Further, Mr Rodger highlighted the clear evidence to the effect that there had been no reaction whatsoever from the child to what her mother did. This, he submitted, was capable of drawing inferences as to the extent of the force used.

[44] Mr Rodger further highlighted that the Reporter in the present case had elected to offer no medical evidence. This required the Court to rely upon eye witness evidence and to draw inferences from that. I should, he submitted, not draw inferences as to likelihood of injury to health from the evidence in this case. Mr Rodger reminded me of the reference in *H* v *Lees* and repeated in *Dunn* v *McDonald* to the effect that there must not be speculation in reaching any view on the likelihood of injury to health.

For the safeguarder

[45] Mr Crabbe invited me to prefer the evidence of Mrs Swan to that of Miss Bryce and KR (albeit that the latter was in the context of a police interview). Miss Bryce was, he

submitted, an unreliable witness whose attention had been elsewhere. KR had minimised her conduct.

[46] Mrs Swan on the other hand had been clearly disturbed by the incident. She was, he submitted, telling the truth.

[47] Mr Crabbe added that he was concerned that the mother also was reported to have used the phrase "wait until I get you home". In the later part of her interview, she advised the police that S's behaviour had become more difficult and that she had bitten her mother on a number of occasions.

[48] Mr Crabbe submitted that I should approach the legal test of likelihood by reference to the evidence of Mrs Swan. If a four year old child was struck with force, the Court can take it that the act was necessarily harmful or likely to be injurious to her health.

Analysis and decision

The evidence

[49] It was quite clear to me that all three eyewitnesses were describing the same event. I preferred the versions of Mrs Swan and Miss Bryce to that of KR, primarily because the former had been given on oath and had been subjected to cross examination.

[50] I found Mrs Swan to be a truthful witness as to the events. It was clear that she had agonised over whether to report the matter to the police. She described what she saw as a slap across the head of the child, which imparted sufficient force to move the child's head. She however was quite clear in her evidence that this act had no apparent detrimental effect upon the child. The child neither appeared injured nor was distressed. It was Mrs Swan's position that immediately beforehand; the child had appeared to bite her mother.

[51] Miss Bryce's position was that what occurred was a "tap" on the child's head. She did however accept that she had used the word "hit" when speaking to police officers. Miss Bryce freely accepted that she was not entirely paying attention to the incident. What she however described was KR using her hand to move the child's head away. It was Miss Bryce's impression that KR was moving the child's head away to bring an end to the bite which she was inflicting on her mother.

[52] The above two accounts in my judgment are not irreconcilable. Both witnesses spoke of contact made by KR's hand with S's head, sufficiently to move the child's head. Both described the lead up to the event as involving what appeared to be S biting her mother. Neither suggested that there was any material delay between the apparent bite and the action taken by KR.

[53] Miss Bryce's evidence was criticised during the course of submissions by the Reporter and Mr Crabbe. I agree that her attention may have been – understandably – elsewhere in the lead up to the incident. She was however in my judgment a truthful witness describing an unexpected and quick incident.

[54] There was disparity between the two witnesses as to whether the child was standing (as per Mrs Swan) or still on her mother's knee (Miss Bryce) when she was struck. I prefer Mrs Swan's account on this issue because she was closer and her attention was directed towards KR and S. Nevertheless the contact happened instantly after the apparent bite had occurred. It was a momentary, fleeting contact.

[55] I reach the conclusion that the force used in this case was moderate. It caused no injury or distress. It caused the child's head to move. It did no more. The child was standing at the time. She had just bitten her mother but was not in the process of doing so. The reaction by the mother was almost instant.

[56] I should add for the sake of completeness that KR did not accept that she used the words "wait until I get you home" during her police interview. It was put to her that she had. She refuted this suggestion and then offered a conditional response that even if she had; she had not meant anything by it. It is my view in fact and law that this statement cannot inform the Court of any state of mind on the part of the mother at the material time. KR denied using the words. No contrary evidence was led. Even were the words used capable of bearing an inference of an intention to cause suffering to the child, such intent was in the future and not pertinent to the matters falling for proof.

The legal principles

The requirements of section 12

[57] Section 12 of the Children and Young Persons (Scotland) Act 1937 has as a heading "Cruelty to persons under sixteen". Subsection 1 provides as follows:

> "1. If any person who has attained the age of sixteen years and who has parental responsibilities in relation to a child or to a young person under that age or has charge or care for a child or such a young person, wilfully ill-treats, neglects, abandons or exposes him .. in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb or organs of the body, and any mental derangement0, that person shall be guilty of an offence…"

[58] It was not in dispute in the present case that KR was a qualifying person for the purposes of this section, and further that the act of hitting the child had been wilful, that is to say, deliberate or intentional. It was accepted that, if the act in question were to contravene section 12 at all, it would require to be capable of being construed as ill treatment. All bar Mr Rodger urged me to the view that it could be.

[59] It was also Mr Rodger's position that there was an insufficient evidential basis to regard the final part of the test, namely the "likelihood" test, as made out.

[60] I consider that the requisite test was correctly identified in the course of submissions in this case.

[61] It should however be noted that the offence in section 12 is directed at "cruelty". The specific examples of injury to health it provides are serious ones. The offence is not concerned with conduct that is "trivial" or "transient" (*H v Lees 1993 JC 238*, per Lord Justice General (Hope, as he then was), at 244). I am prepared to accept that a single significant event may fall within the scope of section 12. However, it should be noted that single events of a lesser gravity may not fall under the scope of this offence.

Ill-treatment

[62] The test for what may amount inter alia to ill-treatment for the purposes of section 12 is an objective test, applying the standard of the reasonable parent (*Clark v HM Advocate* 1968 JC 53, per Lord Justice-Clerk (Grant) at 56).

[63] Miss Sime invited me to have regard to the effect of section 51 of the 2003 Act as guidance on this issue, and also in relation to the later question of likelihood. That section was however concerned with cases of assault, where there is a very different *mens rea*. Evil intent is not required for the purposes of section 12. Nevertheless it seems to me to be the case that where Parliament has taken a blow by a parent to a child's head away from the scope of reasonable chastisement, then it should be outwith the range of responses open to the reasonable parent for the purposes of section 12.

[64] In my judgment it is helpful that Miss Sime raised the issue of justified assault in the course of submissions. Had this case contained an allegation of assault, it may have been suggested that KR had acted in self-defence. Miss Bryce's evidence would have supported that proposition but Mrs Swan's would not. In the latter case there may however have been

at least arguable that KR had acted under provocation. The former would amount to a defence. The latter would not.

[65] Neither self-defence nor provocation would be relevant to an allegation under section 12. If however I had favoured the account of Miss Bryce over that of Mrs Swan it would have been in my judgment arguable that KR had acted out of necessity to prevent an ongoing risk that the child may inflict a biting injury on her. Having reached the decision I have on the evidence, however, that issue does not arise.

[66] I do not regard what KR did to be trivial, but it was transient. Section 12 appears in Part II of the 1937 Act. This part contains the heading "Prevention of Cruelty and Exposure to Moral and Physical Danger". The "cruelty" is to be found in the manner of the conduct and its likely effect (*H* v *Lees*). Momentary conduct which is likely to cause injury to health cannot be said to be trivial. I accordingly consider that the single blow in this case is capable as a matter of law as amounting to ill-treatment for the purpose of section 12.

[67] As however can be noted from the paragraph immediately above, there is an interaction between the conduct and its likely consequences which lies at the heart of the section 12 offence.

Likelihood

[68] Even if the conduct of KR did amount to ill-treatment, it would as a matter of law only contravene section 12 if it was likely to cause unnecessary suffering or injury to health.

[69] The applicable test is objective.

[70] In my judgement, the central question to the present case is what may be viewed as "likely". "Likely" means a "real and substantial risk of occurrence", which need not be

probable but must be beyond a bare possibility, to the extent that unnecessary suffering or injury to health is "such as may well happen" (*H* v *Lees*, 246).

[71] The Court in *H* v *Lees* was concerned with an allegation of wilful neglect. It is clear from the wording of the statutory offence that neglect and ill-treatment are separate concepts. What I however take from the case of *H* v *Lees* are the statements of principle found within the Opinion of the Court. In particular it was opined thus at 246:

> "It is the absence of any findings that in any specific and substantial respect the child was likely to be caused unnecessary suffering to health that persuades us in this case, it was not proved that there was a contravention of section 12".

[72] The Court continued:

> "It cannot be assumed that such neglect will be likely to cause the child unnecessary suffering or injury to health, as this cannot be left to speculation."

[73] The above principles were summarised by Sheriff Reid in the case of *Dunn* v *McDonald* 2013 ST (Sh Ct) 34 at paragraphs 47 and 48. Beyond these paragraphs however, I did not find that case useful. In *Dunn*, the issue was one of parental neglect, and contained a number of separate issues where inferences could be drawn as to unnecessary suffering or injury to health. It was not concerned with the situation of a singular incident, nor was it concerned with a situation of ill-treatment.

[74] In *M* v *Normand* 1995 SLT 1284, a parent was charged with a contravention of section 12 by wilful neglect of a child by leaving the child alone in a parked car. The child was found safe and well. In convicting the appellant, however, the Court at first instance placed material weight upon evidence of a police officer as to the child being at risk of abduction, or injury to health by unforeseen events whilst alone, or unnecessary suffering by becoming upset. The child was not as a matter of fact upset.

[75] The Court of Criminal Appeal quashed the conviction. It held that the risks identified by the police officer and accepted by the Sheriff were speculative and did not relate to the period of time during which the child had been left unattended.

[76] In delivering the Opinion of the Court Lord Justice General Hope stated the following at 1286:

> "It seems to us that the various events referred to in finding 14 [those referred to in paragraph 73 above] are events which are on the evidence of this case speculative. They were not events which were related to any particular period of time during which the child was left alone in the car. They might have occurred at any time, and the risk they might occur was not created by the period of the appellant's absence… There was some force in the Advocate Depute's submission that, in a situation where a child is likely to become distressed by being left alone, that is a circumstance which might cause unnecessary suffering… The only matter which might be said to be unrelated to interference by others is the possibility of sudden illness being caused to the child, but there are no findings that the child was suffering from any medical condition which made him susceptible to a sudden illness while he was in the car."

[77] Plainly a distinction falls to be drawn between the facts of M and the present case. There was no suggestion in the present case of any intervening act by a third party. This distinction however does not in my judgment affect the principle which in my view forms the *ratio* decidendi of *M*, namely that factors bearing on the extent to which suffering or injury to health is likely, are evidential in nature and must be relevant to the period during which the conduct forming the subject matter of the charge is said to have occurred.

[78] What was important in *M*, as in my judgment is also so in the present case, is that there was no evidence of any distress on the part of the child. Indeed in the present case, the evidence is to the contrary. The child was unaffected by the action taken by her mother. Mr Crabbe's submission in particular was in my view close to what the Court in *H* v *Lees* specifically ruled cannot be done, namely for the Court to assume a likelihood of unnecessary suffering or injury to health from the mere fact of the conduct *per se*.

Speculation and judicial knowledge

[79] In *H* v *Lees*, the Court opined that there must be a real and substantial basis for the likelihood of unnecessary suffering or injury to health. It must not be speculative. The Shorter Oxford English Dictionary defines "speculation" as "a conclusion, opinion, view, or series of these reached by abstract or hypothetical reasoning". Forming a conclusion without an evidential basis would in my judgment amount to speculation. In *M* above, the theories of a police officer were viewed as speculative as they did not correspond with the circumstances set out in the evidence.

[80] It was submitted for the Reporter that judicial knowledge would enable me to reach the conclusion that the factual circumstances in this case would found the inference of unnecessary suffering or injury to health. Judicial knowledge applies to matters that can be immediately ascertained from sources of indisputable accuracy. The fact should be "so notorious as to be indisputable" (Walker and Walker, The Law of Evidence in Scotland, 4th Edition paragraph 11.6.1). The above is to be contrasted with the Court carrying out its own research, which would be impermissible (Walker and Walker 11.6.2). Some natural facts have been held to be within judicial knowledge, such as the period of human gestation (Walker, 11.7.5).

[81] It should be borne in mind that the likelihood test within section 12 does not merely require the existence of a risk. That would in my judgment be the "bare possibility" referred to by the Court in *H* v *Lees*. Rather, the section requires a quantitative assessment of the level of risk. Such an assessment in my judgement requires evidence. This need not necessarily be from medical professionals, but should nevertheless provide the Court with an evidential basis upon which conclusions may legitimately be drawn. It may fall within judicial knowledge that a blow to the head may convey a risk of injury, but I am of the view that I

cannot and should not assess how likely that risk of injury may be without some evidence to show what the nature and extent of such an injury would be, especially to a child of four years of age.

[82] There was no evidence of what injuries may be sustained to the child by the mother's act. Mrs Swan gave evidence that she had sought the advice of a health visitor. The hearsay evidence of the health visitor however was merely a recommendation to report the matter to the police. There was no evidence, even hearsay evidence, as to what real and substantial risks attended the single blow struck by the KR.

[83] It was submitted by Miss Sime that I may derive guidance from section 51 of the 2003 Act on this particular issue. I disagree. Section 51 is concerned with assaults on children. It conveys no information as to the likelihood of suffering, harm or injury. I do not regard this submission as helpful.

[84] In the present case, there is no evidence to show any suffering on the part of the child. There accordingly in my judgment can be no finding of a likelihood of causing unnecessary suffering.

[85] Without an evidential basis as to the potential medical consequences of the conduct referred to in the findings in fact, it is my judgment that no determination of the likelihood of injury to health can be embarked upon. The offence referred to in paragraph 4 of the statement of supporting facts cannot accordingly be said to have been committed by KR. It follows that Ground of Referral 2 has not been established.