FILE NO. CI 15-01-95460

THE QUEEN'S BENCH
GENERAL DIVISION
WINNIPEG CENTRE

BETWEEN:

SHIRLEY-MARIE BILKOSKI,
BY HER LITIGATION GUARDIAN, TODD DEREK BILKOSKI,
AND THE SAID TODD DEREK BILKOSKI,

plaintiffs,

-and-

METIS CHILD AND FAMILY SERVICES,
CHILD AND FAMILY SERVICES ALL NATIONS COORDINATED RESPONSE NETWORK AND MELINDA TAGALIK TAUTU

defendants.

SITTING DATE: May 17, 2018 **JUDGE: DEWAR J.**

ENDORSEMENT

APPEARANCES:

S. Norman Rosenbaum for plaintiffs
Michael Finlayson and Gabrielle C. Lisi for Metis Child and Family Services
Kris M. Saxberg for Child and Family All Nations Coordinated Response Network

ENDORSEMENT

INTRODUCTION

[1] The Adult Plaintiff brings this action in his personal capacity and as next friend of his infant daughter (the "Child Plaintiff"), a girl who at the critical time of this case, namely April 2014, was three years old. The plaintiffs allege that in April 2014, the defendant Agencies encouraged or assisted the Child Plaintiff's mother ("the Female Defendant") to leave the province with the Child Plaintiff in the face of a custody dispute then proceeding in the Family Division of this Court. When the Child Plaintiff was returned to the Adult Plaintiff following a custody trial, the Adult Plaintiff alleges that he noticed the Child Plaintiff to be noticeably more insecure. He claims damages to compensate the Child Plaintiff for the detrimental psychological impact of the child's removal from Winnipeg, and for damages to compensate him for interference in his parental relationship with the Child Plaintiff.

[2] One of the Agencies, namely Metis Child, Family & Community Services named in the Style of Cause as Metis Child and Family Services ("Metis CFS") brings a motion for summary judgment dismissing the action as against it.

[3] This motion was filed in November 2016 before the recent amendments to the *Queen's Bench Rules* came into force. On the hearing of the motion, counsel for Metis CFS argued that the traditional test in assessing summary judgment motions, namely the two-part test pronounced by Freedman J.A. in ***Homestead Properties (Canada) Ltd. v. Sekhri et al.***, 2007 MBCA 61, 214 Man. R (2d)

148 at para14 is no longer applicable. She relies upon the approach set forth by Greenberg J. at paras 40 and 41 of ***Free Enterprise Bus Lines Inc. et al. v. Winnipeg Exclusive Bus Tours Inc. et al.***, 2018 MBQB 64, which dispenses with the shifting onus test.

[4] Because this summary judgment motion was filed under the old *Rules*, no pre-summary judgment case conference was held. It is therefore incumbent upon me in deciding whether there is no genuine issue to also satisfy myself that the summary judgment motion can achieve a fair and just adjudication of the issues in the action by providing a process that allows me to make the necessary findings of fact, allows me to apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[5] The Metis CFS have supported their motion with affidavits from Jennifer Maffiola, Jennifer Rye and Linda Chartrand. The Metis CFS deponents have also been cross-examined. Counsel for the plaintiffs have filed an affidavit from the Adult Plaintiff, and an affidavit of Judith Allard which attaches the Metis CFS file. The Adult Plaintiff has been cross-examined.

[6] This is not a case where one witness says "black" and the other says "white." Rather, there is no evidence that contradicts what the Metis CFS witnesses say. It is simply suggested that on some points, what they say cannot be relied upon.

[7] There have not as yet been examinations for discovery in this case, notwithstanding that it was commenced approximately three years ago. In some

instances, motions for summary judgment should not be allowed to proceed until the responding party has had the opportunity to avail themselves of the discovery provision in the *Rules.*

[8] However, when a responding party has not taken steps to avail themselves of the discovery *Rules* within a reasonable time after the case is at issue, a court need not be as concerned about hearing a motion for summary judgment. I am fortified in this view on this case because the responding party has exercised its rights to cross-examine the people of Metis CFS who were primarily involved with the case of the Child Plaintiff. I am persuaded that there is sufficient information before me to render a reliable decision.

FACTS

[9] The Child Plaintiff was born on August 25, 2010. The Female Defendant is her mother. The Adult Plaintiff is her father. Because the Metis CFS had dealings with the Female Defendant in respect of two of her older children, it felt it necessary to apprehend the Child Plaintiff upon her birth. Therefore, it took control of the Child Plaintiff, and placed her with the Adult Plaintiff's sister who cared for her for approximately a year. Thereafter, Metis CFS found a foster parent to whom the Child Plaintiff was placed pending further assessment of the Female Defendant and the Adult Plaintiff. They then requisitioned a Parental Capacity Assessment from a registered psychologist, and upon receiving his report, reunited the Child Plaintiff with the Female Defendant in June 2012. However, in November 2012, the Female Defendant, then having *de facto* custody of the Child Plaintiff with the

blessing of Metis CFS, decided to leave the Child Plaintiff in the custody of the Adult Plaintiff, and proceeded to relocate to Nunavut. Shortly after the Female Defendant left the jurisdiction, Metis CFS closed its file on the Child Plaintiff.

[10] Following the departure of the Female Defendant, the Adult Plaintiff commenced proceedings in 2013 in the Family Division of this court for custody of the Child Plaintiff.

[11] In March 2014, the Female Defendant returned to Winnipeg. She was given access to the Child Plaintiff by the Adult Plaintiff and during her access she took the Child Plaintiff to All Nations Coordinated Response Network (ANCR) where she complained that the Adult Plaintiff had been abusive to the Child Plaintiff. ANCR removed the Child Plaintiff from the custody of the Adult Plaintiff and placed her with the Female Defendant and as well denied access of the Adult Plaintiff to the Child Plaintiff while ANCR investigated the abuse complaint. Around the time of her complaint, the Female Defendant also commenced a motion in the Family Division file for custody of the Child Plaintiff.

[12] On April 25, 2014, ANCR concluded that the complaint of the Female Defendant was unsubstantiated and advised the Adult Plaintiff and the Female Defendant of that fact. On April 30, 2014, the Adult Plaintiff contacted ANCR in order to regain custody of the child, but alleges that ANCR staff would not assist him in locating the child. As it turned out, the Female Defendant had taken the Child Plaintiff to Nunavut. She came back to Winnipeg with the Child Plaintiff only shortly in advance of the custody trial which was held before Thomson J. in

September 2014. His decision was pronounced on September 25, 2014 and in it, he gave custody of the Child Plaintiff to the Adult Plaintiff.

[13] This action was commenced in May 2015, and seeks to obtain from the Female Defendant and the two agencies compensation for psychological damage caused to the Child Plaintiff by her removal to Nunavut as well as compensation for the Adult Plaintiff in respect of the loss of *de facto* custody of the Child Plaintiff from April 2014 until the date when his custody of the Child Plaintiff was restored by order of Thomson J. In so doing, the Adult Plaintiff, on behalf of his daughter and on his own behalf, aims his sights at the two agencies and alleges that they encouraged or assisted the Female Defendant in taking and keeping the Child Plaintiff from him during that period.

[14] The Metis CFS has brought its motion for summary judgment on the grounds that it was not involved in the removal of the Child Plaintiff from the care of the Adult Plaintiff in April 2014, and there therefore is no genuine issue as to any liability for damages.

ANALYSIS

[15] Metis CFS acknowledges that it was initially involved with the Child Plaintiff from her birth until November 2012 when the Female Defendant left for Nunavut. Because Metis CFS had initially been requested by the Female Defendant to be the supervisory agency, upon her departure from Manitoba, Metis CFS closed their file, but only after notifying ANCR of the need to follow up with the Adult Plaintiff who then was in *de facto* custody of the Child Plaintiff.

[16] There is one complicating factor in the factual mosaic of this case. Although Metis CFS had ceased providing its services to the Child Plaintiff in 2012, one of its employees, a Ms. Linda Chartrand, had befriended the Female Defendant as of at least January 2014, if not earlier. She had seen the Female Defendant at the Metis CFS on occasions. Ms. Chartrand had nothing to do with the Female Defendant on a professional level – she had not been involved in doing work on the Child Plaintiff's case. Ms. Chartrand deposes that in January 2014, Ms. Chartrand heard the Female Defendant singing at the Metis CFS office, and invited her to attend at Ms. Chartrand's church to sing there. Her evidence is somewhat inconsistent with the timing contained in the Metis CFS files which have the Female Defendant away from Winnipeg from November 2012 to March 2014, and it is entirely possible that Ms. Chartrand may be mistaken about the first time that she invited the Female Defendant to her church. At any rate, a friendly relationship then developed between Ms. Chartrand and the Female Defendant. Ms. Chartrand deposes that she saw the Female Defendant at the offices of Metis CFS in March 2014, learned that the Female Defendant was then homeless and destitute, and then took her into her own house and gave her food and shelter.

[17] The allegations against Metis CFS stem from Ms. Chartrand's interaction with the Female Defendant around this period since shortly thereafter, the Female Defendant made the unsubstantiated complaint to ANCR about the Adult Plaintiff which was the initial impetus in his loss of *de facto* custody. The Adult Plaintiff also alleges that Ms. Chartrand knew and encouraged the Female Defendant to

take the Child Plaintiff from the jurisdiction. There is also a suggestion that Ms. Chartrand directly or indirectly funded the purchase of an air ticket for the Female Defendant.

[18] Ms. Chartrand admits that she had a supportive relationship with the Female Defendant that arose out of her Christian belief to be a good Samaritan, but steadfastly denies that she encouraged the Female Defendant to leave the province. She admits that she provided the Female Defendant with a place to stay in 2014. She denies having discussion with the Female Defendant about her ongoing custody case. Her cross-examination evidence acknowledges that she purchased a plane ticket for the Female Defendant but suggests that the plane ticket which she arranged purchasing for the Female Defendant was in the period following the decision of Thomson J. However, most significantly, Ms. Chartrand denies ever telling anyone at Metis CFS that she had struck up this relationship with the Female Defendant, a fact confirmed in the affidavits of the two other employees of Metis CFS who did have responsibility for the Child Plaintiff before they closed their file in 2012.

[19] Metis CFS submits that the evidence does not permit any conclusion that it is liable. It raises a number of arguments, but I need not deal with them all. The Plaintiff claims that the evidence is such that a trial is necessary in order to obtain the full picture of the encouragement and assistance that Ms. Chartrand was providing to the Female Defendant when she absconded to Nunavut with the Child Plaintiff.

[20] I am of the view that a trial as regards Metis CFS is unnecessary, because even if one assumed that Ms. Chartrand's involvement was greater than she says, that does not make Metis CFS automatically vicariously liable. Clearly, on the evidence before me, Ms. Chartrand was acting on her own, as a friend to the Female Defendant, unbeknownst to the Metis CFS. Ms. Chartrand had never acted in regards to the Female Defendant or the Child Plaintiff while performing her job as an employee of Metis CFS.

[21] The leading case on vicarious liability is ***Bazley v. Curry, [1999] 2 S.C.R. 534*** in which at para 57, McLachlin J. wrote:

> 57 The appropriate inquiry in a case such as this is whether the employee's wrongful act was so closely connected to the employment relationship that the imposition of vicarious liability is justified in policy and principle. From the point of view of principle, a prime indicator is whether the employer, by carrying on its operations, created or materially enhanced the risk of the wrong that occurred, such that the policy considerations of fair recovery and deterrence are engaged. In answering this question, the court must have regard to how the employer's enterprise increased opportunity to commit the wrong, and how it fostered power-dependency relationships that materially enhanced the risk of the harm. There is no special rule for non-profit corporations.
>
> (underlining added)

[22] More recently, Beard J.A. in ***Robertson v. Manitoba Keewatinowi Okimakanak Inc. et al.,*** 2011 MBCA 4, 262 Man. R (2d) 126 at para 36 wrote:

> 36 I would summarize the requirements for a finding of vicarious liability, as they are set out in Bazley, as follows:
>
> - the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee *materially increased* the risk of the sexual assault and hence the harm;
>
> - the enterprise and employment must not only provide the locale or the bare opportunity for the employee to commit his or

> her wrong, it must *materially* enhance the risk, in the sense of *significantly contributing* to it, before it is fair to hold the employer vicariously liable;
>
> • opportunity to commit a tort can be "mere" or significant; consequently, the emphasis must be on the strength of the causal link between the opportunity and the wrongful act, and not blanket catch-phrases — when the opportunity is nothing more than a but-for predicate, it provides no anchor for liability;
>
> • the appropriate inquiry in a case such as this is whether the employee's wrongful act was so closely connected to the employment relationship that the imposition of vicarious liability is justified in policy and principle;
>
> • in determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors, which will vary with the case, may be considered, such as:
>
> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power; and
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power; and ...

[23] If one assumes that the wrongful act of Ms. Chartrand was to encourage the Female Defendant to abscond with the Child Plaintiff, the question to be then asked is whether that act was so closely connected to the employment relationship that the imposition of vicarious liability is justified. Firstly, in most vicarious liability cases, the person sustaining the harm is the person directly affected by the actions of the employee. In this case, that person is the Female Defendant, not the

plaintiffs. They are only indirect victims at best, which in itself is inconsistent with the "close connection" contemplated in ***Bazley***. Secondly, the only involvement of Metis CFS was that Ms. Chartrand met the Female Defendant while she was attending the offices of Metis CFS. Ms. Chartrand was never professionally associated as an employee of Metis CFS with the Child Plaintiff or the Female Defendant. Further, the allegations against Ms. Chartrand involved her actions, if any, away from the premises of Metis CFS almost two years after Metis CFS stopped their involvement with the Child Plaintiff. In my respectful opinion, there is simply no close connection between Metis CFS and the acts alleged by the Adult Plaintiff to have been committed by Ms. Chartrand in 2014.

[24] Counsel for the plaintiffs suggested that by closing their file in November 2012, Metis CFS somehow contributed to the events that occurred in April 2014. Again, I see no connection. It is very clear in the materials before me that the agency involved in April 2014 was ANCR, not Metis CFS. It will be up to a trial judge to ultimately determine whether ANCR contributed to the events of April 2014.

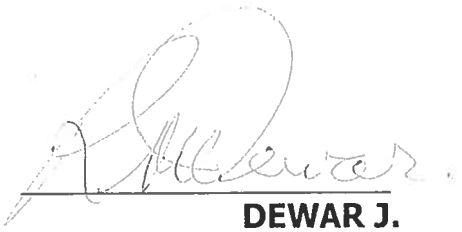
[25] Under the circumstances, assuming that Ms. Chartrand committed the acts alleged by the plaintiffs, they do not invite vicarious liability on the part of Metis CFS. If there is no vicarious liability, there is no genuine issue against Metis CFS and the action should be dismissed against it.

[26] Metis CFS also argued that, there is no duty owed by a child welfare agency to a parent of the child under the jurisdiction of the agency and at the very least,

the action by the Adult Plaintiff against it should be dismissed. Given my decision on the issue of vicarious liability, I purposely decline to express an opinion on that issue. Resolution of the issue is unnecessary and it should be left to be dealt with by a judge upon hearing submissions from counsel for the Adult Plaintiff and the remaining agency, if the remaining agency wishes to raise it.

[27] Costs may be spoken to if not agreed.

SIGNED May 25, 2018



DEWAR J.