K.L.B. *v.* British Columbia, [2003] 2 S.C.R. 403, 2003 SCC 51

K.L.B., P.B., H.B. and V.E.R.B. *Appellants*

v.

Her Majesty The Queen in Right of
the Province of British Columbia *Respondent*

and

Attorney General of Canada, Nishnawbe Aski Nation, Patrick Dennis Stewart, F.L.B., R.A.F., R.R.J., M.L.J., M.W., Victor Brown, Benny Ryan Clappis, Danny Louie Daniels, Robert Daniels, Charlotte (Wilson) Guest, Daisy (Wilson) Hayman, Irene (Wilson) Starr, Pearl (Wilson) Stelmacher, Frances Tait, James Wilfrid White, Allan George Wilson, Donna Wilson, John Hugh Wilson, Terry Aleck, Gilbert Spinks, Ernie James and Ernie Michell *Interveners*

Indexed as: K.L.B. *v.* British Columbia

Neutral citation: 2003 SCC 51.

File No.: 28612.

2002: December 5, 6; 2003: October 2.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for british columbia

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Torts — Liability — Intentional torts — Abuse of children by foster parents — Whether government can be held liable for harm children suffered in foster care — Whether government negligent — Whether government vicariously liable for torts of foster parents — Whether government liable for breach of non-delegable duty — Whether government liable for breach of fiduciary duty.

Limitation of actions — Torts — Intentional torts — Abuse of children by foster parents — Whether government can be held liable for harm children suffered in foster care — Whether tort actions barred by Limitation Act — Limitation Act, R.S.B.C. 1996, c. 266, ss. 3(2), 7(1)(a)(i).

Torts — Damages — Intentional torts — Abuse of children by foster parents — Whether government can be held liable for harm children suffered in foster care — Proper basis for assessing damages for child abuse by parent or foster parent.

The appellants suffered abuse in two successive foster homes. In the second home the appellants were also exposed to inappropriate sexual behaviour by the older adopted sons. On one occasion, K. was sexually assaulted by one of these young men. The trial judge found that the government had failed to exercise reasonable care in arranging suitable placements for the children and in monitoring and supervising these placements. She also found that the children had suffered lasting damage as a result of their stays in the two homes. She rejected the defence that the tort actions were barred by the British Columbia *Limitation Act*. Consequently, in addition to allowing K.'s claim for sexual abuse, she found the government: (1) directly liable to all four children for its negligence in the placement and the supervision of the children and for breach of its fiduciary duty to the children;

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and (2) vicariously liable for the torts committed by the foster parents. However, the trial judge made low damage awards, on the ground that the children would in any case have had difficulties as adults because of the impoverished circumstances of their birth family. The Court of Appeal allowed the Crown's appeal. All three judges found that the appellants' claims were statute-barred, with the exception of K.'s claim for sexual assault. In addition, all three judges overturned the ruling that the government had breached its fiduciary duty to the children. However, the majority upheld the trial judge's conclusion that the government was vicariously liable and in breach of a non-delegable duty of care in the placement and supervision of the children.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ.: The government is liable to the appellants on the basis of direct negligence, subject to the defence of the limitation period. Both courts below held that the government had a duty under the *Protection of Children Act* to place children in adequate foster homes and to supervise their stay, and that this duty had been breached. These unchallenged findings are fully supported on the record. The trial judge proceeded on the basis that the standards of the time required: (1) proper assessment of the proposed foster parents and whether they could meet the children's needs; (2) discussion of the acceptable limits of discipline with the foster parents; and (3) frequent supervisory visits in view of the fact the foster homes were "overplaced" and had a documented history of breach. She found that the government negligently failed to meet this standard, and that this negligence was causally linked to the physical and sexual abuse suffered by the children and their later difficulties. It is clear from these conclusions that the government failed to put in place proper

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placement and supervision procedures, as required by the Act. The system of placement and supervision was faulty, permitting the abuse that contributed to the children's subsequent problems.

The case for extending vicarious liability to the relationship between governments and foster parents has not been established. To make out a successful claim for vicarious liability, plaintiffs must demonstrate first that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate. In determining whether the tortfeasor was acting "on his own account" or acting on behalf of the employer, the level of control the employer has over the worker's activities will always be a factor. Other relevant factors include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers and whether the worker has managerial responsibilities. These factors suggest that the government is not vicariously liable for wrongs committed by foster parents against the children entrusted to them. It is inherent in the nature of family-based care for children that foster parents are in important respects independent, and that the government cannot exercise sufficient control over their activities for them to be seen as acting "on account" of the government. Foster parents do not hold themselves out as government agents in their daily activities with their children, nor are they reasonably perceived as such. Foster families serve a public goal — the goal of giving children the experience of a family, so that they may develop into confident and responsible members of society. However, they discharge this public goal in a highly independent manner, free from close government control.

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The *Protection of Children Act* offers no basis for imposing on the Superintendent of Child Welfare a non-delegable duty to ensure that no harm comes to children through the abuse or negligence of foster parents. Nor did the government breach its fiduciary duty to the appellants. There is no evidence that the government put its own interests ahead of those of the children or committed acts that harmed the children in a way that amounted to betrayal of trust or disloyalty.

The Court of Appeal's conclusion that the appellants' claims were statute-barred should be upheld. The meetings between the appellants and various members of the government suggest that the appellants, by June of 1991 at the latest, had acquired sufficient awareness of the relevant facts to start the limitation period running. The appellants have not established disability as required by the Act.

Had the appellants been successful in their appeal, the trial judge's findings of fact and the factual inferences she drew from them on the appropriate quantum of damages would have been upheld. The trial judge's assessment of the evidence before her is a question of fact, which an appellate court cannot set aside absent palpable and overriding error.

Per Arbour J.: The majority's analysis as to direct negligence by the government was substantially agreed with. The appellants have also made out the elements of a successful claim of vicarious liability against the government for the abuse inflicted by their foster parents. The central question, when determining whether a relationship is close enough to justify the imposition of vicarious liability in the context of a non-profit enterprise, is whether the tortfeasor was acting on his or her own behalf or acting on behalf of the defendant. The relevant factors, properly

weighed, indicate that foster parents do in fact act on behalf of the government when they care for foster children. The government has sufficient power of control over the foster parents' activities to justify finding vicarious liability. It is clear that the government, as the legal guardian of foster children and by the terms of the government's agreement with foster parents, maintains ongoing control, or at the very least an ongoing right of control, over the care of children living in foster homes. While foster parents do control the organization and management of their household to the extent permitted by government standards, the government does indeed supervise via the social workers, and may interfere to a significant degree, precisely to ensure that the child's needs are being met. A secondary factor indicating that foster parents act on behalf of the government is the perception that children have of who in fact is ultimately responsible for their well-being. It is clear that the relationship between foster parents and foster children is a more transient relationship than the usual parent/child relationship. Where children stay successively in a number of homes for relatively short periods, the government may — through assigned social workers — remain the only steady authority figure for foster children. In such circumstances, foster parents may well be perceived as acting on behalf of the government by the foster children, and by the larger community. A useful indicator of whether the relationship between government and foster parents is sufficiently close to justify vicarious liability is whether the imposition of vicarious liability could in fact deter harm to children. The evidence reveals that as the government becomes aware of risks to children in foster care, it can respond, and has responded, by imposing rules and restrictions on how foster parents exercise their authority. These measures often involve continuing control over foster parents' activities and yet they need not undermine foster parents' relationships with foster children or deny foster children the experience of a real family. Rather, they reflect the reality that children

in foster care remain the responsibility of the government, which is their legal guardian.

The wrongful act at issue here was sufficiently connected to the tortfeasor's assigned tasks for vicarious liability to be imposed. It is clear that the foster care arrangement reflects the highest possible degrees of power, trust, and intimacy. The relationship does more than merely provide an opportunity for child abuse; it materially increases the risk that foster parents will abuse. As well, the policy goals that justify vicarious liability, namely just compensation and deterrence of future harm, are served by finding vicarious liability in the present circumstances. However, as vicarious liability is a form of tort liability, the claim is statute-barred, for the reasons set out by the majority. As a result, it is unnecessary to decide issues related to damages.

The appellants cannot succeed in their claims for breach of non-delegable duty and breach of fiduciary duty, substantially for the reasons given by the majority.

Cases Cited

By McLachlin C.J.

Distinguished: *Bazley v. Curry*, [1999] 2 S.C.R. 534, aff'g (1997), 30 B.C.L.R. (3d) 1; *Lister v. Hesley Hall Ltd.*, [2002] 1 A.C. 215; **referred to:** *M.B. v. British Columbia*, [2003] 2 S.C.R. 477, 2003 SCC 53; *E.D.G. v. Hammer*, [2003] 2 S.C.R. 459, 2003 SCC 52; *Wilsher v. Essex Area Health Authority*, [1988] 2 W.L.R. 557; *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Challand v. Bell* (1959), 18 D.L.R. (2d)

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150; *Ali v. Sydney Mitchell & Co.*, [1980] A.C. 198; *Durham v. Public School Board of Township School Area of North Oxford* (1960), 23 D.L.R. (2d) 711; *McKay v. Board of Govan School Unit No. 29 of Saskatchewan*, [1968] S.C.R. 589; *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59; *Cassidy v. Ministry of Health*, [1951] 2 K.B. 343; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Emery v. Emery*, 289 P.2d 218 (1955); *Evans v. Eckelman*, 265 Cal. Rptr. 605 (1990); *M. (M.) v. F. (R.)* (1997), 52 B.C.L.R. (3d) 127; *C. (P.) v. C. (R.)* (1994), 114 D.L.R. (4th) 151; *J. (L.A.) v. J. (H.)* (1993), 13 O.R. (3d) 306; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802.

By Arbour J.

Distinguished: *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570; **referred to:** *Bazley v. Curry*, [1999] 2 S.C.R. 534; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59; *Yewens v. Noakes* (1880), 6 Q.B.D. 530.

Statutes and Regulations Cited

Limitation Act, R.S.B.C. 1996, c. 266, ss. 3(2), 7(1)(a), (9).

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Protection of Children Act, R.S.B.C. 1960, c. 303, ss. 8(5), (12), 10(1), 14, 15(1), (3).

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APPEAL from a judgment of the British Columbia Court of Appeal (2001), 197 D.L.R. (4th) 431 (*sub nom. B. (K.L.) v. British Columbia*), [2001] 5 W.W.R. 47, 151 B.C.A.C. 52, 87 B.C.L.R. (3d) 52, 249 W.A.C. 52, 4 C.C.L.T. (3d) 225, [2001] B.C.J. No. 584 (QL), 2001 BCCA 221, affirming in part a decision of the British Columbia Supreme Court, [1998] 10 W.W.R. 348, 51 B.C.L.R. (3d) 1, 41 C.C.L.T. (2d) 107, [1998] B.C.J. No. 470 (QL). Appeal dismissed.

Gail M. Dickson, *Q.C.*, *Megan R. Ellis*, *Karen E. Jamieson* and *Cristen L. Gleeson*, for the appellants.

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John J. L. Hunter, *Q.C.*, *Douglas J. Eastwood* and *Kim Knapp*, for the respondent.

David Sgayias, *Q.C.*, and *Kay Young*, for the intervener the Attorney General of Canada.

Susan M. Vella and *Elizabeth K. P. Grace*, for the intervener the Nishnawbe Aski Nation.

David Paterson and *Diane Soroka*, for the interveners Patrick Dennis Stewart et al.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ. was delivered by

1 THE CHIEF JUSTICE — This appeal raises the question of whether, and on what grounds, the government can be held liable for the tortious conduct of foster parents toward children whom the government has placed under their care. The appeal was heard together with *M.B. v. British Columbia*, [2003] 2 S.C.R. 477, 2003 SCC 53, and *E.D.G. v. Hammer*, [2003] 2 S.C.R. 459, 2003 SCC 52, which raise many of the same issues.

I. Background

2 The appellants, K.L.B., P.B., H.B. and V.E.R.B., are siblings. Prior to placement in foster care, they lived in extreme poverty. Although their mother, in the

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trial judge's words, "was resilient, resourceful and loved the children" ((1998), 51 B.C.L.R. (3d) 1, at para. 2), their father was an alcoholic and frequently violent toward their mother. After an incident in 1966, she brought the two elder boys to social services and requested an emergency placement. Shortly after this, the two younger children were apprehended as well. All four children were placed in the same foster home, the Pleasance home. Later, the children were placed in a second foster home, the Hart home. Placement was not fought by either parent. Their mother felt it would be better for them. She was confident they would be placed in a stable, nurturing home.

3 The children suffered abuse in both foster homes. Instead of being treated as family members and shown love and trust, they were subjected to harsh and arbitrary disciplinary measures. They were blamed for things they did not do, humiliated in front of each other, and made to feel worthless.

4 Prior to placing the children in the Pleasance home, Ministry social workers had interviewed Mrs. Pleasance. They judged her to be cooperative and caring. Her file, however, contained a 1959 report stating that she was dishonest and insincere about what went on in her home. It also contained repeated warnings from subsequent years that placements should only be made in her home on a short-term basis. The social workers disregarded these warnings because they believed it was most important to keep children from the same family together and the Pleasance home was one of the few homes that would take all of them. The Pleasances normally took on up to eight foster children, four times what was regarded as the ideal number. The children did not tell anyone about the abuse. Because social workers assumed they would be unhappy in any type of foster home, their unhappiness was not probed.

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Social workers visited the home only infrequently, sometimes not for several months, because of personnel shortages.

5 The social workers did, however, continue their search for a more permanent placement for the children, and eventually they were moved to the Hart home. This home, too, was overplaced; but again, social workers did not want to separate the children. Because there was no exchange of records between offices at the time, the Ministry social workers did not know that the Harts had been rejected for further foster placement in Alberta out of concern that they had drugged a child in their care. Nor did they know that when living in Dawson Creek, B.C., the Harts had their foster children removed after Mrs. Hart had hit a foster child with a knife. The social workers met with the Harts and were favourably impressed. They did not read the little file information they had on the Harts prior to making the placement and they did not ask the Harts about their history as foster parents. They assumed the home was a good one because the Harts had several adopted sons. When a social worker finally read the Hart file, she concluded the placement was "iffy"; but on the assumption that it was only short term, she decided not to alter the placement.

6 The abuse and humiliation continued at the Hart home. The children were also exposed to inappropriate sexual behaviour by the Harts' older adopted sons. On one occasion, K. was sexually assaulted by one of these young men. The children said nothing to their mother. After the first six weeks, social workers assumed all was well and stopped their regular visits. Finally, on a visit with their mother, the children blurted out that Mrs. Hart had beaten K. with an electric cord, and that he had welts from the beating. Upon discovery of this, social workers removed all four children from the Hart home.

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7 At trial, Dillon J. found that the government had failed to exercise reasonable care in arranging suitable placements for the children and in monitoring and supervising these placements. She also found that the children suffered lasting damage as a result of their stays in the two homes. She rejected the defence that the tort actions were barred by the British Columbia *Limitation Act*, R.S.B.C. 1996, c. 266. Consequently, in addition to allowing K.'s claim for sexual abuse, she found the government directly liable to all four children for its negligence in the placement and the supervision of the children and for breach of its fiduciary duty to the children; and she found it vicariously liable for the torts committed by the foster parents (including both their physical and their sexual abuse). However, Dillon J. made low damage awards, on the grounds that the children would in any case have had difficulties as adults because of the impoverished circumstances of their birth family.

8 The British Columbia Court of Appeal allowed the Crown's appeal ((2001), 87 B.C.L.R. (3d) 52, 2001 BCCA 221). All three judges found that the appellants' claims were statute-barred, with the exception of K.'s claim for sexual assault. In addition, all three judges overturned the ruling that the government had breached its fiduciary duty to the children. However, Mackenzie and Prowse JJ.A. upheld the trial judge's conclusion that the government was vicariously liable and in breach of a non-delegable duty of care in the placement and supervision of the children. McEachern C.J.B.C. held that liability could not be grounded on either of these headings.

II. Issues

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9 The appellants appeal to this Court on three issues: first, whether their claims are statute-barred; second, whether the Court of Appeal erred in failing to find a breach of fiduciary duty; and third, whether the trial judge erred in her approach to damages. The Crown has not cross-appealed the Court of Appeal's holdings on the issues of vicarious liability and breach of a non-delegable duty. However, because these doctrines are at issue in the companion cases of *M.B. v. British Columbia*, *supra*, and *E.D.G. v. Hammer*, *supra*, and because it is desirable to develop the doctrines of negligence, vicarious liability, non-delegable duty and fiduciary duty in a coordinated and systematic way, all of the doctrines will be discussed here.

10 The questions to be dealt with are therefore:

(1) Is there any legal basis on which the government could be held liable for the harm that the appellants suffered in foster care?

(2) Are the appellants' tort actions barred by the *Limitation Act*?

(3) What is the proper basis for assessing damages for child abuse by a parent or foster parent, and did the trial judge err in her assessment?

III. Analysis

A. *Is There Any Legal Basis on Which the Government Could Be Held Liable for the Harm That the Appellants Suffered in Foster Care?*

11 Three grounds of government liability were canvassed by the trial judge, and a fourth added by the Court of Appeal: (1) direct negligence by the government;

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(2) vicarious liability of the government for the tortious conduct of the foster parents; (3) breach of non-delegable duty by the government; and (4) breach of fiduciary duty by the government.

1. Direct Negligence by the Government

12 This ground of liability requires a finding that the government itself was negligent. Direct negligence, when applied to legal persons such as bodies created by statute, turns on the wrongful actions of those who can be treated as the principal organs of that legal person. Both courts below held that the government had a duty under the *Protection of Children Act*, R.S.B.C. 1960, c. 303, to place children in adequate foster homes and to supervise their stay, and that this duty had been breached.

13 These unchallenged findings are fully supported on the record. Before turning to this, however, it is worth noting that the private nature of the abuse may heighten the difficulty of proving the abuse and its connection to the government's conduct in placement and supervision. As in other areas of negligence law, judges should assess causation using what Sopinka J., citing Lord Bridge in *Wilsher v. Essex Area Health Authority*, [1988] 2 W.L.R. 557 (H.L.), at p. 569, referred to as a "robust and pragmatic approach" (*Snell v. Farrell*, [1990] 2 S.C.R. 311, at p. 330). As Sopinka J. emphasized, "[c]ausation need not be determined [with] scientific precision" (*Snell*, at p. 328). A common sense approach sensitive to the realities of the situation suffices.

14 Turning first to the duty of care, the Act stipulates, in s. 8(12), that the Superintendent of Child Welfare must make such arrangements for the placement of

a child in a foster home "as will best meet the needs of the child". (The relevant legislative provisions are reproduced in the Appendix.) This imposes a high standard of care. In most contexts, the law of negligence requires reasonable care, not perfection: *Challand v. Bell* (1959), 18 D.L.R. (2d) 150 (Alta. S.C.); *Ali v. Sydney Mitchell & Co.*, [1980] A.C. 198 (H.L.). In the case of those exercising a form of control over a child comparable to that of a parent, however, the law imposes a heightened degree of attentiveness. The "careful parent test" imposes the standard of a prudent parent solicitous for the welfare of his or her child (*Durham v. Public School Board of Township School Area of North Oxford* (1960), 23 D.L.R. (2d) 711 (Ont. C.A.), at p. 717; *McKay v. Board of Govan School Unit No. 29 of Saskatchewan*, [1968] S.C.R. 589; *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21). This is the test that governs the placement and supervision of children in foster care under the *Protection of Children Act*. It does not make the government a guarantor against all harm. But it holds it responsible for harm sustained by children in foster care, when, judged by the standards of the day, it was reasonably foreseeable that the government's conduct would expose these children to harm of the sort that they sustained.

15 It is reasonably foreseeable that some people, if left in charge of children in difficult or overcrowded circumstances, will use excessive physical and verbal discipline. It is also reasonably foreseeable that some people will take advantage of the complete dependence of children in their care, and will sexually abuse them. To lessen the likelihood that either form of abuse will occur, the government must set up adequate procedures to screen prospective foster parents. And it must monitor homes so that any abuse that does occur can be promptly detected.

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16 This appeal and the appeals in the two companion cases stand to be judged by the standards of the day for placement and supervision, in other words the standard of a prudent parent at that time. The standards prevailing in the 1960s and early 1970s were lower than those of today, because there was less awareness of the risk of abuse in foster homes. The trial judge did not apply today's standards, but proceeded on the basis that the standards of the time required proper assessment of the proposed foster parents and whether they could meet the children's needs; discussion of the acceptable limits of discipline with the foster parents; and frequent supervisory visits in view of the fact the foster homes were "overplaced" and had a documented history of breach. She found that the government negligently failed to meet this standard (para. 74), and that this negligence was causally linked to the physical and sexual abuse suffered by the children and their later difficulties (para. 143). It is clear from these conclusions that the government failed to put in place proper placement and supervision procedures, as required by the Act. The system of placement and supervision was faulty, permitting the abuse that contributed to the children's subsequent problems.

17 It follows that the government is liable to the appellants on the basis of direct negligence, subject to the defence of the limitation period, discussed below.

2. Vicarious Liability of the Government for the Torts of Foster Parents

18 Direct liability in negligence law requires tortious conduct by the person held liable, in this case, the government. The doctrine of vicarious liability, by contrast, does not require tortious conduct by the person held liable. Rather, liability is imposed on the theory that the person may properly be held responsible where the risks inherent in his or her enterprise materialize and cause harm, provided that

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liability is both fair and useful: *Bazley v. Curry*, [1999] 2 S.C.R. 534; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570.

19 To make out a successful claim for vicarious liability, plaintiffs must demonstrate at least two things. First, they must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate. This was the issue in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59, where the defendant argued that the tortfeasor was an independent contractor rather than an employee, and hence was not sufficiently connected to the employer to ground a claim for vicarious liability. Second, plaintiffs must demonstrate that the tort is sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise. This was the issue in *Bazley*, *supra*, which concerned whether sexual assaults on children by employees of a residential care institution were sufficiently closely connected to the enterprise to justify imposing vicarious liability. These two issues are of course related. A tort will only be sufficiently connected to an enterprise to constitute a materialization of the risks introduced by it if the tortfeasor is sufficiently closely related to the employer.

20 Whether vicarious liability can fairly be imposed in the case at bar depends on the first of these issues — that is, on whether the relationship between the foster parent tortfeasors and the government is sufficiently close. The relationship that most commonly attracts vicarious liability is that of employer/employee. Imposing vicarious liability in the context of an employer/employee relationship will often serve both of the policy goals outlined in *Bazley*: fair and effective compensation and

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deterrence of future harm. As I noted in *Bazley*, when an employer creates a risk and that risk materializes and causes injury, "it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss" (para. 31). And assigning responsibility to an employer for an employee's tort will often have a deterrent effect, because "[e]mployers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision" (para. 32). 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 reasonably be 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: see P. S. Atiyah, *Vicarious Liability in the Law of Torts* (1967), at p. 327).

21 In *Sagaz*, *supra*, this Court considered the appropriate test for determining whether a tortfeasor is to be considered an employee or an independent contractor for the purposes of vicarious liability. The Court held that the existence of a contract referring to the parties as employer and independent contractor is not determinative (para. 49). The inquiry is rather a functional one: "what must always occur is a search for the total relationship of the parties" (para. 46). In *Sagaz*, the Court held that the "central question" in this functional inquiry "is whether the person who has been engaged to perform the services is performing them as a person in business on his own account" (para. 47). This way of putting the question reflects the type of enterprise

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that *Sagaz* was concerned with – namely, a for-profit enterprise. In the case at bar, we are concerned with a non-profit enterprise: the government-administered foster care system. In this context, the focus of the inquiry will be simply on whether the tortfeasor was acting "on his own account" or acting on behalf of the employer.

22 Which factors are relevant in making this determination? As the Court held in *Sagaz*, "the level of control the employer has over the worker's activities will always be a factor" (para. 47). This is related to the obvious fact that it would be unjust to impose vicarious liability for a tort committed in pursuit of the tortfeasor's own private purposes, or for tortious conduct that could not have been influenced or prevented by the person held vicariously liable (*Sagaz*, at para. 34). Control is not, however, the sole consideration. Workers can have considerable independence and yet still act on behalf of their employer. Many skilled professionals, for instance, perform specialized work that is far beyond the abilities of their employers to supervise; and yet they may reasonably be perceived as acting "on account of" these employers. Control is simply one indication of whether a worker is acting on behalf of his or her employer; it is not, in itself, determinative of whether vicarious liability is appropriate. Other relevant factors include, as the Court noted in *Sagaz*, "whether the worker provides his or her own equipment", "whether the worker hires his or her own helpers" and whether the worker has managerial responsibilities (para. 47).

23 These factors suggest that the government is not vicariously liable for wrongs committed by foster parents against the children entrusted to them. Foster families serve a public goal — the goal of giving children the experience of a family, so that they may develop into confident and responsible members of society. However, they discharge this public goal in a highly independent manner, free from

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close government control. Foster parents provide care in their own homes. They use their own "equipment", to use the language of *Sagaz*. While they do not necessarily "hire" their own helpers, they are responsible for determining who will interact with the children and when. They have complete control over the organization and management of their household; they alone are responsible for running their home. The government does not supervise or interfere, except to ensure that the child and the foster parents meet regularly with their social workers, and to remove the child if his or her needs are not met.

24 The independence of the foster family is essential to the government's goal of providing family care. If foster parents had to check with the state before making ordinary day-to-day decisions, they not only would be less effective as parents, but would be unable to deliver the spontaneous, loving responses and guidance that the children need. Foster families must be left to arrange their own family routine, in their own way. They must deal with day-to-day challenges and problems by working them out within the family, and by sharing responsibility for doing this, demonstrating to foster children that it is possible to resolve difficulties by working together. Moreover, foster children must know that their foster parents have this responsibility. Only in this way can foster children come to understand that authority figures can be loving and consistent and worthy of trust. Foster parents cannot function as loving and consistent authority figures unless they have some authority to exercise. Hence, while foster parents act in furtherance of a public purpose, they must operate independently of day-to-day state control if they are to meet the goals of foster care.

25 The fact that foster parents must operate so independently in managing the day-to-day affairs of foster children and in resolving the children's immediate

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problems, and the fact that they exercise full managerial responsibility over their own household are indications that, in their daily work, they are not acting on behalf of the government. It is also important to note, in this connection, that they do not hold themselves out as government agents in the community; nor are they perceived as such. Although foster parents are indeed acting in the service of a public goal, their actions are too far removed from the government for them to be reasonably perceived as acting "on account of" the government in the sense necessary to justify vicarious liability.

26 This conclusion finds confirmation in the fact that imposing vicarious liability in the face of a relationship of such independence would be of little use. Given the independence of foster parents, government liability is unlikely to result in heightened deterrence. Exacting supervision cannot prevent abuse when the supervising social worker is absent, as must often be the case in a private family setting. Nor is stricter monitoring a real option. Governments can and do provide instruction and training to foster parents. They can and do put in place periodic monitoring. They can and do encourage social workers to develop communication between social workers and foster children. These are now standard practice and are encouraged by direct liability. But given the nature of foster care, governments cannot regulate foster homes on a day-to-day basis. Imposition of vicarious liability can do little to deter what direct liability does not already deter. Not only would imposing vicarious liability do little good; it could do harm. It might deter governments from placing children in foster homes in favour of less efficacious institutional settings. And it would raise the question of why the government should not be vicariously liable for other torts by foster parents such as negligent driving causing injury to a foster child. While these concerns might not be insurmountable, they tend to confirm the

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conclusion that the relationship between foster parents and the government is not close enough to support a finding that the government is vicariously liable.

27 I note in conclusion on this point that this case is significantly different from *Lister v. Hesley Hall Ltd.*, [2002] 1 A.C. 215, where the House of Lords held a company that ran a private boarding annex vicariously liable for the sexual assaults committed by the warden of the annex. The boarding annex was designed to provide a home environment for a number of troubled boys, in the company of the warden and his wife; in this respect, it was similar to a foster home. In that case, the warden was clearly an employee acting on behalf of the company. The care was given in the boarding annex, not in a private home. The warden received a salary, instead of the cost-recovery payments made per child to foster parents. The warden would have been perceived as acting on behalf of the company. By contrast, the foster parents in the present appeal are not reasonably perceived as acting on behalf of the government.

28 For similar reasons, the case at bar differs considerably from the situation in *Bazley*, *supra*. In *Bazley*, this Court found the Children's Foundation, a non-profit organization, vicariously liable for the abuse of children by one of the employees in its residential care facilities. Although the Foundation's employees were authorized to act as "parent figures", the care was not provided in their private homes; it was provided in a facility that was overseen and managed by the Foundation. The employees were salaried, and were clearly acting on behalf of the Foundation. Consequently, the issue in that case was not, as here, whether the caregiver who committed the tort stood in a sufficiently close relationship to his employer to ground a claim of vicarious liability: in *Bazley*, he clearly did. The issue was rather the

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second of those discussed earlier in para. 19 — namely, whether the tort itself was a manifestation of the risks inherent in that particular enterprise.

29 I conclude that the case for extending vicarious liability to the relationship between governments and foster parents has not been established. It is inherent in the nature of family-based care for children that foster parents are in important respects independent, and that the government cannot exercise sufficient control over their activities for them to be seen as acting "on account" of the government. Foster parents do not hold themselves out as government agents in their daily activities with their children; nor are they reasonably perceived as such.

3. Liability for Breach of a Non-Delegable Duty

30 The appellants argue that the government is liable for their losses on the basis of the doctrine of non-delegable duty. The idea that a person who delegates work to another person may be held responsible for torts committed by that person in executing the work on grounds other than vicarious liability has been discussed for some time. More than 50 years ago, Denning L.J. stated in *Cassidy v. Ministry of Health*, [1951] 2 K.B. 343 (C.A.), at p. 363: "where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services".

31 It may be that there is no single common law concept of non-delegable duty. Instead, the phrase seems to have been used to describe a number of situations in which special, non-delegable duties arise. If this is correct, then rather than seeking

to state the doctrine in terms of a single principle, we should look to the different situations in which such duties have been found — an approach consonant with the traditional methods of the common law. In *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, at para. 20, Cory J. suggested that these different situations comprise a "spectrum of liability", and that "[w]ithin that spectrum there are a variety of legal obligations which may, depending on the circumstances, lead to a principal's liability for the negligence of an independent contractor."

32 The starting point for non-delegable duties that have their source in a statute is provided by *Lewis*. That case concerned a non-delegable duty imposed upon the British Columbia Ministry of Transportation and Highways by the *Highway Act*, R.S.B.C. 1979, c. 167, s. 33(1), and the *Ministry of Transportation and Highways Act*, R.S.B.C. 1979, c. 280, ss. 14 and 48. The Court found, as Cory J. stated, that "[t]hese sections clearly indicate that the Ministry has the management and direction of all matters relating to construction, repair and maintenance of the highways and must direct those operations" (para. 22), and indeed, that s. 48 amounted to "a statutory duty to personally direct those works" (para. 25 (emphasis added)). The Court concluded that these sections placed a non-delegable duty on the Ministry to ensure that maintenance work on the highways was performed with reasonable care. The duty was "non-delegable" in the sense that the Ministry was liable for the negligence of its independent contractors, and could not raise the defence that it had delegated the responsibility for taking due care to them. In concurring reasons, I described this non-delegable duty as a duty "not only to take care, but to ensure that care is taken", and I noted that "it is no answer for the employer to say, 'I was not negligent in hiring or supervising the independent contractor'" (para. 50). In other words, the non-delegable duty was breached simply because the independent contractor failed to take care in the

performance of the work. The statutes gave the Ministry paramount authority over highway maintenance, and required it personally to manage and direct maintenance projects. They rendered it ultimately responsible for ensuring that reasonable care was taken by those who performed the work. Hence, because reasonable care was not taken by these contractors, the Ministry was liable for breach of its non-delegable duty.

33 The issue in the case at bar is whether the *Protection of Children Act* places the same type of duty on the Superintendent as the statutes in *Lewis* placed on the Ministry. Does the *Protection of Children Act* place a non-delegable duty on the Superintendent to ensure that foster children are kept safe while in foster care?

34 The Act imposes different duties at different stages of the placement process. Upon apprehending a child, the Superintendent is "responsible for the care, maintenance, and physical well-being of the child" until final disposition of the child's case by a judge: s. 8(5). The same subsection also provides that no liability shall attach to the Superintendent "by reason only that the child is provided with necessary medical or surgical care during such time". It follows from this exclusion that the Superintendent is responsible for other harms at this point, and that this duty is non-delegable. When a child is committed to the custody of the Superintendent, the Superintendent becomes the child's legal guardian and "shall make arrangements as soon as may be for the placement of the child in a foster home, or such other place as will best meet the needs of the child": s. 8(12). Alternatively, the Superintendent may deliver the child into the custody of a children's aid society which, under s. 10(1),

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must "use special diligence in providing suitable foster homes for such children as are committed to its care". These duties also appear to be non-delegable.

35 After placement, the Superintendent is granted the right to visit the child (s. 14). The organization or family caring for the child is required to provide information and access to the Superintendent, who must report deficiencies to the Minister (s. 15(1) and (3)). The Act also requires that if at any time it appears to the Superintendent that any children's aid society or foster home "is not such as to be in the best interests of the children in its care or custody . . . the Superintendent shall report the circumstances to the Minister", who may inquire into the situation and may remove the child (s. 15(3)). Again, responsibility for these specific duties lies on the Superintendent and arguably cannot be absolved by delegation.

36 The legislation offers no basis for imposing on the Superintendent a non-delegable duty to ensure that no harm comes to children through the abuse or negligence of foster parents. Foster parents provide day-to-day care for the children. But the Act does not suggest that the Superintendent is responsible for directing this day-to-day care and for ensuring that no harm comes to the children in the course of this care. In this respect, the Act differs significantly from the statutes at issue in *Lewis*, *supra*, which imposed a duty on the Minister of Transportation and Highways personally to direct and manage the maintenance and repair works. Although the Act makes the Superintendent solely responsible for the well-being of a child before placement, it does not suggest that this is work for which the Superintendent retains responsibility after placement. Indeed, if the Superintendent were responsible for all

of the wrongs that might befall children in foster care, there would be no need to set out his particular duties with respect to placement and supervision.

37 I conclude that the doctrine of non-delegable duty does not assist the appellants.

4. Liability for Breach of Fiduciary Duty

38 The parties to this case do not dispute that the relationship between the government and foster children is fiduciary in nature. This Court has held that parents owe a fiduciary duty to children in their care: *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6. Similarly, the British Columbia Court of Appeal has held that guardians owe a fiduciary duty to their wards: *B. (P.A.) v. Curry* (1997), 30 B.C.L.R. (3d) 1. The government, through the Superintendent of Child Welfare, is the legal guardian of children in foster care, with power to direct and supervise their placement. The children are doubly vulnerable, first as children and second because of their difficult pasts and the trauma of being removed from their birth families. The parties agree that, standing in the parents' stead, the Superintendent has considerable power over vulnerable children, and that his placement decisions and monitoring may affect their lives and well-being in fundamental ways.

39 Where the parties disagree is over the content of the duty that this fiduciary relationship imposes on the government — over what actions and inactions amount to a breach of this duty. The appellants argue that the duty is simply to act in the best interests of foster children. The government, on the other hand, argues for a more

narrowly defined duty — a duty to avoid certain harmful actions that constitute a betrayal of trust, of loyalty and of disinterest. For the reasons that follow, I conclude that the government's view must prevail.

40 First a procedural point. Fiduciary duties arise in a number of different contexts, including express trusts, relationships marked by discretionary power and trust, and the special responsibilities of the Crown in dealing with aboriginal interests. Although the parties' view seemed to be that the Superintendent's fiduciary duty was a private law duty arising from the relationship between the Superintendent and the children, they also suggested at times that it arose from the public law responsibilities imposed on the Superintendent by the *Protection of Children Act*. On the latter view, the Superintendent's fiduciary obligations would be closer to the fiduciary obligations of the Crown toward aboriginal peoples, which have been held to include a requirement of using due diligence in advancing particular interests of aboriginal peoples: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Guerin v. The Queen*, [1984] 2 S.C.R. 335. In my opinion, this latter view of the Superintendent's fiduciary obligation cannot succeed. A fiduciary obligation to promote the best interests of foster children while in foster care cannot be implied from the statute, because the statute evinces a clear intent that these children be nurtured in a private home environment; and, as discussed above, this effectively eliminates the government's capacity to exercise close supervision in relation to the foster parents' day-to-day conduct. The statute could not, therefore, consistently imply that the Superintendent stands under a fiduciary duty to exercise due diligence in ensuring on a day-to-day basis that the foster children's best interests are promoted.

41 What, however, might the content of the fiduciary duty be if it is understood, instead, as a private law duty arising simply from the relationship of discretionary power and trust between the Superintendent and the foster children? In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 646-47, La Forest J. noted that there are certain common threads running through fiduciary duties that arise from relationships marked by discretionary power and trust, such as loyalty and "the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary". However, he also noted that "[t]he obligation imposed may vary in its specific substance depending on the relationship" (p. 646). Because such obligations will vary in their content depending on the nature of the relationship involved, we should determine the content of the obligation owed by the government to foster children by focussing on analogous cases. This suggests that in determining the content of the fiduciary obligation here at issue, we should focus generally on cases dealing with the relationship of children to caregivers, and more particularly on the relationship between parents (in whose stead the Superintendent stands) and their children.

42 Case law has traditionally described the parental fiduciary duty in narrow terms, as a duty to avoid certain harmful actions which find their origin in parents abandoning and abusing the position of trust they hold with respect to their children. The content of the parent-child fiduciary obligation has been held to include the duty not to exercise undue influence over the child in the context of economic matters and contractual relations between parent and child: *M. (K.) v. M. (H.)*, *supra*, at p. 66; *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (4th ed. 2002), at pp. 508-9. In the United States, the parental fiduciary duty has been extended to a

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duty not to wilfully inflict personal injuries on the child "beyond the limits of reasonable parental discipline" (*Emery v. Emery*, 289 P.2d 218 (Cal. 1955), at p. 224; see also *Evans v. Eckelman*, 265 Cal. Rptr. 605 (Cal. Ct. App. 1990)). In the same vein, this Court held in *M. (K.) v. M. (H.)* that incest amounts to a breach of the parental fiduciary duty. La Forest J. there described "the essence of the parental obligation . . . [as] simply to refrain from inflicting personal injuries upon one's child" (p. 67).

43 A second view, not yet endorsed by this Court, suggests that the content of the parental fiduciary obligation is simply to "look after" the best interests of the child. A number of lower courts in Canada have expressed this view: see *B. (P.A.) v. Curry*, *supra*, *per* Newbury J.A.; *M. (M.) v. F. (R.)* (1997), 52 B.C.L.R. (3d) 127 (C.A.), *per* Donald J.A., dissenting in part; *C. (P.) v. C. (R.)* (1994),114 D.L.R. (4th) 151 (Ont. Ct. (Gen. Div.)), *per* Corbett J.; *J. (L.A.) v. J. (H.)* (1993), 13 O.R. (3d) 306 (Gen. Div.), *per* Rutherford J. In *M. (M.) v. F. (R.)*, Donald J.A. held that "the nature of the fiduciary duty as a foster parent required the mother to look after the best interests of her foster child" (para. 48). Likewise, in *B. (P.A.) v. Curry*, at para. 97, Newbury J.A., citing *C. (P.) v. C. (R.)*, noted that the parental fiduciary obligation "has been said to involve a duty to protect the child's 'health and well-being'". She held, citing *M. (K.) v. M. (H.)*, that "[a] parent's duty certainly involves a duty to act in the child's best interests" (para. 97).

44 Parents <u>should</u> try to act in the best interests of their children. This goal underlies a variety of doctrines in family law and liability law. However, thus far,

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failure to meet this goal has not itself been elevated to an independent ground of liability at common law or equity. There are good reasons for this.

45 First, an obligation to do what is in the best interests of one's child would seem to be a form of result-based liability, rather than liability based on faulty actions and omissions: such an obligation would be breached whenever the result was that the best interests of the child were not promoted, regardless of what steps had or had not been taken by the parent. Breach of fiduciary duty, however, requires fault. It is not result-based liability, and the duty is not breached simply because the best interests of a child have not in fact been promoted. Moreover, a wrong of this type would not be ascertainable at the time that it was committed; and a wrong must be so ascertainable if it is to found legal liability.

46 Second, the simple injunction to act in the best interests of the child does not provide parents with a workable standard by which to regulate conduct. It does not recommend particular courses of conduct that they must engage in or not engage in, to avoid legal liability. It is often unclear at the time which, among all of the possible actions that a parent could perform, will best advance a child's best interests. Different parents have different ideas of what particular actions or long-term strategies will accomplish this, all of which may be reasonable. And even once parents do sort this out, they may face the practical difficulty that what they can do for their children is limited by their resources, their energy, their abilities and the competing needs of their other children. All this suggests that a simple injunction to act in the best interests of the child, however laudable, does not provide a workable basis for

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assigning legal liability, whether in negligence or for breach of fiduciary duty. It simply does not provide a legal or justiciable standard.

47 The "best interests" of the child forms a guiding objective in family law. It is a guide to courts in making custody and other decisions respecting children, and it can function as a guide in part because of the limited number of alternatives in these contexts. Deciding which of two home environments would be better for a child is very different from attempting to decide which of an almost infinite number of combinations of potential actions toward one's child would best advance the child's interests. The guiding objective of furthering the best interests of the child also informs the content of various legal duties that parents owe their children, whether statutory, at common law (negligence) or at equity (breach of fiduciary duty). However, this objective is not to be confused with the legal obligations themselves. Although it is a laudable goal, it does not constitute a justiciable standard for determining liability in damages. Moreover, the goal of promoting the best interests of the child is larger than the concerns of trust and loyalty central to fiduciary law. It is true that breach of parental fiduciary duty is unlikely to further a child's best interests. However, the converse proposition that everything that is not in a child's best interest constitutes a breach of fiduciary duty does not hold. The list of parental fiduciary duties is not closed. But it does not include a broad and unspecified duty to act in the child's best interests.

48 What then is the content of the parental fiduciary duty? This question returns us to the cases and the wrong at the heart of breaches of this duty. The traditional focus of breach of fiduciary duty is breach of trust, with the attendant

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emphasis on disloyalty and promotion of one's own or others' interests at the expense of the beneficiary's interests. Parents stand in a relationship of trust and owe fiduciary duties to their children. But the unique focus of the parental fiduciary duty, as distinguished from other duties imposed on them by the law, is breach of trust. Different legal and equitable duties may arise from the same relationship and circumstances. Equity does not duplicate the common law causes of action, but supplements them. Where the conduct evinces breach of trust, it may extend liability, but only on that basis. As I wrote in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226: "In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. . . . The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other" (p. 272).

49 I have said that concern for the best interests of the child informs the parental fiduciary relationship, as La Forest J. noted in *M. (K.) v. M. (H.)*, *supra*, at p. 65. But the duty imposed is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust. This explains the cases referred to above. The parent who exercises undue influence over the child in economic matters for his own gain has put his own interests ahead of the child's, in a manner that abuses the child's trust in him. The same may be said of the parent who uses a child for his sexual gratification or a parent who, wanting to avoid trouble for herself and her household, turns a blind eye to the abuse of a child by her spouse. The parent need not, as the Court of Appeal suggested in the case at bar, be consciously motivated by a desire for profit or personal advantage; nor does it have to be her own interests, rather than those of a third party, that she puts ahead of the child's. It is rather a question of disloyalty — of putting someone's interests ahead of the child's

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in a manner that abuses the child's trust. Negligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust in this sense.

50 Returning to the facts of this case, there is no evidence that the government put its own interests ahead of those of the children or committed acts that harmed the children in a way that amounted to betrayal of trust or disloyalty. The worst that can be said of the Superintendent is that he, along with the social workers, failed properly to assess whether the children's needs and problems could be met in the designated foster homes; failed to discuss the limits of acceptable discipline with the foster parents; and failed to conduct frequent visits to the homes given that they were overplaced and had a documented history of risk (trial judgment, at para. 74). The essence of the Superintendent's misconduct was negligence, not disloyalty or breach of trust. There is no suggestion that he was serving anyone's interest but that of the children. His fault was not disloyalty, but failure to take sufficient care.

51 I would therefore uphold the Court of Appeal's conclusion that the government did not breach its fiduciary duty to the appellants.

5. Summary of the Legal Basis for Liability

52 For the foregoing reasons, the government's liability to the appellants is confined to direct negligence, subject to the limitations defence. Vicarious liability cannot justifiably be imposed in this case, and the government did not breach a non-delegable duty or a fiduciary duty owed to the appellants.

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B. *Are the Appellants' Tort Actions Barred by the Limitation Act?*

53 The *Limitation Act* imposes a two-year limitation period for actions based upon personal injuries resulting from torts (s. 3(2)), beginning when a child attains the age of majority: s. 7(1)(a)(i). The appellants lived in the Pleasance and Hart homes from 1966 to 1968. The youngest of the appellants reached the age of majority in 1980. Their actions were not commenced until 1994 (K.), 1995 (V.) and 1996 (H. and P.).

54 The appellants argue that their tort actions are not statute-barred because their causes of action were not reasonably discoverable "prior to commencement of these actions". They rely on the trial judge's finding that "[n]one of the plaintiffs had a substantial awareness of the harm and its likely cause prior to commencement of these actions" (para. 140). This finding was based upon the evidence of a psychologist, Dr. Ley, who assessed the appellants after they had commenced their actions and concluded that they lacked a "thorough understanding" of the psychological connection between their past abuse and their current state.

55 This approach to reasonable discoverability is problematic. It rests on evidence that the plaintiffs lacked sufficient awareness of the facts even after they had brought their actions. Since the purpose of the rule of reasonable discoverability is to ensure that plaintiffs have sufficient awareness of the facts to be able to bring an action, the relevant type of awareness cannot be one that it is possible to lack even after one has brought an action. The "thorough understanding" proposed by Dr. Ley

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— an understanding not present even after suit was launched — thus sets the bar too high.

56 All of the appellants were aware of the physical abuse they sustained at the time that it occurred. They may not have been aware of the existence of a governmental duty to exercise reasonable care in making and supervising their placements. They may also not have been immediately aware of the harm that the abuse caused to them or of the causal link between the abuse and the harm. Indeed, in *M. (K.) v. M. (H.)*, *supra*, La Forest J., writing for the majority, acknowledged that awareness of the connection between harm suffered and a history of childhood abuse is often elusive. However, in 1986, K. and V. consulted with a lawyer about the possibility of receiving compensation from the government for damage suffered while in foster care. The lawyer told them that he thought they had a cause of action, and suggested they consult a lawyer in Victoria who specialized in such claims. V. did not follow up on this advice, perhaps as a result of a sense of powerlessness and a concern that she was to blame. In 1990, three of the appellants made a complaint to the Ombudsman, who informed the Superintendent that "[a]ll of the complainants are seeking financial compensation for the events which occurred while in the care of the Superintendent". In June of 1991, all of the appellants met with a Ministry representative. With his assistance, they made a formal request for counselling and for a settlement from the government for physical and mental abuse suffered in the Pleasance and Hart homes.

57 The appellants could not have come away from these meetings with anything less than an awareness that the government may have breached a duty that it

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owed to them, and that an action against the government would have a reasonable prospect of success. They now contend that they did not have access to some of the information that they needed in order to conclude that an action would have a "reasonable prospect of success" because the Crown failed to provide them with their child-in-care records. However, the only facts that are contemplated by the statute as necessary for determining whether an action has a reasonable prospect of success relate to the existence and the breach of a duty. The meetings between the appellants and various members of the government suggest that the appellants, by June of 1991 at the latest, had acquired sufficient awareness of those facts to start the limitation period running.

58 The appellants also argue that the running of time should be postponed beyond 1991, on the grounds that they were under a disability: s. 7(1)(a)(ii) of the Act. The Act defines disability as the state of being either (i) a minor, or (ii) "in fact incapable of or substantially impeded in managing his or her affairs", and places the onus of proving that the running of time has been postponed under this provision on the person who is claiming the benefit of the postponement: s. 7(9). The appellants have not established disability as required by the Act. While the trial judge found that they suffered from a number of psychological difficulties, she made no finding that they had difficulty managing their affairs at the relevant time.

59 I would therefore uphold the Court of Appeal's conclusion that the appellants' claims were statute-barred.

C. *What is the Proper Basis for Assessing Damages in This Context?*

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60 As the appellants' claims are barred by the *Limitation Act*, it is not necessary to review in detail the damage awards given by the trial judge. There is, however, one general principle concerning the appropriate damage assessment that requires clarification. Dillon J. found that the plaintiffs fell within the "crumbling skull" rule described by Major J. in *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 34. This rule is intended to ensure that the plaintiff is not put in a position better than that which he or she would have been in had the tort not been committed. It applies where the plaintiff has a pre-existing condition that would have caused or increased the risk of damage in any case. Dillon J. concluded that the appellants' prior home life, with its extreme material deprivations and marital discord, brought them within the ambit of the crumbling skull rule. Their early experiences, in her view, would have caused long-term psychological damage in any event.

61 The appellants challenge this conclusion, on the grounds that it cannot simply be assumed that poverty and marital difficulties are equivalent in their effects to verbal, physical or sexual abuse. In my view, the appellants are correct insofar as they are suggesting that trial judges may not simply <u>assume</u> that children who have come from impoverished or difficult homes would have sustained extensive psychological damage in any case. Life below the poverty line, though difficult, does not automatically rob children of their sense of self-worth; nor does it automatically prevent parents from maintaining a loving and supportive home for their children. However, there is no evidence in this case that Dillon J. arrived at her conclusion on the basis of such unwarranted assumptions, rather than on the basis of a clear appreciation of the evidence before her.

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62 The appellants have also contested the trial judge's damage awards on the related ground that they failed to give proper weight to various aspects of the evidence before her. The trial judge's assessment of the evidence before her is a question of fact, which an appellate court cannot set aside absent "palpable and overriding error": *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802. The trial judge's findings of fact and the factual inferences she drew from them on the appropriate quantum of damages should be upheld.

IV. Conclusion

63 I would dismiss the appeal. The only cause of action that assists the appellants is direct liability in negligence law, which the Court of Appeal correctly held to be statute-barred.

The following are the reasons delivered by

64 ARBOUR J. — This case raises the issue of whether, and on what legal grounds, the government can be held liable when children are abused by their foster parents in the government-administered foster care system. The essential facts, set out in greater detail by McLachlin C.J., are that K.L.B., P.B., H.B. and V.E.R.B. were abused in two foster homes in which they were placed successively in the late 1960s. The Chief Justice discusses numerous potential heads of government liability: (1) direct negligence by the government; (2) vicarious liability of the government for the torts of the foster parents; (3) breach of non-delegable duty by the government; and (4) breach

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of fiduciary duty by the government. McLachlin C.J. also discusses whether the claims are barred by the *Limitation Act*, R.S.B.C. 1996, c. 266, and the proper bases for assessing damages. I substantially agree with the Chief Justice's analysis as to each of these matters, except vicarious liability and damages. In my view, the government is vicariously liable for the abuse suffered by the appellants in foster care. However, for the reasons given by the Chief Justice, I find the claims are barred by the *Limitation Act*. As a result, I find it unnecessary to decide issues related to damages.

I. Vicarious Liability

65 The Chief Justice holds that the relationship between the state and foster parents is not sufficiently close to justify holding the government vicariously liable for the abuse suffered by the appellants in foster care. I am in general agreement with her that the central question, when determining whether a relationship is close enough to justify the imposition of vicarious liability in the context of a non-profit enterprise, is whether the tortfeasor was acting on his or her own behalf or acting on behalf of the defendant. I disagree, however, as to the outcome of the inquiry in this case. In my view the relevant factors, properly weighed, indicate that foster parents do in fact act on behalf of the government when they care for foster children. I also find that the policy goals that justify vicarious liability, namely just compensation and deterrence of future harm, are served by finding vicarious liability in the present circumstances.

66 The doctrine of vicarious liability holds a person, even though he or she may have committed no personal fault, liable for the wrongful acts of another. In *Bazley v. Curry*, [1999] 2 S.C.R. 534, at para. 29, McLachlin J. (as she then was)

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summarized main policy considerations underlying vicarious liability as, first, fair compensation and, second, deterrence of harm. Vicarious liability facilitates compensation to the victim, who can seek indemnification from the potentially deeper pockets of the defendant. Part of what makes vicarious liability fair is that a faultless person is held liable only where risks inherent in his or her enterprise materialize and cause harm. As McLachlin J. explained in *Bazley*, *supra*, at para. 31:

> Vicarious liability is arguably fair in this sense. The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm.

McLachlin J. confirmed that this rationale applies even in the non-profit setting: *Bazley*, *supra*, at paras. 49-51. As to deterrence, the theory is that vicarious liability encourages employers and others who may be subject to vicarious liability to take extra measures, beyond what is required to avoid direct liability in negligence, to reduce the risk of future harm: *Bazley*, *supra*, at paras. 32-34.

67 The law provides two requirements for the imposition of vicarious liability which ensure that such liability is imposed so as to further its policy objectives. First, the relationship between the tortfeasor and the principal must be sufficiently close that the tortfeasor's activities can properly be regarded as a part of the defendant's enterprise. Second, the wrongful act must be sufficiently connected to the tortfeasor's assigned tasks that it can fairly be said that the defendant is the one who created the risk of harm. Each of these requirements helps ensure that people are only held liable for

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risks that they introduce into the community and that vicarious liability is imposed in circumstances where there is a real possibility for the defendant to take effective measures to deter harm.

68 The main issue in this case is whether the relationship between the government and the foster parents is sufficiently close for vicarious liability to be imposed. I turn to this question now.

A. *Is the Relationship Between the Government and Foster Parents Close Enough to Attract Vicarious Liability?*

(1) The Test

69 How do we know if the relationship between the government and the foster parents is sufficiently close to justify the imposition of vicarious liability? Although the employer/employee relationship continues to be the most common relationship to attract vicarious liability, the categories of relationships that can attract vicarious liability "are neither exhaustively defined nor closed": *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59, at para. 25. In addition, as McLachlin C.J. points out, the existence of a contract referring to the parties as employer and employee is not determinative; rather, a functional inquiry into the nature of the relationship must be conducted.

70 In *Sagaz*, this Court considered the appropriate test to determine whether a commercial relationship was sufficiently close to attract vicarious liability. The

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question in that case was whether the tortfeasor, who assisted in marketing the defendant's sheepskin car seat covers, was an employee of the defendant or an independent contractor. In seeking the appropriate test, Major J. noted that the employee/contractor distinction arises in a variety of legal contexts, including the applicability of employment legislation, the availability of actions for wrongful dismissal, the assessment of business and income taxes and others. After reviewing various tests emerging from diverse areas of case law, he concluded that "there is no universal test to determine whether a person is an employee or an independent contractor": *Sagaz*, *supra*, at para. 47. He cited, at para. 46, the following passage from P. S. Atiyah, *Vicarious Liability in the Law of Torts* (1967), at p. 38:

> [I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose . . . . The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones. [Emphasis added.]

71 The focus of the inquiry adopted by Major J. in *Sagaz*, at para. 47, was "whether the person who has been engaged to perform the services is performing them as a person in business on his own account". I agree with the Chief Justice in this case that this test must be modified for the non-commercial context of the government-administered foster care system. Unlike her, however, I would not ask whether the tortfeasor was acting "on his own account". This language, deriving as it does from the commercial context, suggests that there is a chance of profit here. Financial risk may be a relevant factor in determining whether a tortfeasor can be categorized as an

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employee rather than an independent contractor in a commercial context, but the concept has no place in the present inquiry. Instead, I would ask simply whether the foster parents, when they care for foster children, act on behalf of the government. In my view, expressing the inquiry in this way allows the underlying objective of the *Sagaz* inquiry — to ensure that vicarious liability is imposed where the activity that gave rise to the harm can fairly be attributed to the defendant — to be meaningfully expressed in the present context.

72 This case marks the first time this Court has been called upon to consider the relevant factors for determining whether foster parents act on behalf of the government for vicarious liability purposes. As I set out below, the factors that are relevant to this inquiry will not be the same as the factors that are relevant under a vicarious liability analysis in the commercial context.

73 The most important factor in any vicarious liability claim has always been the level of control that the defendant has over the tortfeasor's actions: Atiyah, *supra*, at p. 36. Indeed, in *Sagaz*, Major J. stated that "the level of control the employer has over the worker's activities will always be a factor" (para. 47 (emphasis added)). In my view, the level of control that the government has over the foster parents is the most important indicator of whether foster parents can be seen as acting on behalf of government.

74 Other factors identified as relevant in *Sagaz*, *supra*, at para. 47, including whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of

responsibility for investment and management held by the worker, and the opportunity for profit in the performance of his or her tasks, are less relevant and, in some cases, inapplicable. Each of these factors relates, to greater or lesser degrees, to the risk of profit or loss. In the commercial context, the tortfeasor's chance of profit or loss provides a useful indicator of whether a tortfeasor was acting on behalf of the defendant or acting on his or her own account. Reliance on chance of profit or loss also reflects the policy concern, absent in this context, that it would be unfair to hold a person liable for the acts of another where the other stood to profit: see *Sagaz*, *supra*, at para. 35. Where, as here, profit is not a relevant factor and the focus of the inquiry is simply whether the tortfeasor acted on behalf of the defendant, these factors will not be helpful and should be given little or no weight.

75 In addition to control, it is my view that the victim's and the community's reasonable perception of who is ultimately responsible for the safety of children in foster care is helpful to determine whether foster parents act on the government's behalf.

(2) Application of the Test

76 For the reasons that follow, I conclude that the government has sufficient power of control over the foster parents' activities to justify finding vicarious liability. It is important to emphasize that it is the right of control, rather than its actual exercise, which is relevant to a vicarious liability analysis: *Yewens v. Noakes* (1880), 6 Q.B.D. 530 (C.A.), at pp. 532-33; see also R. Flannigan, "Enterprise control: The servant-independent contractor distinction" (1987), 37 *U.T.L.J.* 25, at p. 37. The question is

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not, therefore, the extent to which the government in fact intervenes in the activities of foster parents, or even the extent to which it would be advisable to intervene in any given case. Rather, the question is to what extent the government has the power to control the activities of foster parents. The record reveals that the Superintendent, who remains the legal guardian of children placed in foster care (see the *Protection of Children Act*, R.S.B.C. 1960, c. 303, s. 8(12)), in fact retains a significant right of control over the parenting activities of foster parents.

77 The most important source for information about the government's right of control over the foster parents is the contract which sets out the terms of the foster care arrangement, the Foster Home Agreement ("the Agreement"). The Agreement requires foster parents to "[m]aintain, feed, clothe and lodge any children [placed in foster care], send them to school, obtain medical and dental care, promote and maintain moral and intellectual well-being, and care for any children so placed as if they were members of the foster parents' family." This clause would indicate that foster parents have significant independent control over foster children's activities. However, the Agreement also requires the foster parents to "[r]ecognize at all times the Superintendent's right to plan for any children so placed" (emphasis added); and that the parents "[e]nsure that any children so placed shall not be visited by anyone, regardless of relationship to any children so placed, unless the Superintendent has given permission to the foster parents for this visit."

78 The 1965 foster parents' manual, prepared by the Department of Social Welfare, reflects the ongoing right of control retained by the social workers who act on behalf of the Superintendent. The foreword to the manual states: "This Manual

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describes how the Department of Social Welfare shares this responsibility [of caring for children in foster care] with foster-parents and also how we can work and plan together to help each child entrusted to our care." The manual also states, for example, with respect to dental care, that "[t]he social worker will plan the appointment with [the foster parents] and arrange with the dentist the method of payment" (p. 7). Where there are special purchases that are required (the example referred to in the manual is a Boy Scout or Girl Guide uniform) "[t]hese can be obtained for foster-children, but we ask you to discuss the plan with the social worker before making the purchase. Sometimes a parent or interested relative would like to participate, or there may be special funds available from which the purchase can be made" (p. 8). The manual provides that arrangements for visiting with the foster child's own parents are to be made with the social worker. As to education, the manual asks parents to "[e]ncourage [their] foster-child to talk with members of his foster-family <u>and his social worker</u> about his interests and ambitions. As in other things, our funds are limited, but if we <u>plan carefully together</u> and well in advance, no child need be disappointed in his hopes for future education or training" (pp. 10-11). Finally, as to holiday trips, the manual asks that foster parents inform the Department about where they are going and for how long. These examples indicate that the care of children in foster homes is very much a joint exercise shared by the government and the foster parents.

79 It is clear that the government, as the legal guardian of foster children and by the terms of the government's arrangement with foster parents, maintains ongoing control, or at the very least an ongoing right of control, over the care of children living in foster homes. This right of control over the children's activities clearly entails a right of control over foster parents' activities *vis-à-vis* the children. While foster parents do control the organization and management of their household to the extent permitted

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by government standards, I do not agree with McLachlin C.J.'s statement at para. 23 that "[t]he government does not supervise or interfere, except to ensure that the child and the foster parents meet regularly with their social workers, and to remove the child if his or her needs are not met." The government does indeed supervise via the social workers, and may interfere to a significant degree, precisely to ensure that the child's needs are being met.

80 A secondary factor indicating that foster parents act on behalf of the government, in addition to the government's ongoing right of involvement in the care of foster children, is the perception that children have of who in fact is ultimately responsible for their well-being. It is relevant to note here that foster care is by nature a temporary arrangement. Although the record does not contain detailed information on this point, it is clear that the relationship between foster parents and foster children is a more transient relationship than the usual parent/child relationship. It is fair to assume that some children may stay with a given foster family for many years, while others may remain in a given foster home only for a number of months. While foster parents are certainly not babysitters (who would surely qualify as employees and meet this branch of the test for vicarious liability), they are not adoptive parents either. They fall somewhere in between. Where children stay successively in a number of homes for relatively short periods, the government may — through assigned social workers — remain the only steady authority figure for foster children. In such circumstances, foster parents may well be perceived as acting on behalf of the government by the foster children, and by the larger community.

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81 I have set out the reasons supporting my view that the relationship between the government and foster parents is closer than the Chief Justice finds it to be. But is the relationship sufficiently close to support a finding of vicarious liability? There is no clear place to draw the line. Atiyah observes that "in marginal situations, it is reasonable . . . to keep in mind the general policy considerations underlying the whole doctrine": Atiyah, *supra*, at p. 38. Similarly, in *Sagaz*, *supra*, Major J. stated, at para. 30: "Identification of the policy considerations underlying the imposition of vicarious liability assists in determining whether the doctrine should be applied in a particular case."

82 A useful indicator of whether the relationship between government and foster parents is sufficiently close to justify vicarious liability is whether the imposition of vicarious liability could in fact deter harm to children.

83 McLachlin C.J. suggests that imposing vicarious liability would not deter harm to children apparently on the basis that any government control over foster parents' activities would undermine their effectiveness as parents. I do not agree. The kind of measures that the government would likely implement as a response to the threat of vicarious liability would not render foster parents "unable to deliver the spontaneous, loving responses and guidance that the children need" (para. 24). On the contrary, social workers can work together with parents and children in a manner that can reduce the likelihood of abuse and help foster parents give better care to children. For example, social workers would want to discuss with foster parents the limits of appropriate discipline. They may discuss risk factors for abuse, and signs and symptoms of abuse with foster families. This may make a potentially abusive parent

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aware that abusive behaviour is likely to be detected. Explicitness about acceptable and non-acceptable behaviour might also encourage prompt detection and reporting of one foster parent's abusive behaviour by the other, non-abusive foster parent. Finally, discussions with children about abuse and about the importance of maintaining open communication with social workers may also help reduce the likelihood of ongoing abuse continuing undetected. Foster children should be informed that if anything is unsatisfactory in their foster care placement, particularly if there is abuse in the home, they can and should tell the Superintendent, via their social workers.

84 None of these measures would interfere with the foster parents' ability to maintain their position as authority figures. The government does not have to require foster parents to check with the state before making day-to-day decisions in order to exercise the kind of control that would help protect foster children from abuse, contrary to McLachlin C.J.'s assertion. Rather, the state can choose to exercise its right of control where doing so would reduce the risk of harm. It is for the government to weigh whether a given measure will reduce harm without being overly intrusive. For example, installing video cameras in foster homes might reduce the risk of harm, but would on balance be detrimental to the care of foster children. Regardless of which measures the government chooses to take to reduce the likelihood of harm, the point is that foster parents do not, and need not, operate so independently that the government can do nothing to control the risk of abuse to which the enterprise of foster care gives rise.

85 Indeed, over the years, the government has put many more protections in place to ensure that the foster care arrangement meets individual foster children's needs

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and to guard against abuse. Some protective measures are taken prior to the placement of children in foster homes, but many of them entail the ongoing involvement of social workers in the day-to-day lives of foster families.

86 The British Columbia government takes numerous measures before children are put in foster care to reduce the risk of abuse. For example, home studies must be done of each prospective foster home prior to placement. Foster parents are required to complete 53 hours of training that inform them not only of acceptable standards of parenting and the special needs of foster children, but also about ways in which they, as foster parents, can work together with the children's social workers: see the *Program Schedule and Registration Guide*, British Columbia Foster Care Education Program, Ministry of Children and Family Development; B.C. Federation of Foster Parent Associations, Fall 2002. This training includes education about appropriate ways of disciplining children: see the *Foster Family Handbook* (3rd ed. 2001), British Columbia Ministry for Children and Families; B.C. Federation of Foster Parent Associations ("*Handbook*").

87 In addition, once children are placed in foster care, foster parents must meet with social workers and the child to develop an individualized Plan of Care for each child, to be reviewed every six months. The Plan of Care always requires foster parents to keep records of the child's progress and daily routines including school-related issues, unusual behaviour, changes in the child's circumstances or routines, and any incident or development that might put the child at risk of harm. Foster parents are expected to make such entries daily. The records are property of the Ministry. (See *Handbook*, *supra*, at pp. 14-15.)

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88 Finally, the British Columbia Government has developed mandatory standards for foster homes (see *Standards for Foster Homes*, British Columbia Ministry of Children and Family Development (2001) ("*Standards*"); see also the *Handbook*). These standards govern the behaviour of foster parents in some detail. For example, physical restraint is prohibited except to protect the child from physical harm. Children are to be informed that such restraint is prohibited. Foster parents are prohibited from allowing children over the age of one year to share a bedroom with an adult, unless stated otherwise in the Plan of Care. Foster parents are required to develop a household emergency response plan for fires, earthquakes, disasters and other emergencies. Emergency telephone numbers must be clearly displayed near the telephone. Medications, firearms, and other dangerous materials must be locked up. Social workers must be satisfied that any babysitters engaged by foster parents are capable of ensuring the safety and well-being of the child. The standards also require foster parents to tell children that they can discuss any matters or problems without reprisal with their foster parent, their social worker, or other government authorities such as the Child, Youth and Family Advocate. Foster parents are required to promptly report all information of significance to the safety and well-being of children to a social worker, and to provide any additional information that the social worker requires. Interestingly, the current standards recognize that the social worker has <u>exclusive</u> power to plan for the ongoing safety and well-being of the child after any reportable incidents, including allegations of abuse, marked behavioural changes, self-injurious or high-risk behaviour by the child and "any other circumstance affecting the safety or well-being of a child or youth": *Standards*, s. B.2.2.

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89 To conclude on this point, the evidence reveals that as the government becomes aware of risks to children in foster care, it can respond, and has responded, by imposing rules and restrictions on how foster parents exercise their authority. These measures often involve continuing control over foster parents' activities and yet they need not undermine foster parents' relationships with foster children or deny foster children the experience of a real family. Rather, they reflect the reality that children in foster care remain the responsibility of the government, which is their legal guardian. Thus, it is my view that foster parents do in fact act on behalf of the government when they care for foster children and it is therefore fair to impose vicarious liability in this case.

90 Once it has been established that a relationship between a defendant and a tortfeasor is sufficiently close to attract vicarious liability, it must be determined whether the wrongful act was sufficiently connected to the tortfeasor's assigned tasks for vicarious liability to be imposed. As I explain in the coming section, this Court's decision in *Bazley* compels the conclusion that this second condition for the imposition of vicarious liability is met.

A. *Are the Wrongful Activities Sufficiently Connected with the Tortfeasor's Assigned Tasks?*

91 In *Bazley*, *supra*, this Court considered whether a non-profit foundation operating a residential care facility for emotionally troubled children was vicariously liable for sexual abuse committed by one of its employees. There was no question that the relationship was an employment relationship and was close enough to attract vicarious liability. The only issue was whether the sexual abuse was sufficiently within

the scope of the employee's assigned tasks for vicarious liability to lie. At para. 42, McLachlin J. set out the test as follows:

> . . . there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. [Emphasis in original.]

She restated the test as it applies to vicarious liability for sexual abuse at para. 46:

> . . . the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm.

The Court concluded that the Foundation was vicariously liable for the sexual misconduct of its employee. McLachlin J. explained at para. 58 that "[t]he abuse was not a mere accident of time and place, but the product of the special relationship of intimacy and respect the employer fostered, as well as the special opportunities for exploitation of that relationship it furnished." In other words, it was job-created power and job-created intimacy that attracted vicarious liability in *Bazley*.

92 The companion case to *Bazley*, *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, marks the limits of vicarious liability. In that case, Binnie J., writing for the majority, declined to find a Boys' and Girls' Club which conducted after-school and weekend activities for children vicariously liable for the sexual assaults of its employee against

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children who frequented the club. In Binnie J.'s view, there was insufficient power and intimacy in the ordinary relationship between the recreational director and the after-school program participants to say that the employer materially introduced or materially increased the risk of harm. Binnie J. noted that the victims were "free to walk out of the Club at any time" (para. 83) and that "whatever power Griffiths used to accomplish his criminal purpose for personal gratification was neither conferred by the Club nor was it characteristic of the type of enterprise which the respondent put into the community" (para. 84).

93 The factors applied in both *Bazley*, *supra*, and *Jacobi*, *supra*, to determine whether an employer materially increased the risk of an employee's intentional wrong included:

> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power.
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> (*Bazley*, *supra*, at para. 41; *Jacobi*, *supra*, at para. 79)

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94 Applying these factors, it is clear that the foster care arrangement reflects the highest possible degrees of power, trust, and intimacy. The relationship does more than merely provide an opportunity for child abuse; it materially increases the risk that foster parents will abuse. Despite government efforts, some foster parents might impose excessive physical discipline on children in a misguided effort to carry out their duty to educate and care for the children entrusted to them. Because foster homes generally operate free from day-to-day supervision, some foster parents may believe that they can take advantage of foster children without being detected. Unlike the situation in *Jacobi*, *supra*, foster children are required to remain in the physical custody of their foster parents. They have nowhere to go to escape abuse in the short term. The power relationship between foster parents and foster children gives rise to its own set of concerns: foster children may submit to their foster parents even when their foster parents are abusive. Children may fear their foster parents more than they would other adults. In sum, as McLachlin J. stated in *Bazley*, *supra*, "the more an enterprise requires the exercise of power or authority for its successful operation, the more materially likely it is that an abuse of that power relationship can be fairly ascribed to the employer" (para. 44). It is difficult to imagine a relationship requiring greater power or authority for its successful operation than the foster care relationship.

95 It has been suggested that it would be unfair to impose vicarious liability in this case because it would place children who are in foster care at an advantage over those who are not in foster care. I do not believe this is any reason to decline to impose vicarious liability where, as here, the necessary legal elements have been made out. The doctrine of vicarious liability generally allows a victim access to deeper pockets than if the tortfeasor were acting on his or her own behalf. In that sense, victims of

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"employees" and others who are in a relationship that attracts vicarious liability are all placed at a relative advantage to those who are injured by independent actors.

II. Conclusion

96 Unlike the Chief Justice, I find that the appellants have made out the elements of a successful claim of vicarious liability against the government for the abuse inflicted by their foster parents. However, as vicarious liability is a form of tort liability, I find the claim is statute-barred, for the reasons set out by the Chief Justice.

97 I also agree with the conclusion of McLachlin C.J. that the appellants cannot succeed in their claims for breach of non-delegable duty and breach of fiduciary duty.

98 As the causes of action in this case are statute-barred, I find it unnecessary to pronounce on issues related to damages.

99 I would dismiss the appeal.

APPENDIX

Relevant Legislative Provisions

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Protection of Children Act, R.S.B.C. 1960, c. 303

8. . . .

(5) Subject to subsection (4), from the time that a child is apprehended under section 7 until final disposition of the case by the Judge, the person who apprehends the child is responsible for the care, maintenance, and physical well-being of the child, and no liability shall attach either to such person or to any duly qualified physician or surgeon by reason only that the child is provided with necessary medical or surgical care during such time.

. . .

(12) If the Judge commits a child to the Superintendent under this section, the Superintendent shall receive the child into his custody and is thereupon the legal guardian of the child, and he shall retain the guardianship unless and until he delivers the child to a children's aid society. The Superintendent shall make arrangements as soon as may be for the placement of the child in a foster home, or such other place as will best meet the needs of the child. But the Superintendent may at any time, with the consent of a children's aid society, deliver the child to the society to be dealt with in like manner as if delivered to the society under the order of a Judge under the provisions of this section, and the Superintendent shall in such case deliver to the society a certified copy of the order of the Judge endorsed with a memorandum signed by the Superintendent, setting out the delivery of the child to the society under this section.

10. (1) The society to the care of which any child is committed under this Act is the legal guardian of the child until it is relieved of that guardianship by order of the Judge or by the fact that the child has reached the age of twenty-one, or, if a female, is married; and it is the duty of the society to use special diligence in providing suitable foster homes for such children as are committed to its care, and the society is hereby authorized to place such children in foster homes on a written agreement, during minority, or for any less period in the discretion of the society. Notwithstanding any such contract the society has the right to withdraw the child from any person having the custody of the child if, in the opinion of the society placing out the child, the welfare of the child requires it.

14. Every society to whose care any child is committed under the provisions of this Act, and every person entrusted with the care of the child by any such society, shall from time to time permit the child to be visited, and any place where the child may be, or reside, to be inspected by the Superintendent or by any person authorized by the Superintendent for the purpose.

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15. (1) Every organization that deals with or cares for children . . . shall, in addition to all other requirements of this Act, upon request of the Superintendent or of any person authorized by the Minister,

(*a*) furnish to the Superintendent or person so authorized full information and particulars concerning every child with whom the organization has dealt, or to whom the organization has given care, or of whom the organization has had the custody; and

(*b*) permit the Superintendent or person so authorized to have access to all parts of the premises and buildings of the organization . . . and to all children therein, and to all books and records of the organization.

. . .

(3) If it appears to the Superintendent that the management of any organization referred to in subsection (1) is not such as to be in the best interests of the children in its care or custody. . . the Superintendent shall report the circumstances to the Minister . . . .

Limitation Act, R.S.B.C. 1996, c. 266

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(2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:

(a) subject to subsection (4) (k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty:

. . .

7 (1) For the purposes of this section,

(a) a person is under a disability while the person

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(i) is a minor, or

(ii) is in fact incapable of or substantially impeded in managing his or her affairs . . . .

(9) The onus of proving that the running of time has been postponed or suspended under this section is on the person claiming the benefit of the postponement or suspension.

Appeal dismissed.

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Solicitor for the respondent: Ministry of the Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

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