CAN A CHILDREN'S AID SOCIETY BE LIABLE FOR ABUSE BY FOSTER PARENTS?

By Loretta P. Merritt

Sexual abuse by foster parents can have a devastating effect and cause significant damages. However, a civil action against the individual perpetrator(s) may not be possible (if they are deceased) or worthwhile (if they are impecunious). The survivor's only recourse may be against the Children's Aid Society. There are three possible ways a CAS may be liable for sexual abuse committed by foster parents; vicarious liability, breach of non-delegable duty and negligence. If the CAS is liable for the abuse it will have the means to satisfy the judgment. In many cases, the CAS will also have insurance coverage for such claims.

Vicarious Liability

In order to determine whether vicariously liability can be imposed on a CAS one must start with first principles of institutional vicarious liability for abuse. In *Bazley v. Curry*[1] and *Jacobi v. Griffiths*[2], the Supreme Court of Canada set out the principles to be applied in determining the vicarious liability of an employer for sexual assault perpetrated by an employee. The Court referred to the test expounded in Salmond (from Salmond and Heuston's treatise on torts)[3] which maintains that employers are vicariously liable for both acts authorized by the employer and unauthorized acts that are deemed to be sufficiently connected with authorized acts that they may be viewed as modes (albeit improper modes) of doing authorized acts. The imposition of vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrongful conduct that arises from that risk, regardless of the intentions or wishes of the employer.

The Court considered the opportunity afforded by the employer's enterprise for the employee to abuse power; the extent to which the wrongful act furthered the employer's interests; the extent to which the employment situation created confrontation, intimacy or other conditions conducive to the wrongful act; the extent of power conferred on the employee in relation to the victim[4]; and the vulnerability of potential victims when determining an employer's liability.[5]

In *Bazley*, a non-profit organization operating residential care facilities for children was held to be vicariously liable for a sexual assault perpetrated by a child care counselor. The Court unanimously rejected the argument that non-profit bodies should be protected from tort liability, a position that was affirmed in *Blackwater v. Plint*.[6] The non-profit was found to be liable for the assault because the assaults took place in circumstances that flowed from the organization's child-care mandate, and because the employee was found to have abused authority given to him by the organization.

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1 [1999] 2 S.C.R. 534

2 [1999] 2 S.C.R. 570

3 See, e.g., Salmond and Heuston on the Law of Torts (19th ed. 1987), at pp. 521-22).

4 While the term “survivor” may be preferred, the term “victim” has been used where it is the term used in the case law.

5 *Bazley*, *supra* note 1 at para. 40.

6 2005 SCC 58, [2005] 3 SCR 3

In contrast, in *Jacobi*, the majority of the Court found that a non-profit Boys' and Girls' Club was not vicariously liable for sexual assaults committed by its employee, the program director. Some of the assaults took place in the employee's home, and some of them in the course of excursions relating to the children's sports activities. In applying the test set out in *Bazley*, the majority found that the required strong connection between the risks inherent in the recreational activities and the employee's job did not give him the degree of control or intimacy with respect to the children that would attract liability.[7] The fact that the position gave the perpetrator the opportunity to meet the plaintiff was insufficient for a finding of vicarious liability.

It appears clear from *Bazley* and *Jacobi* that, in the context of a traditional employment relationship, the courts must carefully scrutinize the nature of the relationship between the offending employee and the survivor in order to determine whether the employment cloaked the offending employee with sufficient power, authority or trust, which facilitated the offending employee's coercion of sexual compliance or submission to the harmful act. In *K.L.B.*[8] the Court examined the nature of the relationship between the offending employee and the institution itself.

The K.L.B. Trilogy

The Court in the *K.L.B. Trilogy* affirmed the several principles of vicarious liability found in *Bazley* and *Jacobi*. However, in both *K.L.B.* and *M.B*[9]., the Court dismissed appeals in which the Plaintiffs asserted that the government was vicariously liable for sexual assaults committed by their foster parents.

In *K.L.B.*, the Court remarked that the relationship that most often attracts a finding of vicarious liability is that of employer and employee. Such a finding furthers the policy goals of deterrence for the perpetrators and providing an avenue for compensation for the survivors. The Court clarified the distinction between an employee and an independent contractor and stated:

> By contrast, imposing vicarious liability in the context of an employer/independent contractor relationship will not generally satisfy these two policy goals. Compensation will not be fair where the organization fixed with responsibility for the tort is too remote from the tortfeasor for the latter to be acting on behalf of it: in such a case, the tort cannot be reasonably regarded as a materialization of the organization's own risks and vicarious liability will have no deterrent effect where the tortfeasor is too independent for the organization to be able to take any measures to prevent such conduct. Hence, the relationship of employer to independent contractor does not generally give rise to vicarious liability (subject to certain exceptions).[10]

As stated above, in *K.L.B.*, the Supreme Court held that the government was not vicariously liable for torts committed by the plaintiffs' foster parents. In this case, the question of vicarious liability was decided based solely on the issue of whether the relationship between the defendant foster parents and the government was sufficiently close to establish a finding of vicarious

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7 *Jacobi, supra* note 2.
8 [2003] S.C.J. No. 51
9 [2003] S.C.J. No. 53
10 *K.L.B., supra* note 8 at para. 20.

liability. The Court ultimately concluded that the government was not vicariously liable for torts committed by the plaintiffs' foster parents.

The Court reasoned that because of the nature of foster care, governments could not regulate foster parents on a regular day-to-day basis given that foster parents operate independently of state control in order to achieve the goals of foster care. This disconnect, as it were, from the government, was prompted by a policy encouraging foster parents to create an environment where children in foster care may experience a more traditional family atmosphere. In furtherance of this policy goal, foster parents act with a substantial amount of independence and autonomy. Therefore, despite foster parents acting to serve a public objective, their actions were viewed as being far-removed from the government to maintain the reasonable perception of acting on behalf of the government in the sense required to justify a finding of vicarious liability.[11]

The Court also noted that foster parents did not hold themselves out as agents of the government nor were they perceived as such. In contrast, in *Bazley*, *supra*, the Supreme Court found the Children's Foundation vicariously liable for the abuse of children by an employee in a residential care facility. While the employees were to act as "parent figures," the care was provided in a facility overseen and managed by the Foundation and not in the employees' private homes.

The Court in *KLB* further examined the policy basis for imposing vicarious liability. It held that imposing vicarious liability would have little effect as a deterrent in the case of foster families because of the independent nature of the relationship between foster parents and the Government. (In *Bazley*, deterrence was held to be a key policy goal behind the imposition of vicarious liability.) Without this deterring effect, vicarious liability should not be imposed.[12]

The Court also distinguished *K.L.B.* from *Lister v. Hesley Hall Ltd.*[13] In *Lister*, vicarious liability was imposed on a company because it provided care in a boarding annex, and the warden of the annex would have been reasonably perceived as acting on the company's behalf. To illustrate this point, the Court observed that the care was provided in an annex, not a private home, and the warden received a salary, as opposed to the cost-recovery payments received by foster parents.

Similarly, in *M.B.*, the Supreme Court held that the government was not vicariously liable for torts committed by foster parents against their foster children. It determined that foster parents were not acting "on account" of the government. For this reason and those discussed in *K.L.B.*, the Court did not find the government vicariously liable in this case.[14]

On the surface the Court seems to indicate that there would be no vicarious liability for abuse by foster parents in any Canadian province. However, this may not be the case if the relationship between the foster parents and the governing entity is substantially different than it is in British Columbia. For example, in Ontario, as discussed below under Non-Delegable Duty, the governing legislation imposes a much higher and stricter standard on the CAS. As a result, the CAS maintains substantial control over foster parents. It is not uncommon for CAS workers in

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11 *Ibid.*
12 *Ibid*.
13 [2002] 1 A.C. 215
14 *M.B., supra* note 9.

Ontario to meet with school officials and maintain control over medical and other decisions. Third parties such as medical and school officials know that the CAS is the ultimate decision maker. Arguable these differences should lead to a different conclusion on the issue of vicarious liability.

NON-DELEGABLE DUTY

The fundamental rationale underlying the concept of non-delegable duty is that "a party upon whom the law has imposed a strict statutory duty to do a positive act cannot escape liability simply by delegating the work".[15] As outlined by the Supreme Court of Canada in *Lewis (Guardian ad litem of) v. British Columbia*, the Court outlined the rationale for the non-delegable duty as follows:

> It is but fair that when a public authority exercises the statutory authority and power granted to it in circumstances which may have serious consequences for the public interest that it be held liable for a breach of duty occasioned by the negligent acts of its contractor. In those circumstances, it is both appropriate and just to hold a public body ultimately responsible for ensuring that reasonable care is taken in the work necessary to carry out its authority.[16]

In the *KLB Trilogy*, the Supreme Court first addressed the doctrine of breach of a non-delegable duty in a sexual assault context. The cases of *K.L.B.* and *M.B.* raised the issue as to whether the British Columbia government had breached a non-delegable duty to the appellants to ensure that no harm came to them as a result of placing them in foster homes where they were sexually abused.

In *K.L.B.* and *M.B.*, the relevant statute that applied to both circumstances was the B.C. *Protection of Children Act*.[17] Upon reviewing the terms of the statute, the Court determined that certain provisions did indeed impose non-delegable duties upon government officials, notably those concerning the apprehension of a child. However, following the placement of a child, the *PCA* does not provide that the Superintendent is responsible for directing foster parents' daily care of children, nor is he/she responsible for ensuring that no harm comes to the children during the course of their placement. Therefore, the legislation offers no basis for imposing on the Superintendent a non-delegable duty to ensure that no harm comes to the children through the abuse or negligence of foster parents.[18] Rather, the statute imposed various specific duties, including: placing the child in such a place as best meets his or her needs; caring for the physical well-being of the child before the child is placed in foster care; and a duty to deliver the child to a children's aid society. Thus, the Court held that there was no breach of a non-delegable duty by the government for sexual abuse inflicted by foster parents on foster children as a result of the language contained within the relevant statutory provisions.

The kind of analysis applied in the *KLB Trilogy* has continued in subsequent decisions. In the Supreme Court decision of *Blackwater v. Plint*, a residential school case, the Court was confronted with a decision by the trial court which found that the Government of Canada was

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15 *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145 at 1157-1158.
16 *Ibid*. at para. 24.
17 R.S.B.C. 1960, c. 303 (the *PCA*).
18 [2003] S.C.J. No. 51 [*K.L.B.*] para. 35-36.

under a non-delegable statutory duty to ensure the safety and welfare of students at the school under sections 113 and 114 of the *Indian Act*.[19] The Court once again began its analysis with the language contained within the relevant statute, and following *E.D.G.*, stated that the "analysis must determine whether the statute clearly places Canada under a non-delegable duty to ensure that students are kept safe at school".[20] Section 113 maintains that the Governor-in-Council *may* authorize the Minister to establish, operate and maintain schools for Indian children. Section 114 further maintains that the Minister *may* provide for and regulate various aspects of the school, as well as enter into agreements with religious organizations to provide for the support and maintenance of children being educated at such schools.

The Court focused on the use of the term "may" in these provisions to find that an obligation similar to a duty did not arise in this case. Moreover, the Court held that the power of the government to enter into agreements with religious organizations for the support and education of Indian children suggested that the duties at issue were "eminently delegable" and were found to be "contracted out of by the government".[21] The Court further rejected an additional argument that Canada acquired a non-delegable duty to protect the interests of Aboriginal children because it was responsible for forcing them to attend these schools. Thus, the Court reversed the decision at trial that the government had breached a non-delegable duty without engaging in a policy analysis as a potential basis for imposing a non-delegable duty.

Overall, it appears that, in abuse cases, the courts will not find a breach of non-delegable duty unless the enabling legislation explicitly creates a more general non-delegable duty. Ontario's governing statute the *Child and Family Services Act*[22], and predecessor statutes impose far broader and more general duties on children's aid societies than the British Columbia legislation. For example, in the *Child and Family Services Act*, section 15(3) describes the functions of a children's aid society. These include: protecting, where necessary, children who are under 16 or in the society's care or supervision; and providing care for children assigned or committed to its care under the Act. Therefore, an argument based on non-delegable duty may still be available in Ontario and other provinces where legislation imposes broader general duties[23].

NEGLIGENCE

Both vicarious liability and breach of non delegable duty are basis of imposing liability on a CAS where there is no evidence of wrong doing by the CAS itself. On the other hand, a finding of liability based on negligence is based on a finding that the CAS's conduct fell below the standard of reasonable care required.

There are many cases where courts have found a CAS to be negligent and liable for sexual abuse committed by foster parents. It is clear from the case law that Children's Aid Societies are to be judged according to the "standards of the day" and therefore the date of the alleged negligence is key. Industry standards are important but not determinative. Courts have found that there is an

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19 S.C. 1951, c. 29.

20 (2005) S.C.C. 58 at para. 48.

21 *Ibid*. at para. 50.

22 R.S.O. 1990, c. 11.

23 See for example *The Child and Family Services Act*, C.C.S.M. c. C80, s. 4(1)(i) (The Director of Child and Family Services "shall protect children in need of protection"). See also the *Children and Family Services Act*, R.S.N.S. 1990, c. 5, s. 9 ("The functions of [a child protection] agency are to (a) protect children from harm …[and] (g) provide care for children in its care or care and custody pursuant to this Act").

ongoing duty on the CAS to monitor and supervise children in foster care. In *M.B.*the court held that a lack of contact between the social worker and the child after placement amounted to negligence on the part of the CAS. Similarly in *K.L.B.* the court found that the CAS was negligent because 1) there were no visits to the foster home for several months, 2) there were issues concerning prior placements, 3) double the recommend number of children in a home and 4) evidence of unhappiness of the children in the home, which was not probed by social workers. In *J.A.K.E. v. B.C.*[24] .the court held that the failure to evaluate a foster father's suitability (i.e., no home study at all), combined with a failure to have proper supervision where the home was in an isolated location was found to be inadequate supervision and negligent. Obviously, each case must be determined based on its own specific facts, however courts hold Children's Aid Societies to a fairly high standard with respect to the duty to monitor and supervise foster care placements.

[24] E.(J.A.K.) [J.A.K.E.] v British Columbia[2002] B.C.J. No. 597