



TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA

Meeting the Good Faith Defence in Negligence Claims Against Institutional Defendants

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Maximize Your Personal Injury Practice:
20 Ways to Get Smart Fast seminar
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By

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MEETING THE GOOD FAITH DEFENCE IN NEGLIGENCE CLAIMS AGAINST INSTITUTIONAL DEFENDANTS

Alison L. Murray
(not Gail M. Dickson, as she then was)

K.L.B. v. British Columbia, 2003 SCC 51

"The only cause of action that
assists the appellants is direct
liability in negligence law..."

Statutory Defence of Good Faith

S. 101 of the *Child, Family and
Community Services Act*, R.S.B.C. 1996,
c. 46:

No person is personally liable for anything done or omitted in
good faith in the exercise or performance or intended exercise or
performance of

- (a) a power, duty or function conferred by or under this Act,
or
- (b) a power, duty or function on behalf of or under the
direction of a person on whom the power, duty or function is
conferred by or under this Act.

Statutory Defence of Good Faith

S. 23 of the *Family and Child Service Act*, S.B.C., 1980 c. 11:

No person is personally liable for anything done or omitted in good faith in the exercise of the powers conferred by this Act.

(proclaimed in force on June 1, 1981)

Common Law Defence of Good Faith

- No statutory provision for the defence of good faith in the predecessor legislation, the *Protection of Children Act*, R.S.B.C. 1960, c. 303.
- From May 3, 1974 (enactment of the *Crown Proceedings Act*, S.B.C. 1974, s. 24) until June 1, 1981 no statutory immunity.

Common Law – British Jurisprudence

- *Dorset Yacht Co. Ltd. v. Home Office*, [1970] A.C. 1004
- *Anns v. Merton London Borough Council* [1978] C.C. 728
- *Barrett v. Enfield London Borough Council*, [1993] 3 All E.R. 193

Common Law – Canadian Jurisprudence

- *J.H. v. British Columbia* [1998] B.C.J. No. 2926
- *M.B. v. British Columbia* at the trial level: 2000 BCSC 735
- *K.L.B v. British Columbia* at the British Columbia Court of Appeal level: 2001 BCCA 221
- *R.A.R.B. v. British Columbia* 2001 BCSC 667

Social Workers and the Good Faith Defence

"The theme running through the important cases in this area is the difficulty facing those who work with disturbed children. Decisions have to be about care when the outcome is unpredictable. It is too easy to say when things turn out badly that it was the fault of the person who made the judgment. Social workers should not be so afraid of making a mistake that they cannot do their job properly.

The statutory immunity is intended to protect workers in the field so their judgments will be focused on child welfare and not their exposure to liability."

(*B.D. v. British Columbia* (1997) 30 B.C.L.R. (3d) 201 (CA))

When is it Bad Faith?

Levine, J. (as she then was) in *M.B. v. British Columbia* explains:

"The Crown cannot claim that its servants possess an honest belief that a decision was reasonable or made in good faith if they do not at least reasonably supervise or monitor the circumstances of a child-in-care to reveal facts the decision maker ought to know. Similarly, once Crown officials are put on inquiry, the defence of good faith will be of no assistance unless they actually consider the matter and make a decision consistent with the exercise of the Crown's duty. As Lord Reid wrote in *Dorset Yacht* at p. 301:

When is it Bad Faith?

■ (cont.)

"But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his power. Parliament cannot be supposed to have granted immunity to persons who do that."

Meeting the Defence of Good Faith

- *C.H. v. British Columbia* 2003, BCSC 1055; 2004 BCCA 385
- *M.D. (Guardian ad Litem of) v. British Columbia* 2000 BCSC 700
- *D.H., J.H. & E.H. v. Kline et al*, 2006 BCSC 1903

Practice Tips

Pursue allegations of:

- Failing to act
- Failing to properly investigate
- Failing to communicate relevant information within the Ministry
- Misleading information
- Patently unreasonable conduct

Document Disclosure is Key

Obtain:

- All relevant Ministry policies including:
 - Placement policies
 - Interoffice communication policies
- Child in Care file
 - Running records
 - Medical records
 - School records
 - Names of other foster children

Document Disclosure cont.

- Family file
- Resource file (foster family file)
 - Home study
- Social Worker's personnel file
 - Sick leave records
 - Discipline records
 - Emails/computer records
 - Education details
- Child Care worker's file

Document Disclosure cont.

- Social Assistance file
- Police records
- Criminal Proceedings records
 - Transcripts of trials or sentencing
- Criminal records
 - Requires application to Provincial Court
- School Records
- Medical Records

Discovery of the Social Worker

- Can they describe the child, family or foster home?
- Establish their practices.
 - Note taking
 - Information gathering practices (i.e., interview the child alone, collateral information)
- Review the policies.
 - Admissions regarding their duties
 - Purpose and necessity for the policies

Discovery cont.

- Exploit the opportunity to blame others.
 - Failure of others to pass on information
 - Missing information that would have influenced their actions
- Avoid Alternatives.
 - Sounds like exercising discretion
 - Close any paths that lead to options

Discovery cont.

- Identify every failure.
 - On the face of the record
 - What your client has told you
 - Tie into the applicable policy
- Zero in on what they knew and when they knew it.
 - Failing to investigate
 - Failing to act

Conclusion

"There is much to be said for developing and refining the paths of potential direct liability against employers which introduce child-related enterprises into the community, but that is not the issue before us on this appeal."

Jacobi v. Griffiths, [1999] 2 S.C.R. 570