



Claim Case Studies & Legislation: M.B. v. British Columbia, 2003 SCC Vicarious Liability and Non- delegable Duties of the Crown

Facts

The respondent, M.B., was apprehended by the British Columbia Ministry of Social Services when she was 13 years old. Her mother was chronically ill and suffered from drug dependency. Her father was violent and had sexually abused M.B. for eight years. He was later criminally charged and convicted for the sexual abuse. M.B. was placed in the foster home of Mr. and Mrs. P. The couple had been foster parents for many years. Mrs. P was ill at the time and so Mr. P assumed primary care for her. Mr. P engaged in sexually inappropriate behaviour including engaging in physical contact with M.B. and offering her gifts in exchange for sex.

During this time M.B.'s social worker did little monitoring of the placement. There was no evidence that she visited the home or had any direct contact with M.B. during the time that she was there.

Following an instance of sexual abuse by Mr. P, M.B. left the house and returned to her mother's home. She did not tell her social worker about the assault. M.B.'s life with her

mother and brother was chaotic. Although her father had stopped visiting the home and was no longer an immediate threat, her mother was still addicted to pain killers and was hospitalized several times due to overdoses. M.B. became the care giver for her mother and brother. She did not finish grade 9 and was expelled from school. Social workers attempted to provide help to the family. Her mother received drug counseling and social workers were assigned to help her younger brother.

M.B.'s mother committed suicide about 7 years later. Approximately 14 years after that, M.B. initiated her claims against the Crown for negligence, vicarious liability, breach of a non-delegable duty and breach of fiduciary duty. Mr. and Mrs. P had both since died. She initially joined her biological father as a defendant, but reached a settlement with him prior to trial.

At trial the judge found that although M.B.'s social workers were negligent in their monitoring and supervision of the placement, this negligence was not the cause of the abuse.

The Court believed that more frequent visits to the house would not have enabled social workers to detect Mr. P's inappropriate sexual behaviour. However, the Court found that the Crown was vicariously liable to M.B. for Mr. P's tort and breach of fiduciary duty to her. The judge also held that Mr. P's actions constituted a breach of the Crown's non-delegable duty to look after the welfare of foster children. A breach of the Crown's fiduciary duty could not be made out on the grounds that the Crown did not take advantage of M.B.'s trust for its own personal advantage.

The Crown appealed to the British Columbia Court of Appeal on the issues of vicarious liability and breach of non-delegable duty. A majority of the Court of Appeal dismissed the appeal.

The Crown then appealed to the Supreme Court of Canada on the issues of liability.

Issues

1. Is the Crown vicariously liable for the sexual abuse of M.B. by her foster father?
2. Did the Crown breach a non-delegable duty?

Findings

The answer to the first issue was established in the case *K.L.B. v. British Columbia* (2003, SCC). It was held that the government is not vicariously liable for torts committed by foster parents against foster children in their care because foster parents are not acting "on account" or "on behalf" of the government. The relationship is not one that is sufficiently close to make out vicarious liability. Foster parents provide care in their own homes in a highly independent manner free from close governmental control. They have complete control over the organization and management of their household.

For the second question, the Court looked at the *Protection of Children Act* R.S.B.C. 1960 which imposes a number of non-delegable duties on the Crown. These include the following: a duty to care for the physical well-being of a child before the child is placed in foster care; a duty to place the child in such a place as best meets his or her needs, or to deliver the child to a children's aid society; and a duty to make a report to the Minister if at any time it appears to the Crown that any children's aid society or foster home is not in the best interest of a child in its custody or care. These are non-delegable duties to ensure that certain actions are performed in connection with children's care. The Court looked at these duties but found that there was no provision in the Act that suggested that the Crown "stands under a general non-delegable duty to ensure that no harm comes to children through the abuse or negligence of foster parents, such as would render (the Crown) liable for their tortious conduct".

Court's Ruling

The majority ruling allowed the appeal on both of these issues. However, there was a dissenting opinion from Justice Arbour regarding the ruling on vicarious liability. Arbour J., dissenting in part, stated that the case raised the issue of whether, and on what grounds, the government can be held liable for abuse committed by a foster parent against a child in foster care. He felt that vicarious liability was made out in this case. In his view "the relationship between the state and foster parents is sufficiently close that the relationship is capable of attracting vicarious liability. In addition, the wrongful act is so closely associated with the power and intimacy created by the foster care relationship that it can fairly be said that the government's empowerment of foster parents materially increased the risk of sexual abuse of children".