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Considerations When Bringing Claims Against Family Members

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CONSIDERATIONS WHEN BRINGING CLAIMS AGAINST FAMILY MEMBERS

The inherent purpose of the family relationship imposes certain obligations on a parent to act in his child's best interests, and a presumption of fiduciary obligation arises.

The fiduciary duty extends to everyone charged with responsibility for the care of the children…[1]

I. Introduction

The breadth and depth of trauma suffered by sexual assault survivors is boundless and manifests uniquely for each survivor. Common features can include shame, guilt, depression, and anger. A common thread amongst survivors of childhood sexual abuse or assault is anger towards parents or guardians who may have known about the abuse and done nothing.

When a survivor suspects, or knows, that a parent was aware of the abuse, they understandably want to include them in a civil claim. In this paper, we will examine the causes of action that can be applied, the features that must be present in order to be successful and will look overall at how these cases have been treated in British Columbia courts.

Additionally, claims involving abuse by family members can often involve siblings. Sometimes, the abuse starts when the children are very young, and sometimes the perpetrators themselves are also children. We will review the particular considerations to be aware of when bringing such claims, and the evidence that should be present.

This review of recent decisions involving bystander family members and sibling perpetrators aims to provide practical issues to consider when drafting pleadings and assessing the likelihood of recovery from the primary, or secondary, defendants.

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[1] *M.(K.) v. M.(H.),* 1992 CanLii 31 (SCC) at 43 and 313.

II. Breach of Fiduciary Duty and/or Negligence claims against secondary defendants

There is no dispute that the relationship of a parent, or a guardian, to a child is fiduciary in nature and characterized by power, and authority, of the parent, and vulnerability of the child. To put it simply, the child is at the mercy of the parent.

In cases where a plaintiff suffered childhood sexual abuse, consideration should be given to whether a claim can be brought against secondary defendants on the basis of breach of fiduciary duty, or negligence, or both.

Where those secondary defendants are parents, or guardians, there is an obligation to protect their children from sources of harm that the parents know about, foresee or ought reasonably to know about. Whether there is in fact a breach of fiduciary duty will depend on the particular facts of each case.

Parents or those acting *in loco parentis* may also, or alternatively, be found negligent if they are found to be willfully blind to the harm. As we will see in the cases below, the parent's actions must be judged by the standards that existed at the time of the abuse.

The 2007 decision of ***Waters v. Bains***[2] was brought against the plaintiff's uncle for sexual assault, and against her aunt on the basis that her aunt breached her duty of care to the plaintiff, or alternatively, that she was liable in negligence by reason of her failure to act to protect the plaintiff from the harm she was suffering at the hands of her uncle.

The aunt denied a fiduciary relationship, and denied any knowledge that her husband was, in any way, inappropriate towards the plaintiff.

The allegations involved abuse that occurred when the plaintiff was aged 8 to 18. The abuse was prolonged and sustained, and involved vaginal rape. After her period started, she was taken by her aunt and grandmother to have an IUD forcibly inserted without her knowledge.

In reviewing the claim against the defendants, Madam Justice Morrison found that:

> *[150] The claim against the defendants has been framed in negligence, and there are the three elements to prove in a negligence claim**. First, the duty of care that is owed by the defendants to the plaintiff. Second, that there must be a breach of that duty of care, and evidence to demonstrate that the defendants failed to exercise the standard of care required of a reasonable and careful person in these circumstances. Third, the plaintiff must have suffered damages as a direct result of the negligence of the defendants.***
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> *[151] It may be that in these circumstances, simply being an aunt and uncle to an eight year old child who has lost her mother under tragic circumstances is sufficient to establish a duty to take care. But the circumstances here point to a special relationship between the plaintiff and these two defendants.*
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> *[152] The female defendant was the plaintiff's aunt, and the male defendant was an uncle by marriage. The plaintiff was of a tender age, and she was vulnerable. Her mother had died recently and suddenly under terrible circumstances; the plaintiff and her younger brother were living on the nearby farm of their grandmother, where they were not treated in a kind and loving*

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[2] 2007 BCSC 1500.

> *manner. I find as a fact that both Vicki and her brother spent substantial amounts of time, including overnights, on the premises of the defendants, at their home on their farm.*
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> *[153] Those facts, taken together with the gross nature of the illegal acts of Joginder Bains, establish without question not only a duty of care owed by the defendants to the plaintiff, but a serious breach of that duty of care. Both defendants failed to exercise a standard of care required of any reasonable and careful person in these circumstances.*
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> *[154] The aunt, Darshan Bains, took no reasonable steps to prevent or stop the sexual abuse that she had to have known was ongoing. Instead, she collaborated, with Vicki's grandmother, to have an IUD inserted into a 12 or 13 year old child, at the onset of puberty, without the consent or knowledge of the child. That process was a painful and distressing episode for the plaintiff. The only inference that can be drawn from the insertion of that IUD was that Jagdish and Darshan knew that the sexual abuse by Joginder Bains was ongoing, and they wanted to ensure there would be no pregnancy or discovery of the ongoing abuse.*
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> *[155] The law imposes a standard of care on a teacher in many instances similar to that of a prudent and careful parent. The law imposes no less a duty of care on an aunt and uncle in these circumstances. The conduct of both defendants could only result in harm to Vicki Waters, serious and possibly lifelong harm.*
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> *[156] The only outcome of their acts resulted in the continued sexual gratification for the male defendant and the continued cover up by the female defendant. The defendants had to foresee what harm was being done to this child over the years. No other conclusion can be drawn under these circumstances. Given her age and circumstances, the plaintiff was particularly vulnerable to and at the mercy of the defendants who held power over her because of their position within the family, and because of the position of power that they held generally within the family.*

Madam Justice Morrison found that the Plaintiff had repeatedly asked her aunt for help but that help was refused. The refusal to provide help when it was clear that the plaintiff was being repeatedly, and grievously, harmed by her uncle was found to constitute a further breach of a fiduciary duty. The Plaintiff's aunt had knowledge of the sexual assaults and did nothing to prevent further harm.

The defendants were found jointly and severally liable for general damages in the sum $325,000 and punitive damages in the amount of $80,000.

In ***B.(P.) v. V.E.(R.),*** 2007 BCSC 1568 an action was brought against the defendant R.V.E. for defamation. She brought a counterclaim against her father for sexual assault and her mother for breach of a fiduciary duty and breach of a duty of care in failing to take steps to protect her.

The claim against the father was for numerous incidents of groping and non-consensual touching of the defendants genitals and breasts over a four year period. The incidents occurred in the family home, their trailer, in a car, and other locations. R.V.E. claimed that she advised her mother and pleaded with her not to leave her alone with her father. Her mother denied this conversation occurred.

The father was ultimately found liable for the sexual assaults but the mother's breach of fiduciary duty was not established.

Mr. Justice Sigurdson found that a ***"parent's fiduciary obligation obviously includes a duty to refrain from incestuous assaults on his or her child; however, whether a parent can be in breach of her fiduciary duty for failing to protect or prevent the sexual abuse of her child will turn on the facts of each individual case."***[3]

In this case, though the defendant's evidence was preferred over her mother's, there was insufficient cogent evidence to impose civil liability against the mother. Justice Sigurdson noted that, when the defendant spoke to her mother about the abuse, the mother had taken steps to remediate the harm, including speaking to her husband about not touching the defendant inappropriately. There was also no evidence regarding the mother's participation or attendance at the time of the assaults.

The case of ***D.M. v. R.L.,*** 2014 BCSC 1061 involved a claim brought by the plaintiff against the estate of her deceased step-father for sexual assault and breach of fiduciary duty, and a claim against her mother for breach of fiduciary duty in failing to protect her.

The plaintiff's step-father assaulted her when she was 5 years old and the mother interrupted the assault. She did call the police on that occasion, but nevertheless continued to live with the step-father which provided him with continuous opportunities to harass, abuse, and assault the plaintiff further.

The plaintiff's mother was found to have breached her fiduciary duty to her daughter with respect to her husband's sexual abuse of the plaintiff.

In reviewing the issue of breach of fiduciary duty, Madam Justice Brown found that:

> *[60] There is no doubt that I.M. stood in a fiduciary relationship to her daughter, as did J.W., as her step-parent. In addition to committing the tort of sexual assault, by sexually assaulting her, J.W. breached his fiduciary duty to her.*
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> *[61] I.M. argues that there was only one sexual assault and while there may have been signs or suspicions in the days or weeks immediately before the incident, the import of these signs and suspicions would only have become apparent in retrospect. She concedes that a reasonable person would have come to the conclusion that at least some sexual activity had been perpetrated by J.W. on D.M., given the events of November 1967. However, relying on B(P). v. V.E.(R), 2007 BCSC 1568 at para. 244, she argues that whether a parent can be in breach of her fiduciary duty for failing to protect or to prevent the sexual abuse of her child will turn on the facts of each individual case.*
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> *[62] She acknowledges that the onus lies on her as a fiduciary to demonstrate that she did not have the ability, awareness or means to act (K.K. v. K.W.G., [2006] O.J. No. 2672 (Sup. Ct. J.) at para. 55, varied on damages 2008 ONCA 489).*
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> *[63] She says that she should not be found in breach of her fiduciary duty to D.M. for the following reasons:*

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[3] At para 244.

(a) as soon as she became suspicious of the 1967 incident, she contacted police;

(b) to her mind, there were several reasons why J.W. might not have assaulted D.M.;

(c) this allowed her to conclude that the best option for her family was to continue the relationship with J.W. who was able to provide for the family;

(d) she had had a nomadic existence. She said she suffered from anxiety. She said she was afraid of J.W. and what he might do to her if she left him. She testified that the social safety net did not offer a viable alternative. She argues that she faced a no-win situation;

(e) their living situation continued to improve between 1967 and 1973 because J.W. was able to afford to buy a home;

(f) D.M. did not report any further sexual contact for at least 6 years;

(g) D.M. has admitted that she did not complain to I.M. at this time.

[64] She argues that for these reasons, the claim against her for breach of fiduciary duty for failure to protect D.M. should be dismissed, or alternatively, that the damages suffered were substantially from the 1967 incident. She says that even if she were in breach of her fiduciary duty thereafter, that no damage flowed as a result. The damage was already suffered. She argues that damages that flow from any breach are divisible from those that are suffered as a result of J.W.'s actions and that damages against her should be apportioned accordingly.

[65] I reject these submissions. In my view, I.M.'s attempt to characterize herself as a victim unable to act is an after-the-fact justification. As indicated above, I have rejected her evidence in this regard. There is no independent evidence to support her story that she was "under a doctor's care" and was taking prescription drugs. I have rejected her evidence that she was too frightened of J.W. to move away. I also reject her evidence that there was no viable social safety net. She availed herself of the social safety net on many occasions, even before she met J.W. I also reject the submission that she stayed to benefit the entire family or that the children's circumstances were improved by living with J.W. D.M. and T.M. each testified about their deplorable childhood living with their mother and J.W.

*[66] Following the bathroom incident in November 1967, I.M. was certainly aware of the danger that J.W. posed to D.M. Yet, she chose to continue to live with him and expose D.M. to that danger**. In doing so, she chose her interests over those of D.M. and was in breach of her fiduciary duty. As I have indicated above, the sexual assaults continued after J.W. returned to the family home. I.M. is clearly an intelligent person. A person with her background and capacity would have appreciated the risk. Indeed, in my view, it is likely that she was well aware that J.W. continued to sexually abuse and torment D.M. as D.M. testified. I.M. simply did not bother to do anything about it.***

Madam Justice Brown awarded damages in the amount of $441,000 including $20,000 in punitive damages. She ultimately declined to award additional equitable compensation for breach of fiduciary duty, finding that damages would suffice.

More recently, the issue of a bystander parent was before the Court of Appeal in the 2015 decision of ***Antrobus v. Antrobus***[4].

Antrobus involved a historical sexual assault committed by the plaintiff's grandfather. The Plaintiff sued her parents for failing to protect her from her grandfather and was successful at trial.

The Court of Appeal overturned the trial decision, finding that a if a bystander parent does not have actual knowledge of wrongdoing, they may only be held liable in negligence if the parent is willfully blind as to the existence of wrongdoing. This was not the case here as once the parents learned of the abuse, they immediately barred all contact between the plaintiff and her grandfather. This was also the basis for their dismissal of the fiduciary duty claim; the Court of Appeal found that the parents did not put their own interests ahead of their daughter's.

Additionally, in considering whether harm is foreseeable, parents must be judged by the standards of the time in which the events took place. In the 1960s, it was found to be reasonable for parents to allow their child to spend unsupervised time with her grandparent. Although he had been in prison, he had been released more than 5 years prior and was ostensibly a "changed man". They also did not know that the offences included sexually abusing young girls.

The application for leave to appeal to the Supreme Court of Canada was dismissed with costs.

III. Parents of Abusive Children

When an assault is committed by a child against another child, it is worth considering whether the parent or guardian could be liable for the assailant child's actions.

Canadian courts have been reluctant to hold one individual responsible for the acts of another, and in cases of parents and children, there is neither strict nor vicarious liability that applies for damage or injury caused by children, however, parents can be found liable on the basis of negligence.

A. The Innocent Bystander

Canadian courts have consistently applied the "innocent" bystander test for negligence in claims against parents of children who commit abuse. Application of this test means that parents are unlikely to be found negligent in the absence of:

(a) actual knowledge

(b) wilful blindness, or

(c) constructive knowledge.

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4 2015 BCCA 288 ("*Antrobus*").

Note that constructive knowledge is based on an objective assessment of a reasonable person, standing in place of the parent.

The test was set out in *Streifel v. S.*, 1957 CanLII 447 (BC SC) and recently cited by Justice Richards in ***W.E. v. F.E. et al*****,** 2008 YKSC 40 ("*W.E.*").

W.E. involved a plaintiff who was sexually abused by his aunt when they were both children (the aunt was 13-14 years old and the plaintiff was 5-7 years old). This aunt was a permanent ward of the Commissioner of the Yukon Territory ("YTG"). The plaintiff alleged that YTG, who was *in loco parentis*, was liable for the actions of the defendant child.

Justice Richards noted that a parent is not liable for every intentional tort committed by the child merely by virtue of the parent-child relationship. There must be something more – some special circumstances – that exist before liability will be imposed on the parent. He also referred to the test set out in *Streifel* which is to be used in determining whether a parent is exposed to liability for the actions of an offending child:

> *"To succeed a plaintiff must show (1) that the defendant child had a dangerous propensity; (2) that the parents knew of the propensity; (3) that the parents could reasonably anticipate another occurrence; (4) that reasonable steps could have been taken to avoid a recurrence, and (5) that the parents failed to take such steps.*

Ultimately, there was no evidence of a propensity, or knowledge of any such propensity and the action against YTG was dismissed.

Parents are in a position to control and dictate their children's behaviour. Thus, there is a corresponding duty to use reasonable care to prevent foreseeable harm. Where a child has a propensity to act in a manner that is harmful to others, then the duty of care is heightened. A parent who has actual or constructive knowledge, or displays wilful blindness, and fails to act, or chooses a path that supports the harmful behaviour, is at risk of being found negligent.

B. Does the Age of The Perpetrator Matter?

The age of the sibling/related children is not a determining factor in regards to culpability. Rather, age is relevant in demonstrating whether the child committing the offence was capable of forming intent.

Although the defendant in ***C.L.H. v. K.A.G.*****, 2022 BCSC 994** ("*C.L.H.*") did not assert that he was incapable of forming intent, Mr. Justice Veenstra reviewed the issue of age in respect of tort liability. The defendant in that case was 4 years and 2 months older than his sister and committed sexual assaults when he was between the ages of 9 and 16.

He relied upon the decision of *Olsen v. Olsen*, 2006 BCSC 560,[5] in which Madam Justice Stromberg-Stein confirmed that there is no age limit which absolves children under a certain age from liability for intentional torts, unlike in criminal law in which there is an age limit of 12. The question is whether a child was capable of forming the intent required for the tort. If the evidence

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[5] Indexed as *T.O. v. J.H.O.*, 2006 BCSC 560.

demonstrates that the defendant acted with the requisite intent, his age does not matter. If the elements of the tort are established, he may be found liable.

Consent can also be raised as a consideration. While the law appears to be that the age of consent from the Criminal Code (then 14 years, now 16) would apply as a matter of public policy, Justice Stromberg-Stein held at para 42 in *Olsen* that *"younger siblings naturally look to older ones for guidance, protection, and love. Even if the plaintiff had been old enough to consent, that influence alone is enough to vitiate any apparent consent."*

C. Practice Considerations

When assessing whether to name one or more secondary, or bystander, defendants in a sexual assault action, the facts will be crucial in determining whether one should plead negligence, or breach of fiduciary duty (where appropriate), or both.

The courts have been increasingly prepared to find that actual notice – or constructive notice, where one ought to have known in the circumstances – will be sufficient for a finding of negligence where no steps, or inadequate steps, were then taken to prevent further harm. Difficulty will arise however where steps were in fact taken and the plaintiff is attempting to argue the adequacy of those steps – particularly in historical sexual assault cases.

When assessing whether a fiduciary duty exists, consider the circumstances of the relationship. One need not be a parent or full-time guardian or custodian for the relationship to be considered fiduciary in nature, although in those particular circumstances it is of course a given.

The fiduciary duty extends to "everyone charged with the responsibility for the care of children".[6] In addition to extended family members, this could conceivably extend to babysitters or nannies,[7] close family friends, or even older siblings. This issue was raised in the decision of *C.L.H.,* discussed below, but not developed in the closing argument.

Mr. Justice Veenstra noted that he had doubts about whether a child could be appropriately found to have assumed fiduciary obligations in respect of an only slightly younger sibling. However, depending on the age of the elder sibling, as well as the gap of ages between the two, the characteristics of a fiduciary relationship could exist and it is an argument worth exploring.

It is also worth considering, in cases where there is a bystander parent or family member against whom no claim is raised, whether the defendant will attempt to advance a third party claim for contribution and indemnity on the theory that the non-offender knew or ought to have known the child was being abused and yet took no, or inadequate, steps.

Thus far, this strategy has not been successful. In the 1997 decision of *T.(L.) v. T. (R.W.)* (1997), 36 B.C.L.R. (3d) 165 (S.C.) the defendant issued a third party claim against the bystander mother. The claim was dismissed on the basis that the mother, who witnessed a small portion of one incident, did not fail to protect her child. She did not encourage the abuse, nor try to preserve her relationship with the father. She confronted the father and then considered the matter, a

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6 *Brooks v. British Columbia*, 2000 BCSC 735, varied on issue of crown liability 2001 BCCA 227 and damages 2002 BCCA 142, rev'd 2003 SCC 53 at para 112

7 See *M.L.H v. R.G.R.*, 2007 ONCA 804.

"private family shame", closed, and there was no further action that roused suspicion on her part.

Further, even if the court did find a breach on the part of the mother, Madam Justice Koenigsberg found the proposition that the defendant could successfully claim contribution and indemnity was ludicrous. Although she noted it was difficult under the law to articulate *why*, she ultimately relied upon the definition of "contribution and indemnity" which required contribution to the infant's injuries and found that the failure to protect did not contribute to the plaintiff's injuries independently of the defendant's actions.

Although the judicial commentary in *T.(L)* suggests defendants should use this defence at their peril, it is worth considering whether such a claim will be advanced, and if so, how that will impact issues such as the decision of litigation guardian in the case of an infant plaintiff.