COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *B.M. (Guardian ad litem of) v. British Columbia,* 2009 BCCA 413

Date: 20091001
Docket: CA036951

Between:

B.M., an Infant, by his Litigation Guardian, O.P.

Respondents
(Plaintiffs)

And

Her Majesty the Queen in Right of the Province of British Columbia

Appellant
(Defendant)

And

R.M. and A.V.

Defendants

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine
The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of British Columbia, February 23, 2009
(*B.M. (Guardian ad litem of) v. R.M.,* 2009 BCSC 214, S045078)

Counsel for the Appellant:	J.E. Gouge, Q.C. M.L. Butler
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Place and Date of Hearing:	Vancouver, British Columbia July 17, 2009
Place and Date of Judgment:	Vancouver, British Columbia October 1, 2009

Written Reasons by:
The Honourable Madam Justice Saunders
Concurred in by:
The Honourable Madam Justice Levine
The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] This is a case concerning the Provincial Crown's liability (vicarious) for injuries

to an infant boy, four months old, caused by the boy's father. The injuries occurred after a requirement the child not be left alone with his father, imposed by a social worker employed by Her Majesty the Queen in Right of British Columbia, was lifted by the social worker.

[2] In her reasons for judgment Madam Justice Dillon, addressing only the issue of liability, held the father liable in assault and negligence. She held the Crown liable in negligence and in light of that conclusion declined to decide the issue of liability for breach of fiduciary duty. The finding of Crown liability rests upon the lifting of the supervision requirement in circumstances where risk factors were, in the words of Madam Justice Dillon, "high, unresolved, and increasing".

[3] The Crown does not dispute the existence of a duty of care. Rather the Crown appeals the order on four grounds. It contends the judge erred in:

1. concluding in these circumstances a failure by a social worker to exercise reasonable care and skill is sufficient to found liability in the absence of evidence of bad faith;

2. finding a causal connection between the omission to prepare a new comprehensive risk assessment in August 2002 and the injury to the child;

3. finding a failure to exercise reasonable care and skill on a basis which had been rejected by the plaintiff's expert; and

4. refusing to allow the Crown's expert to comment on a theory raised for the first time by the judge during argument of a no evidence motion, and which later formed a basis for the decision.

The Circumstances

[4] The child, B.M., was born on May 16, 2002. At the time of his birth his mother, A.V., and father, R.M., resided with the child's maternal grandmother, the litigation guardian O.P., near Castlegar, British Columbia. I shall refer to these four persons as B.M., the Mother, the Father, and O.P.

[5] The circumstances of the Mother's early life are set out in the reasons for

judgment, as is, in some detail, the interaction between Ministry officials and the family. What follows is a brief summary.

[6] Before the Mother and Father met, the Father had a child in Manitoba by another woman. That child, when less than two months old, suffered a fractured leg while in the care of the Father. The Father was charged with assault and pleaded not guilty. In February 2002 the Father was convicted of aggravated assault. The evidence at trial established the assault involved severe force, which would have caused an audible snap as the bone broke.

[7] At the sentencing hearing in Manitoba the court was provided a pre-sentence report that informed the court the Mother and Father were living together in British Columbia and the Mother was due to give birth May 11, 2002. The report did not include a risk assessment. On May 10, 2002, about a week before the birth of B.M., the Father was sentenced by Chief Justice Monnin of the Manitoba Court of Queen's Bench to six month's imprisonment to be served as a conditional sentence, followed by a period of probation. Terms of the conditional sentence included a requirement to attend a parenting course and counselling as directed, an order restraining him from contacting that child or that child's mother except as may be allowed by a court order, and a curfew. The Father was ordered to report to a supervisor by May 16, 2002, in Nelson, British Columbia, near Castlegar.

[8] Even after the trial the Father denied responsibility for his son's broken leg.

[9] The Father returned to British Columbia and reported to his supervisor. On June 5, 2002, his supervisor notified the local office of the provincial Ministry of Children and Family Development of the Father's conviction in Manitoba. A social worker obtained a copy of the conditional sentence order, the probation order and the pre-sentence report, and spoke to the author of the pre-sentence report. The social worker learned there had been no assessment of the counselling services needed by the Father or of his risk to re-offend.

[10] The child protection officers in the local office of the Ministry then opened a file and started an investigation. Based upon the information they had, B.M. was recognized as a child potentially at risk. An immediate risk assessment was

performed by a social worker, followed by a comprehensive risk analysis. It concluded the risk posed by the Father's access to B.M. was high, but was mitigated because B.M. was not left alone in the Father's care. The lead protection worker on the case was Ms. Martens, a senior social worker. She met with the Mother, the Father and O.P. and told the Mother not to leave B.M. with the Father. The family agreed B.M. would not be left alone in the Father's care until it was determined it was safe to do so.

[11] In late June 2002 a risk reduction service plan for B.M. was prepared for the period June 20 to September 20, 2002. That plan included the requirement B.M. not be left alone with the Father.

[12] The trial judge found:

> [13] ... Overall, the risk was considered medium with the mitigating factor being constant supervision by the mother and grandmother. B.M. was found to be a child in need of protection because there was a likelihood that he could be physically abused by R.M. The immediate risk reduction safety and service plan was that the family would ensure that R.M. was not left alone to care for the child and family support was to begin immediately.

[13] For a period of time social workers and a public health nurse attended O.P.'s home. The supervision was generally supported by O.P., who had concerns about the Father's rough handling of B.M. The efficacy of the visits was questioned, however, by the Mother, who found some of them useless. The judge found that by the time visits were reduced to once a week, the Ministry "could not realistically enforce the strategy employed in the action plan regarding no unsupervised access of [the Father] to B.M. Reliance was placed upon the presence of the grandmother in the home as the basic safety net."

[14] It is clear that although the Ministry could not enforce the strategy requiring supervision while the Father was with B.M., both the Mother and O.P. followed the strategy at all times. By late August O.P. had assumed most of B.M.'s care.

[15] The judge found that in mid-July 2002 Ms. Martens received information from Manitoba that the first child's mother reported the Father "had become easily agitated

when caring for the child" and the Father "was reported to have a temper and be easily frustrated".

[16] For a time in August 2002 both the public health nurse involved with the family and Ms. Martens were on vacation. Ms. Martens returned from vacation on August 19, 2002 and prepared a revised risk reduction plan for B.M. dated August 23, 2002. On about that day Ms. Martens informed the family that the restriction on the Father's unsupervised access of B.M. was no more. O.P. suggested, to no avail, that the restriction should stay in place. The Mother and the Father signed the revised plan on August 27 and 28, 2002, respectively. The trial judge found:

> [24] There are no documented reasons within MCFD [the Ministry of Children and Family Development] for lifting the supervision requirement. There was no reassessment of risk documented. Martens could not point to anything that showed what review was undertaken, what analysis was done, or what conclusions were reached that led to the decision that lifting the supervision order was appropriate. It is not known how or why Martens made this decision. Neither she nor anyone else from MCFD testified. However, some of Martens' discovery evidence was read in by the plaintiff. There was no assessment of how the decision fit into guiding principles. The red flag that had been raised by R.M.'s denial of injury to his first son had never been lowered. The information from Winnipeg had never been resolved. There was no feedback on R.M.'s particular risk demonstrative of the child's safety while in his care. Martens described that it had been an ongoing struggle to decide whether to make changes to the initial plan because R.M.'s denial meant that the triggers that led to the assault were unknown so that it was difficult to tailor a service plan. This was identified as the biggest factor under appraisal. This factor never changed. It had never been determined that B.M. would be safe in R.M.'s care.
>
> [25] The original comprehensive risk assessment, which concluded that R.M. was likely to cause harm to B.M. such that a supervisory protective condition was required, remained in effect. Although the parents' cooperation, partial completion of a parenting course, and planned

> ongoing monitoring by MCFD were considered positive indicators, the risk remained as originally assessed and the decision to remove supervision was incompatible with the original assessment. The risk reduction service plan now proposed that R.M. would be given an opportunity to demonstrate through unsupervised access that he could interact with the child safely while MCFD conducted random home visits. This plan was signed by the social worker, R.M. and A.V. on August 27, 2002. O.P. was not involved and her views do not appear to have been considered. When this plan was developed, A.V., R.M. and B.M. were living with O.P. in her home.

[17] Subsequent to implementation of the revised reduction plan the relationship between O.P. on one hand, and the Mother and the Father on the other, deteriorated, at least in part due to the Father's treatment of B.M. The Mother and the Father moved from O.P.'s house within a week of the lifting of the supervision requirement.

[18] In late August 2002, Ms. Martens became aware of this change in the family circumstances and learned that allegations by O.P. of certain rough behaviour of the Father towards B.M. were true. She told O.P. she would replace the supervision requirement the day they spoke, but did not do so. Shortly after, on September 16, 2002, B.M. was alone in the charge of the Father. The Father shook B.M. to the point of injury. B.M. was hospitalized and is now blind. The Father was tried and convicted of aggravated assault, and sentenced to a period of incarceration.

The Trial

[19] The trial proceeded before a judge alone. In addition to testimony by O.P., the plaintiff called Annie Simonds, a social worker formerly employed by the Ministry who was accepted by the court as an expert witness qualified to proffer opinion evidence on child protection practices. The plaintiff also read in passages of the examination for discovery of the Mother, the Father and Ms. Martens.

[20] After the plaintiff's case closed the defence made a no evidence motion, contending there was no evidence of any causal connection between the negligence alleged by the plaintiff and the injuries of B.M.

[21] The judge dismissed the no evidence motion. She referred to the passage in *Athey v. Leonati,* [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 at para. 16: "The causation test is not to be applied too rigidly.... Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without scientific proof". She held:

> [6] There has been evidence in this trial that [the Father] was convicted of committing an aggravated assault against his child in Manitoba (another child, not [B.M.]), that he was sentenced for having committed the aggravated assault, and that a term of his conditional sentence was that he was not to have contact with the child. There has also been evidence adduced that the British Columbia Ministry of Children and Family Development ("the Ministry") was aware of these facts prior to the injury suffered by [B.M.], that the Ministry found [B.M.] to be in need of protection, and that the Ministry imposed a requirement that [the Father] not be allowed access to [B.M.] without supervision to protect [B.M.]. There is also evidence that the Ministry lifted the no access without supervision condition on August 23, 2002 without further risk assessment. Finally, there is evidence that on September 16, 2002, [the Father] committed an aggravated assault against [B.M.] causing serious injury.
>
> [7] Keeping in mind the Supreme Court of Canada's comments regarding the finding of causation in *Athey*, in my view, the plaintiff has presented evidence that may allow for an inference of a causal connection between the removal of the no access without supervision condition and the subsequent injury to [B.M.].
>
> [8] Accordingly, since there is some evidence of causal connection between the negligence alleged by the plaintiff and the injury suffered by [B.M.], the Province's no evidence motion is dismissed.

[22] The Crown then tendered an expert report authored by the witness Margaret Osmond addressing child protection issues that arise in cases similar to those of this family. The Crown did not call Ms. Martens or any employee of the Ministry as a

witness at the trial.

The Judgment

[23] The criticisms of the employees of the Crown as pleaded and argued were broad. The judge focused her conclusions upon the supervision requirement. She summarized the case presented to her as complaining of Ms. Martens:

> [68] ... dropping the supervision requirement for R.M. contrary to the comprehensive risk assessment, allowing B.M. to have unsupervised contact with R.M. notwithstanding that an assessment had not been done as to the cause of R.M.'s assault upon his first child and in face of a finding that there was a likelihood that R.M. would cause serious injury to B.M., and failing to reinstate the supervision requirement after circumstances changed significantly.

[24] The judge held a duty of care existed. She found the standard of care was that of the reasonable social worker in like circumstances and rejected the standard of good faith. The judge then moved to breach of the standard, holding:

> [75] The social workers failed to meet the applicable standard of care in this case when it was decided to remove the supervision provision and when that decision was not reconsidered after significant changes in family circumstances and when a third child protection report was made within a year. At the time that the supervision requirement was removed for R.M., B.M. was a child in need of protection due to the fact that he could be physically harmed by R.M. The criminal conviction provided clear indication of imminent risk in a profession where such clarity is rare. There had been no request to remove the provision. There was no urgency. There was no basis to remove the requirement founded upon protection to B.M. or elimination of risk, the mandatory priority concern. It is not known why the social worker removed the requirement or how the decision was made. The elimination of the supervision requirement was incompatible with the comprehensive risk assessment and no new risk assessment was done. A reasonable social worker would not have lifted the supervision requirement without

performing another risk assessment and without having determined that there was no real risk to B.M. from unsupervised contact with his father. It was not reasonable to fail to complete a new comprehensive risk assessment which was mandatory under the Practice Standards in this circumstance.

[76] The risk to B.M. then increased as A.V. and R.M. left O.P.'s home, when it was clear that R.M. would have sole care of B.M. when A.V. was at work, and when R.M.'s attitude changed. Any doubt about what led R.M. to assault his first son had to be resolved in favour of protection to B.M. A new risk assessment should have been done at this time. On the basis of the existing risk assessment, there was no basis to lift the supervision provision. There was ample opportunity and a stated intention by Martens to re-instate the provision but this was not done. Any danger or risk to B.M. was required by policy to be resolved in favour of protection. Given the previous history, unresolved recidivism of R.M., and risk factors, the plan to leave A.V. and R.M. with only sporadic home visits was unreasonable.

[77] A reasonable social worker in the same circumstance would not have removed the supervision provision. The primary operative principle was protection of B.M. High risk factors had not decreased. There was a failure to follow policy to assess risk. This situation only worsened when A.V. and R.M. left O.P.'s home. It matters not that such a provision could not have remained indefinitely. Priority had to be given to B.M.'s safety and this was still in the short term. The decision to remove the supervision requirement cannot be considered a mere error in judgment in light of the existing comprehensive risk assessment. Further, removal in the circumstance of increased, unresolved risk was unreasonable. The social worker did not act as would be expected of a reasonable social worker in the same circumstance. Failure to do so was in breach of the required standard of care.

[25] Last, the judge approached causation. She held:

[79] The Crown has conceded that it is open to this court to draw an inference of a causal

> connection between the lifting of the supervision term and the injury to the plaintiff. However, the Crown says that there is no evidence that a second comprehensive risk assessment would have resulted in a different decision.
>
> [80] In this case, the family was following the supervision requirement faithfully and there had been no incidents during the time that the supervision requirement was in place from June 20, 2002 to August 23, 2002. There is no evidence that A.V. or O.P. would have allowed R.M. to have unsupervised care of B.M. until the Ministry had determined that B.M. was no longer in need of protection from R.M. B.M. had never been left alone with R.M. while the defendant had imposed the supervision requirement. B.M. was safe. There is a substantial connection between removal of the supervision requirement and R.M.'s assault of B.M. when B.M. was solely in his care shortly thereafter. The decision was inherently risky without resolution of the recidivism issue and without a re-assessment of risk in the changed family circumstances and after the third child protection report. The decision created a dangerous situation whereby R.M. was permitted to have unsupervised access to B.M. despite the fact that the risk factors were high, unresolved, and increasing. Removal of the supervision requirement gave R.M. the opportunity to assault B.M., which was not available to him while the supervision requirement was in place. The assault upon B.M. by R.M. would not have occurred if the supervision requirement had remained in place.

The Legislation

[26] The social workers involved with B.M. and his family are regulated by the *Child, Family and Community Service Act,* R.S.B.C. 1996, c. 46. The *Act* establishes guiding principles for engagement on behalf of children:

> 2 This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:
>
> > (a) children are entitled to be protected from abuse, neglect and harm or threat of harm;

(b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;

(c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;

...

(e) kinship ties and a child's attachment to the extended family should be preserved if possible;

...

(g) decisions relating to children should be made and implemented in a timely manner.

3 The following principles apply to the provision of services under this Act:

(a) families and children should be informed of the services available to them and encouraged to participate in decisions that affect them;

...

4(1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:

(a) the child's safety;

(b) the child's physical and emotional needs and level of development;

(c) the importance of continuity in the child's care;

(d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;

...

(g) the effect on the child if there is delay in making a decision.

[27] Part 3 of the *Act* sets out the scheme for protection of children, including as s. 13(1)(a) the circumstances in which a child is considered to require protection.

13(1) A child needs protection in the following

circumstances:

> (a) if the child has been, or is likely to be, physically harmed by the child's parent;
>
> ...

[28] The *Act* then sets out certain tools available for use in child protection, including family conferences, development of a plan of care, and applications to court for orders protecting a child. Practice standards developed by the Ministry provide for preparation of a Comprehensive Risk Assessment and development of a Risk Reduction Service Plan, although neither of those documents are expressly referred to in the *Act*.

[29] Section 101, which is not relied upon by the Crown in this case, but which is relevant in considering case authority, provides immunity from liability for acts committed in good faith in the exercise of a power, duty or function under the *Act.*

Discussion

1. Standard of Care and Good Faith

[30] The role of good faith in the standard of care, and its absence, is the focus of the central ground of appeal.

[31] In her reasons for judgment Madam Justice Dillon adverted to the Crown's submission on the role good faith, or its absence, may play in a negligence analysis:

> [48] Although the Crown does not argue that there was no duty of care owed, she says that "… the scope of the duty of care owed by social workers employed by MCFD was to act in good faith and to consider relevant factors in making protection decisions about B.M.'s care…" based upon *Dorset Yacht Co. Ltd. v. Home Office*, [1970] A.C. 1004, [1970] 2 All E.R. 294, [1970] 1 Lloyd's Rep. 453, [1970] 2 W.L.R. 1140 (H.L.) [*Dorset Yacht*], and *L.C. v. British Columbia (Ministry of Children and Families*), 2005 BCSC 1668, 49 B.C.L.R. (4th) 164 [*L.C.*]. The Crown says that there is no evidence to establish that the social workers failed to act in good faith and that the most that can be said is that they failed to comply with

practice standards.

[32] At para. 70 the judge found the standard that applied is that of a reasonable social worker in like circumstances. She seemed to reject the proposition "a social worker was acting in good faith" could either satisfy the standard of care or act as a defence, stating:

> [70] The standard of the reasonable social worker in like circumstances is the appropriate standard to apply here. This was the standard applied in the case of an alleged negligent police investigation in *Hill* where, at para. 68, this standard was found to provide a "flexible overarching standard that covers all aspects of investigatory police work and appropriately reflects its realities." This standard incorporates "an appropriate degree of judicial discretion, denies liability for minor errors or mistakes and rejects liability by hindsight" (*ibid*.). The standard of good faith, described sometimes as a defence, was rejected in *M.B*. [2000 BCSC 735] at paras. 169-170 as applying to operational decisions of a supervisory nature involving the day-to-day tasks of a social worker.

[33] The judge next considered *D.H. (Guardian ad litem of) v. British Columbia*, 2008 BCCA 222, 81 B.C.L.R. (4th) 288 and *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129:

> [71] The reasonableness standard was also applied to a probation officer in *D.H.* at para. 67, where Saunders J.A. said:
>
> > In *Hill*, the Supreme Court of Canada found the appropriate standard to impose in relation to the tort of negligent investigation by a police officer was that of a reasonable police officer in similar circumstances. In this case, I consider that the appropriate standard is that of the reasonable probation officer in similar circumstances. The considerations that supported the standard for a police officer in *Hill* support this standard: it is flexible and may be tailored to reflect the realities of the

> case, it is parallel to the standards applied in other negligence cases and in particular to cases concerning the negligence of professionals, and it fits easily with the common law factors usually considered in determining the content of the standard of care such as the likelihood of harm, the gravity of the potential harm, external indicators of reasonable conduct, statutory standards and the burden incurred to prevent the injury.

[72] In considering this standard of care, the degree of discretion is important. As stated in *Hill* at para. 73:

> I conclude that the appropriate standard of care is the overarching standard of a reasonable police officer in similar circumstances. This standard should be applied in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made - circumstances that may include urgency and deficiencies of information. The law of negligence

> does not require perfection of professionals; nor does it guarantee desired results (*Klar*, at p. 359). Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere "errors in judgment" which any reasonable professional might have made and therefore, which do not breach the standard of care (see *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351; *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (C.A.V.); *Klar*, at p. 359.)
>
> Other factors to consider include "the likelihood of known or foreseeable harm, the gravity of harm, [and] the burden or cost which would be incurred to prevent the injury" (*Hill* at para. 70).

[34] Counsel for the Crown submits the judge erred in her treatment of the issue of good faith, or its absence, in considering the content of the standard of care. He framed the issue two ways: negligence *simpliciter*, absent evidence of bad faith, is not sufficient to found liability; and, a social worker who acts in good faith is not liable for errors in judgment.

[35] The essence of the Crown's complaint on the issue of the standard of care is that the standard found by the judge, simply that of a reasonable social worker in similar circumstances, is wrong. The Crown relies upon *G.(A.) v. Supt. of Fam. & Child Service* (1989), 38 B.C.L.R. (2d) 215, 61 D.L.R. (4th) 136 (C.A.), and *D.(B.) v. British Columbia* (1997), 30 B.C.L.R. (3d) 201, [1997] 4 W.W.R. 484 (C.A.), in support of its general proposition that given the role of social workers, the plaintiff was required to prove an absence of good faith in an error of judgment.

[36] The Crown further refers to the need to provide a zone of protection for social workers in order that they may exercise their statutory powers "free from the fear of liability". It draws an analogy between the social worker, fashioning and removing the

supervision requirement, with a judge imposing terms in a conditional order or probation order. In this analogy, the actions of the social worker are akin to determining the Father should be restrained from having unsupervised access with his infant son. Such a term could have been imposed, says counsel for the Crown, by Chief Justice Monnin of the Manitoba Court of Queen's Bench, and if it had been, would be beyond the reach of the tort of negligence on authority such as *Sirros v. Moore*, [1975] 1 Q.B. 118, (U.K.C.A.), quoted with approval in *Morier v. Ricard*, [1985] 2 S.C.R. 716, 23 D.L.R. (4th) 1, at 738-739. So too, it is contended, the decision of the social worker in this case to permit unsupervised access by the Father of B.M. was made in the exercise of a statutory power and, absent bad faith, is beyond the reach of the tort of negligence.

[37] Liability of public officials has been addressed in a train of cases in the Supreme Court of Canada in recent years, starting with *City of Kamloops v. Neilson,* [1984] 2 S.C.R. 2. The main ground of discussion in these cases has been duty of care. Focusing upon duty of care and the role discretion and policy play in that issue, this Court established an approach to liability of social workers consistent with *Dorset Yacht Co. Ltd. v. Home Office,* [1970] A.C. 1004, [1970] 2 W.L.R. 1140, [1970] 2 All E.R. 294 (H.L.) first in *G.(A.)*, affirmed and arguably extended in *D.(B.)*. Since those decisions the Supreme Court of Canada has published *Hill*, a case of alleged negligent investigation by police officers. This Court applied *Hill* in *D.H*. These cases describe the standard of care as, respectively, that of the reasonable police officer and probation officer in similar circumstances.

[38] *G.(A.)* and *D.(B.)* along with *Hill* and *D.H.*, provide the analytical framework for this ground of appeal. The question on this appeal is the role, if any, of good faith or its absence in the standard of care analysis.

[39] In *G.(A.)* this Court addressed the liability at common law of social workers who had apprehended children from their family, and found no basis for such liability. Mr. Justice Esson did not reach a conclusion on the application of s. 23 of the *Family and Child Service Act*, S.B.C. 1980, c. 11, the provision in force at the time (similar to present s. 101), providing statutory immunity from liability for actions taken in good faith. In his pellucid reasons for judgment, Mr. Justice Esson addressed the social worker's discretionary power, and the issue of due care in the exercise of discretion,

making reference to good faith in the course of his reasons. Commenting o*n Home Office v. Dorset Yacht Co.,* he said at pp. 226-7:

> This is not a case in which it can be said that the defendants in exercising the discretion imposed upon them acted in abuse or excess of power. Clearly it was a case in which a discretion was vested in them. There were errors of judgment in exercising that discretion but that is not a proper basis for imposing liability. The circumstances which confronted the social workers in this case were very like those discussed by Lord Reid at p. 301 when he said:
>
> > Governors of these institutions and other responsible authorities have a difficult and delicate task. There was some argument whether the present system is fully authorised by the relevant statutes, but I shall assume that it is. That system is based on the belief that it assists the rehabilitation of trainees to give them as much freedom and responsibility as possible. So the responsible authorities must weigh on the one hand the public interest of protecting neighbours and their property from the depredations of escaping trainees and on the other hand the public interest of promoting rehabilitation. Obviously there is much room here for differences of opinion and errors of judgment. In my view there can be no liability if the discretion is exercised with due care. There could only be liability if the person entrusted with discretion either unreasonably failed to carry out his duty to consider the matter or reached a conclusion so unreasonable as again to show failure to do his duty.
>
> In that passage, it is stated that there can be no liability if the discretion is exercised with due care. In my view, “due care” in that context does not refer to the degree of care required by the general law of negligence. In the sense in which the term is there employed, there will have been want of due care

> only if there has been a failure to carry out the duty to consider the matter, or if the conclusion reached is so unreasonable as to show a failure to carry out the duty.
>
> [Emphasis added.]

[40] And at 228 he referred to ‘good faith’ in considering whether there had been a want of ‘due care’:

> The fault established against Mrs. McHale was that she cared too much or, as the trial judge put it, that she got "too close to this case." There was no absence of good faith. There was no collateral purpose. Accepting that the defendants were stubborn and, at times, unreasonable, it remains the case that their errors were errors of judgment flowing from their belief, based on grounds of some substance, that the children were in need of protection. Applying the law as laid down in *Dorset Yacht* to those facts, I conclude that the conduct of the social workers provides no basis for holding them liable for any damages which may have been caused to the plaintiffs by the apprehension.
>
> [Emphasis added.]

[41] In *D.(B.)* this Court again had occasion to address the issue of liability of a social worker, this time in placing a 13-year-old child known to be short tempered and rough, in a foster home in which a three-year-old child of the foster mother resided. An action was brought against the social worker after the three year old was assaulted by the foster child, alleging negligence in failing to tell the foster mother all that was known of the foster child’s behaviour, and as well for placing another foster child in the home.

[42] Unlike the case at bar, it engaged the application of s. 23 of the *Family and Child Service Act*, and the basis for the impugned judgment was before the court through the explanations of social workers advanced as part of the defence of good faith.

[43] In his reasons for judgment Mr. Justice Donald, addressing the standard of care, first referred to then s. 23:

> 23 No person is personally liable for anything done or omitted in good faith in the exercise or purported exercise of the powers conferred by this *Act*.

[44] Mr. Justice Donald observed:

> [40] I have said that the finding of bad faith was contrary to authority. The theme running through the important cases in this area is the difficulty facing those who work with disturbed children. Decisions have to be made 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.
>
> [41] 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.

[45] Mr. Justice Donald then referred to *G.(A.)*, and *McAlpine v. H.(T.)*, 57 B.C.L.R. (2d) 1, [1991] 5 W.W.R. 699 (B.C.C.A.). In *McAlpine* a majority of this Court, applying then s. 23, held that a decision to place two adolescent boys in a foster-like situation on Saltspring Island which culminated in the destruction of a neighbouring cottage was a matter of judgment, not of bad faith, and was not a basis for a finding of liability.

[46] Mr. Justice Donald concluded:

> [48] I take from these various judicial opinions a recognition that decisions relating to child welfare are inherently difficult and that liability cannot be founded on errors of judgment made in good faith. In the instant case I have found no basis in the evidence for inferring bad faith on the part of Mr. Singh. It was a matter of judgment whether the D. house was a suitable placement. Similarly, the fullness of disclosure of J.F.'s background was also a matter of judgment. The evidence will not reasonably support the finding that Mr. Singh exercised his judgment without turning his mind to the safety of S.. I would allow the appeal from the finding of liability.

[Emphasis added.]

[47] Thus in British Columbia, prior to *Hill*, due care (in *G.(A.)*) and good faith (in *(D.(B.)*), were seen as important aspects of a claim in negligence against a social worker. The question is whether this remains so, post *Hill*, and (using the Crown's focus on good faith), at what stage good faith is relevant.

[48] As can be seen from *G.(A.)* and consequently *D.(B.)*, the discussion of the relationship of the exercise of judgment, due care, good faith and liability for injury is based upon observations in *Dorset Yacht.*

[49] In *Hill*, Chief Justice McLachlin, writing for the majority, did not advert to *Dorset Yacht*, nor did she comment on the role of good faith in determining the standard of care. Justice Charron referred to *Dorset Yacht* but did so in her discussion of duty of care. What to do with good faith or its absence has not, on my understanding of the recent cases from the Supreme Court of Canada, been addressed. In *D.H.*, we adverted to *Dorset Yacht* at para. 85, but without engaging a discussion of the issue of good faith.

[50] Thus we are left to reconcile this Court's jurisprudence in *G.(A.)* and *D.(B.)*, both social worker cases, with the recent authority.

[51] In *D.H.* I approached *Hill* and the issue of standard of care of a probation officer in these words, referred to by the judge:

> [67] In *Hill*, the Supreme Court of Canada found the appropriate standard to impose in relation to the tort of negligent investigation by a police officer was that of a reasonable police officer in similar circumstances. In this case, I consider that the appropriate standard is that of the reasonable probation officer in similar circumstances. The considerations that supported the standard for a police officer in *Hill* support this standard: it is flexible and may be tailored to reflect the realities of the case, it is parallel to the standards applied in other negligence cases and in particular to cases concerning the negligence of professionals, and it fits easily with the common law factors usually considered in determining the content of the standard of care such as the likelihood of harm, the

gravity of the potential harm, external indicators of reasonable conduct, statutory standards and the burden incurred to prevent the injury.

[68] In considering the standard of care, the degree of discretion and the policy reason for the discretion is significant. The reasoning in *Hill* on this issue is apt to the role of the probation officer:

> [73] ... This standard [the reasonable police officer in similar circumstances] should be applied in a manner that gives recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made – circumstances that may include urgency and deficiencies of information. . . . The law distinguishes between unreasonable mistakes breaching the standard of care and mere "errors in judgment" which any reasonable professional might have made and therefore, which do not breach the standard of care ... [Emphasis added.]

[52] For the same reasons it seems to me the trial judge was correct in applying the

standard of the reasonable social worker in like circumstances.

[53] The consequence of this conclusion is that good faith is not a discrete aspect of a claim in negligence directed to actions of a social worker.

[54] Notwithstanding the articulation of the standard of care consistent with *Hill,* I consider the presence or absence of good faith may be an important consideration in determining whether the standard of care has been breached where the basis for the judgment is laid squarely before the court. In those cases it seems to me that the presence or absence of good faith will be powerful in a judge's characterization of actions as being those of a reasonable social worker in similar circumstances. In *G. (A.)* Mr. Justice Esson said this at 229, referring to the words "good faith" used in s. 23:

> ... The concept of good faith has obvious similarities to what Lord Reid [in *Dorset Yacht*] called: "a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion." Despite these similarities, s. 23 may provide protection in respect of the exercise of a discretionary power in cases where liability would otherwise be imposed.

[55] While I recognize Mr. Justice Esson made those comments on "good faith" in reference to a statutory provision, they usefully describe the general concept, explain its objective aspect and demonstrate the relationship of good faith to the standard of reasonableness. There is not, however, a perfect overlap between the two notions, and, consistent with *Hill*, I conclude the correct expression of the standard of care in this case is that of the reasonable social worker in like circumstances.

[56] Further, whether expressed as an issue of good faith or of reasonableness, the concerns addressed in *G.(A.)* and *D.(B.)* as to the difficult, sensitive and conflicting task of a social worker, and the broad range of opinion and judgment that might satisfy the standard, continue to resonate, to the extent the evidence before the court engages those considerations. The degree of professional discretion in a particular case, and the opportunity for genuine disagreement on the wisdom of any particular course of action, will be important aspects for consideration in a case such as this:

see *D.H.*, paras. 84-85.

[57] The significance of the vulnerability of decisions of social workers to hindsight is illustrated by the nature of the cases this Court has considered. *G.(A.)* for example, is a case of an allegation the social worker had interfered excessively in the family. *McAlpine* is a case in which criticism was levelled for placing adolescent boys in a home next door to the persons eventually injured by their actions. *D.(B.)* is a case in which the social worker was criticized for failing to take sufficient care of a family with whom children in need of protection were placed. This is a case in which the social worker is criticized for failing to protect a child in need of protection. In assessing compliance with the standard of care, hindsight must not be so critical as to ignore the dilemma.

[58] The question then is whether the judge demonstrated error in finding a breach of the standard of care. In my view she did not. She concluded the change in the supervision requirement, in the face of growing risk and the social worker's own statement she would reinstate the supervision requirement, did not meet the standard of care. It is true that the judge did not discuss the scope for disagreement in child protection decisions. That she did not is, I consider, largely the product of the evidence before her, which did not develop the social worker's justification, explanation, or rationale for the impugned actions. Absent an explanation from the social worker or other person involved in the decision, as to the basis of her judgment to revoke the supervision requirement, and in the face of the information before the social worker recited in paras. 75-77 replicated above, it was, in my view, open to the judge to reach the conclusion she did on the evidence that was before her.

[59] In aid of their main submission on the content of the standard of care, Counsel for the Crown drew an analogy between the social worker and a judge imposing terms in a conditional sentence order under the *Criminal Code*. I do not consider this an apt analogy; neither their purposes nor the breadth of considerations a social worker and a judge bring to bear upon a decision are parallel.

[60] Further, the Crown's reliance upon the statutory authority of the social worker in this case, in my view, is not of assistance because the impugned action, absent explanation by the social worker, appears entirely at odds with the determination

under s. 13(1)(a) of the *Act* that B.M. “is likely to be physically harmed by the child’s parent”, and the comprehensive risk assessment which called for adult supervision to ensure the Father was not alone with B.M.

[61] In conclusion on this point, I see no basis upon which to interfere with the judge’s conclusions on the content of the standard of care, or breach of that standard.

2. The Causal Connection

[62] The Crown contends the judge erred in finding a causal connection between the actions of Ms. Martens and the injury to B.M. It says there is no evidence recission of the supervision requirement before a new comprehensive risk assessment was performed, was a cause of the injury to B.M., and there is no evidence from which to infer a comprehensive risk assessment would have contradicted Ms. Marten’s decision to rescind the supervision condition. The Crown is critical of the judge’s conclusions at paras. 75-77 replicated above and characterizes those conclusions as the judge carrying out her own risk assessment.

[63] The leading authority on causation is *Hanke v. Resurfice Corp.*, 2007 SCC 7, [2007] 1 S.C.R. 333. There, at para. 21 Chief Justice McLachlin affirmed the basic test for determining causation is the “but for” test.

[64] In this case the judge directed her criticism of the social worker’s actions to recission of the supervision requirement, and failure to reinstate it. Absent a new comprehensive risk assessment with a different conclusion, the judge found this was a breach of the standard of care. The question for the judge, then, was whether, but for the action that she found to be the breach, which may loosely be stated as failing to ensure a supervision requirement was in place, the injury to B.M. would not have occurred.

[65] The judge addressed this issue in para. 80, which I repeat for convenience:

> [80] In this case, the family was following the supervision requirement faithfully and there had been no incidents during the time that the supervision requirement was in place from June 20, 2002 to August 23, 2002. There is no evidence that A.V. or O.P. would have allowed R.M. to have unsupervised care of B.M. until the Ministry had

> determined that B.M. was no longer in need of protection from R.M. B.M. had never been left alone with R.M. while the defendant had imposed the supervision requirement. B.M. was safe. There is a substantial connection between removal of the supervision requirement and R.M.'s assault of B.M. when B.M. was solely in his care shortly thereafter. The decision was inherently risky without resolution of the recidivism issue and without a re-assessment of risk in the changed family circumstances and after the third child protection report. The decision created a dangerous situation whereby R.M. was permitted to have unsupervised access to B.M. despite the fact that the risk factors were high, unresolved, and increasing. Removal of the supervision requirement gave R.M. the opportunity to assault B.M., which was not available to him while the supervision requirement was in place. The assault upon B.M. by R.M. would not have occurred if the supervision requirement had remained in place.

[66] In my view the error on causation propounded by the Crown is not established. The finding of causation is solidly attached to the breach of the standard of care described in the reasons for judgment and discussed above. It was not necessary for the judge to find that a new comprehensive risk assessment would have contradicted Ms. Marten's decision because the fault that anchors the judge's decision was the lifting (and not reinstating) the supervision requirement, given the information known to the social workers.

[67] I would not accede to this ground of appeal.

3. Finding of a Breach of the Standard of Care

[68] The Crown submits further on the issue of breach of the standard of care that there was no expert evidence that a reasonable social worker would not have removed the supervision requirement in similar circumstances. It says the judge erred in drawing her own conclusion to that effect, and was wrong to ignore evidence of the plaintiff's expert that she could not form that opinion, citing *R. v. Harper,* [1982] 1 S.C.R. 2, 133 D.L.R. (3d) 546, *R. v. Sheppard,* 2002 SCC 26, [2002] 1 S.C.R. 869.

[69] Contrary to the Crown's submission, the expert witness, on my review of the

evidence, did not testify she could not form that opinion; the passage of her testimony relied upon by the Crown was directed to a different question.

[70] Nor do I see the evidentiary gap posited by the Crown. For example, in her expert report, the plaintiff's expert included in her list of actions falling below the standard, "[t]he decisions to withdraw supports and to withdraw the requirement that [the Father's] access to [B.M.] be supervised were maintained despite significant changes in the family circumstances". She testified her conclusion was in reference to the revised risk assessment plan of August 23, 2002, that is, the document that effected the lifting of the supervision requirement.

[71] This evidence amounts to sharp expert criticism of the revocation, by means of the August 23, 2002 document, of the supervision requirement. Coupled with evidence of the practice of social work and the regulatory scheme, the evidence of the events and the evidence of the escalating risk factors, this evidence provided a sufficient evidentiary basis for the judge's conclusion on the issue of breach of the standard of care.

[72] In my view the judge did not demonstrate a failure to appreciate the evidence, or reach a decision that was unsupported by evidence. I would not accede to this ground of appeal.

4. Refusal to Permit Ms. Osmond to Comment on a Theory of the Case

[73] This ground of appeal is directed to a question asked by the judge during argument on the no evidence motion as to whether an inference of negligence could be drawn from the criminal conviction of the Father alone. The Crown's expert was not permitted to answer that question. The Crown says the judge then found liability on the basis of the criminal conviction alone, thus demonstrating error.

[74] I do not read the reasons for judgment as founding liability on the thin ground of the Father's criminal conviction. Rather in the passages I have replicated, the judge focuses upon risk and knowledge of risk by the supervisor.

[75] I would not accede to this ground of appeal.

Other

[76] In the Crown's factum, arguments were advanced on the fairness of the trial. During the hearing counsel advised the Court he was not advancing this issue. I have, therefore, not addressed it in these reasons, and am of the view the submission framed in the factum is without merit.

Conclusion

[77] For the reasons I have stated I would dismiss the appeal.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Levine"

I AGREE:

"The Honourable Mr. Justice Groberman"