

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES**

In the Matter of)
)
K S) OAH No. 14-1681-SAN
) Agency No.
_____)

DECISION

I. Introduction

In June 2014, police officer K S pulled out his pistol for a short time during a light-hearted conversation with his 11-year-old son over a computer video connection. He displayed the pistol to his son as a mock threat to try to persuade the boy to answer a trivial question. At that time, all three S children were living apart from K. All three were being treated for post-traumatic stress syndrome, which their doctors related back to incidents where K had displayed police weapons to the children. After learning of K’s action of displaying the pistol in a mock threat, the children’s doctor filed a report of harm with the Office of Children’s Services. OCS investigated and substantiated three counts of mental injury—one for each child. K appealed.

OCS’s counts of substantiated mental injury to the two younger children are reversed. For the two younger children, who did not witness the display of the pistol and the implied threat, OCS has not met its burden of proving that K caused mental injury.

One count of substantiated mental injury to the son who witnessed the mock threat, however, is affirmed. This event increased the child’s anxiety level, and it occurred at a time where K should have known that the child was vulnerable to mental injury through being frightened by his father’s display of a weapon.

II. Facts

K and L S were married in the late 1990s. They lived in City X, and built a house out the road at No Name. They had three children, B, C, and D. In 2014, when most events discussed in this decision occurred, B turned 12, C turned 10, and D turned four.

K worked for Department X in 2000-04, and then rejoined Department X in 2011 through April 2015. After the children were born, the family lived in an apartment in town. For many years, K worked two jobs, managing the apartment complex and serving in Department X.¹ K liked being a member of the police force, and according to him, the children liked having him in

¹ *Id.*

the force. He believes that the children liked seeing his police paraphernalia, such as his Taser, baton, and gun.²

How K presented these weapons to the children is a disputed factual issue in this case. One version of the facts—K’s—has it that K described these weapons to the children, explained how they worked, and cautioned that the weapons were dangerous and not toys.³

The other version of how K presented the weapons to the children was offered by the Office of Children’s Services. OCS’s version of the facts is derived from interviews with the children. These interviews were not videotaped or transcribed. The children’s versions of the facts were, however, presented in testimony of Dr. E N, a child psychologist with considerable expertise, training, and experience in interviewing children. F O, a protective services specialist with OCS, also interviewed the children. Her testimony was presented by deposition.

OCS believes that K presented the weapons in a manner that was likely to frighten and dominate the children. According to this version, K told the children how the Taser stunned people with an electric charge. He reportedly pointed the Taser at the children, with the guard removed, and would trigger the Taser so that it made a ticking sound.⁴ Dr. N reports that both children stated that the Taser could electrocute them, which is a very frightening concept to children.⁵ With his baton, K told the children how the baton could be used to break bones. He would swing the baton and they could hear it whistling in the air. He held the baton against C’s shins, and told the children that this is the spot to hit to break a leg.⁶

Dr. N did not know when the demonstration of the Taser and the baton occurred. He may have known at one time.⁷ He speculated that it may have been in the October 2013 to February 2014 time period. In his view, when the baton and Taser events occurred was not important for him to diagnose the children, although he believed that the Taser and baton incidents occurred within the last year.

Ms. O’s notes of her June 17, 2014, interview with C indicated that C told her

last summer was really bad. He [K] would wave his tazer around in a circular motion and the kids would have to back up, but if they got scared he would get mad and say, “I am a trained professional, do you really

² K S testimony.

³ *Id.*

⁴ N testimony; Admin. Rec. at 145 (O deposition).

⁵ N testimony.

⁶ *Id.*

⁷ *Id.*

think I am capable of having an accident? [H]e would point the tazer at B and ask, “Has he been bad enough, do you want me to taze him?”⁸

Another witness, P P, the guardian-ad-litem who was appointed after a report of harm (described below) had been received, testified that she was never able to determine when the Taser and baton incidents occurred. She had a vague sense from talking to L that they occurred in 2013.⁹

Assuming the Taser and baton incidents occurred in summer or fall of 2013, family life continued after the incidents with no evidence of dysfunction or fear in the children. In November 2013, the family moved back to the house on No Name. They were only there for a short time, however, when K’s and L’s marriage fell apart. K told L that he had been unfaithful. The previous summer he had an affair, and apparently confessed to three total affairs. L was upset, and demanded that K tell the children. K was reluctant, but agreed. According to K, the forced disclosure was awkward. The children were discomfited and confused by the disclosure.¹⁰

Shortly thereafter, L demanded that K leave the home, which he did. After he first left, K stayed with friends. He continued to see the children, although the two boys were angry with him and would not go to stay with him. In February, D spent the night with K. She returned in a reportedly upset condition, telling a story, as related by others, that her father had punched her, killed somebody, and locked her in a closet.¹¹ L then left City X suddenly. She took the children to City Y, and moved the family into the City Y women’s shelter. D’s story led to a report of harm to the Office of Children Services (OCS). OCS investigated and determined that it could not substantiate a finding of abuse or neglect by K based on this story.

Following L’s and the family’s removal to City Y, the children were given counseling and medical attention. They saw a pediatrician, and were referred to the No Name Program (NNP). This program is a multidisciplinary approach to providing support services to families. Dr. N was part of the team that provided services to L and the three children. Dr. N testified that he and the children’s pediatrician, both of whom were on the NNP team, both diagnosed the children as suffering from post-traumatic stress disorder. The earliest chart note in this record is for C, dated June 3, 2014, although the notes imply that treatment may have started before that date. The note for C documents that he was diagnosed with PTSD, depression, and adjustment

⁸ Admin. Rec. at 80.

⁹ P testimony.

¹⁰ N testimony.

¹¹ *E.g.*, Admin. Rec. at 143 (O Deposition).

disorder with anxiety.¹² The June 18, 2014, medical chart for B documents diagnoses of PTSD and adjustment disorder with anxiety.¹³ The June 18, 2014, medical chart for D documents diagnoses of PTSD, adjustment disorder with anxiety, and behavioral regression.¹⁴

During this time, L and K both engaged attorneys, and engaged in legal proceedings in court involving family and domestic violence issues. Some evidence on these proceedings was introduced at the hearing. For a short time, a domestic violence protective order regarding L and D was in place. A guardian ad litem was appointed. L's complaint for divorce and custody also included allegations that K was intimidating and displayed his weapons in the house in a frightening manner.¹⁵ Although custody remained in flux, by June, the court had ordered that K be allowed to have nightly telephone contact with the children.

K's call with the children that occurred on the night of June 10, 2014, is relevant to this action. That call was made over the computer video connection known as "Skype," and will be referred to in this decision as the "Skype incident."

The incident occurred when K was speaking with B. K was calling from his parents' home, and his parents overheard the conversation. During the Skype call, B was in a room by himself.¹⁶ B revealed that he had made a friend at school. The friend was a girl. K asked B to tell him the girl's name. B refused. K said "Ah come on, you're going to tell me. At least tell me the first letter."¹⁷ B refused. K testified that he then said, "aw come on buddy, you're gonna tell me, you're gonna tell me." K testified that he was on duty, or had just come off duty at the police department, and he "did a quick flip with my pistol, and then put it right back." K continued to ask B for the name, and when B told him it started with "S," he first guessed using a few common girls' names, and then guessed a silly name, which he recalled as "Sabibalu." B then told him the name.¹⁸ K reports that the call was a great call, that he and B were both "all smiles and jokes," and that he detected no change in B's demeanor when he drew his pistol.¹⁹

¹² Admin. Rec. at 15.

¹³ *Id.* at 19. *See also id.* at 31 (June 6, 2014, progress notes stating "B is focused on controlling the anxiety of the other two children to reduce re-experiencing and numb negative emotions"); *id.* at 52 (June 8, 2014, progress notes regarding B).

¹⁴ *Id.* at 21.

¹⁵ For a summary of the legal proceedings, see K S's Pre-Hearing Brief. K emphasizes that the Magistrate rejected all of L's arguments.

¹⁶ Admin. Rec. at 90.

¹⁷ K S testimony.

¹⁸ Admin. Rec. at 90; Attachment B to S Pre-Hearing Brief at 6 (affidavit of M S).

¹⁹ K S testimony.

About one hour later that evening, L called Dr. N and told him about the call. Dr. N had a follow-up Skype conversation with B. He testified that B was very troubled. B told Dr. N, “That’s not my dad. He’s crazy. I’m scared. He hasn’t done that before.” Dr. N concluded that the conversation increased B’s anxiety, fear, and bewilderment.²⁰

On June 12, 2014, Dr. N filed a “protective services report”—a report of harm to a child—with OCS, reporting the Skype incident.²¹ The report was investigated by Ms. O. She interviewed the children the next day. She testified that B told her his father had pulled the gun out and then said, “so you’re really not going to tell me?”²² B told Ms. O that this was very frightening to him. Her notes reflect that “He said he felt like a ghost; he felt frozen for about five seconds, but it seemed like hours. He said he felt like he was already dead.”²³

As part of the divorce/custody proceedings, on June 24, 2014, both K and his mother, M S, signed affidavits about the Skype incident. K’s affidavit was slightly different from his testimony at the hearing:

During my conversation with B, we had been lighthearted and goofy. He brought up that he liked a girl. I asked him what her name was. He asked me to try to guess. I told him that I had no idea but that he had to tell me. He laughed and told me that he would tell me the first letter of her first name. I laughed and said you better and did a quick draw with my pistol and put it right back into the holster.²⁴

M S’s affidavit described the incident as follows:

B brought up that he liked a girl. K teased him trying to guess the girl’s name. B was being coy was teasing and did not want to tell K the name. K using a pretend voice and being silly too—did a quick draw, saying tell me her name.²⁵

In both affidavits, K and M S testified that B remained light hearted throughout the conversation, including after the gun display, and that in subsequent conversations on the following evenings B continued to talk to his father without displaying fear.²⁶

In investigating the report of harm, Ms. O also interviewed C. She testified that on June 13, 2014, C told her about the Skype incident, which he had learned about from B. He said that “he was worried about his dad and family, and he was afraid that they would all end up dead.”²⁷

²⁰ N testimony. See also Admin rec. at 119-20 (affidavit of Dr. N. The affidavit reports that B told Dr. N that K had “take[n] his gun in response to something B said and wave[d] it around.”

²¹ N testimony.

²² Admin. Rec.at 145 (O Deposition).

²³ *Id.*

²⁴ Attachment B to S Pre-Hearing Brief at 2.

²⁵ *Id.* at 5. M S did not testify at the hearing.

²⁶ *Id.* at 2-3; 6-7.

In a follow-up interview with Ms. O on June 17, 2014, B described how the situation in the home had worsened, told her about the Taser and baton incidents, and then returned to discussing the Skype incident. Ms. O's notes reflect the following:

The gun (on Skype) made me feel paralyzed, I had fear that I was going to die. I was afraid he was going to come down and hurt us. He came to City Y the day after and it placed me in fear. He said he was just kidding around but it didn't feel like it. He was at Mom's wearing police gear. Mom hasn't talked about him lately. She feels she's protected enough, fighting for us. . . . I want him to go to jail and us be safe to go back home or do whatever we wanted. It's not safe to go back home. We're at [No Name] and the police wouldn't be there quick enough. He would take us and he might hurt Mom. . . . I am more scared now after the Skype call. It was a black pistol. It came from his holster. Did I say enough? I hope it's enough to have something done.²⁸

On August 12, 2014, Ms. O sent a closing letter to K, telling him that OCS had finished its investigation, and had substantiated three counts of his having had caused mental injury to a child—one each for B, C, and D. K appealed. A one-day in person hearing was held in City Y on July 9, 2015.

III. Discussion

OCS investigates reports of harm, and maintains a central registry of its investigation reports.²⁹ The registry is confidential, but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.³⁰ The standard that must be met to make a finding of substantiated abuse or neglect is found in the definition of abuse or neglect:

child abuse or neglect” means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child's health or welfare is harmed or threatened thereby.³¹

The definition of child abuse or neglect contains a definition of mental injury: “in this paragraph, ‘mental injury’ means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable, and substantial impairment in

²⁷ *Id.* at 146.

²⁸ Admin. Rec. at 80.

²⁹ AS 47.17.040.

³⁰ AS 47.17.040(b).

³¹ AS 47.17.290(3).

the child’s ability to function.”³² The term “mental injury” is then defined again in its own paragraph as follows”

“mental injury” means a serious injury to the child as evidenced by an observable and substantial impairment in the child’s ability to function in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness.³³

For purposes of this hearing, both definitions of mental injury will apply.

K has essentially raised two arguments for why he did not cause a mental injury in his children. First, he asserts that the definition of “mental injury” sets a high bar and that any injury suffered by the children did not rise to the level of mental injury. Second, he asserts that even if the children experienced mental injury, that injury was not caused by any conduct of K’s. These arguments are discussed below.

A. Did the children suffer mental injury?

K argues that “there is no indication that the children have suffered anything more than injury to their emotional well-being.”³⁴ Citing *In re A.B.*, he argues that the acting out and expression of thoughts of self-harm seen in the three children is not sufficient to establish the kind of mental injury as that term is defined in AS 47.17.290(3).³⁵ Yet, here, we have an expert in identifying mental injury testifying to a diagnosis of post-traumatic stress disorder.³⁶ In order to make that diagnosis, Dr. N had to identify verifiable physical symptoms, which he did in terms of somatic illnesses, headaches, bed-wetting, and so on.³⁷

Dr. N described B as a “parentalized” child, meaning he was trying to take care of the other children. He was anxious and suffered from somatic symptoms such as headaches. He was hypervigilant, lost sleep, and had nightmares.³⁸

Dr. N described C as the “most impacted” of the three children. He diagnosed C as having nervous anxiety and adjustment disorder. C suffered from nightmares and exhibited avoidance behaviors. Dr. N noted, however, that C was able to disguise some of the impact because C was an exceptionally bright child.³⁹ He described similar somatic symptoms in D.⁴⁰

³²

Id.

³³

AS 47.17.290(10).

³⁴

S Pre-Hearing Brief at 16.

³⁵

Id. at 16-17 (citing OAH No. 10-0157-DHS (Health and Soc.Serv. 2010)).

³⁶

N testimony.

³⁷

Id.

³⁸

Id.

³⁹

Id.

⁴⁰

Id.

Dr. N’s testimony meets the statutory requirement that the mental injury be “evidenced by an observable and substantial impairment in the child’s ability to function.”⁴¹ It also meets the requirement that the injury be attested to by an expert.⁴² Thus, unlike *In re A.B.*, in this case, the three children have suffered mental injury.

B. Did K cause the children’s mental injury?

Given that OCS has established mental injury, the question here is whether K caused that mental injury. With regard to causation, K makes essentially three arguments. The first is a factual one regarding the factual allegations made by OCS—he argues that the Taser and baton incidents never occurred. If those incidents never occurred, then OCS’s case depends only on the Skype incident.

His second argument, in the alternative, is that even if the Taser and baton incidents occurred, they did not cause the children’s mental injury that Dr. N observed in late spring 2015. In K’s view, the intervening incidents, especially the breakup of their parents’ marriage, the sudden departure from City X, the living in the fortress-like shelter, and hearing only their mother’s side of the story for many months, were more likely the cause of any mental injury suffered by the children. In his third argument, K dismisses the Skype incident as insufficient to establish child abuse because drawing a pistol in fun while on video could never be interpreted as a genuine threat. These arguments are addressed below.

1. Did K brandish his Taser and baton in front of the children?

K denies that he demonstrated the Taser and the baton to the children in a manner that could be interpreted as threatening. Indeed, he testified that he only brought out those weapons in a very serious and educational manner, when he wanted to instruct the children that they were dangerous. He implied that he would not treat weapons as anything but dangerous instruments.

Yet, both B and C told Ms. O and Dr. N that their father had brandished his Taser and his baton, and demonstrated how a person could be subdued by the Taser, and legs broken by the baton. If K’s version of the facts were true, both children gave counterfactual statements.

Here, K was not convincing when he was describing how he was extra-careful with his Taser and baton around the children. The degree of care he described is not consistent with his general personality. The Skype incident shows that K did bring out a weapon and display it to a child in a manner that could be interpreted as threatening to a child. Although in the Skype

⁴¹ AS 47.17.290(3).

⁴² AS 47.17.290(10).

incident the threat was clearly a joke, it belies K’s testimony that he always treated his police weapons as serious and dangerous implements that he would never brandish around the children.

Because the children’s version of the Taser and baton incidents is more credible than K’s, OCS has met its burden of proving that K brought out his baton and Taser, and made gestures with them that the children interpreted as threatening. We turn next to the issue of whether the Taser and baton incidents were the cause of the children’s subsequent mental injury.

2. Did the Taser and baton incidents cause the children’s mental injury?

Legal disputes often involve questions of causation. In analyzing causation, courts generally require a showing that an action was both the “actual” cause and the “proximate” cause.⁴³ Actual cause is often called a “but-for” test—but for the action taken by the respondent, the injury to the victim would not have occurred. In some cases, if the action is a “contributing factor” to the injury, the action is considered an actual cause of the injury.⁴⁴

“Proximate cause,” sometimes called “legal cause,” is a different concept. Proximate cause relates to the idea that some actions or events, even though they may be a contributing factor in the chain of causation, are so remote or attenuated to the resulting harm that a reasonable person would not attach legal liability to the action or event. This concept is often discussed in terms of foreseeability.⁴⁵ Another concept in this case is “superseding cause.”⁴⁶ When a superseding cause is found, the original causative event may, in some circumstances, no longer be considered a cause.

The concepts of “foreseeability” and “superseding cause” have been developed largely in the context of tort law. Great caution must be used in applying tort law standards for causation to this investigation of abuse and neglect. In tort law, legal liability attaches for negligence, which is not a high standard of culpability.

In an investigation of abuse and neglect, however, we are not being asked to determine “culpability” (the level of fault or blame that attaches to the person being investigated). Here, the inquiry is whether a child’s health and well-being has been diminished through an infliction of harm by other than accidental means.⁴⁷ This is a different question than is being asked in tort law, and the analysis of proximate cause here will be somewhat different than is required to find

⁴³ Cf., e.g., *Vincent by Staton v. Fairbanks Mem’l Hosp.*, 862 P.2d 847, 851-52 (Alaska 1993) (“Two distinct prongs are encompassed in the concept of legal cause in negligence: actual causation, and a more intangible legal policy element.”).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Winschel v. E.*, 171 P.3d 142, 148 (Alaska 2007).

⁴⁷ AS 47.17.010.

negligence in a tort case. In this fact situation, the concepts of foreseeability and superseding cause are used as analytical tools to help understand the issue of proximate cause. These concepts are not being adopted here as legal requirements that must be met in every case. Ultimately, the issue of proximate cause in this case will turn on the question of whether a reasonable person would attach legal liability to K's action.

a. Were the Taser and baton incidents an actual cause of the children's mental injury?

Support for concluding that K's actions caused the children's mental injury is provided by Dr. N's testimony. Dr. N found that K's action of brandishing the Taser and the baton while in the presence of the children was the medical cause of the all three children's subsequent PTSD. No medical testimony contradicted his conclusion. Dr. N was a believable witness with outstanding credentials for being able to reach a conclusion regarding medical causation.⁴⁸

From a common sense point of view, however, the gap in time between the Taser and baton incidents and the mental injury raises doubt about causation. The record does not firmly establish when K engaged in his Taser-and-baton-brandishing behavior, although it appears that it occurred in the summer of 2013. Dr. N diagnosed PTSD about 9-12 months later, in the late spring of 2014.

Dr. N's testimony about the etiology of PTSD explained that PTSD does not necessarily erupt close in time to the traumatic event. That a child represses the stressful incident and masks his or her anxiety does not mean that the child did not suffer a mental injury. Dr. N made very clear that in his expert opinion, the medical cause of the PTSD (in all three children, and certainly in B and C) was the threat of personal injury experienced by the children during the baton and Taser incidents.⁴⁹

K made some headway in questioning Dr. N's potential bias due to Dr. N's doctor/patient relationship with L. Yet, Dr. N's testimony was grounded in fact. He found that the boys expressed genuine fear, especially related to the fear of electrocution, and he found that fear expressed not just in interviews, but in the boy's drawings. In sum, Dr. N's testimony establishes that for B and C, who were directly threatened by the baton and Taser incidents, these incidents were a significant factor in, and thus could be a "but-for" cause of, B's and C's mental injury.

⁴⁸ N testimony.

⁴⁹ *Id.*

For D, however, Dr. N agreed that tracing D's mental injury to the Taser and baton incidents was more attenuated. Although for medical and treatment purposes he could trace D's PTSD to those two incidents because she could reasonably have feared for her brothers, his testimony that D's fear reaction began with the Taser and baton incidents was not persuasive. Therefore, for legal purposes, the evidence does not support a finding that K caused D's PTSD. OCS's finding of mental harm in D will not be substantiated.

b. Were the Taser and baton incidents the proximate cause of B's and C's mental injury?

Even accepting Dr. N's view that the Taser and baton incidents were an actual cause of C's and B's mental injury, however, does not mean that they were the proximate cause. As explained above, this analysis will turn on whether a reasonable person would assign legal liability to the Taser and baton incidents for the mental injury that was diagnosed nine months to one year after the incidents.

If K were a domineering, controlling bully to his family—and the record shows that some believe he was—then it would be relatively easy to close the time gap and conclude that K caused the children's mental injury. If this were the case, the mental injury would be a foreseeable consequence of brandishing weapons in a manner that frightened the children.

On the other hand, some participants take the opposite view of K—they see him as a big, fun-loving, goofy dad, who likes to playfully impress his children with his police paraphernalia. Under this view, even with Dr. N's testimony about repression and medical causation, significant mental injury erupting months afterward would not be a foreseeable result of the Taser and baton incidents. Although K's display of the weapons was bad judgment, many, if not all, parents will have instances of bad judgment in their parenting. A playful parent who scares a child through a scary-incident-gone-too-far would not expect that an instance of bad judgment would lead to significant mental trauma.

This record, however, supports neither of these extreme views of K. Taking the record as a whole, the picture of K that emerges is somewhere in the middle: a loving father who has some controlling tendencies.⁵⁰ This picture makes the causation issue muddy because K's conduct in the Taser and baton incidents was less jokey and more frightening than a typical

⁵⁰ Although evidence that K has a controlling side is in the record, Dr. N expressed the opinion that K is not a bully. As counsel for OCS said in closing argument, the truth about K's character is somewhere in-between the extreme views.

family joke-gone-too-far. The resulting mental injuries, even though they occurred much later, were somewhat foreseeable.

Yet, this record prevents a finding that OCS has met its burden of substantiating that the Taser and baton incidents caused the children's mental injury. In addition to the time gap, the events that occurred after the incidents and before the mental injury make it more difficult to assign legal liability to K's actions of frightening the children with his weapons during the preceding summer. This includes the traumatic effect of the breakup of the household, D's unusual story, the sudden transfer to City Y, and the subsequent moving into a shelter. As Dr. N testified, each of these incidents would have increased the children's stress and anxiety.

Adding to the doubt about whether K's actions in the Taser and baton incidents were the proximate cause of the mental harm observed in late spring 2014 is the result of the first investigation of whether K had committed abuse or neglect. This investigation occurred in February 2014, after D had told her story and the family had been moved to City Y. Although this investigation revolved around D, all three children were interviewed by an investigator with OCS. The case notes from that interview show that the children were afraid of their father, but they do not reflect that any of the children had experienced mental injury. The investigator's decision after interviewing the children in February that no action was warranted makes it less likely that a reasonable person would assign legal liability for the mental injury later diagnosed by Dr. N to an event from the previous summer.

Furthermore, the case notes record that the investigator was skeptical about the source of the children's fear of their father. She recorded that C had told her that his father was "mean and scary and they had to get a protective order because they're afraid that their dad will find them."⁵¹ She quotes C as saying that his dad had "gone 'bezerk and acts cocky and manipulative.'" Her analysis was as follows:

During my conversation, it appeared that C had heard a lot of what his mother has said about his father either things she's told him directly or possibly overhearing conversations she was having. He was using words that I had heard his mother use to describe K and his behaviors.⁵²

Then, following her interview with B, the case notes state the following: "Worker believes that B also has been either coached or heard his mother have conversations with other people about his father. He used words such as 'manipulative' as well when talking about him."⁵³

⁵¹ Admin. Rec. at 131.

⁵² *Id.*

⁵³ *Id.*

These case notes do not prove that the children were coached into displaying fear. They reflect, however, that this record does not explain how the weapons incidents were translated over time into extreme fear in the children. We understand how an adult might worry that K's behavior indicated signs of being erratic and emotional, and a reasonable adult might speculate that K could be one of those rare and tragic individuals who is a threat to his family. Understanding how it is that a child would reach that conclusion, however, is much more difficult. Merely having K engage in scary behavior would not normally lead to PTSD. Many children have some fear of a parent. We would not expect a child, who has never witnessed his father being actually violent to his family, to be able to synthesize that K's erratic behavior, fixation with weapons, combined with other indicators, could mean that K could be a threat to his family. The investigator's conclusion that the boys had been coached or overheard adults adds an additional reason why a reasonable person would not assign legal liability to the Taser and the baton incidents as the legal cause of the children's mental injury. In sum, on this record, OCS has not proved that K's actions in the Taser and baton incidents were the legal cause of mental injury in the children.

3. Did the Skype incident cause mental injury to B?

The remaining question in this case is whether the Skype incident caused mental injury to B. Although B or his mother told the other children about the Skype incident, and it increased the anxiety in the entire family, only B saw the gun and only he was threatened by the gun. The evidence of the increase in anxiety in the other children from the Skype incident is insufficient to make a case that the Skype incident caused "substantial impairment in the child's ability to function" for C or D.

K argues that the Skype incident was minimal. Ms. P dismissed it as a "pistol trick" done over a video, in a context that was obviously joking and light-hearted. In K's view, the incident could not have made B feel actual fear for his safety. K also asserts that the Skype incident did not lead to any actual injury—B continued to converse with K in a light-hearted manner that evening, and for subsequent evenings. Finally, K testified that he agrees that pulling his pistol out was inappropriate, but he did not intend to scare B. He was hoping to reestablish a relationship with his children. Scaring them would have been the furthest thing from his mind. Further, he asserted that at the time of the Skype incident, he had never been told that his displaying of his weapons was a source of the children's anxiety.

K's testimony about his intent was persuasive. In displaying his gun during the Skype incident, he did not mean to scare B. Intent, however, is not part of the inquiry. The question here is whether K caused mental injury in a manner that it was not accidental, as that term is used under AS 47.17.010.

Turning first to the issue of proximate cause, the discussion about foreseeability with regard to the Taser and baton incidents causing mental injury can also be applied to the Skype incident—but with the opposite result. Here, no intervening gap in time or superseding event would make it difficult to assign legal liability to the action. At the time of the Skype incident, a reasonable parent in K's shoes would have been aware that the children were vulnerable. Even though the domestic violence allegations against K had been rejected by the judicial process, a reasonable person would have known, both from the domestic violence petitions and L's furtive actions of taking the children to City Y and living in a shelter, that there likely was a very high degree of fear in the family.

Moreover, even if unwarranted, the family's fear was foreseeable. At the time of the Skype incident, a reasonable person would have understood that K could be seen as a threatening figure. Indeed, the more that K attempted to assign the family's fear to an irrational fixation by L, the more predictable and foreseeable it becomes that B would be frightened by his policeman father displaying a weapon. The children were living with their mother, and children will assimilate the fears of others, particularly their mother when she is a single parent. This decision has found that K had a history of brandishing his weapons in front of the children, which the Skype incident itself supports. In short, an increase in B's fear and anxiety was a foreseeable consequence of K's action of pulling out his pistol to imply a threat against B.

Thus, K's action cannot be dismissed as a mere pistol trick. Even though done in a joking manner, pulling a gun on a video and making an implied threat to a vulnerable, frightened child, could be a foreseeable cause of mental injury.

The remaining question here, however, is actual cause. Did the Skype incident, in fact, cause a mental injury in B? K and his mother's evidence that B kept talking on the night of the call, with no change in demeanor, does provide some support for an inference that B was not adversely affected by the threat. To some extent, so does the evidence of B's continued conversations over subsequent nights.

Further, the case notes from Ms. O's June 13 interview with B raise troubling questions about whether K's fear is genuine. In this interview, B does state that "I am more scared now

after the Skype call.”⁵⁴ Yet, he then goes on to say: “It was a black pistol. It came from his holster. Did I say enough? I hope it’s enough to have something done.”⁵⁵ Earlier in the conversation, B had stated that his goal was “I want him to go to jail.” He expressed a fear that his father “would take us and he might hurt Mom.”⁵⁶

B’s statements indicate that he may have been coached on what to say. Even if not coached, it appears that B was highly motivated to achieve the result of protecting his mother. Without a recording of this interview, we cannot determine from Ms. O’s notes the degree to which B’s report of increased fear is feigned or genuine.⁵⁷

On the other hand, Dr. N’s reaction to the Skype incident showed that Dr. N considered it to be a significant event. After having a Skype session with B within one hour of B’s Skype session with his father, Dr. N concluded that the incident triggered his obligation to report the potential harm to authorities. He had evidence a child felt threatened and was scared that his dad was going to hurt him. The child said he was afraid of his father. A telephone threat of this nature, much less a video threat, would cause him to file a mandatory report. If the threat had been made in person, he would have called the police.⁵⁸ In his testimony, Dr. N tied the Skype incident into the series of events that began with the Taser and baton incidents, which led to B’s somatic symptoms of losing sleep and having nightmares with themes of being hurt.⁵⁹ The short time period between the call with his father and the call to Dr. N, make it more likely that B’s fear reaction to the call from his father was genuine.

Dr. N also stressed that with B both he and the children’s pediatrician, Dr. H E, had made independent diagnoses of PTSD. With regard to the Skype incident, Dr. E’s medical chart notes for B for June 18, 2014, record that:

The patient presents with acutely increased anxiety after a Skype threat by father on Tues, June 10 by pulling his pistol out to show on Skype to get B to answer a question B did not want to answer. B told his mother about this. The household anxiety has skyrocketed.⁶⁰

⁵⁴ Admin. Rec. at 80.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ B may or may not have been coached—a twelve-year-old boy who is trying to be the dad for this estranged family may have formulated his statements on his own. Even if coached, however, his fear may be genuine. On the other hand, even if not coached, his fear might be feigned. A recording of his statements to Ms. O might help in determining whether his fear was genuine. *Cf., e.g., In re Doe*, OAH No. 06-0112-DHS (Comm’r Health and Soc. Serv. 2006).

⁵⁸ N testimony.

⁵⁹ *Id.*

⁶⁰ Admin. Rec. at 19.

Dr. E's note is independent evidence that B experienced "acutely increased anxiety" after the Skype incident. Although Dr. E was on OCS's witness list, and attended the hearing, neither side called Dr. E to testify. As an official record, Dr. E's chart note has persuasive value, in that it corroborates Dr. N's testimony. Although this issue is extremely close, based on Dr. N's testimony and Dr. E's chart note, more likely than not B experienced genuine mental injury as a result of the Skype incident. Therefore, a single instance of mental injury to a child is substantiated.

IV. Conclusion

OCS did not prove that K S's actions in the summer and fall of 2013 caused the mental injury in the three S children that was first diagnosed by a doctor in spring 2014. Therefore, the findings of mental injury in D S and C S are dismissed as unsubstantiated. OCS did prove, however, that K's action of displaying his service pistol to his son B S during a video telephone conversation on June 10, 2014, was a significant contributing cause of B's mental injury. Therefore, one count of substantiated mental injury to B is affirmed.

DATED this 29th of September, 2015.

By: Signed
Stephen C. Slotnick
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 12th day of November, 2015.

By: Signed
Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

[This document has been modified to conform to the technical standards for publication.]