PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. E. M., 2017 NSPC 35

Date: July 17, 2017
Docket: 2970398

Between:

The Queen

v.

E. M.

Restriction on Publication: s. 486 Identity of Complainant

DECISION ON TRIAL

Judge:	The Honourable Judge Chisholm
Heard:	February 23, 2017 and May 5, 2017 at Halifax, Nova Scotia
Decision:	July 17, 2017
Charge[s]	Section 218 of the Criminal Code
Counsel:	Susan MacKay, for the Crown Peter Planetta, for the Defendant

By the Court:

The Charge

The accused, E. M., is charged that he on or about the 20th day of September 2015, at or near Halifax, Nova Scotia did unlawfully abandon A. M., a child under the age of ten years, and did thereby endanger his life contrary to section 218 of the Criminal Code.

Summary of Undisputed Circumstances

[1] September 20, 2015, was a beautiful, warm, late summer day in Halifax, Nova Scotia. The Accused, E. M., age 55, was caring for his eleven-month-old child, his only child. His wife was working until 4:00 PM, having recently returned to work after maternity leave – during which time she was the primary caregiver.

[2] The Accused was to begin his work, as […], at QEII hospital in Halifax at 3:00 PM. The Accused and his wife had agreed upon a plan for child care for the day. He was to take the child to his work site and keep him there with him until it was time for him to leave to meet her at 4:00 pm. He would then sign out on a one hour break and take his son to his wife's workplace to turn care of the infant over to her. A simple plan.

[3] Sometime before 3:00 PM, the Accused put his son into his car seat and secured him in the rear seat of the family van, behind the driver's seat. He drove to the area of the QEII hospital in Halifax. The Accused claimed he had difficulty finding a parking space, eventually finding a spot about a five-minute walk from the hospital.

[4] According to the Accused's statement to the police the time was then shortly before 3:00 PM. He was running late. He had hoped to arrive in time to speak with a co-worker about recent changes to the computer system. She was scheduled to leave work at 3:00PM.

[5] The Accused, in his statement to the police stated that his son was asleep in his car seat. The Accused stated that rather than awaken his child and put him into the stroller and take him to his workplace, as agreed with his wife, he decided to leave his child in the vehicle. He said that he thought it would be easier for both he and the child and quicker. He said his plan was to go to work, check-in, then check-out and return to the van. He said that he expected to be gone about 15 minutes, less than 20 minutes. Having driven with several windows slightly open he left them open and locked the vehicle. He acknowledged his wife had told him repeatedly never to leave the baby alone. But he decided that this was a good plan.

[6] The vehicle in which the child was left had tinted side windows. The passenger side front window was left down about one inch. The rear vent windows were also left open about one inch. The vehicle was facing west in the direction of the afternoon sun. Witnesses described it as a warm/hot late summer day.

[7] The Accused said he walked quickly, even ran some, to the hospital. At work, he had a problem checking-in. He stated that, after checking-in he noted the time, according to the clock on the wall, was 3:20 PM. He indicated that he was concerned and felt he needed to get back to his son, but, he didn't leave immediately.

[8] There had been something new added to the hospital computer system and, before leaving, he checked it out so he'd be familiar with it. Then he left to return to the van and his son. At approximately 3:35 PM he was seen walking quickly toward his parked van, arriving at approximately 3:36pm.

[9] While the Accused was away from his child the temperature inside the van increased. The baby awoke and began to cry.

[10] Fortunately, the child's cries were heard by J. E.. Ms. E. described the child's cries as "frantic". She followed the sound to the van and looked inside, seeing the baby. She looked around for an adult but found no one connected to the van. She described the baby as: crying hysterically, hair soaked, drenched in sweat, clothes damp. She believed the baby was in distress. She decided to call the police and did so.

[11] The police arrived on the scene at 3:30pm and took immediate action, breaking a window of the van and removing the infant child. At 3:36 pm ambulance personnel examined the infant and found all his vital signs were normal.

[12] Section 218 of the *Criminal Code* states:

> "Abandoning child
>
> 218 Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured,
>
> (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
>
> (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months."

[13] The charge laid against the Accused alleges:

> "unlawfully abandon A. M., a child under the age of ten years, and did thereby endanger his life contrary to Section 218 of the Criminal Code."

[14] For whatever reason, the Crown alleged that the Accused's abandonment of his child endangered its life, not that it was "likely to" endanger the child's life. The Crown conceded at trial that having alleged "endanger", they were required to prove actual endangerment.

[15] The Crown position is consistent with jurisprudence (See *R. v. L.M*, [2000] O.J. No. 5284 Ont. HCJ; *R. v. J.R*. [2000] O.J. No. 6073 (Ont HCJ). I find that, based upon the wording of the charge, the Crown must prove actual endangerment of life.

[16] The Crown argued that the difference in the wording of the charge versus the offence section was meaningless because endangerment of life connotes a significant risk of life which assumes a “likeliness” of the risk of death.

[17] In support of its position, the Crown referred to the *Supreme Court of Canada* decision in *R. v. A.D.H.* [2013] 1 SCR 269. At paragraph 39 of the decision Justice Cromwell for the majority stated:

> “There is no doubt that the purpose of the abandonment offence is the protection of children from risk even when no harm occurs.”

[18] In *A.D.H.,* Justice Cromwell was interpreting the language of section 218 which includes the words “its life is or is likely to be endangered …”. In my view the statements of the Court must be viewed in this context.

Endangers Life

[19] The term “endangers the life” has been judicially considered in the context of s. 268 (aggravated assault). In *R. v. Freitas* (1999) 132 CCC (3d) 333 (Man. C.A.) the Accused made stabbing motions at the victim with a knife but did not injure him. The Court noted that while endangerment of a life does not require proof of bodily harm, the conduct must endanger the complainant’s life and not merely have the potential to endanger life.

[20] I accept the reasoning in *R v Freitas* and I find that proof of endangerment of life requires the Crown to prove more than the potential endangerment of life. The Crown must prove that the accused's actions caused the child's life to be endangered, ie. put at risk of death.

[21] I find that the requirement of proof of endangerment of life is different then the legal requirement of abandoning a child so that its life is or is likely to be endangered.

The Testimony

J. E.:

[22] Ms. E., a mother of three, lives in the Annapolis Valley. She brought her children to Halifax on September 20, 2015, to enjoy, with them, the Halifax Public Gardens on a day that she described as “like a summer day in late September”, “really hot”, “abnormally warm for September.”

[23] She heard a baby crying frantically. She said the sound of a baby’s cry is not always the same. She acknowledged a child can be frantic for many reasons and she had no familiarity with this child. She felt this child was in distress. She tried, without success, to find an adult responsible for the child. After 5-10 minutes, she called the police. After the police arrived she stayed to give a statement.

[24] She testified to seeing a man, later identified as the Accused, about ten minutes after the police arrived, walking quickly from the direction of the university.

[25] Ms. E. testified that the Accused walked to his vehicle and had contact with the police. He did not go to the police vehicle to see his child. She described his demeanor as “nonchalant”. She said he stood by his vehicle and was very quiet.

[26] Ms. E. described the time of the incident as 3:00 – 4:00 PM. She told the police that she believed the time, when she called 911, was 3:23pm but she wasn’t sure.

Cst. LeBlanc

[27] Cst. LeBlanc of the Halifax Regional Police Service testified that he responded to a call on September 20, 2015, to College Street. He made note of arriving at 3:30 PM. After briefly speaking with Ms. E. and assessing the situation, he made a call to his supervisor for clearance

to do so and then broke the window of the van and removed the infant child (noted to have been done at 3:31 PM.).

[28] When he opened the van door he stated that a “wave of heat hit him in the face”. He testified that, “It was like a sauna in the vehicle”, “very hot”, “extremely hot”. He observed that the baby was screaming in a high voice, hysterical, bright red color in the face, soaked, drenched, like someone had poured a bucket of water on the baby. He said that he saw sweat glistening on the child’s skin. He believed the child was in distress.

[29] He stated that the van from which the infant had been removed had tinted windows. The right-side passenger window was down about an inch. At least one rear van window was open about an inch. The doors were locked. He couldn’t see inside the van until his face was against the glass.

[30] At 3:36 PM. he was advised by Ms. E. that the father had arrived.

[31] He spoke to the Accused. He commented that the Accused did not show any emotion, did not ask about the baby’s wellbeing, and did not check on the child. Cst. LeBlanc acknowledged that he’d never met the Accused before and did not know his usual demeanor.

Sgt. Strickland:

[32] Sgt. Strickland attended the scene and, upon arrival, observed Cst. LeBlanc carrying the baby to the police vehicle. He described the child as: very red faced, soaking wet, hair completely soaked, and screaming hysterically.

[33] Sgt. Strickland testified that the instrumentation in his police vehicle indicated an outside temperature of 23°c, which, because of the circumstances, he noted. That reading was consistent with his estimate of the temperature.

[34] Sgt. Strickland testified that within minutes EHS were on scene and assessed the baby. The baby was medically cleared having been assessed as hot and sweaty but with normal vital signs.

Jonathan Darrow:

[35] Jonathan Darrow, paramedic with EHS, Nova Scotia, testified that he and his partner attended the scene on College Street in Halifax on September 20, 2015, arriving at 3:36:52 pm after having been dispatched at 3:31:02 pm.

[36] He first observed the baby in the police vehicle noting he was crying heavily, very upset, diaphoretic, clothing soaked through and through (heavier pants and long-sleeved shirt), extremely sweaty, and emotionally distraught. He said that the child reached for him. While he held the child, he calmed significantly.

[37] He testified that he was very surprised to find the child's body temperature was normal given his observation of the baby. Indeed, all the infant's vital signs were normal. There was no medical need to take the child to the hospital. He was not asked how quickly an infant's condition could normalize after having been removed from a hot interior of a motor vehicle.

Kyle Meyers:

[38] Kyle Meyers, EHS, observed the child to be agitated, crying and quite wet and sweaty. The child's vitals, checked by him, were all normal. He was not asked how quickly an infant's vital signs could return to normal if he'd been hypothermic.

Kendra Mountain:

[39] Kendra Mountain of the Department of Community Services, Nova Scotia, testified that she attended the scene on September 20, 2015. She stated that the call came in around 3:30 PM. and she arrived at 3:55 PM.

[40] She made the following observations: the child in the police care was about about eleven months old. The child had a sweaty shirt and was wearing clothes that were warm for the day. She said it was a very hot day, beach weather. The child was calm and drinking water.

[41] She talked to the father, Mr. E. M., whom she described as “very calm” and “not showing much reaction to what was going on.”

[42] She discussed with the father the risks of leaving a child in a vehicle, including the heat, the risk of the child being taken, the risk of something happening and the child can’t escape. She stated the Accused was very calm as she discussed these risks with him. He acknowledged the risks but had limited reaction. His reactions struck her as “unusual”.

[43] She took the child to the hospital as a precaution.

[44] The Accused went to get his wife and bring her to the hospital. When the child saw his mother at the hospital he reached for her and became happy. The child hadn’t done so with his dad at the scene although he’d seen his dad there. She acknowledged that the child could have seen his father before she arrived on the scene. She also acknowledged not having had prior contact with the Accused and, therefore, being unfamiliar with his usual demeanor.

L. M.:

[45] L. M., the Accused’s wife confirmed that on September 20, 2015, she was scheduled to work at p,,,[until 5:15 PM, but she was given permission by her supervisor to leave by 4:00 PM.

Her husband was scheduled to go to work at the QEII […] at 3:00 PM. They made a plan for him to take their eleven-month-old son with him to the hospital in his stroller and keep the baby in the cafeteria, near his work station, until it was time for him to take the baby to […] to turn care of the child over to her at 4:00 PM. The plan did not include leaving the child alone at any time.

[46] She testified that at 4:00 PM she checked and her husband hadn't arrived. She commented that "he's always late." By 4:15 PM he had not arrived, nor sent her a message.

[47] Ms. M. testified that her husband arrived sometime later without their son, A. which surprised her. She began crying. They went to the IWK Hospital. There she saw her son A. whom she described as "happy to see Mommy" and his condition was normal.

[48] Ms. M. testified that her husband told her that he'd driven to work with their son. That he couldn't find a parking spot for some time. When he did so he realized he was going to be late. He said their son, A., was asleep. He told her he thought it would be good not to wake the child, because he'd cry. So, he left two windows open and walked quickly to the hospital.

[49] She stated that he told her that he had a problem checking-in at work and a problem relating to a co-worker. He told her that, while at work, he thought about their son and whether he was awake and crying. He told her he left work and, as he approached their van, he saw the police and ambulance vehicles on scene. She said that he told her that he didn't know what was happening. He went to the van and looked for their son but couldn't find him.

[50] She was asked twice by Crown counsel if the Accused said how long he was away from the van. She replied, "around 15 minutes…then this". She wasn't asked to explain what she meant by "then this".

[51] She testified that she was very upset and angry at her husband.

[52] She stated that he expressed remorse for what happened and why it happened.

[53] The language she used in answering the questions about what her husband told her, for example "he expressed remorse", differed from her language in answering other questions.

[54] Her evidence on these points appeared rehearsed.

[55] On cross-examination, she stated that Children's Aid required her husband to take a parenting course which he did. After which, Children's Aid had no further involvement with the family.

The Accused, E. M.'s Statement:

[56] The Accused gave a voluntary statement to the police on February 4, 2016, some 4 ½ months after the incident. The Court viewed a video of the Accused's statement and was provided a transcript of the interview, Exhibit #3. During the video the Accused displayed a flat tone and soft voice. He showed little emotion.

[57] It was my impression that the Accused's statement appeared rehearsed. It seemed that, whenever he could, he repeated his key messages which were:

1. That he didn't know it was unlawful to leave a child alone; and
2. If he thought he was putting his son at risk he wouldn't have done it.

[58] The Accused confirmed the plan to take his son to work then take his break and go to […] to meet his wife. He testified "It didn't happen". (page 9 line 2). He stated that he took a long time finding a parking spot. When he did he turned his head, and noted that his son, A., was asleep in the back seat. He stated:

> "And I said, well, I would be in and out of work pretty quick. I don't have to wake him up. I said, if he – if I try to wake him up, he'll cry a lot. He'll cry very loud and very long because that's the way my son is. And so I said I would quickly go over

> to the hospital, check in, say I'm going on my one-hour break, return to the van and drive A. down to […]." (page 9, lines 8-16)

[59] The Accused added, without a question being asked:

> "Now I wasn't aware at that point that leaving a child alone was against the law. I...I thought it would be okay to leave him for a short time. Leave him for a long time, no.
> And, oh, I didn't believe A. was at any risk because when I left home I checked how warm it was outside and it said plus 21, and, oh I said, well, that isn't hot. So, I said, you know, when I arrived, when I arrived at the place where…where I was going to leave my van, I said, well, you know, the temperature in the van may go up a couple of degrees but A. would be asleep and he wouldn't, you know, care." (page 10, lines 1-11)

[60] When the Accused returned to the scene and saw the police and ambulance he stated:

> "It surprised me. Like, I…I…if I was even aware that it was even against the law, I…that wouldn't have happened. Like, I see children alone everywhere, right. And…and…I thought leaving A. there for a short time, it'll be easy on him, easy on me. You know, I'd be in and out a lot quicker. And, oh, you know, I…I believed it was a good plan" (page 10, lines 15-21).

[61] The Accused carried on talking, without a question being posed. He stated that as 3 p.m. approached he was "rushed" (page 11, line 3). He said he wouldn't do it again the same way and that,

> "If I knew it was against the law to do what I did, I wouldn't have one, and two, if I thought I was putting A. at risk, I wouldn't have." (page 11, lines 8-10).

[62] In repeating his key messages here he even referred to them as one and two. He stated,

> "I didn't see it, but, you know, afterwards, you know, it was explained to me that I did put my son at risk, that it is against the law to do that, and I said, you know, that was a surprise to me (page 11, lines 11-15).

[63] At page 12, lines 13-16, the Accused stated:

> "And when I was a child, I was left alone when I was young in our house or in the car, but I understand that's quite a few years ago and things have changed, that we're in a more child-centered world than we ever were."

[64] The Accused added, "I feel awful that I did leave A., I did put him at risk...but I love A." (page 12, lines 17-20).

[65] The Accused stated that his wife was so upset with him leaving A. alone, he had to take a week off work and that still hasn't completely resolved (page 1, lines 16-19), and the social worker was very harsh with us (page 13, lines 9-10).

[66] At page 13 lines 13-14, the Accused stated, "…[I]t's one little thing I did wrong in my whole life. Like, and I wasn't even aware I was doing anything wrong," and added at line 20-21 "…[Y]ou know, there's no criminal intent here. Like I, I thought I wasn't doing anything wrong. You know, I just thought that it…it was easy, you know, but…"

[67] Use of the term "no criminal intent" also seemed rehearsed and inconsistent with his normal vocabulary.

[68] In answer to questions posed by the officer the Accused added that:

1. He left the van at "close to 3" (page 17, line 1);
2. He got to work at "probably 5 after 3 (page 17, line 8); "maybe a little bit earlier. I-I-I don't know. I did walk very quick. I even ran a little bit."

[69] The Accused stated that he had to try three computers before he was able to log-in, due to changes that had been made to the computer system. When "at long last" he was able to get logged-in he looked at the wall clock and noted it said 20 after 3:00 PM. "And I got concerned about my son and I just said, you know, I…I have to leave. I'm going on my break." (page 18, lines 8-11)

[70] That statement clearly intimated that he left at that point. But that wasn't true. He later admitted staying longer before leaving.

[71] The Accused stated that, as he approached his van, he saw the police "carrying A. out of the van in his car seat and he wasn't crying. He had—he was a little bit red."

[72] This statement is inconsistent with the police evidence. At the time of his arrival I believe the child was likely being moved to the ambulance, having been out of the van for about five minutes.

[73] The Accused stated that he asked the police officer what was going on and was told to wait here with him. He said he asked to see A. and the officer just said to wait there.

[74] This statement differed from the evidence of Cst. LeBlanc. I believe the evidence of Cst. LeBlanc on this point as it clearly stood out to him and was consistent with the observation of the accused's attitude as observed by others. I do not believe the accused's evidence on this point.

[75] The Accused stated that he was told to go get his wife and meet them at the hospital where the child was being taken to be examined. He went and met his wife. He stated that he told her what happened and, "She couldn't believe it, you know, why did you leave him alone. I said, Well I was in a rush. I said, I thought that was the quickest way. And she said, No, you don't ever leave him alone. And she said, she always said to me; Don't ever leave A. alone."

[76] He added, "I wasn't used to looking after a child because my wife took a year off from work. So up until the first week of September one hundred per cent of A.'s care was with her.

[77] At page 22, the Accused stated

> "…[I]t didn't seem wrong. Like I didn't believe I was doing anything wrong." and then
> "…[I] only thought I would be away for under 20 minutes."

Then added

> "Like I thought, you know, when I glanced at A., seen him asleep, I said, well, I'm going to be away for a very short time, you know. If I have the windows open, lock the van—the van has tinted windows, so that's some—you know, some protection, they, you know, can't—anybody can't, oh, see him right."

At page 23 he added,

> "[I] knew I had to leave the windows open a little bit so he'll get air, you know, so it wouldn't-the van wouldn't heat-heat up"

[78] At page 24, after, again, stating that he looked at the clock at 20 after 3 and said to himself I have to go, in response to a question whether he left immediately he stated:

> "Ah, I, ah—well, with the computer up—upgrade, they have new icons. So I just clicked on some of the icons and—to see how they worked in case I have any questions, you know, I could ask. And—and, oh—and, an, once I did that and I could see that I could handle the computer, I left."

[79] At page 25, the Accused stated that earlier in the day he had been outside with his son and it was cool. When he was leaving to go to work he noted the temperature was 21 so he though A. may be cool so he put a light jacket on him. To him 21 isn't warm or hot.

[80] As to what he thought at the time he left A. in the van he stated:

> "[I]f I knew that A. was at risk or it was against the law to do this—I just didn't clue—I mean, I didn't click in. And, oh, you know, I do—like everybody else, I do hear about other areas, childs being—children being left in hot cars and animals being left in hot cars and stuff. Sometimes, the consequences aren't good, and—and—but to me, it just seemed like I would be in and out so quickly and it didn't seem hot to me, and the windows on the van were open and the van was locked and—and, you know, the windows of the van were tinted, that A. would be okay just for a very short period of time.
> And of course, this decision I made was so quick. It was—it—it—occurred to me to leave him there when I turned around and seen him asleep."

At page 27, referring to the interior temperature of the van stated:

> "I thought it may go up a little bit, maybe two or three degrees, while I was gone, go from 21 to 24 or something, but I didn't believe it would go high (lines 6-9).

[81] At page 28 he stated:

> "…I thought, you know the animal or child would have to be in the van a long time for a car to warm up or heat—heat up. And you know, I didn't – you know, it was explained to me afterwards that it can happen very quickly, and I was completely unaware of that."

<u>Dr. Bowes:</u>

[82] Dr. Bowes is the Chief Medical Examiner for the Province of Nova Scotia. The Crown presented Dr. Bowes as an expert witness to provide an opinion on: (1) Hyperthermia and its effect on human beings, in particular infants; and (2) The speed at which heat rises in a motor

vehicle in the sunshine and the time within which the environment within a motor vehicle in the sunshine will cause an infant to experience hyperthermia.

[83] The Court accepted Dr. Bowes as an expert on the first area of expertise but, ruled his opinion on the second area of expertise inadmissible.

[84] While the Court did not accept Dr. Bowes' opinion regarding the rate of rise of the internal temperature of the motor vehicle, based upon the facts of the present case, I find that some opinions expressed by him are of such common knowledge that the Court can, and I do, take judicial notice of them, specifically:

1. That on a warm/hot sunny day the interior temperature of a motor vehicle is liable to increase.
2. That the speed and extent of increase of the interior temperature of a motor vehicle is dependent on numerous factors including the outside temperature and the length of the time the car is in the sun.
3. That the interior of a motor vehicle on a warm/hot sunny day will, as the temperature increases, become an increasingly hostile environment for any living being.
4. That this danger is <u>not</u> limited to only very hot days.

[85] Dr. Bowes testified that a human body, when exposed to a warm/hot environment, will attempt to compensate in order to maintain a body temperature in the normal range.

[86] Sweating/perspiring is a body's means of attempting to maintain a normal body temperature. The extent of sweating will vary. depending on the temperature of the environment and the length of time the human being is exposed to the warm/hot environment. At some point, as the exposure to the heat continues, the individual may no longer be able to maintain a normal body temperature by sweating, and may become hyperthermic. If the exposure to the heat

continues the individual may become dehydrated, no longer able to sweat and liable to suffer a heat stroke.

[87] Dr. Bowes testified that an infant is more prone to hyperthermia then an adult. In his opinion Hyperthermia is not life threatening. It is entirely survival. A heat stroke may endanger one's life but is survivable. Continued exposure to the hostile environment could cause death.

[88] In relation to the condition of the infant child, A. M., when seen in and removed from the Accused's motor vehicle, Dr. Bowes testified that a pediatrician would be more qualified then him to make a diagnosis of the child's condition.

[89] Dr. Bowes testified that evidence of mucous excretion or tears or sweating would indicate that the infant was not completely dehydrated. If the child was sweating this would indicate the child had not experienced a heat stroke.

[90] I found the evidence of Dr. Bowes reasonable and I accept his opinion.

[91] The Court did not hear evidence of a pediatrician.

Assessment of the Evidence and Findings of Fact

[92] Let me begin by complimenting J. E.. She heard the sounds of a baby crying. She chose to become involved. She found young A. alone in his father's van. Out of concern for the child, she called 911. Her caring and concern for the child and her action to seek help demonstrated the best of human compassion. I commend her for her actions.

[93] I found Ms. E.'s evidence and that of each of the witnesses who testified at this trial to be credible. Recollections and observations of witnesses differed somewhat. Where there was a difference I accept the evidence more favorable to the Accused.

[94] In relation to the Accused's statement to the police, I found that the Accused repeated points helpful to his defense at virtually every opportunity, not prompted by questions. This led me to believe that the Accused, prior to meeting with the police, prepared and rehearsed what he intended to say. That, in itself, did not cause me to doubt the veracity of some of his statements, but, it was a factor.

[95] The Accused stated that he made the decision to leave his son in the van only after he parked the van and saw the child was sleeping. He referred to his decision as quick and rushed. But, he also said that he checked the temperature before leaving home and stated that his parents had left him alone in a vehicle when he was a child, and that he saw kids alone in vehicles all the time, and that he thought it was a good plan. These statements and his lack of truthfulness on other points caused me to doubt his claim that his decision was not considered in advance. Nevertheless, whether or not his course of action was considered in advance the evidence leaves me uncertain when he made the decision. I find that the decision may have been a quick decision, made at the time he parked.

[96] The accused told the police that his plan was to go to his work site, log-in and then immediately check-out on a break and return to his child. He said that he expected to be gone less than 20 minutes. I did not believe that statement. At 3:20, after the accused had checked-in and had already been away longer than he claimed to have expected, he chose not to check-out and rush back to his child. Rather he checked out some changes to the computer system. Further, if he did as he said he planned to do he would've arrived at his wife's workplace considerably early. That may have raised questions why he was early and possibly reveal what he'd done. Given that his actions went against her repeated direction not to leave the baby alone I sincerely doubt he would've wanted to disclose his action. I find that the accused statement regarding his plan was untrue. I reject it. I find that he intended to return to the car at a time sufficient to bring his child to his wife's workplace by 4;00pm., just as he did.

[97] Furthermore, the accused claimed that he walked quickly, even ran some to work. He intimated that this was so that he would minimize his time away from his child. When seen returning to his vehicle he was walking quickly, not running. I have no doubt that the only reason why he rushed to his workplace was to try to get there in time to ask questions of a co-worker about the changes to the computer system before she left work.

[98] The Accused repeatedly stated that he did not know that leaving his son in his vehicle was against the law, nor that it would put his son at risk.

[99] There was no evidence to establish that the Accused knew the relevant law as of September 20,2015. I accept his statement on that point.

[100] In relation to his not knowing that, by leaving his son alone in the vehicle, he was putting his son at risk, if he meant risk of endangering his life, then I accept his evidence.

[101] If he meant that he believed he was causing no risk to his child’s well-being, I reject his statement. The accused appeared to be of average intelligence. The accused indicated that he'd heard of cases of pets or children being left in vehicles on hot days and that sometimes "the consequences aren't good". The accused said that he'd checked the temperature before leaving home. He said he left windows down to ensure the child had some fresh air. He said he locked the doors. He said he believed the temperature in the vehicle would increase while he was away. He assumed the temperature rise would be two or three degrees, going from 21 to 24 C. He assumed his child would not awaken and be unaffected by such a temperature change. Yet he also stated that at 3:20 he wondered if his son was awake and crying. And he said he thought he'd be gone for less than 20 minutes. So, if the temperature was expected to rise two to three degrees in less than 20 minutes how much of an increase was he prepared to accept when at 3:20 he chose not to immediately return to the vehicle. Rather he stayed away for some 36

minutes. I find that he was aware of some of the risk of leaving a child or a pet, alone in a motor vehicle and was prepared to take that risk.

[102] The evidence does not establish that the accused perceived the risk to be more minimal. Indeed, the accused described his mistake, the only one he'd made in his life, as "little".

[103] The Accused presented as a person who tries to learn about things before attempting them so that he does the thing correctly, as with the new computer program at his work in September 2015. Prior to September 2015 he had little or no experience caring for an infant. In explanation of his decision to leave his infant child alone in the van he said he “didn’t have the intelligence”, referring to the risk to which he was exposing his child. Yet, he asked no questions nor took any steps to ascertain the risk of doing so, when, I find, any reasonable person would have done so.

[104] He said his wife had told him never to leave their son A. alone. Yet he disregarded her direction/advice. He acted in a manner he perceived to be a perfectly good plan – based upon his experience and assumptions.

[105] The evidence failed to establish beyond a reasonable doubt that the accused intentionally endangered the life of his child.

[106] The evidence failed to prove beyond a reasonable doubt that the accused perceived that he was endangering the life of his child.

[107] I find that the evidence established beyond a reasonable doubt that the accused did perceive that he was putting his son at risk by leaving him alone in the vehicle for 36 minutes. The evidence failed to establish that the accused perceived that risk to be other than minor.

[108] The evidence established beyond a reasonable doubt and I find that the accused demonstrated willful blindness to the risks to which he was exposing his infant child.

[109] The Accused is charged with a specific offence. The burden is on the Crown to prove the offence beyond a reasonable doubt. Each element of the offence must be proven beyond a reasonable doubt. If there is a reasonable doubt on any element than the charge has not been proven.

[110] The key elements of the charge against Mr. M. are:

1. That he abandoned his child, A.;
2. That by abandoning his child and thereby caused his child's life to be endangered; and
3. That he had the requisite mental element to abandon his child thus endangering his child's life.

[111] The term "abandon" in s. 218 of the *Code* is defined in section 214 of the *Code*:

> "abandon or expose includes:
>
> (b) dealing with a child in a manner that is likely to leave that child exposed to risk without protection;"

[112] I find that by leaving his son, A., in the van in the circumstances of this case was likely to leave the child exposed to risk. Was it "without protection"?

[113] The term without protection is not defined in the Code. This is, of course, a criminal statute so any uncertainty regarding the meaning of the language must be resolved in the accused's favour. To ascertain the meaning of the language the Court ought to consider the purpose of the provision, the intent of Parliament. In R v ADH, supra, the Supreme Court of Canada found that the purpose of section 218 of the Criminal Code was to protect children from risk.

[114] That being the intent of the provision, I reject any suggestion that any protection is sufficient to raise a reasonable doubt that the child was abandoned without protection. If a person left a loaded gun with an infant amidst a pack of wolves would that be protection? I think not. The court must take a contextual approach, considering the age and intelligence, etc. of the child, the risk to which the child was exposed and the actions of the individual which could be considered protection. The burden rests upon the Crown to establish that the child was left without protection. I find that term to mean reasonable, adequate protection in the circumstances.

[115] An eleven-month-old is completely defenceless.

[116] While the Accused locked the doors and left windows open a small amount on this did not, in my view, in the circumstances, reasonably/adequately address the risks to which the child was exposed. I find that the evidence established beyond a reasonable doubt that the child was left alone exposed to risk without protection.

The Mens Rea

[117] Proof of abandonment requires proof of the act of abandonment and the mental element of the offence.

[118] In relation to the mental element of the offence, in *A.D.H., supra*, the Supreme Court found that a subjective fault was required, meaning:

> "a subjective standard means, in the context of an offence under s. 218 of the Code, that the fault element requires proof at least of recklessness, in other words that the Accused persisted in a course of conduct knowing of the risk which it created. Subjective fault, of course, may also refer to other states of mind. It includes intention to bring about certain consequences; actual knowledge that the consequences will occur; or willful blindness — that is, knowledge of the need to inquire as to the consequences and deliberate failure to do so."

[119] I find that the Accused had an awareness of the risks to which he was exposing his child, albeit not to the full extent of those risks, when he left his baby alone in the van for more than half an hour. The steps he took were not adequate protection for his infant child in the circumstances,

even when considered in light of the accused's perception of the extent of the risk. I find that he knew of the need to inquire as to the consequences of his actions and deliberately failed to do so. I am satisfied beyond a reasonable doubt that the Accused abandoned his child.

Endanger Life

[120] Did the accused's abandonment of his child endanger the life of his child?

[121] In the present case, the evidence of witnesses, who observed the child, A., was that he was very wet from sweating. The evidence was that he was sweating or sweaty. I find that the evidence did not establish beyond a reasonable doubt that, at the time the child was removed from the vehicle, he was no longer sweating. The evidence failed to establish beyond a reasonable doubt that the child had been exposed to heat for such a period of time that he was no longer able to maintain a body temperature within the normal range by sweating. Therefore, the evidence failed to prove that the child suffered a heat stroke or that he was hyperthermic or dehydrated. The evidence failed to establish beyond a reasonable doubt that continued exposure for the additional five minutes before the accused's return to his van would have caused the child to become hyperthermic, dehydrated or suffer a heat stroke.

[122] Therefore, while I find that the accused caused the potential endangerment of his infant son's life, the evidence failed to establish beyond a reasonable doubt that the action of the accused endangered the life of his child nor that it would have before his return.

Conclusion

[123] This case involved an infant child being left, alone, in a motor vehicle by the accused on a warm/hot day for 36 minutes. The accused's actions demonstrated not even a modicum of common sense. He needlessly exposed his infant child to a risk of harm. The risk of harm to a pet or a child left in a motor vehicle on a warm/hot day is widely known and was known by the

accused. He assumed the risks were minimal. He assumed the risk of heat rise in the period of time he was away would be minor and not harmful to his child. He asked no questions nor made any effort to ascertain the true extent of the heat risk to his child. When speaking to the police he minimized the seriousness of his actions and tried to put himself in the best light. His statements regarding the time that he planned to be away from his vehicle were untruthful. His statement that he intended to check-in and out of work and return to his child as quickly as possible was untrue. At 3:20 pm, having checked-in he chose to delay his return to his child. He was not unexpectedly delayed. He made a choice to stay away longer. He decision to leave his infant son alone in the vehicle for over 30 minutes was because it was easier for him. He was lazy and irresponsible and failed in his duty as a parent.

[124] Children are priceless. Children require adult protection. Infant children are totally dependent and defenseless. A motor vehicle on a warm/hot sunny day is a place of potential danger for a child. A motor vehicle ought not be used as a storage place for a child, not even for a minute for an infant child.

[125] As a result of his actions the accused was charged with the abandonment of his infant child thereby endangering the child's life. The burden rests on the Crown to prove the charge beyond a reasonable doubt. The Crown alleged actual endangerment of the child's life not the likely endangerment thereof.

[126] The Court found that on September 20, 2015 the accused left his 11-month-old son, A. M., alone, in a motor vehicle for some 36 minutes. It was a warm/hot sunny late summer day with an afternoon temperature of around 23 degrees Celsius. Prior to his return the police attended and removed the child from the vehicle. Minutes later, at around the time of the accused's return the child was examined by paramedics and medically cleared, all vital signs being normal. The evidence failed to establish beyond a reasonable doubt that the child had become dehydrated,

become hyperthermic or suffered a heat stroke, nor that the child would have done so before the accused returned.

[127] Endangerment of life involves the causing of an actual risk of death. Proof of an injury is not required but the Crown must prove more than the potential endangerment of life. In the present case the evidence proved that the accused abandoned his child and did thereby cause the potential endangerment of his life, that potential increasing as time passed and the temperature inside the motor vehicle increased. The evidence failed to prove beyond a reasonable doubt that the child's life was actually endangered, or would have been before the accused returned.

[128] I find the accused not guilty of the offence charged.