

■ LIABILITY CONSIDERATIONS IN TRANSITIONING TO FIRST NATIONS JURISDICTION OVER CHILD AND FAMILY SERVICES

Presented By:

Eileen Vanderburgh, Partner

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OVERVIEW – SCOPE OF PRESENTATION

What legal liability is assumed by an Indigenous governing body who provides child and family services under the *Act respecting First Nations, Inuit and Metis children, youth and families* (the “Act”)?

What are the legal principles developed through the common law on the scope of liability for provincial governments providing child and family services? How might those principles apply to Indigenous governing bodies?

OVERVIEW - ISSUES

Legal Basis for liability of governing bodies providing child and family services

- Claims in negligence in performance of duties
 - Non-delegable duties owed to children in care
 - Duty to family members of children in care
 - Vicarious liability of governing bodies for wrongful actions of agencies, employees and care-givers
 - Statutory immunities for good faith acts

OVERVIEW - ISSUES

- Claims for breach of fiduciary duty
- Damage awards
- Managing the risks

LEGAL BASIS OF LIABILITY - NEGLIGENCE

Negligence is the most commonly pleaded cause of action giving rise to direct and vicarious liability for governing bodies. In order to establish a claim in negligence, the plaintiff must prove that

- The governing body **owed the plaintiff a duty of care,**
- The governing body **breached the duty of care,**
- The plaintiff suffered **damages which were a reasonably foreseeable consequence** of the breach, and which were **caused** by the breach.

LEGAL BASIS OF LIABILITY - NEGLIGENCE

Commonly pleaded negligence claims against child welfare service providers (including provincial and federal governments) include

- a failure to apprehend the child,
- a failure to supervise and/or negligent supervision of a care-giver,
- negligent placement, and
- negligent performance of specific statutory duties.

LEGAL BASIS OF LIABILITY - NEGLIGENCE

In a negligence claim, whether a defendant in an action owes the plaintiff a duty of care requires either

- an analysis of existing precedent that either recognizes or does not recognize a duty of care in the particular circumstances of the claim; or
- The application of a three-part test referred to as an “*Anns* analysis” to the circumstances.

LEGAL BASIS OF LIABILITY - NEGLIGENCE

Anns analysis

- Is the **risk of the type of damage suffered by the plaintiff reasonably foreseeable to the class of plaintiff?**
- Is there a **relationship of sufficient proximity** between the parties such that it would be **just to impose a duty of care?**
- If the first two elements are met, are there **policy reasons to negate a duty of care?**

LEGAL BASIS OF LIABILITY – DUTY OF CARE

- A governing body owes a duty of care to children and families in the exercise of their statutory powers and duties.
- A governing body may be **directly liable** to a child or family based on its own acts or omissions in delivering child and family services, or may be **vicariously liable** for the acts or omissions of agencies and others who are employed or retained to deliver services.

LEGAL BASIS OF LIABILITY – DUTY OF CARE

Direct liability can arise from the negligence of the governing body in its performance of its statutory duties, for example, failing to comply with statutory obligations around the placement of children in care. The governing body may be liable for breaches of its statutory obligations even where the performance of those duties has been delegated to an agency or service provider under the **doctrine of non-delegable duty**.

LEGAL BASIS OF LIABILITY – DUTY OF CARE

- Provincial child welfare authorities are subject to the **non-delegable duty** doctrine, which provides that a party upon whom the law has imposed a **strict statutory duty to do a positive act cannot escape liability by delegating the work to another.**
- A non-delegable duty of care ensures that the governing body responsible for performing certain statutory duties will retain its obligation to perform those duties.

LEGAL BASIS OF LIABILITY – DUTY OF CARE

In the context of child and family services, when the government apprehends a child, **it assumes custody of that child and becomes responsible for the care, maintenance and physical well-being of the child** until the child is placed in a foster home or other home. **This is a non-delegable duty:** *K.L.B. v. British Columbia*, 2003 SCC 53

LEGAL BASIS OF LIABILITY– DUTY OF CARE

In the case of a breach of non-delegable child welfare duties, the government will be **vicariously liable** for damages that flow from the breach even if the duties were properly delegated to an agency and the breach of the duty was committed solely through the acts or omissions of the agency.

LEGAL BASIS OF LIABILITY – DUTY OF CARE

In the case of Indigenous governing bodies who exercise their jurisdiction over child and family services and establish their own legal regime, the concept of non-delegable duties in relation to child protection services, and in particular the apprehension of children, may be applicable.

LEGAL BASIS OF LIABILITY – DUTY OF CARE

Under the doctrine of vicarious liability, in addition to liability for non-delegable duties, governing bodies may also be held liable for the wrongful acts or omissions of their service providers and employees, **including where the wrongful conduct was intentional.**

LEGAL BASIS OF LIABILITY – DUTY OF CARE

In order to establish vicarious liability against a governing body or agency a plaintiff must prove:

- A sufficiently **close relationship between the governing body or agency and the wrongdoer** such that a claim for vicarious liability is appropriate.
- A sufficient connection to the wrongdoer's assigned tasks such that the conduct is a **materialization of risks** created by the governing body or agency.

LEGAL BASIS OF LIABILITY – DUTY OF CARE

Courts have held that, generally, the relationship between governing bodies and foster parents is not sufficiently close to impose vicarious liability on governing bodies for abuses committed by foster parents against children in their care: *K.L.B v. British Columbia*, 2003 SCC 51

LEGAL BASIS OF LIABILITY – DUTY OF CARE

Who is the duty owed to?

10 (1) The best interests of the child must be a **primary consideration** in the making of decisions or the taking of actions in the context of the provision of child and family services in relation to an Indigenous child and, **in the case of decisions or actions related to child apprehension, the best interests of the child must be the paramount consideration.**

LEGAL BASIS OF LIABILITY – DUTY OF CARE

The explicit recognition in the *Act* that the best interests of the indigenous child are paramount in child apprehension cases, is consistent with case law establishing that child welfare authorities do not owe a duty of care to parents and other family members in child apprehension cases.

LEGAL BASIS OF LIABILITY – DUTY OF CARE

“The deciding factor for me, ... is the potential for conflicting duties: imposing a duty of care on the relationship between the family of a child in care and that child’s court-ordered service providers creates a genuine **potential for “serious and significant” conflict with the service providers’ transcendent statutory duty to promote the best interests, protection and well-being of the children in their care.**”

Justice Abella in *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38

LEGAL BASIS OF LIABILITY – STANDARD OF CARE

Whether or not conduct amounts to a breach of duty is measured against the applicable **standard of care** which may be set out in legislation, policy, common law standards and standards for particular professions and occupations.

LEGAL BASIS OF LIABILITY – STANDARD OF CARE

- The minimum national standards set out in the *Act* for child protection matters and any standards set out in laws adopted by Indigenous governing bodies will form the basis for the standard of care.
- Under the *Act*, the paramount consideration in child apprehension is the best interest of the indigenous child, as defined and described in the *Act*.

LEGAL BASIS OF LIABILITY – STATUTORY IMMUNITY

Most provincial child welfare statutes include a form of statutory immunity which bars claims for loss or damage suffered by a person by reason of **acts or omissions committed in good faith** in the exercise of powers conferred by the relevant act. In order for a plaintiff to succeed in an action for damages, the plaintiff must establish the authority or individual was **acting in bad faith**.

LEGAL BASIS OF LIABILITY – STATUTORY IMMUNITY

The rationale stated in the case law for statutory immunity in claims arising in child protection matters is a recognition of the challenges faced by those making decisions about the care of vulnerable children where the outcomes are unpredictable. Statutory immunity is said to permit social workers and others to do their jobs without fear of making a mistake.

LEGAL BASIS OF LIABILITY – STATUTORY IMMUNITY

Where there is statutory immunity, the presence or absence of good faith is an important consideration in determining whether the standard of care has been breached. In a case involving the placement of a vulnerable youth, the court equated “**good faith**” with an “**honest belief**” that the placement was suitable, and found the social worker’s failure to obtain the necessary information amounted to bad faith: *C.H. v. British Columbia*, 2004 BCCA 385.

LEGAL BASIS OF LIABILITY – BREACH OF FIDUCIARY DUTY

Although the breach of a fiduciary duty is commonly pleaded along with negligence in claims arising from child protection matters, it is more difficult for a plaintiff to establish. A fiduciary duty is a trust-like duty, involving duties of loyalty and an obligation to act in a disinterested manner that puts the recipient's interest ahead of all other interests. A fiduciary duty has, at its core, an undertaking of loyalty on the part of the fiduciary to act in the best interests of the beneficiary.

LEGAL BASIS OF LIABILITY – BREACH OF FIDUCIARY DUTY

Concern for the best interests of the child informs the **fiduciary relationship of a parent or a person standing in the place of a parent**. 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 or exploits their vulnerability.

LEGAL BASIS OF LIABILITY – BREACH OF FIDUCIARY DUTY

“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.**”

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

DAMAGES

Where liability against the Indigenous governing body and others has been established, the courts may award **compensatory damages** under the following categories:

- Pecuniary damages,
- Non-pecuniary damages, and
- Aggravated damages.

DAMAGES

Pecuniary damages are awarded to compensate a plaintiff for **losses that have monetary value**. For example, they include: (a) special damages such as pre-trial cost of care, pre-trial loss of working capacity and other pre-trial out-of-pocket expenses; (b) future loss of earning capacity; and (c) future cost of care such as counselling, therapy, medical treatments and prescriptions.

DAMAGES

In cases involving harm to children, pecuniary damages can be hard to establish in law, because the plaintiff's **losses must be causally related to the conduct at issue** in order for the losses to be compensable. This can be difficult for claims advanced many years after the events once a plaintiff becomes an adult.

DAMAGES

In addition to pecuniary damages, the plaintiff will be entitled to **compensation that is fair and reasonable for non-pecuniary damages**, which are awarded to compensate a plaintiff for **losses that cannot be monetarily quantified**. Non-pecuniary damages include pain, suffering and loss of enjoyment of life.

DAMAGES

Aggravated damages are designed to compensate, depending upon the circumstances under which the loss or injury has occurred. Aggravated damages are not ordered as punishment but for circumstances which have peculiarly aggravated the loss or injury.

DAMAGES

The court may also award **punitive damages** which are intended to punish the wrongdoer rather than compensate the plaintiff for his or her losses.

Punitive damages are only recoverable against the wrongdoer. They are not recoverable from a governing body or agency who is found to be vicariously liable for the wrongdoer's actions.

MANAGING THE RISKS

- Development of clear operational policies and protocols
- Hiring and training of employees
- Supervision and support of care-givers
- Limiting liability through laws passed by the governing body
- Liability insurance

Thank you

Eileen Vanderburgh
Alexander, Holburn, Beaudin + Lang LLP
evanderburgh@ahbl.ca