COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***D.H. (Guardian ad litem of) v. British Columbia,***
2008 BCCA 222

Date: 20080526
Docket: CA034744

Between:

D.H.

Respondent
Appellant by Cross Appeal
(Plaintiff)

And

J.H., an infant by his guardian ad litem, the Public Guardian and Trustee, and E.H., an infant by her guardian ad litem, the Public Guardian and Trustee

Respondents
(Plaintiffs)

And

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

Appellant
Respondent by Cross Appeal
(Defendant)

RESTRICTION ON PUBLICATION: AN ORDER HAS BEEN MADE IN THIS CASE THAT PROHIBITS ANY INFORMATION THAT COULD IDENTIFY THE COMPLAINANT[S] OR WITNESS[ES] BEING PUBLISHED, BROADCAST OR TRANSMITTED.

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe

A.K. Fraser and N.H. Barnes	Counsel for the Appellant
H.A. Mickelson and A.S. Dosanjh	Counsel for the Respondents
C. Jeklin	Representative of the Public Guardian and Trustee
Place and Date of Hearing:	Vancouver, British Columbia September 17, 18 & 19, 2007
Written Submissions Received:	December 4 & 10, 2007
Place and Date of Judgment:	Vancouver, British Columbia May 26, 2008

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] A young boy, J.H., was sexually assaulted between October 1998 and July 1999 by Mark Kline, an offender on probation for sexual offences against boys. At least some of these assaults occurred after Mr. Kline received permission from his probation officer to reside in a suite in the same residence as J.H., his sister and his mother, in the face of a probation order prohibiting the offender from having unsupervised contact with children.

[2] J.H.'s mother, the respondent D.H., had told the probation officer that Mr. Kline had no contact with her children when this was not so, and had permitted the offender to have unsupervised contact with her son after being told by the probation officer not to leave J.H., or his younger sister E.H., alone with him. D.H. knew that Mr. Kline was on probation, but did not understand that he had committed sexual offences against young boys.

[3] This appeal concerns the liability of the probation officer for the sexual assaults of Mr. Kline against J.H. and the assignment of fault to D.H. for her actions in leaving the children with him when she had been warned against doing so. There are, as well, issues of the quantum of damages and the refusal by the trial judge to allow a late application of the appellant to file a counterclaim against D.H.

[4] The appeal is brought by Her Majesty the Queen in Right of the Province of British Columbia from the order it pay damages, on a vicarious basis, to J.H. A cross appeal is brought by D.H. from an order that she is five percent at fault.

[5] The probation officer who permitted Mr. Kline to live in the residence is Mr. Gill. In their oral submissions, the respondents suggested there was no proof Mr. Gill was employed by British Columbia (a question that bears upon the application of a statutory provision). The statement of claim alleges that Mr. Gill was a probation officer and that probation officers are employees of B.C. Corrections. Those allegations are admitted in the statement of defence. I therefore consider that an employment relationship between Mr. Gill and British Columbia is established.

[6] The sexual assaults of J.H. were the subject of criminal charges against Mr. Kline. On December 7, 1999, Mr. Kline pleaded guilty to sexual offences under ss. 151, 152, and 271 of the ***Criminal Code***, R.S.C. 1985, c. C-46, and was sentenced to thirty months' incarceration for the sexual offences and six months' incarceration for breach of the probation order.

[7] By the time of trial, the action of the respondents had been reduced to an action against Mr. Kline and British Columbia. The claim against Mr. Kline, who was not represented or present at trial, was for assault. As against British Columbia, the respondents alleged that it was directly liable in negligence and was vicariously liable for the negligent actions of Mr. Gill and another probation officer who attended the residence with Mr. Gill in March

1999. D.H. claimed damages for nervous shock. E.H. claimed damages for the cost of therapy required to address the trauma to the family caused by the assaults. J.H. claimed for damages resulting from the assaults upon him.

[8] British Columbia did not contest vicarious liability. It defended the allegation of negligence made against it, and defended the allegations of negligence made against the probation officers. British Columbia contended their conduct was not actionable. It further pleaded contributory negligence on the part of D.H. in respect of her false advice to the probation officers that Mr. Kline had no contact with her children, and her actions in leaving the children with Mr. Kline after she had been told by the probation officers not to do so. In a late filed counterclaim, British Columbia claimed contribution and indemnity from D.H. under the ***Negligence Act***, R.S.B.C. 1996, c. 333, based upon those allegations of negligence on the part of D.H. As the counterclaim was filed late, British Columba required an order extending the time for its filing. That application was made just prior to the commencement of the trial, and dismissed, with the result that the counterclaim was not before the court. The order therefore does not include an order for contribution by D.H. to any damages assessed in favour of J.H.

[9] In his reasons for judgment (2006 BCSC 1903), Mr. Justice Blair found that the probation officers had been negligent in the performance of their duties, and that British Columbia therefore was liable. Mr. Justice Blair ordered general damages in favour of J.H. in the amount of $540,000. He found that Mr. Kline was seventy-five percent at fault, British Columbia was twenty percent at fault, and D.H. was five percent at fault. He ordered joint and several liability as between Mr. Kline and British Columbia. Further, he ordered the claims of D.H. and E.H. for general damages and all claims for special damages adjourned to a trial yet to be held. We have been advised those claims have settled, subject to this appeal.

The Circumstances

[10] Mr. Kline, 42 years old at the time of these events, has a criminal record for sexual offences against pre-pubescent boys that dates to 1982, when he was convicted of three counts of indecent assault in New Brunswick and sentenced to four years' incarceration. In 1997, he was convicted of charges involving four boys, one count of invitation to sexual touching, and three counts of sexual assault. For those offences, he was sentenced in June 1997, to two years less a day incarceration and three years probation. He was released from prison on October 21, 1998, under the supervision of a probation officer. The probation order included these terms:

> 1) Report forthwith upon your release from incarceration to a Probation Officer, and report thereafter at least twice per month as directed by the Probation Officer.
>
> 2) Reside where directed and approved by your Probation Officer and upon demand, provide access to your residence, upon reasonable demand of a Probation Officer or a Peace Officer.
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> …
>
> 6) No contact with any person under the age of 18 years unless accompanied by an adult approved of in writing by your Probation Officer, and with the advanced written approval of your Probation Officer.

7) Not to attend within 4 blocks of any playground, school yard, park, recreation centres, daycares or other places where children may congregate.

[11] Upon his release, Mr. Kline met his assigned probation officer, Mr. Gill. Mr. Gill assessed Mr. Kline as a high risk to re-offend.

[12] Mr. Kline's housing situation immediately after his release was, in the words of the trial judge, "somewhat transient" as he stayed at a number of locations. This situation caused Mr. Gill to refer Mr. Kline's probation order to Crown counsel to determine whether Mr. Kline was in breach of the probation order but Crown counsel declined to proceed.

[13] Shortly after his release, Mr. Kline sought Mr. Gill's approval to live in a housing complex occupied by many families and with play areas. Mr. Gill refused approval on the basis that the residence did not comply with term No. 7 of the probation order (replicated above) prohibiting him from living within four blocks of a place children may congregate.

[14] On November 27, 1998, Mr. Kline moved into a suite in a fourplex in Surrey, sharing accommodation with a released inmate and his girlfriend, Ms. Bulten. Mr. Gill conducted a home visit and, after confirming with the landlord that no children resided in the fourplex, approved Mr. Kline's request to reside there.

[15] In 1998, D.H. was a single mother with two young children. She relied mainly on government funding for support. In the summer of that year she moved into the downstairs suite of a split level house in Surrey. The residence was a short distance from the fourplex. The upstairs suite was occupied by three males.

[16] D.H. became a friend of Ms. Bulten. After Mr. Kline moved into the fourplex Ms. Bulten introduced D.H. to him. Mr. Kline and D.H. became friendly. Mr. Kline started visiting D.H.'s home. Occasionally, he acted as a babysitter to E.H. and J.H., and by Christmas, was sufficiently friendly with D.H. and the children that he ate Christmas dinner with them. The record shows that he spent a great deal of time alone with J.H. teaching him to ride a bicycle, shopping, watching television, and babysitting.

[17] Sometime late in 1998, D.H. learned from Mr. Kline that he was on probation with an order not to have unsupervised contact with children younger than eighteen years. Mr. Kline told D.H. that this related to a matter involving a seventeen year old female prostitute.

[18] In late December 1998, Mr. Kline and the released inmate with whom he resided moved into a motel. Mr. Gill started a two-month leave and another probation officer, Mr. Salim, assumed responsibility for Mr. Kline's supervision. Mr. Kline asked Mr. Salim for permission to move into the suite above D.H. that was occupied by the three males. Mr. Salim refused on the basis that the residence was within four blocks of two schools contrary to the probation order.

[19] When Mr. Gill returned from his leave in February 1999, Mr. Kline renewed his request. He told Mr. Gill that the three men knew of his charges, as did the residents in the suite below. He described the residents below as a girl with two young children.

[20] Mr. Gill allowed Mr. Kline to move into the upstairs suite and, in early March 1999, Mr. Gill conducted a home visit, accompanied by another probation officer, Mr. Ginther. They spoke to two of the three roommates of Mr. Kline. Mr. Gill and his colleague told them that Mr. Kline was on parole or probation but did not disclose the nature of the offence. Later in March, Mr. Gill and his colleague spoke to D.H. They advised her they were with the sexual offenders unit, and that Mr. Kline had been convicted of a sexual offence and was not to have contact with children. D.H. told them that Mr. Kline had no contact with her children and that she was aware he was prohibited from contact with children. She asked about the convictions, but they declined to provide any details. The trial judge found:

> [19] D.H. knew Mr. Kline was prohibited from contact with persons younger than 18 years but understood the prohibition followed his dispute with a young prostitute. D.H. admitted that she lied in telling the probation officers that her children had no contact with Mr. Kline when he had been in contact with the children, including babysitting them when she was out of the house. Mr. Kline had also spent time with J.H. watching videos, fishing and teaching J.H. how to ride a bicycle. D.H. said her son had few male role models and she had earlier applied for a Big Brother for him from that organization. D.H testified that Mr. Kline filled a male role in J.H.'s life, she believed the relationship was good for her son, and she did not want Mr. Kline to get into trouble. D.H. did not see Mr. Kline's difficulties with a prostitute as creating a threat to her son. D.H. testified that if the probation officers had responded fully to her query and told her that Mr. Kline's criminal record involved sexual assaults upon young boys of her son's age she would never have allowed further contact between J.H. and Mr. Kline.
>
> [20] Mr. Ginther was concerned about D.H.'s lack of surprise and her rather blasé response when told Mr. Kline's probation order precluded him from having contact with persons younger than 18 years, and that she should not leave her children with him for even just a few minutes. Mr. Ginther testified that D.H. described Mr. Kline as a "nice guy" who was causing no problems. Those comments taken alone are not particularly significant, however, Mr. Kline approached his previous victims by befriending their parents or custodians and used that relationship to get closer to his victims. The probation officers knew of Mr. Kline's grooming techniques and that he was a manipulative individual, but did not pursue D.H.'s comments which suggested cordial contact between herself and Mr. Kline.

[21] Following these conversations, Mr. Gill permitted Mr. Kline to live upstairs from the respondents. This continued until July 1999, when a third party recognized Mr. Kline as a person who had assaulted her grandson, and information was given to Mr. Gill that Mr. Kline had been alone with J.H.

[22] The trial judge found that Mr. Kline had touched J.H. on about ten occasions in Mr. Kline's bedroom. The times of those assaults were not determined, but include at least instances after Mr. Gill approved Mr. Kline's request to live above D.H.

The Regulatory Framework

[23] A probation officer derives his or her authority from the ***Correction Act***, R.S.B.C. 1996, c. 74 [now S.B.C. 2004, c. 46]. That ***Act*** provided:

> 2 The purpose of this Act is to protect the community.
>
> 3(1) Probation officers and other employees required for the purposes of this Act may be appointed under the *Public Service Act*.
>
> (2) Persons appointed as described in subsection (1), except the director and employees in the office established under section 33, are peace officers while carrying out their duties under this Act and the regulations.
>
> …
>
> 5(1) A person who is appointed a probation officer under this Act
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> …
>
> (b) is an officer of every court in British Columbia,
>
> …
>
> (f) must supervise parolees paroled under the *Parole Act*, …
>
> 7 A probation officer charged with the supervision of a person on whom the passing of sentence was suspended, or who is subject to a probation order, may report to the court or prosecutor if the person fails to carry out
>
> …
>
> (b) the terms of the probation order.

[24] Section 24 of the ***Act*** (as it then was) appears to provide protection from suit for certain persons carrying out duties under the ***Act***. However, that section was not pleaded and is not an issue in this action. The issue of liability on this appeal falls to be resolved on the basis of the common law as it applies to the performance of duties by a public official acting under statutory authority.

[25] Guidelines prepared by the Ministry of the Attorney General are available to assist probation officers in the performance of their duties. *An Interim Policy – Case Management of Adult Sex Offenders* outlined required steps in the supervision of sex offenders in the community. That policy, in effect at relevant times, was described by the trial judge as follows:

> [36] The Interim Policy states at para. 6.02 that the purpose of supervision of sex offenders is to enhance public safety by providing assistance and support to sex offenders and to monitor the offender to ensure compliance with court orders. At para. 6.07 probation officers are directed to contact key collateral contacts who are defined as including, but not limited to employers, supervisors, and family friends. The purpose of such contact is "to provide cautions about activities that could present a risk to the public or provide opportunities for the offender to re-offend".

[26] Additional policy directives regarding notification were issued by the Ministry. The trial judge described them beginning at para. 37 of his reasons:

> [37] A further directive to probation officers came from the Ministry of Attorney General on December 11, 1995 and it was entitled Notification Policy to Protect Children from Abuse. The introduction notes that a fundamental obligation of society is the protection of children, stating:
>
> > The purpose of this policy is to enhance the protection of children in all cases where there is a real risk of harm, by ensuring appropriate sharing and disclosure of relevant information relating to known abusers.
>
> [38] The Notification Policy directs that when an offender presents a risk to children a notification to the "at risk" party must be conducted. The policy describes how a probation officer after determining that there is a real risk of harm to children posed by a person on probation is to release personal information about that person, including their criminal record, within the legislative constraints set by a variety of federal and provincial statutes including the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165. At p. 5, para. 5(c) the policy notes that personal information might be disclosed pursuant to s. 5(2) of the*Correction Act* to ensure compliance with the terms of a probation order.
>
> [39] The Ministry of the Attorney General on January 28, 1999 issued a further policy directive to assist in the interpretation of the 1995 Notification Policy. At para. 6.10 the Ministry reiterated its 1995 directive that probation officers are to conduct a risk assessment on all offenders under their supervision who have been convicted of sex and other violent offences against children, stating:
>
> > When risk of re-offence is high, the probation officer must pro-actively effect notification to at risk persons.
>
> [40] The policy continued at para. 6.11:
>
> > Notification refers to the disclosure of an offender's personal information to an individual, group or the general community, with or without the offender's signed consent.
>
> [41] Where the probation officer determines there is a risk, para. 6.19 provides in part:
>
> > … the probation officer must effect notice to the at risk person, or person's guardian. Information disclosed must be limited to that information required to enhance safety. In most cases, information disclosed would identify the offender by name and description, general residential area,criminal history as it pertains to his offences against children, modus operandi and other information that is needed to identify why there is a risk.
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> [Emphasis in original.]

The Appeal

[27] I turn now to the appeal. British Columbia says the trial judge erred:

1) in law in concluding the probation officer owed an actionable, private law duty of care in these circumstances;
2) if there is such a duty of care, in finding that the probation officers breached the duty of care;
3) in finding causation;
4) in limiting D.H.'s liability to five percent, having assessed British Columbia's liability at twenty percent;
5) in declining to extend the time for filing the counterclaim and thereby declining to order contribution against D.H.; and
6) in ordering damages that were excessive.

Duty of Care

[28] The trial judge found that Mr. Gill owed J.H. a duty of care. It is not clear whether he concluded Mr. Gill also owed D.H. and E.H. a duty of care. The entered order, which makes a finding of liability in respect only of the claim of J.H., leaves the claims of D.H. and E.H. for damages to be tried at a future date, and those claims, as noted above, have been settled subject to this appeal. For the purposes of these reasons for judgment, I have concluded that the issue of British Columbia's liability to D.H. and E.H. remained to be determined with a separate analysis for each plaintiff (***Hill v. Hamilton-Wentworth Regional Police Services Board***, 2007 SCC 41, at para. 27).

[29] In its appeal, British Columbia contends that, in holding it liable in negligence to J.H. for the injuries suffered by him arising from Mr. Kline's assaults, the trial judge failed to correctly apply the law on the liability of public officials which, it says, distinguishes between policy and operational decisions. It contends that the public policy that animates this distinction is the long-standing need for government officials to freely discharge their functions peculiar to government. It says that, apart from malice or bad faith, a government official is accountable only through public law.

[30] In the hearing before us, the parties focused their submissions on the line of cases that starts with ***Home Office v. Dorset Yacht Co. Ltd.***, [1970] A.C. 1004, [1970] 2 All E.R. 294 (H.L.) ("***Dorset Yacht*** "), and moves through ***Anns v. Merton London Borough Council*** (1977), [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.) [***Anns*** cited to A.C.], ***Just v. British Columbia***, [1989] 2 S.C.R. 1228, 64 D.L.R. (4th) 689, ***Cooper v. Hobart***, [2001] 3 S.C.R. 537, 2001 SCC 79, and ***Syl Apps Secure Treatment Centre v. B.D.***, 2007 SCC 38. Another case in this line of authority is ***Brown v. British Columbia (Minister of Transportation and Highways)***, [1994] 1 S.C.R. 420, 112 D.L.R. (4th) 1. Since this case was heard, the Supreme Court of Canada has published reasons for judgment in ***Hill***. We have asked for and received submissions on the effect of ***Hill***upon the issues before us.

[31] The threshold question in a negligence action is whether a duty of care is owed by the alleged wrongdoer to the plaintiff. If so, the questions

are whether the alleged wrongdoer breached the standard of care, whether that breach caused the injury complained of, and whether damages were sustained. In most private disputes the threshold question is not troublesome — a driver owes a duty of care to others on roadways, a doctor owes a duty of care to his or her patient, a manufacturer owes a duty of care to those who may buy the product.

[32] However, in claims against public officials the question of the existence of a duty of care bumps up against the role of government, the necessary delegation by government of its functions to public officials, the delicacy of some of those government functions, the courts' deference to the government function, and the historic caution of the courts in assessing damages against the public purse for deficiencies in performance by public officials. The first question in a negligence analysis, whether there is a duty of care, functions as a brake on findings of public liability. The degree to which it is a brake is one of the issues before us. I consider that a fair reading of the recent cases from the Supreme Court of Canada, and in particular ***Hill***, leads to a conclusion that the braking function of the duty of care issue is not as sharp as once thought.

[33] In ***Hill***, the Supreme Court of Canada considered the liability of police for negligence in the conduct of the investigation leading to Mr. Hill's arrest, trial, and wrongful conviction. Chief Justice McLachlin, writing majority reasons for judgment, concluded that the police owe a duty of care in negligence to suspects being investigated. In reaching these conclusions, she first confirmed the two part test that derives from ***Anns***:

> [20] The test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care? (See *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), as affirmed and explained by this Court in a number of cases (*Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, at paras. 25 and 29-39; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80, at para. 9; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, at paras. 47-50; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18, at para. 47.)

[34] This test comes from Lord Wilberforce's speech, at pp. 751-2 of ***Anns***:

> Through the trilogy of cases in this House — *Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and*Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his

part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht* case [1970] A.C. 1004, *per* Lord Reid at 1027.

[35] What, then, goes into the first ***Anns*** question — consideration of foreseeability and proximity? As to the issue of foreseeability, Chief Justice McLachlin harkened to the discussion of duty of care in ***Donoghue v. Stevenson***, [1932] A.C. 562 (H.L.), at para. 22 of ***Hill***:

> The first element of such a relationship is foreseeability. In the foundational case of *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), Lord Atkin stated:
>
> > The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. ...Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. [Emphasis added; p. 580.]
>
> Lord Atkin went on to state that each person "must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" (p. 580). Thus the first question in determining whether a duty in negligence is owed is whether it was reasonably foreseeable that the actions of the alleged wrongdoer would cause harm to the victim.

[36] On the issue of proximity Chief Justice McLachlin observed:

> [23] However, as acknowledged in *Donoghue* and affirmed by this Court in *Cooper*, foreseeability alone is not enough to establish the required relationship. To impose a duty of care "there must also be a close and direct relationship of proximity or neighbourhood": *Cooper*, at para. 22. The proximity inquiry asks whether the case discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close to give rise to a legal duty of care. The focus is on the relationship between alleged wrongdoer and victim: is the relationship one where the imposition of legal liability for the wrongdoer's actions is appropriate?
>
> [24] Generally speaking, the proximity analysis involves examining the relationship at issue, considering factors such as expectations, representations, reliance and property or other interests involved: *Cooper*, at para. 34. Different relationships raise different considerations. "The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic": *Cooper*, at para. 35. No single rule,

> factor or definitive list of factors can be applied in every case. "Proximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (*Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, cited in *Cooper*, at para. 35).

[37] In ***Hill***, the Supreme Court of Canada addressed the question of sufficient proximity by focusing on whether the relationship was, in words springing from ***Donoghue***, "close and direct" such that the wrongdoer ought to have had the complainant in mind as a person potentially harmed by his actions. This question engaged the presence or absence of a personal relationship, although that feature was said not to be determinative: ***Hill***, at para. 30. The analysis at this first stage focuses on "factors arising from the relationship between the plaintiff and the defendant, for example expectations, representations, reliance and the nature of the interests engaged by that relationship": ***Hill***, at para. 31.

[38] Generally, the first question has not been conceptually difficult in determining whether a duty of care exists. One cannot say the same of the second question from***Anns*** — the existence, or not, of a policy consideration negating the *prima facie* duty of care. Before ***Anns***, in ***Dorset Yacht***, the distinction was made between discretionary decisions and other decisions, with the proposition that discretionary decisions were afforded immunity from suit unless the exercise of discretion was unreasonable. That distinction was adopted in ***Anns*** using the added terms "policy function" and "operational function", with policy function equated generally with discretionary decisions. Further, in ***Anns***, liability for discretionary acts was restricted to an exercise of discretion not "within the limits of a discretion *bona fide* exercised" (p. 755).

[39] The broad meaning of the term "discretion", as applied in ***Anns***, had the theoretical effect of greatly limiting the situations in which the exercise of statutory power by a public official was actionable. To some degree this limitation was relaxed in ***Just***. There, the Supreme Court of Canada narrowed the circumstances in which public policy would negate the existence of a duty of care to "pure policy decisions". This approach was also taken in ***Brown***, with liability arising from a policy decision restricted to one "made in bad faith or in circumstances where it is so patently unreasonable that it exceeds governmental discretion" (p. 435).

[40] The same narrowed approach was taken in ***Cooper***. In considering the existence of a duty of care of a registrar of mortgage brokers sued by members of the investing public for economic losses incurred as a result of the misfeasance of a mortgage broker, the Supreme Court of Canada said:

> [38] It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy

> decisions is properly regarded as an application of the second stage of the *Anns* test. The exclusion does not relate to the relationship between the parties. Apart from the legal characterization of the government duty as a matter of policy, plaintiffs can and do recover. The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons – more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters. Similar considerations may arise where the decision in question is quasi-judicial (see *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80).
>
> [Emphasis added.]

[41] On my reading of ***Hill***, the Supreme Court of Canada has affirmed this restricted approach to the second ***Anns*** question, leaving the denial of a duty of care where there is sufficient proximity to establish a *prima facie* duty to cases where there is "a real potential for negative policy consequences" (para. 43). In other words, mere exercise of discretion is not sufficient to negate a duty of care; the discretion must engage policy issues that would be negatively affected by finding a duty of care.

[42] In ***Hill*** the majority considered and dismissed as reasons for negating a duty of care, the "quasi-judicial'" nature of police work, the potential for conflict between a duty of care in negligence and other duties owed by police, the need to recognize the degree of discretion present in police work, the need to maintain the standards applicable to police work, the potential for a chilling effect and the possibility of a flood of litigation. In the view of the majority, these considerations, alone or together, did not provide a convincing reason for rejecting a duty of care on police to a suspect under investigation. While the minority opinion of the court would have found otherwise, the majority concluded that the second ***Anns*** question should be answered in favour of the plaintiff. In reaching this conclusion, Chief Justice McLachlin, writing for the majority, said:

> [51] The discretion inherent in police work fails to provide a convincing reason to negate the proposed duty of care. It is true that police investigation involves significant discretion and that police officers are professionals trained to exercise this discretion and investigate effectively. However, the discretion inherent in police work is taken into account in formulating the *standard* of care, not whether a duty of care arises. The discretionary nature of police work therefore provides no reason to deny the existence of a duty of care in negligence.
>
> [52] Police, like other professionals, exercise professional discretion. No compelling distinction lies between police and other professionals on this score. Discretion, hunch and intuition have their proper place in police investigation. However, to characterize police work as completely unpredictable and unbound by standards of reasonableness is to deny its professional nature. Police exercise their discretion and professional judgment in accordance with professional standards and practices, consistent with the high standards of professionalism that society rightfully demands of police in performing their important and dangerous work.

> [53] Police are not unlike other professionals in this respect. Many professional practitioners exercise similar levels of discretion. The practices of law and medicine, for example, involve discretion, intuition and occasionally hunch. Professionals in these fields are subject to a duty of care in tort nonetheless, and the courts routinely review their actions in negligence actions without apparent difficulty.

[43] In its submission on ***Hill***, British Columbia contends that the discretion discussed in those passages differs from the one that bears on this case. ***Hill***, says British Columbia, considered only a private law discretion similar to the discretion exercised by professionals such as doctors and lawyers. It says this is so because the court only considered negligence in investigation and did not extend the discussion to negligence in arresting and charging, the critical functions of police work that engage broad public law discretions more similar to the case at bar. In this they say the discussion of discretion in ***Dorset Yacht*** is still influential.

[44] The respondents argue otherwise. They say the Supreme Court of Canada has answered the question as to the stage of analysis that engages the existence of a discretion, and placed it firmly in the analysis of a standard of care.

[45] I do not understand the Supreme Court of Canada to say in ***Hill***, that exercise of a statutory discretion will never be relevant to the second ***Anns*** question. The question is situation specific — is the discretion in respect to policy or quasi-judicial matters, or is it in relation to how the action is performed? Whether the impugned decision is a policy decision, as contemplated in ***Cooper***, will depend upon the function performed by the public official. In other words, one must look at the nature and extent of the discretion accorded the public official in the context of the role the official was playing in the circumstances giving rise to the action. As said in ***Just***, a policy decision is "usually at a high level" (p. 1242).

[46] I turn then to the application of these principles to this case. In ***Hill***, the Supreme Court of Canada observed that the categories of relationship that are characterized by sufficient proximity as to attract legal liability are not closed. I see the claim in this appeal, like the one in ***Anns***, ***Just***, ***Cooper*** and ***Hill***, as one that is sufficiently novel that we cannot say it falls within a recognized category of recovery. The question is whether, as in ***Just*** and ***Hill***, a duty of care will be imposed, or whether, as in ***Cooper***, it will not.

[47] The first question is whether the relationship between Mr. Gill and J.H. discloses sufficient foreseeability and proximity such that a *prima facie* duty of care arises. (As I have earlier indicated, I approach the reasons for judgment of the trial judge as not having resolved the existence of a duty of care arising from the relationship between Mr. Gill, on the one hand, and D.H. and E.H., on the other.)

[48] The trial judge concluded that a duty of care should be found to exist and in doing so said as to the first ***Anns*** question — is there *prima facie* a duty of care?:

> [45] I am satisfied that in the circumstances of this case, Mr. Gill was an individual in a proximate relationship with the infant

> plaintiff J.H. and his guardian, D.H. and that harm to J.H. by Mr. Kline was foreseeable given Mr. Kline's criminal record, the assessment that he was a high risk to re-offend, J.H.'s age and gender, and the close proximity of his residence to that of Mr. Kline. I conclude that Mr. Gill owed a *prima facie* duty of care specifically to J.H. given the circumstances, thereby answering affirmatively the first part of the test in *Anns.* …

[49] I have no doubt that the relationship between Mr. Gill and J.H., in these circumstances, easily meets the first question posed by ***Anns***. The probation officer was clothed with the responsibility to approve the residence of Mr. Kline, and was the only reliable channel of information to residents living near Mr. Kline as to the danger he posed, and to whom. The statutory scheme under which the probation officer performs his or her function contemplates the probation officer monitoring compliance with the terms of a probation order. In my opinion, the conclusion of the trial judge that a proximate relationship existed between J.H. and Mr. Gill is unassailable given Mr. Gill's role and the situation of J.H. Likewise, his conclusion that harm was reasonably foreseeable, given Mr. Kline's criminal record, his recidivism assessment, and J.H.'s characteristics as a high-risk boy fitting the profile of Mr. Kline's previous victims, is beyond question.

[50] The second question is whether there are policy considerations that operate to negate a duty of care to J.H.

[51] The trial judge found that this second question was not engaged because the circumstances were not novel. He based that conclusion on the case of ***D.N. and D.S.G. v. The Corp. of the Dist. of Oak Bay***, 2005 BCSC 1412, 261 D.L.R. (4th) 692, which he found to be analogous to this case. In ***D.N.***, Mr. Justice Silverman held the Crown vicariously liable for the actions of a probation officer who failed to advise a hockey association that a coach was a convicted sex offender on probation and under his supervision.

[52] The trial judge then went further and considered whether either giving permission to Mr. Kline to move into the residence, or declining to tell D.H. the offence committed by Mr. Kline, should negate liability in any event. He first referred to ***Just*** and held as to the discretion:

> [52] … However, in the instant case the probation officer's discretion is limited by the policy determined by the *Correction Act*, the conditions of the probation order imposed on Mr. Kline, and the directives issued by the Ministry of the Attorney General specifically addressed to probation officers who are supervising sex offenders.

[53] The trial judge said the following concerning the permission given to Mr. Kline to live in the house:

> [53] The purpose of the *Correction Act* is to protect the community and a probation officer as an officer of the court is responsible for carrying through with that purpose when supervising a person on probation. Mr. Kline's probation order provided that he have no contact with any person under the age of 18 years unless accompanied by an adult approved of in writing and in advance by his probation officer. There is no discretion afforded the

> probation officer with respect to contact with persons younger than 18 years, and when read in conjunction with the other terms of the order, appears to preclude any exercise of discretion by the probation officer such that he could permit Mr. Kline to reside in the same home as J.H. and E.H. with its various common areas inviting contact between Mr. Kline and the two children, including the single front door, the common laundry room and the jointly enjoyed front and back yards.

[54] On the other aspect complained of, Mr. Gill's failure to advise D.H. of the offence committed by Mr. Kline, the trial judge said the following:

> [54] The policy directives, particularly the notification policies of December 11, 1995 and January 28, 1999 also limited Mr. Gill's discretion as they addressed the real concern that children should be protected when they are at a real risk of harm by ensuring appropriate disclosure of relevant information relating to known child abusers such as Mr. Kline. Mr. Gill assessed Mr. Kline as posing a high risk to re-offend and at trial acknowledged that Mr. Kline's presence in the home posed a danger to J.H. The January 28, 1999 policy directs that a probation officer must disclose to the at risk person or his guardian information which in most cases would include the criminal record as it pertains to his offences against children, *modus operandi* and other information needed to identify why there is a risk.

[55] The trial judge declined to find a sufficiently broad discretion negating the *prima facie* duty of care. He concluded as follows:

> [55] I find that the policy guidelines found in the *Correction Act,* and the Attorney General's policies limited Mr. Gill's discretion as to the homes in which he could permit Mr. Kline to reside and mandated that he must provide the at risk person or their guardian information such as Mr. Kline's criminal record and other information needed to identify the risk.
>
> [56] I conclude that Mr. Gill's actions in permitting Mr. Kline to live upstairs from the plaintiffs, and in not fully advising D.H. of the threat posed by Mr. Kline, did not involve an exercise of discretion or the making of policy such as to exclude the Crown's liability in this case.

[56] The trial judge then considered the possibility that there was discretion in the sense discussed in ***Dorset Yacht*** and determined even if there was discretion afforded it was not exercised with due care (para. 58).

[57] One swallow, Aristotle said, does not make a summer. Nor does one case create a broad recognized category of recovery. Although the trial judge said he was not required to address the second question of the ***Anns*** analysis based on ***D.N. and D.S.G.*** alone (and I observe that the issue of novelty should be addressed at the beginning of an analysis of duty of care), as stated in para. 46, I consider that the existence of a duty of care in these circumstances requires examination. Accordingly, the second ***Anns***question must be addressed. I approach that question on the basis that ***Hill*** does not eliminate the fact of discretion from every analysis as to

the existence of a duty of care in a novel case. The question is not whether the role of the public official engages discretion, but the nature of the discretion exercised — is it discretion requiring the exercise of judgment in policy considering broad criteria, or is it more narrow? If it is the former, as in ***Cooper***, the case may not support a duty of care. If the latter, as in ***Hill***, the discretion will not negate a duty of care but will be a factor in determining the applicable standard of care.

[58] British Columbia contends that the decisions or actions in issue in this case were taken in the exercise of public discretion and therefore a duty of care should not extend to such discretionary decisions for reasons of public policy. Unlike ***D.N.***, in which there was a complete failure to exercise the discretion, it says this is a case of the public official exercising his discretion, albeit imperfectly. It would end the analysis with the conclusion that Mr. Gill acted in the exercise of statutory discretion.

[59] I do not view ***Hill*** as allowing the approach advocated by British Columbia. The existence of discretion does not compel immunity from liability. Nor, on the other hand, does its existence preclude immunity. The issue of immunity from liability depends upon the function in issue and the role the official was playing in the circumstances giving rise to the action.

[60] In this case the probation officer was supervising the compliance of Mr. Kline, an offender, with the terms of his probation order. In this he was functioning at what may be described as an operational level. Although he exercised discretion in the course of that supervision, and filled an important function both in the corrections system and the justice system in being the first-line check on compliance with the probation order imposed on Mr. Kline as part of his sentence, the probation officer's function in issue did not involve the design of the terms of the probation order or any program for Mr. Kline. Rather, the probation officer's task was management of the parameters already put in place by the sentencing judge. As such, I do not view Mr. Gill's function in relation to J.H. as reaching the high policy level contemplated by the authorities as required before immunity from liability is assured at this stage of the analysis.

[61] As in ***Hill***, I consider that the issue of the exercise of discretion and the competing tensions of Mr. Gill's role in respect to his supervision of this offender are all matters that may be properly reflected in the standard of care.

[62] I conclude that a duty of care on the part of Mr. Gill to J.H. is established.

Standard of Care

[63] The trial judge addressed the standard of care this way:

> [59] . . . The standard of care imposed on the probation officers relates to the type and level of action necessary for them to perform to discharge their duty of care owed to J.H. and their duty to mitigate the risk to the child. The standard of care must be measured against a standard of reasonableness.
>
> [60] The *Correction Act*, the policy directives issued by the Ministry of Attorney General between 1994 and 1999, and the terms and conditions of the probation order imposed on Mr. Kline assist

> in determining the standard of care appropriate in the circumstances which involved placing in the same home with shared facilities a paedophile assessed as being at a high risk to re-offend and a young male who fit the paedophile's target victim group.

[64] The trial judge then discussed the two bases upon which British Columbia is liable to J.H.: (i) the granting of permission to Mr. Kline to reside in the same residence as J.H. and his family and (ii) the probation officers' failure to provide information to D.H. as to the nature of Mr. Kline's criminal record. He concluded that the probation officers, in particular Mr. Gill, did not meet the standard of care required of them.

[65] I agree that the fact permission was provided to Mr. Kline to live in a suite in a residence above J.H., given the nature of the residence, was a failure to meet the standard of care owed to J.H. Although it makes no difference to the conclusion on liability, I do not agree, however, that the failure to provide the details of Mr. Kline's criminal record, alone, was a basis upon which to found liability, given the clear warning given to D.H. that she should not leave her children alone with Mr. Kline for any period of time, and given the misinformation given to the probation officers by D.H. that Mr. Kline had no contact with her children.

[66] In this analysis the existence of discretion is a significant factor, as is the delicate nature of the task of a probation officer.

[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.]

[69] It is here useful to recall the caution expressed by Lord Reid at p. 301 in ***Dorset Yacht*** that responsible authorities have a difficult and delicate task in relation to rehabilitating offenders.

[70] I turn now to the faults found by the trial judge.

(a) The Permission to Reside

[71] On the question of permission to reside in the suite upstairs, British Columbia says the decision of Mr. Gill to allow Mr. Kline to reside in the same house as D.H. and her children was validly made in the exercise of his discretion to approve Mr. Kline's residence, and refers to term No. 2 of the probation order, which states: "Reside where directed and approved by your Probation Officer."

[72] British Columbia observes the order could have designated a specific address but did not do so, or could have said no children should reside at the same address as Mr. Kline, but did not do so. It refers to s. 5(1)(b) of the ***Correction Act*** which designated a probation officer "an officer of every court" and it compares the relationship of a probation officer to persons at risk to the relationship of the judge who imposed the probation order to persons at risk.

[73] The respondents say the probation officer had no discretion to permit Mr. Kline to reside in a house where his doing so would inevitably lead to breach of the probation order. They say the residence approved by Mr. Gill offended two terms of the probation order, that Mr. Kline have "no contact with any person under the age of 18 years unless accompanied by an adult person approved of in writing …" and that he not "attend within 4 blocks of any playground, school yard, park, recreation centres, daycares or other places where children may congregate."

[74] The trial judge concluded that the probation officer had no discretion to permit Mr. Kline to live upstairs, in the same house as J.H. Looking at the terms of the probation order and finding that Mr. Kline would not be able to live in the residence without having unsupervised contact with the two children in the suite below, he concluded that the probation order prohibited the arrangement approved by Mr. Gill. This conclusion is rooted in an appreciation of the physical circumstances of the residence. In discussing this at para. 53, the trial judge said (which I replicate again for convenience):

> … Mr. Kline's probation order provided that he have no contact with any person under the age of 18 years unless accompanied by an adult approved of in writing and in advance by his probation officer.

> There is no discretion afforded the probation officer with respect to contact with persons younger than 18 years, and when read in conjunction with the other terms of the order, appears to preclude any exercise of discretion by the probation officer such that he could permit Mr. Kline to reside in the same home as J.H. and E.H. with its various common areas inviting contact between Mr. Kline and the two children, including the single front door, the common laundry room and the jointly enjoyed front and back yards.
>
> [Emphasis added.]

[75] In para. 65, he described the residence as "a home in which the occupants although living in separate suites, shared several common areas."

[76] The conclusion of the trial judge that the terms of the probation order precluded Mr. Gill from giving permission to Mr. Kline to reside in the residence is a conclusion grounded in his understanding of the premises and the fact that J.H. was a person under the age of eighteen years. It is a conclusion primarily of fact that is, in my view, unassailable. It may be said that the permission given was beyond the authority of the probation officer who was, as was Mr. Kline, bound to observe the terms ordered by the sentencing judge.

[77] Any suggestion that Mr. Gill made a mere error of judgment is not tenable in light of his earlier refusal to allow Mr. Kline to reside in a multi-unit complex where he was likely to encounter children, and in light of the refusal by Mr. Salim to allow Mr. Kline to live in the residence in issue. In my view, there is no demonstrated error in the conclusion of the trial judge that Mr. Gill did not meet the standard of care required of him in permitting Mr. Kline to reside in the suite above J.H.

(b) Provision of Information

[78] The trial judge also found that the probation officers failed to meet the standard of care in declining to tell D.H. that Mr. Kline's sexual offences were against young boys.

[79] British Columbia contends the trial judge erred in this conclusion. It says the probation officers were clothed with discretion as to the amount of information they provided to D.H. and were not negligent in failing to divulge this information. It argues that a probation officer has at least as much protection in providing information to a person as he or she would have in respect to a request for the same information under the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C. 1996, c. 165. That ***Act*** provides:

> 73 No action lies and no proceeding may be brought against the government, a public body, the head of a public body, an elected official of a public body or any person acting on behalf of or under the direction of the head of a public body for damages resulting from
>
> (a) the disclosure, or failure to disclose, in good faith of all or part of a record under this Act or any consequences of that disclosure or failure to disclose, or

(b) the failure to give any notice required under this Act if reasonable care is taken to give the required notice.

[80] British Columbia refers to the balance that must be struck by a probation officer in deciding whether to disclose information. On the one side of the balance is the immediate safety of the community in contact with the offender. On the other side is the long-term objective of a safe community through rehabilitation of the offender and his successful integration into the community with employment, establishment of ordinary social relations, and sufficient residential stability to permit adequate supervision of the offender. British Columbia says that the issue is the need to provide a warning and that in light of the warning given to D.H. not to leave her children alone with Mr. Kline, negligence is not demonstrated.

[81] The respondents agree the probation officers had a degree of discretion as to the extent of information they were required to divulge, but say that by any standard, the degree of information required to be provided was not satisfied. The respondents refer to the Notification Policy which contemplates, in most cases, that information must be disclosed to an at risk person's guardian as to the risk and the criminal history of the offender as it pertains to children. They suggest that the probation officers erred in failing to treat D.H. as J.H.'s guardian and, instead, approached her as a collateral contact. They further observe that D.H. appeared, to the probation officers, not to fully appreciate the warning that Mr. Kline could not have contact with children because D.H. referred to Mr. Kline as a "nice guy" and the probation officers were thereby put on notice that more information was required.

[82] As in ***G.(A.) v .Supt. of Fam. & Child Service*** (1989), 38 B.C.L.R. (2d) 215, 61 D.L.R. (4th) 136 (C.A.), where Mr. Justice Esson considered a decision made in the exercise of discretion to apprehend children (albeit in the context of a discussion on duty of care), there may have been errors in judgment in the exercise of discretion. That is, however, not a basis upon which to find a failure to meet the standard of care. The significant aspect here, in relation to the communications between the probation officers and J.H.'s mother, was the need to tell D.H. that Mr. Kline was not allowed unsupervised contact with children and that she should never leave her children alone with him. These aspects were fully met by the probation officers who attended the home in March 1999. More than that was a matter for the professional discretion of the probation officers.

[83] The respondents and the trial judge put considerable weight upon the policies of the B.C. Corrections Branch as demonstrating a failure to meet the requisite standard of care. The primary obligation of the probation officers is set out in the ***Correction Act***. The policy directives function as a guide and are of assistance in determining the standard of a reasonable probation officer. Failure to comply with the policy raises questions as to the quality of judgment brought to bear on the issue by the probation officer but does not, by itself, compel a conclusion that the probation officers failed to meet the standard of care. Here, the policy required information to be given to the at risk person "limited to that information required to enhance safety". The policy goes on to say that in most cases the information would identify the offender by name, general residential area, criminal history, *modus operandi* and other information needed to identify why there is a risk, but it is couched in terms that leave the degree of detail in any particular case to the probation officer.

[84] The trial judge did not advert to the degree of professional discretion residing in the probation officers both under the ***Act*** and under the policy. On my respectful reading of the reasons for judgment, the trial judge found an error in judgment but did not then ask himself whether this error in judgment, in the circumstances prevailing including the misinformation provided by D.H., was an unreasonable mistake or was one that a reasonable probation officer (who had advised D.H. that Mr. Kline was on probation for a sexual offence, that he was not to have unsupervised contact with persons under the age of eighteen years, and that she should not leave her children alone with him even for a few minutes) might make.

[85] With respect, on this aspect, the trial judge overly narrowed the role of the probation officers and shrank the scope of their responsibilities and discretion, leaving insufficient room for error in judgment or disagreement as to the manner in which this discretion could be exercised. The ***Act*** gives a probation officer a broad mandate that may, on occasion, pit long-term and short-term objectives against each other and may lead to genuinely held but differing views on the wisdom of a particular course of action. These difficulties were described by Lord Reid in ***Dorset Yacht*** as leaving much room for differences of opinion and errors of judgment (p. 301). There is, additionally, some force to British Columbia's submission that the probation officer should be accorded similar protection in the performance of his duties as he would have under the ***Freedom of Information and Protection of Privacy Act***.

[86] I do not consider the failure to provide information in the case at bar a proper basis upon which to found liability where, as here, a warning was provided against leaving Mr. Kline with the children.

[87] Notwithstanding my conclusion on the matter of providing information, because I agree with the trial judge on the matter of the permission given to Mr. Kline to live in the same residence as J.H., I conclude a breach of the standard of care is established.

Causation

[88] British Columbia disputes the finding of causation. It says the only relevant cause of the abuse (apart from Mr. Kline's obvious and egregious culpability) was the lie told by D.H. that Mr. Kline had not had unsupervised contact with the children. It points to the friendship between Mr. Kline and the family fashioned before he moved to the upstairs suite. Applying the "but for" test set out in ***Resurfice Corp. v. Hanke***, [2007] 1 S.C.R. 333, 2007 SCC 7, it says but for the lie of D.H., Mr. Gill would not have approved the residence and Mr. Kline would not have therefore had the chance to assault J.H. in his upstairs bedroom. It says, given the established friendship between Mr. Kline and the family, it is likely the assaults would have occurred in any event.

[89] The trial judge held, as to causation, on the question of approval of the residence:

> [73] I do not agree with the Crown's contention. Although I deplore D.H.'s conduct in lying to the probation officers, Mr. Gill knew from the reports that Mr. Kline was a manipulative individual who exercised his apparently considerable charms as a means of getting close to his young male victims. Although D.H. told the probation officers that she knew of Mr. Kline's no-contact order and the

> circumstances which led to its imposition, the only likely source of that information would have come from Mr. Kline himself, an individual who Mr. Gill must have been aware had little reason to tell the truth. D.H. asked the probation officers to tell her the nature of Mr. Kline's criminal history, a query which the probation officers ignored in spite of the January 1999 notification policy which, given D.H.'s role as the guardian of an at risk child, mandated a proper disclosure of the risk to J.H. posed by Mr. Kline.
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> …
>
> [79] I conclude that the assaults by Mr. Kline upon J.H. would not have occurred but for the probation officer's creation of a dangerous situation when he allowed Mr. Kline to reside in such close proximity to a child who fit into his target group, a decision exacerbated by the probation officer's failure to properly warn D.H. about the risk to J.H. posed by Mr. Kline.

[90] This finding of causation is a finding of fact. In my view, there is no sound basis upon which that finding of fact can be assailed. I would not disturb the conclusion that, but for Mr. Gill's negligent approval of this residence, injury to J.H. would not have occurred.

Measure of Damages

[91] British Columbia contends that the damages ordered are so excessive as to constitute an error in principle.

[92] In assessing non-pecuniary damages, the trial judge said:

> [88] The Crown submits that a $75,000 award would be appropriate for J.H.'s non-pecuniary damages whereas counsel for J.H. submits that $100,000 should be the starting point for the assessment of non-pecuniary damages.
>
> …
>
> [91] Although the actual assaults upon J.H. occurred over a short period of time, the aggravating factors include the experts' conclusion that he has been left with a trauma which will be long-term and cause him difficulties in life. The aggravating factors are at the low end of the scale. I assess the non-pecuniary damages accordingly at $100,000.

[93] The trial judge assessed the cost of future care at $240,000, modestly using six, not eight years, as the appropriate period in which the care would be provided, to recognize the likelihood that J.H. would, without the assaults, have completed a two year college program rather than a four year university program. He assessed loss of future income, assuming a two year post-secondary program, at $175,000.

[94] British Columbia complains that the trial judge awarded an inordinately high sum for non-pecuniary damages. It submits that certain costs of future care, calculated on the basis of six years further education, should be reduced by one-third to reflect the fact J.H. may not stay in education for that length of time, and other costs should be adjusted, to bring them to

$186,748.81. Last, on damages, it complains that the loss of income award was premised on the conclusion that without the abuse, J.H. was sure of obtaining a college certificate. It says that accounting for that negative contingency would reduce the award for loss of future income from one-third of the global figure to ten to twenty percent of the global figure.

[95] This Court will only interfere with a damage award when the trial judge applied a wrong principle of law or awarded damages that are inordinately high so as to indicate a wholly erroneous award of damages: ***Nance v. British Columbia Electric Railway Company Ltd.*** (1951), 2 W.W.R. 665, [1951] A.C. 601 (P.C.); ***Cory v. Marsh***(1993), 22 B.C.A.C. 118, 77 B.C.L.R. (2d) 248.

[96] I do not consider the award for non-pecuniary damages inordinately high. The range of damages for these injuries is broad. In ***S.Y. v. F.G.C.*** (1996), 78 B.C.A.C. 209, 26 B.C.L.R. (3d) 155 Mr. Justice McFarlane said for the court:

> [55] What is fair and reasonable compensation for general damages, including aggravated damages, in this case is not easy to say. This is an evolving area of the law. We are just beginning to understand the horrendous impact of sexual abuse. To assess damages for the psychological impact of sexual abuse on a particular person is like trying to estimate the depth of the ocean by looking at the surface of the water. The possible consequences of such abuse presently are not capable of critical measurement.
>
> [56] Comparison with the awards made in similar cases is helpful in maintaining consistency, and therefore giving fair and equivalent treatment to all victims. But the impact on individuals in particular circumstances of sexual abuse is so difficult to measure that other cases can only provide a rough guide for assessment in this case.

[97] Accordingly, I see no basis upon which to interfere with the award for non-pecuniary damages.

[98] Nor do I see error in the awards relating to cost of future care or loss of future income. The two, of course, are related. In the event the cost of future care is reduced because J.H. is unable to pursue training, the future income loss increases. The best that can be done is a fair assessment that balances these two aspects of the damage award.

[99] The question is whether the global award of damages is adequate. In this the trial judge, having heard the evidence, was in the best position to assess the positive and negative contingencies.

[100] There being no error in principle alleged, I see no basis upon which to conclude these awards demonstrate reversible error.

Refusal to Allow Late Filing of the Counterclaim

[101] British Columbia contends the trial judge made a palpable and overriding error in refusing an extension of time for the filing of the counterclaim. It says there was no prejudice to the respondents by the late filing because the allegations central to it were pleaded in the allegation of contributory negligence contained in the statement of defence. It says that if

this aspect of the appeal fails it will simply file a writ claiming contribution, an inefficient process that is not just and convenient.

[102] The respondents say that British Columbia has not met the high burden that applies to an appeal of a discretionary order. It notes that British Columbia proffered no explanation for the delay of over two and one-half years. It refers to ***Revici v. Prentice Hall Inc. et al.*** (1968), [1969] 1 All E.R. 772 (C.A.) as an example of refusal to extend time where no explanation is given.

[103] The trial judge addressed the application immediately preceding the trial (in unpublished oral reasons for judgment) as follows:

> [8] As for the counterclaim, no leave was asked to file the counterclaim and it was brought long, long after the time permitted. I dismiss the Crown's application brought without Notice of Motion for leave to extend the time for filing the claim.

[104] The trial judge also addressed the application in his reasons for judgment (2006 BCSC 1903) as follows:

> [3] The parties commenced the trial with several matters which impacted on the conduct of the trial. The Crown applied for leave to proceed with a counterclaim filed April 25, 2006 against D.H., the purpose of which was to provide that if any loss or damage suffered by the infant plaintiffs J.H. and E.H. were apportioned between Mr. Kline or the Crown on the one hand and the plaintiff D.H. on the other, that the Crown could claim contribution and indemnity from D.H. on the basis of her alleged failure to take reasonable steps to protect J.H. I denied the Crown leave as the application came well out of the time permitted and would have delayed the trial, thereby causing yet further prejudice to the plaintiffs, particularly J.H.

[105] This order is one made in the exercise of discretion. As such, this Court will only interfere where the discretion was not exercised judicially or was exercised on a wrong principle: ***Lieberman v. Business Development Bank of Canada***, 2006 BCCA 300.

[106] In this case, British Columbia does not identify an error of principle. Nor can it be said the discretion was not exercised judicially. Indeed, the considerations referred to by the trial judge, the length of delay and the potential for delay, are proper considerations on such an application. So, too, is an absence of explanation.

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

Apportionment of Fault and the Cross Appeal

[108] I have left to last British Columbia's appeal as to the five percent fault attributed to D.H. D.H., on the other hand, cross appeals, saying that no fault should be attributed to her.

[109] British Columbia says that D.H.'s wilful blindness, her lie to the probation officers, and her failure to act on the warnings not to leave her

children with Mr. Kline clearly warrants a higher degree of fault, and that five percent is plainly wrong.

[110] Fault was assessed in the manner it was allowing for the predominant fault of Mr. Kline, and respecting the rule that fault under the ***Negligence Act*** permits only one hundred percent liability. What is significant here is the allocation of fault between British Columbia (assuming vicariously liability) and D.H., in a four to one ratio.

[111] Apportionment of fault is a question of fact. It depends upon the respective deficiencies in the actions of the parties.

[112] Here, the trial judge found the probation officers at fault in giving Mr. Kline permission to reside in the suite above J.H. and in failing to provide information about Mr. Kline's criminal offences to D.H. For the reasons above, I conclude that the latter is not a proper basis for a finding of fault. This triggers a review of the respective degrees of fault of British Columbia and D.H.

[113] D.H. contends that she is not at all at fault. I do not agree. D.H. was advised of the term of the probation order. Although she chose not to comply with it on the basis she did not know the underlying offence was a sexual assault against a person of her son's profile, that is not an answer to her election to permit her children to be with Mr. Kline contrary to that order. Nor does she have a good answer to the falsehood told to the probation officers that Mr. Kline did not have contact with her children. While she has explained why she chose to give this false information, and one may sympathize with her desire to have a male influence in her son's life, it cannot be an answer to say the probation officers should have been alerted to her failure to appreciate what she was told (because she said Mr. Kline was a "nice guy") and thus they should have anticipated her falsehood. The probation officers were entitled to expect that, as mother of the children of whom they were speaking, she truthfully answered their questions about Mr. Kline. Had she advised the probation officers of the true state of affairs, Mr. Kline would not have been permitted to reside in the suite above her and consideration would have been given to proceedings against Mr. Kline concerning breach of the probation order. I would dismiss the cross appeal.

[114] Given my conclusion that the failure to divulge the details of Mr. Kline's criminal offending did not amount to a breach of the standard of care, I conclude that the relative degrees of fault should be modified. Greater prominence must be given to the failure by D.H. to comply with the term of the probation order prohibiting Mr. Kline from unsupervised contact with people under the age of eighteen, and her falsehood to the probation officers that Mr. Kline had not had contact with her children. In these circumstances, the relative fault of D.H. and the probation officers is comparable.

[115] Accordingly, as between these two parties, I would adjust the attribution of fault to a ratio of one to one.

Conclusion

[116] In conclusion, I would allow the appeal only to the extent of apportioning fault as between British Columbia and D.H. equally. I would dismiss the cross appeal.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Mr. Justice Tysoe"