IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Milbury v. Nova Scotia (Attorney General)*, 2006 NSSC 293

Date: 20061016
Docket: S.H. No. 192144
Registry: Halifax

Between:

Elizabeth Ann Milbury

Plaintiff

v.

The Attorney General of Nova Scotia, representing Her Majesty The Queen in Right of the Province of Nova Scotia; and **The Children's Aid Society of Halifax County,** a body corporate, incorporated under the laws of Province of Nova Scotia; and **Family & Children's Services of Annapolis County**, a body corporate, incorporated under the laws of the Province of Nova Scotia; and **The Nova Scotia Home for Coloured Children**, a body corporate, incorporated under the laws of the Province of Nova Scotia

Defendants

Judge: The Honourable Justice M. Heather Robertson

Heard: May 23, 2006, in Halifax, Nova Scotia

Written Decision: October 16, 2006

Counsel: Raymond F. Wagner and Fiona Imrie, for the plaintiff
Terry D. Potter, for the AGNS
Bruce Gillis, Q.C., for Family & Children's Services of Annapolis County
John Kulik and Jane O'Neill, for Nova Scotia Home for Coloured Children
Michael J. Wood, Q.C. for Children's Aid Society of Halifax

Robertson, J.:

[1] Elizabeth Ann Milbury is one of 62 former residents of the Nova Scotia Home for Coloured Children (NSHCC) making claims for physical and/or mental and/or sexual abuse suffered while resident there. This is the first challenge made by the defendants against these 62 claimants by an application for summary judgment on the grounds that:

1. There is no genuine issue for trial as the causes of action cannot be sustained and

2. The plaintiff's claims for vicarious liability, negligence and breach of contract are barred by operation of the *Limitations of Actions Act.*

[2] In the action commenced by the plaintiff Mrs. Milbury dated the 8th day of January, 2003, she named as defendants, The Attorney General of Nova Scotia, the Children's Aid Society of Halifax, the NSHCC and the Family & Children's Services of Annapolis County.

[3] At the commencement of this proceeding the plaintiff informed the court the action against the Children's Aid Society of Halifax was to be dismissed without cause.

[4] Counsel for Mrs. Milbury has filed with the court an amended statement of claim dated May 23, 2006 that significantly broadens the original pleadings. Counsel for the defendant NSHCC objected, saying the application was not properly before the court and the amendments were made simply to fit the cause of action within the cause of breach of fiduciary duty to avoid limitation periods and that the amendments came late in the day. No notice of an application to amend pleadings had been given.

[5] Counsel for Mrs. Milbury says that the original pleadings were filed before a trilogy of cases decided by the Supreme Court of Canada, from October 2003 forward necessitating the amended document. *K.L.B. v. British Columbia,* [2003] 2 S.C.R. 403; *M.B. v. British Columbia,* [2003] 2 S.C.R. 477; and *E.D.G. v. Hammer,* [2003] 2 S.C.R. 459. Further he says that filing claims on behalf of all of his client group has been a protracted process and that each plaintiff has had to

respond to multiple and lengthy interrogatories from each of the named defendants, in explanation for the delay in filing the amended statement of claim.

[6] He notes the Attorney General of Nova Scotia has not yet filed a defence, therefore the pleadings are not closed. I agree with him on this point.

[7] All counsel here agreed that a challenge to the amended statement of claim may be made by subsequent application but for the purpose of this summary judgment application, the amended document will stand.

***CIVIL PROCEDURE RULES*; LAW RELATING TO SUMMARY JUDGMENT**

> Application for a summary judgment
>
> 13.01 After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> > (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
> >
> > (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or
> >
> > (c) the only arguable issue to be tried is as to the amount of any damages claimed.

[8] The law is well settled that the applicant bears the initial burden of establishing there is no arguable issue of fact to be determined at trial. If that burden is met the respondent must show that her case has a real chance of success. *United gulf Developments Ltd. V. Iskandar* [2004] N.S.J. No. 66 N.S.C.A. paras. 9 and 10; *MacNeil v. Bethune* [2006] N.S.J. No. 62, N.S.C.A., para. 21.

[9] The plaintiff in the alternative asks the court to consider the application of *CPR* 13.02 (a) and (k):

> 13.02
>
> On the hearing of an application under rule 13.01, the court may on such terms as it thinks just
>
> (a) give such directions as may be required for the examination of any party or witness, or for the production of any books or document or copy thereof, or for the making of any further inquiries; [E. 14/4(4)]
>
> (k) grant any other order or judgment as it thinks just.

[10] The plaintiff in resisting this application has filed her own affidavit and those of her two older sisters, Shirley Melanson and Pauline Comeau who were also resident at the NSHCC at the time the plaintiff was there. The plaintiff says these affidavits provide material facts to support the plaintiff's claim.

[11] The plaintiff has also responded to interrogatories filed by the defendants. These interrogatories dated July 16, 2003 and June 29, 2005, form part of the pleadings for consideration by the court. *Compass Fisheries v. Truckers Association of N.S.* [1990] N.S.J. No. 349 (S.C.T.D.) and *Fraser v. Westminer Canada,* [1995] N.S.J. No. 338 (S.C.).

[12] The pleadings are not however evidence and the plaintiff is required to produce evidence in support of its claim to resist the application if the applicant meets the threshold test of satisfying the court that there is no arguable issue of material fact requiring trial.

THE AMENDED PLEADINGS:

[13] The new pleadings are expanded to include framing the action in breach of fiduciary duty wherein the plaintiff describes the duty owed by each of the defendants as a parental-type fiduciary relationship with the plaintiff, a duty to act loyally in the best interests of the plaintiff and not to put its own or others' interests ahead of the plaintiff in a manner that abused the plaintiff's trust. The plaintiff claims that the defendants owed further duties, to care for, educate, maintain, protect and supervise children in their care and these pleadings are based in contract and the statutory duty owed pursuant to the *Children's Protection Act,* R.S.N.S. 1923 c. 166 as amended up and to including S.N.'s 1948. The plaintiff

claims that the defendants were negligent and remain vicariously liable for the wrongful acts and omissions that caused harm and damage to the plaintiff.

[14] The pleadings allege that the NSHCC ran a commercial farming operation with livestock, chickens and market gardens. It is alleged that despite a plethora of food products, enough to generate income through commercial sale, the children residents at the NSHCC were so poorly fed that they had to resort to eating pig swill and scraps of food intended for the chickens.

[15] It is alleged that the superintendent of the NSHCC who lived in a home on the property along with other members of the staff derived a benefit of the commercial success of the operation at the expense of the hungry children who were resident there and were required to work as child labourers on the farm. It is alleged that the Province of Nova Scotia visited and inspected the NSHCC pursuant to Part I of the *Act* and had full knowledge of the exploitive plantation mode of operation of the institution.

BACKGROUND:

[16] The plaintiff is now 61 years old and resided at the NSHCC in 1947-48 when age 2-3. She was placed there with her 5 siblings who were older than she. By their dates of birth it can be ascertained that sister Pauline was 13-14 years old at this time, brother John (now deceased) 11-12 years old, sister Shirley 8-9 years old, brother Everett 6-7 years old and sister Kathleen 4-5 years old.

[17] These children were taken from their home in Lequille, Annapolis County, Nova Scotia and placed in the NSHCC by the CAS of Annapolis County, in 1947 and returned home sometime in 1948.

THE AFFIDAVIT EVIDENCE:

Elizabeth Ann Milbury:

[18] The plaintiff says in her affidavit that she does not have any clear memories of what happened to her while at the NSHCC, but remembers feelings of sadness and crying.

[19] She says that she was advised by her sister Shirley Melanson that one of the child care staff put her in extremely hot water and caused me to cry and scream and that she came out of the hot water as red as a lobster.

[20] She was also advised by her sister that she was terrified of the child care staff and would wet her pants whenever the staff approached her.

[21] She was advised that there was not enough food for the residents and that they were often hungry.

[22] She learned by reading in the newspaper of a claim by a former resident against the NSHCC in 2001.

[23] She was advised by her sister Shirley that she could make a claim against the NSHCC March 2001.

[24] She stated:

> Until my sister told me about the possibility of making a claim against the NSHCC, I was not aware that I might have such a claim.

[25] The plaintiff has a grade 7 education and has worked at food service jobs for minimum wage during her working life.

Shirley Marie Melanson:

[26] The affidavit of her sister Shirley Marie Melanson recounts the incident of the tub or hot scalding water and says that Shirley was not allowed by child care staff to help her sister. Shirley Melanson would have been 8-9 years of age at the time of these alleged events.

Pauline Jennie Comeau:

[27] The affidavit of Pauline Jennie Comeau, the eldest of the siblings states that “my little sister Elizabeth (Betty) Milbury, would cry from hunger and she was so afraid of the child care staff of the NSHCC that she was unable to eat her food.”

[28] She states that as the oldest sibling she felt responsible and tried to look out for her siblings.

[29] She states that she asked the child care staff if she could hold and feed her sister Elizabeth, but they refused and would yell and lecture her.

[30] She also states that her sister Elizabeth would go to bed hungry at night and she took food out of the kitchen and fed her at night out of the sight of the staff of NSHCC.

[31] The plaintiff's four siblings now living have filed similar claims for the abuse they allege they suffered while resident at the NSHCC.

[32] It is interesting to note that in the affidavit evidence before the court neither the plaintiff nor her two sisters allege that they were forced to work in any farming operation at the NSHCC.

[33] The plaintiff also filed copies of Answers to Demands for Particulars filed by other claimants, former residents in their own actions against the NSHCC et al. They are the answers provided by claimants Marilyn Geraldine Scott SH 211586, Edgar Smith SH 192123, Hughey Izzard SH 191751 and Sarah Lillian Izzard Hayward SH 205070.

[34] Counsel for the plaintiff asked the court to consider these Answers in support of their pleadings of an alleged exploitive plantation mode of farming operation at the NSHCC.

[35] These are pleadings in other actions. Counsel had the opportunity to secure affidavit evidence of these other claimants that may or may not have been relevant to this application but failed to do so. I cannot consider these Answers in the present application. They are not evidence.

ISSUES:

1. Has the applicant shown there are no genuine issues for trial as the causes of action cannot be sustained?

2. Does the *Limitations of Actions Act* operate to defeat the plaintiff's claim of vicarious liability, negligence and breach of contract?

ISSUE #1:

A. Breach of fiduciary

The plaintiff cannot offer direct evidence from her own memory of the alleged abuse suffered as she was only 2 years old. However, the affidavits of her sisters Shirley Melanson and Pauline Comeau recount allegations of incidents where the plaintiff was placed in a hot bath and came out of the bath very red and crying, allegations of fear suffered by the plaintiff when in the presence of staff members and allegations of hunger that required the eldest sister to steal food to give to the plaintiff.

[36] Even if such abuse did occur, which the defendant NSHCC denies, they argue that the elements necessary to prove a breach of fiduciary duty against the defendants simply do not exist in the circumstances of this type of case.

[37] They argue that the plaintiff must demonstrate:

1. the fiduciary duty exits and

2. the fiduciary breached the trust relationship by intentionally putting another's interests ahead of the interests of the child.

[38] In *C.A. v. Critchley* [1998] B.C.J. No. 2587 (C.A.), leave to appeal to the Supreme Court of Canada abandoned, [1999] S.C.C.A. No. 32, the Crown appealed a finding that it had breached a fiduciary duty to the children who were abused at a wilderness home for troubled youth.

[39] The Court of Appeal acknowledged, as was found by the trial judge that the Ministry owed a duty of special diligence in providing suitable facilities for the care of the plaintiffs.

[40] The Court of Appeal however took the opportunity to perform an analysis of the difference between negligence and fiduciary duty.

¶ 77 This case affords us an opportunity to consider whether it is permissible or desirable to engage the law relating to fiduciary obligations in cases where, without dishonesty or intentional disloyalty, harm has been done to a person in the legal care of the Crown.

¶ 78 This question was foreseen and discussed by Southin J., (as she then was), in Girardet v. Crease & Co. (1987), 11 B.C.L.R. (2d) 361 at 362:

> Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g. by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty - if not of deceit, then of constructive fraud. See Nocton v. Lord Ashburton, [1914] A.C. 932 (H.L.)

¶ 85 Applying this approach, I conclude that it would be a principled approach to confine recovery based upon fiduciary duties to cases of the kind where, in addition to other usual requirements such as vulnerability and the exercise of a discretion, the defendant personally takes advantage of a relationship of trust or confidence for his or her direct or indirect personal advantage. This excludes from the reach of fiduciary duties many cases that can be resolved upon a tort or contract analysis, has the advantage of greater certainty, and also protects honest persons doing their best in difficult circumstances from the shame and stigma of disloyalty or dishonesty. In effect, this redirects fiduciary law back towards where it was before this experiment began but with much broader remedies, such as damages, when fiduciary duties are actually breached.

[41] The Supreme Court of Canada has refined this approach by further requiring that the plaintiff must prove that the fiduciary breached the trust relationship by putting other interests of a third party ahead of the interests of the child.

[42] In *K.L.B. v. British Columbia, supra,* the claim involved a claim against the Crown for abuse that occurred in foster homes. While the majority of the B.C. Court of Appeal upheld the trial judge's finding that the government was vicariously liable and in breach of a non-delegable duty of call in the placement and supervision of children, they found that all but one of the claims was statute barred and further overturned the ruling that the government had breached its fiduciary duty to the children.

[43] Addressing the issue of fiduciary duty the Supreme Court said at paras. 48-50:

> ¶ 48 What then is the content of the parental fiduciary duty? This question returns us to the cases and the wrong at the heart of breaches of this duty. The traditional focus of breach of fiduciary duty is breach of trust, with the attendant emphasis on disloyalty and promotion of one's own or others' interests at the expense of the beneficiary's interests. Parents stand in a relationship of trust and owe fiduciary duties to their children. But the unique focus of the parental fiduciary duty, as distinguished from other duties imposed on them by the law, is breach of trust. Different legal and equitable duties may arise from the same relationship and circumstances. Equity does not duplicate the common law causes of action, but supplements them. Where the conduct evinces breach of trust, it may extend liability, but only on that basis. As I wrote in Norberg v. Wynrib, [1992] 2 S.C.R. 226: "In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest... . [page433] The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other" (p. 272).
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> ¶ 49 I have said that concern for the best interests of the child informs the parental fiduciary relationship, as La Forest J. noted in M. (K.) v. M. (H.), supra, at p. 65. But 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. This explains the cases referred to above. The parent who exercises undue influence over the child in economic matters for his own gain has put his own interests ahead of the child's, in a manner that abuses the child's trust in him. The same may be said of the parent who uses a child for his sexual gratification or a parent who, wanting to avoid trouble for herself and her household, turns a blind eye to

> the abuse of a child by her spouse. The parent need not, as the Court of Appeal suggested in the case at bar, be consciously motivated by a desire for profit or personal advantage; nor does it have to be her own interests, rather than those of a third party, that she puts ahead of the child's. It is rather a question of disloyalty -- of putting someone's interests ahead of the child's in a manner that abuses the child's trust. Negligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust in this sense.
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> ¶ 50 Returning to the facts of this case, there is no evidence that the government put its own interests ahead of those of the children or committed acts that harmed the children in a way that amounted to betrayal of trust or disloyalty. The worst that can be said of the Superintendent is that he, along with the social workers, failed properly to assess whether the [page434] children's needs and problems could be met in the designated foster homes; failed to discuss the limits of acceptable discipline with the foster parents; and failed to conduct frequent visits to the homes given that they were overplaced and had a documented history of risk (trial judgment, at para. 74). The essence of the Superintendent's misconduct was negligence, not disloyalty or breach of trust. There is no suggestion that he was serving anyone's interest but that of the children. His fault was not disloyalty, but failure to take sufficient care.

[44] In *E.D.G., supra,* the appellant asked that the school board be held liable for breach of fiduciary duty and breach of non-delegable duty, where a school janitor had committed acts of sexual assault against her in a storage area of the school.

[45] McLauchlin, C.J. found that the specific duties of the school board were laid out in the *School Act* R.S.B.C. 1979, c. 375

> ¶ 20 These specific duties do not permit the inference that boards are generally and ultimately responsible for the health and safety of school children on school premises, in a way as would render them liable for abuse at the hands of a school employee. The same is true of the provisions laying out the general duties of school boards. None of the general duties gives school boards full responsibility for students' welfare while on school premises, in the way that the statutes in Lewis gave the Ministry full responsibility for overseeing maintenance projects and for ensuring that workers exercised reasonable care. Consequently, the Act does not appear to impose a general non-delegable duty upon school boards to ensure that children are kept safe while on school premises, such as would render the Board liable for abuse of a child by an employee on school premises.

[46] In *E.D.G.* McLaughlin C.J. stated paras 23-26:

¶ 23 ...The cases on the parental fiduciary duty focus not on achieving what is in the child's best interest, but on specific conduct that causes harm to children in a manner involving disloyalty, self-interest, or abuse of power -- failing to act selflessly in the interests of the child. This approach is well grounded in policy and common sense. Parents may have limited resources and face many demands, rendering it unrealistic to expect them to act in each child's best interests. Moreover, since it is often unclear what a child's "best" interests are, the idea does not provide a justiciable standard. Finally, the objective of promoting the best interests of the child, when stated in such general and absolute terms, overshoots the concerns that are central to fiduciary law. These are, as La Forest J. noted in Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, at pp. 646-47: loyalty and "the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary".

¶ 24 The appellant's claim that the Board has a fiduciary duty to ensure that no employee harms school children on school premises regardless of fault fares no better. This proposal amounts to an attempt to recast the appellant's claim for breach of non-delegable duty into the language of fiduciary duty and extends fiduciary law beyond its natural boundaries. Fiduciary obligations are not obligations to guarantee a certain outcome for the vulnerable party, regardless of fault. They do not hold the fiduciary to a certain type of outcome, exposing the fiduciary to liability whenever the vulnerable party is harmed by one of the fiduciary's employees. Rather, they hold the fiduciary to a certain type of conduct. As Ryan J.A. held in A. (C.) v. C. (J.W.) (1998), 60 B.C.L.R. (3d) 92 (C.A.), at para. 154, "A fiduciary is not a guarantor." A fiduciary "does not breach his or her duties by simply failing to obtain the best result for the beneficiary".

¶ 25 The fact that a breach of fiduciary duty requires fault is one of the features that distinguishes this type of claim both from claims based upon statutory non-delegable duties of the sort at issue in Lewis, supra, and from claims based upon vicarious liability. The latter two types of claim are no-fault claims. Breaches of fiduciary duty, however, require fault. As the trial judge, Vickers J., noted at para. 46:

> No fault obligations are imposed in the context of a claim for vicarious liability. Breach of fiduciary duty is not a no fault claim.

¶ 26 In the case at bar, the only fault to which the appellant was able to point was the fault of the school janitor. The appellant was unable to identify any action or omission on the part of the School Board that might itself amount to a breach of a fiduciary duty. The fiduciary duty in this case lies upon the Board. The object for analysis, then, is not the conduct of the janitor but the conduct of the

> [page472] fiduciary, the Board. The trial judge specifically found that "no person employed by the Board had any reason to suspect he [Mr. Hammer] was engaged or might be likely to engage in any inappropriate behaviour with the children" (para. 17).

[47] In *Blackwater v. Plint,* [2005] S.C.J. No. 59, the Supreme Court addressed the elements of breach of fiduciary duty. The case involved sexual abuse and other harm suffered at a residential school run by the United Church of Canada.

[48] The Supreme Court of Canada upheld the trial judge's finding that the case for breach of judiciary duty owed by the Government of Canada and the United Church had not been made. It reiterated the principle in *K.L.B.* at para. 57:

> ¶ 57 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: K.L.B. v. British Columbia, [2003] 2 S.C.R. 403, 2003 SCC 51, para.49.

and found that neither the Church nor Canada were dishonest and intentionally disloyal.

[49] It is obvious that the defendants had a fiduciary duty toward the plaintiff. However, whether a breach of that duty has occurred by reason of fiduciaries placing their own interests ahead of those of the plaintiff has not been shown in the plaintiff's response to this application.

[50] Had there been any evidence before me to support the "plantation argument" I would have concluded that an arguable case could be made as against the NSHCC and potentially against the Province of Nova Scotia. The underpinning for such a claim is simply absent in the plaintiff's pleadings and response to this application.

[51] The pleadings recite extensive historical information about the operation of the NSHCC from the 1920's through to the period of time the plaintiff was resident there in 1947-48. We do not however have class proceedings legislation in this Province. The pleadings appear to be generic in nature intended to apply to the circumstances of the other potential claimants Mr. Wagner represents.

[52] As I noted the plaintiff's sisters do not allege that they were required to work in market gardens at the NSHCC. Nor has counsel for the plaintiff offered any sources for the historical information about the NSHCC that he sets forth in the statement of claim. These remain bare allegations.

[53] Counsel for the plaintiff are well aware of the obligation to be in a position to respond with at least some evidentiary foundation to support each cause, if they are to resist summary judgment. I note that this application was commenced on February 7, 2006 and that there has been sufficient time for the plaintiff to offer additional evidence in resisting the application.

[54] If the alleged acts did occur, i.e. that the plaintiff was placed in a scalding or very hot bath and went hungry these are properly claims in negligence, vicarious liability or breach of contract.

[55] I therefore grant the defendant's application for summary judgment dismissing th plaintiff's claim for breach of fiduciary duty against the defendant NSHCC and the Family Children's Services of Annapolis County.

[56] I will now deal with these other causes of action.

VICARIOUS LIABILITY:

Vicarious liability of the NSHCC for the acts of its employees or the CAS Annapolis:

[57] With respect to vicarious liability as against the defendant the NSHCC the plaintiff must show that the relationship between the abuser and the NSHCC is sufficiently close to warrant a finding of the vicarious liability and that the acts or alleged abuse were sufficiently connected to the alleged abuser's assigned tasks to allow such a finding.

[58] In this case the specific alleged acts of abuse involve the alleged incident of the scalding bath, fear of the staff and a sustained condition of hunger. The affidavits of the plaintiff's sisters are sufficient to support an arguable issue for trial. The NSHCC had undertaken the hands on care of the plaintiff and her siblings. The acts complained of are directly related to the duties for which its employees would have been hired, the care and feeding of its residents.

[59] The role of Mr. Eric Woods, a social worker with the CAS Annapolis, in visiting the home to see how the plaintiff and her siblings were faring also raises an arguable issue for trial and meets the established low threshold test.

NEGLIGENCE:

[60] The plaintiff has raised arguable issues for trial. The defendant the NSHCC cannot reasonably argue that because the plaintiff was only two years of age and cannot remember the incidents related to her by her sisters, that no damage could therefore have occurred and the case for negligence must fail. If these alleged events in fact occurred, it will be for a trial judge to determine if the defendants breached a required standard of care and the measure of damages that arise in consequence. No doubt such alleged events would have a lasting effect on a child.

[61] Further, I disagree with the applicant the NSHCC when they compare the facts of this case to *K.L.B.* and suggest that they as a statutory body are not "guarantors against all harm to children in their care but are only responsible for harm to a child when, judged by the standards of the day, it was reasonably foreseeable that their conduct could expose children to the type of harm they sustained."

[62] The NSHCC cannot claim the degree of remoteness that the government of British Columbia could in relation to foster parents, who discharged their duties in a highly independent manner, free from close government control. Here the NSHCC was a hands on operation responsible for the children in their care. The events alleged therefore give rise to arguable issues at trial.

CONTRACT:

[63] Whether or not there exits a claim in contract as against the defendants is a matter that would also be flushed out during the trial process. As our discussion in court revealed funding arrangements were made between the Province and the NSHCC and settlements were made as between municipal units when children were placed in care. This is not an inappropriate claim, that should be dismissed at this time.

LIMITATION PERIOD:

[64] Turning to the limitation period, the plaintiff acknowledges that these events are well beyond the limitation period but says she was unaware that she may have had a claim before March 2001.

[65] By operation of the *Limitation of Actions Act* the latest date the plaintiff could have pursued these causes was within one year of her 21st birthday, i.e. July 25, 1967 s. 2(1)(a); or an action in contract within six years, therefore July 25, 1972, s. 2(1)(e).

[66] The plaintiff cannot avail herself of the relief of s. 3 of the *Act,* which could have allowed a four year extension of the limitation period, because of the events are alleged to have occurred before June 26, 1982.

[67] It is correct therefore that the claims were potentially statute barred by some 30 years before the action was commenced in January 2003.

[68] Discoverability is therefore a live issue.

[69] The plaintiff relies on *Central Trust Company v. Rafuse,* [1986] 2 S.C.R. 147 at para. 77:

> ¶ 77 I am thus of the view that the judgment of the majority in Kamloops laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia Statute of Limitations, R.S.N.S. 1967, c. 168.

[70] In *Kamloops v. Nielsen,* [1984] S.C.R. 2, the case involved a claim against a municipality for negligent failure to prevent the construction of a house upon a defective foundation. In *Central Trust v. Rafuse* the court considered this decision with respect to the operation of s. 2(1)(e) of the Nova Scotia *Act.* The plaintiff says there is a live issue relating to discoverability requiring " a detailed factual inquiry that should take place at trial."

[71] In *Stell v. Obedkoff,* [1999] O.J. No. 2312 (S.C.J.) the plaintiff had in her possession medical records for over four years which later generated expert medical reports upon which she then commenced a second action for medical malpractice against two addition defendant physicians. Their application for summary judgment was granted as the action against them were statute barred.

[72] The defendants argue that the plaintiff must lead evidence why the claim was not discovered during the limitation period. I am satisfied that the plaintiff has raised an arguable issue for trial and that she should not be barred from proceeding because she was unaware of her potential claim before March 2001. She has led sufficient evidence in this regard.

[73] The discoverability principle is intended to ensure that no injustice will occur by reason a person being unaware they have a potential claim. The plaintiff was an infant when the alleged acts of abuse are said to have occurred. A further explanation of these events will occur through the trial process.

[74] I am satisfied that the defence of limitation periods should not, at this juncture succeed in defeating the plaintiff's actions in contract negligence and vicarious liability as against the defendants.

[75] In the result the plaintiff's claims for breach of fiduciary duty against the defendants, the NSHCC and the CAS of Annapolis are dismissed. The remaining causes of action stand and may proceed to trial.

[76] In the absence of agreement by the parties the court is prepared to address the issue of costs.

Justice M. Heather Robertson