COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN: C.A., C.H., L.K. and M.D. PLAINTIFFS (RESPONDENTS) AND: JOHN WILLIAM CRITCHLEY DEFENDANT AND: HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA DEFENDANT (APPELLANT)

Date: 1998-11-06 Vancouver

Before: The Honourable Chief Justice McEachern The Honourable Madam Justice Ryan The Honourable Mr. Justice Donald Thomas H. MacLachlan & J. Douglas Eastwood Counsel for the Appellant M.R. Ellis & S. Aldinger Counsel for the Respondents Place and Date of Hearing Vancouver, British Columbia June 24, 25 & 26, 1998 Place and Date of Judgment Vancouver, British Columbia November 6, 1998

Written Reasons by: The Honourable Chief Justice McEachern Concurring Reasons by: The Honourable Madam Justice Ryan (p. 57, par. 142) The Honourable Mr. Justice Donald (p. 65, par. 156) Reasons for Judgment of the Honourable Chief Justice McEachern:

[1] This appeal is mainly concerned with the question of whether the Provincial Crown is liable either for actual breaches of fiduciary duties on the part of Crown servants, for their negligence, or vicariously for intentional torts and crimes committed against children in the care of the Crown by a person who was not an employee of the government.

[2] For the purposes of this judgment, I shall sometimes refer to this non-government person, John Critchley, as an independent contractor although a question arises about whether that is an accurate description of his status in the present state of the law.

[3] More specifically, the case is about liability for historical sexual assaults (1975 - 1977) committed by Mr. Critchley while he was the operator of a wilderness group home for unmanageable male youths of 14 to 16 years of age. These youths, although committed to the care of the Crown either on remand or apprehension, could not be accommodated in the usual facilities or in foster homes. The four plaintiffs in this action seek to make the Crown liable both vicariously for the wrongs of the operator, Mr. Critchley, or directly for either negligence or breach of fiduciary duty on the part of Crown servants in the supervision of Mr. Critchley.

[4] Mr. Critchley pleaded guilty to counts of sexual assault committed against 16 youths in his care, including three of the plaintiffs, and his culpability is not questioned by the Crown on this appeal. He has since died.

[5] The trial lasted 19 days. The Reasons for Judgment of the learned trial judge comprise 148 pages. She found the Crown liable both for its own and Mr. Critchley's original failures, which she found to be breaches of fiduciary duty, and also vicariously for the wrongs of Mr. Critchley. Although negligence was argued by counsel, the learned trial judge did not find it necessary to deal with that cause of action. As will be seen, I will find it necessary to also consider negligence.

[6] The damages awarded to these four youths range from $139,500 to $278,000, plus $20,000 each for aggravated damages, some pre-judgment interest and 80% of their special costs. A further claim for punitive damages was dismissed. Except for aggravated damages, the Crown does not challenge these damage assessments. The plaintiffs have cross-appealed the judgment dismissing their claim for punitive damages.

The Factual Basis for the Case

[7] Because facilities such as Brannan Lake, which provided for the care of difficult young boys, had been closed by 1975 in favour of a community based service delivery model, it was decided that delinquent children under the Juvenile Delinquents Act would be transferred to the care of the Ministry of Human Resources which normally provided accommodation for such youths in foster care. Some especially troubled youths, however, could not be managed in private homes.

[8] It was at this juncture that Mr. Critchley offered to make what the trial judge called his "bleak" and "dilapidated" ranch (Arden Park) near Clinton, B.C. available as a group home for troubled youths. He had apparently been a successful street worker with troubled children in Surrey, and along with his wife had recently been approved as a foster parent. This offer was welcomed by the Ministry and Arden Park was designated in mid-1975 as a foster home for four boys "...of the unmanageable, anti-social type who would not fit readily into a foster home environment."

[9] A child care worker, a former R.C.M.P. officer, was employed at Arden Park from May, 1975 to November of that year. There was also a social worker in the area, the first one being there from 1972 to October, 1976. This worker visited Arden Park regularly and never saw anything troubling. In addition, there was a Probation Officer in the area for the full period of Arden Park operations who also visited regularly and saw nothing amiss. For some reason, it was not then the practice for visiting social workers to speak directly with the residents of such a facility; thus it is not surprising that complaints were not directed to them.

[10] In the command structure of the government service, there was a Regional Superintendent, Mr. Eggleton, and a District Supervisor, Mr. Friend, who were both in place for the full term of Arden Park operations. The latter regularly visited the ranch.

[11] The social worker, Mr. Gill, was not replaced when he left in November, 1975 until August, 1976, but the other levels of inspection and supervision were continued throughout this entire tragedy. Over the months that followed the opening of Arden Park, its status as a foster home was upgraded, first to a group home on 1 April, 1976 for six youths, and then to a residential treatment facility with nine beds in July, 1978. This was largely to increase levels of funding so that Arden Park could accommodate additional youths, although Mr. Eggleton was uneasy about using a foster home as a remand home.

[12] There seems little doubt that Arden Park was a primitive place with no real facilities for rehabilitation, education or social orientation. It would have been bad enough without sexual molestation, but the evidence indicates the unsuspecting public officers responsible for its supervision were glad to have it as a resource for the placement, for limited periods, of "...difficult, hard-core, male juveniles...". At the same time, the visiting social worker and the local R.C.M.P. Corporal, both of whom visited regularly, thought that it was a "happy place" and had positive views about it because of what appeared to be a good relationship between Mr. Critchley and the boys.

[13] In describing Arden Park as "bleak", it is apparent the trial judge thought Arden Park, as it was operated, was a primitive, unsatisfactory place to warehouse these troubled youths.

[14] At pages 16 to 20 of her Reasons for Judgment, the trial judge describes the sexual violence visited upon the four plaintiffs by Mr. Critchley. The trial judge accepted everything the plaintiffs said about their treatment by Mr. Critchley. The same may be said about the evidence of five other residents of Arden Park which is described at pages 28 to 33.

[15] At page 33, the trial judge describes the events leading to the closure of Arden Park. Briefly, on 8 April, 1979, six residents, including one of the plaintiffs, ran away and went to the R.C.M.P. Detachment in Clinton where they made complaints of abuse by Mr. Critchley. The plaintiff also complained of sexual abuse. In the course of the resulting investigation, Mr. Critchley took a drug overdose. Although the social worker did not believe the complaints, Mr. Eggleton ordered the removal of the youths from Arden Park and the facility was closed.

[16] At the close of her description of Arden Park, under the heading "Analysis', the trial judge said: I have no hesitation in finding that each of the plaintiffs was repeatedly abused, both physically and sexually, by Critchley.

[17] Then, after describing the plaintiffs' three pronged approach: breach of fiduciary duty, negligence, and vicarious liability, the trial judge made the following comment: Clearly, a fiduciary obligation imposes a markedly higher duty and standard of care upon the fiduciary than is commonly imposed upon a negligent wrongdoer. Thus, if the plaintiffs establish that the Crown owed them a fiduciary duty, that it breached that obligation, and that damages flowed from the breach, it is unnecessary to consider their claim against the Crown in negligence.

[18] The trial judge then proceeded to discuss the law relating to fiduciary duty. With respect, I prefer to first discuss the various complaints alleged to have been made because I consider it necessary to develop the factual background before considering the applicable law. At pages 64 to 77, the trial judge described "documented" and "undocumented" complaints. Before I follow that format, I wish to say that I have no doubt everyone charged with responsibility for the care of children is under a fiduciary duty towards such children. One of the real questions on this part of the appeal is whether such duty was breached by the Crown or its servants apart from the Crown's possible vicarious liability for the obvious wrongs committed by Mr. Critchley.

[19] It is also important to remember that these four plaintiffs arrived and left Arden Park at different times and each of their cases must be considered in light of the knowledge the officers of the

Crown had at the times relevant to each of them. The time frames for each plaintiff at Arden Park, stated chronologically were: LK. from 6 November, 1976 to 24 January, 1977; CH. from 27 November, 1977 to 31 March, 1977; CA. from 12 August, 1977 to 23 January, 1978; MJ. from 11 January, 1978 to 8 April, 1978.

[20] As will appear, an event described as the 'surrey Runaway" became a focal part of the Plaintiff's case. It occurred in February, 1977 when four residents of Arden Park ran away to Surrey. This led to a substantial investigation into the operations of Arden Park. It can be seen from the above that the plaintiffs LK. and CH. both left the ranch before that investigation was completed and the other two plaintiffs CA. and MJ. arrived much later.

[21] I turn to describe the chronology of misconduct on the part of Mr. Critchley as detailed by the various witnesses. 1. The complaint of SR. in late 1975 (August 1975 - December 1975)

[22] SR., who was not a plaintiff, was born 21 July, 1958. He was an early resident at Arden Park from 22 August, 1975 to 2 December, 1975. He testified that, after he ran away, he was brought back to Arden Park where Mr. Critchley, in the course of a discussion about SR. behaving himself, first offered him a drink of liquor and then became amorous and eventually "...he took his penis and stuck it between my legs and ejaculated." SR. said he complained to no one because there was no one to complain to except the ex-R.C.M.P. child care worker whom SR. described as the "heavy" when it came to discipline. He described a second similar episode when he woke up to find Mr. Critchley lying on top of him.

[23] SR. ran away after each of these incidents. After the second one, he described talking to a young probation officer or social worker. He said: The best that I can remember is that I told him about the beatings that were going on, the lack of food and Critchley attacking us in the night-time, and the way"I think that I said it would have been he's homo attacking us or something to that effect, because at that time I knew what that was, but I didn"t know what sexual assault was.

[24] When he was returned to Arden Park, SR. said he was attacked a third time by Mr. Critchley, who told him that no one would believe him if he complained. He ran away after that, and broke into a store but he was caught and charged. SR. testified at this trial that his lawyer disclosed these matters to the Provincial Court in Ashcroft in 1975 and subpoenaed Mr. Critchley and his stepson into court, where they were asked directly about sexual abuse. They denied it. SR. testified further that the judge disbelieved him and accepted Critchley's denials. There seems to be no record of what happened in court that day.

[25] In giving his evidence about abuse, SR. insisted that he mentioned Mr. Critchley's "homo activity" but he could not say what words he used. He also said he told his mother about such matters but she did nothing about it.

[26] Laurie Rockwell was the social worker responsible for Arden Park at the time. Although he did not remember SR., he identified a "running record" for him, and under the date 05.12.75, he noted: [SR.] seems bent on making the Big Time, at least # one, a scant two weeks after appearing in Court re: 2 B&E's in Clinton. [S] made a successful AWOL break about 1:00 p.m. in the afternoon of November 31st. He walked to Pavillion via the BCR tracks, got a ride to Highway 97, and one south to Cache Creek. There he pulled 3 successful B&E's for about $165 (his figure). Deerborn - $115 (his own figure) (car dealer). Home - smokes and cash (smashed cigarette machine) 66 Garage - cash. [S] seemed to take exquisite relish in detailing how he did all the B&E's, and especially how he had veal cutlets after the first, chicken and chips after the second, etc. cetera. The details of capture were painstakingly revealed as was his favorite alias, [PAJ]. Why did he not steal a car, ie, "go all the way" instead of trying to take the economy bus route? "Not me, man, and go to the pen?!" Big time aspirations and small time actions. [S] recounted various cruelties, harassments, threats, et cetera at Arden Park that forced him to flee for his life, as it were. After 2 or 3 B&E's on the Arden Park premises, gas sniffing, fights, and various and sundry assaults on Arden Park and its inhabitants - after repeated talks, chances, breaks and promises (on his part) - one can only question the source of the complaints. It was less than one week after his last court appearance that he and [BD] stole frozen food out of Critchley's freezer! Needless to say John [Critchley] will not take him back and the local P.O. wants to nail him for breach of probation. [S] appeared in court December 2nd and was remanded to Friday, December 5th in Kamloops for "bail application." His Legal Aid lawyer is Sven Kraumanius (372 9942), and his partner is Harold Dreyer (phonetic). (Emphasis added)

[27] Mr. Rockwell said that he would definitely have made a note of any mention of "homo" activity, or any serious allegation of abuse. He also said that at no time did he receive any allegations of abuse that he considered needed investigation.

[28] The trial judge accepted the evidence of SR. that he "...related the existence of "homo activity" at Arden Park although he did not specify that he was sexually abused by Critchley." Actually, SR. did allege in his evidence that the "homo activity" was that of Mr. Critchley, which was a new allegation on his part.

[29] The trial judge also criticized Mr. Rockwell for failing to provide a satisfactory explanation for failing to detail what he described as complaints of "cruelties, harassment and threats'. With respect, Mr. Rockwell's report suggests that, considering the record of SR., he and the Provincial Court judge simply did not believe SR. in 1975, as the trial judge did in 1997. Obviously, they were responding to different databases.

[30] Subsequent entries kept by Mr. Rockwell included a statement dated 14.12.75 that Critchley showed him a letter from SR. apologizing for all the trouble he had caused at Arden Park.

[31] It seems clear that apart from the running record just mentioned, there was no other report of these incidents and no senior officials recalled them being brought to their attention.

[32] The trial judge found that the Ministry did not adequately investigate SR.'s complaints of "cruelties, harassments, threats, etc." mentioned in the SR. "running record." Apart from the fact that a judge did not believe SR., further investigations at that early date would not likely have produced sufficient evidence to make much difference, if any, in the decisions being made about Arden Park in 1975. 2. The complaint of WA. (January, 1976 - January, 1977)

[33] This youth gave evidence that he was sent to Arden Park at 13 years of age because there was no place else to send him. He described being aware that other kids were being physically beaten and he was once kicked in the chest. He described one incident when Mr. Critchley forced him to have oral sex with him. He said that about two months before he left Arden Park he told another boy's probation officer about the physical abuse and sexual contact he described, but nothing came of that. In cross-examination he said he was not sure he mentioned sexual contact. There is no record of this discussion with an unidentified probation officer and the trial judge made no finding about the evidence of this witness. 3.

The complaints of the Surrey Runaways

[34] In February, 1977, four Arden Park residents (none of them plaintiffs) ran away to Surrey where they were apprehended and interviewed. Three of them were then returned to Arden Park. The boy not returned to Arden Park was DK., a witness at the trial. In Surrey, these boys made complaints about beatings by Critchley and his stepson, and homosexual activity among some of the boys. The report of these interviews is very general but includes the following: The homosexual situation: there was another young man at the Ranch [name deleted]. He would drop his drawers and expose himself. On two separate occasions got into bed with two different boys [names deleted]. He was "right out of it". Took an axe to Mrs. Critchley at one point, spit in their food and on their faces. They claimed any complaint to Mr. Critchley were not of any use, he didn"t do anything. The beatings: all four boys claim threats. (All four tell relatively the same story, [name deleted] is supposedly a silver gloves boxer.) Mr. Critchley's son is also [name deleted] bragged and the others egged him on to challenge the Critchley lad. They were overheard by Mr. Critchley. (They claim the cabins are "bugged".) Mr. Critchley was in the truck with his son, he called [name deleted] over and asked him about it. He reached out and grabbed [name deleted] by the hair and slammed his face against the truck. This loosened his teeth, cut his lip and caused a lot of bleeding. Mr. Critchley kicked him in the ribs and arms and groin. It still hurts to breath, he claims. There are no bruises in evidence and the scar on his lip could be from anything...

[35] There were other notations of idleness and boredom at the camp. The report continues: Their worst complaints: (1) the physical abuse received by [name deleted, not Mr. Critchley] and witnessed by the three others [names deleted]; harassment to them claimed to have been received by others. They speak of a lot of the type of threat such as "I worked in skid road, learned to street fight so don"t think I afraid of any punks', (2) the inadequate, cold shelter provided, (3) the isolation, (4) the lack of any activity (can"t ride the horses, they"re not broken, can"t watch T.V., etc.)

[36] This report was sent forward to the Regional Manager, Mr. Eggleton, who directed that the resident social worker, Ms. Souster, interview the two remaining residents at Arden Park who had not run away. One of these boys was DS., who was not a plaintiff. The report of his interview states: I interviewed [DS] at Arden Park on Thursday afternoon February 17, 1977. He came to Arden Park on February 3, 1977 and was involved in the first AWOL with the new group. He

refused to go on the second one. He said that [DK] told the new boys lots of weird stories about Arden Park but he said [D] complained and lied all the time and deserved whatever happened to him. He said he had been slapped by John Critchley once but not hard and that he had deserved it. He said John Critchley was very fair. He said he had adequate clothing and was well cared for. He found the food really good and there was plenty of it. He received three meals a day breakfast, lunch, dinner and a bedtime snack at 9 P.M. He said the cabins got really cold at night as they had to go to bed at 10 P.M. and the fire went out about 2 P.M. and the cabins are drafty. To keep warm, he sometimes sleeps in his clothes although he was told to sleep in his long-johns and T-shirt. He was not aware of any sexually related problems.

[37] The other remaining resident was the plaintiff CH. No notes have been located of this interview but Ms. Souster's covering letter refers to "...resumes of my interviews with the two remaining boys at Arden Park." Ms. Souster, in her evidence, assumed there were no serious allegations as she apparently undertook no follow-up. CH., then 14 years old, was a resident at Arden Park from 27 November, 1976 to 31 March, 1977. He testified at trial that Critchley continually abused him both physically and sexually during the period just mentioned.

[38] It is not disputed that CH. was abused as he described at trial, but the only warning the Province had up to that time was the SR. incident already described, and CH. was only at Arden Park for a month and a half after that.

[39] Continuing with the narrative of this runaway, Ms. Souster was one of the two social workers who escorted three of the four runaways from the Kamloops airport back to Arden Park. She mentioned that they seemed content to go back to Arden Park and said that they had "conned" the social workers at Surrey. A few days later, these three were interviewed by Ms. Souster but they made no serious allegations and she gave them paper and asked them to write down anything they wished to convey to her. These letters, possibly prepared under the direction of Mr. Critchley, largely recanted their previous allegations. Ms. Souster's letter report to her supervisor states: I"m enclosing letters written by the three boys who went AWOL from Arden Park on February 8, 1977 and were returned from Surrey on February 19, 1977. They went AWOL on February 20, 1977 and were returned on February 22 after being picked up in Ashcroft. After several sessions with them, they have decided to settle down and give Arden Park an honest trial. When I talked to them on Wednesday they admitted that they had lied on many counts to the people at the coast, quote "they were easy to con". I suggested that their performance had caused us some problems and if they wished to write a statement of any kind good or bad, I"d appreciate it. It was totally up to them and no pressure was put on them to write. I left them some paper for letter writing in general. This morning, John Critchley came in with these three letters. The one letter is to myself and Dale Ginther, Probation Officer. The boys have been most co-operative this week. Their main complaints to us are: 1. Not enough hot drinks. They are requesting 20 cups of coffee a day. They get all the milk they can drink and coffee or cocoa at bedtime. 2. No change in breakfast. They want bacon and eggs once a week. It is on the menu twice a week but they weren"t there long enough to find out, otherwise, it's porridge, toast and milk. 3. No girls, not enough entertainment. 4. Homesick for town, (would like to go to Kamloops). 5. No personal phone calls Arden Park does not have a phone. 6. Not enough baths. 7. Visitors they are allowed but they haven"t been there long enough to have any. The boys really enjoyed their stay at the emergency shelter in Surrey. They were out on day passes and visited many of the boys in that area known to our office and Probation office. They had a ball and figure that's the place for them. I'm also enclosing a letter John Critchley received recently from [name deleted], one of the most difficult boys Arden Park has had. Thought you might appreciate being kept up to date.

[40] The learned trial judge concluded that the runaway incident was not properly investigated, partly because Ms. Souster was not given a copy of the Surrey report, and because she uncritically accepted the boys' recantation letters from Mr. Critchley. In fairness, however, it should be noted that Ms. Souster was specifically instructed to make inquiries about sexual irregularities because such had been mentioned to the Surrey worker. It seems reasonable to conclude that such matters would have been covered in her discussions with these boys. 4. The complaints of the plaintiff CH. (November, 1976 - March, 1977)

[41] In December, 1976 the plaintiff CH. ran away from Arden Park and when apprehended he said he told an R.C.M.P. officer of physical abuse by Mr. Critchley but he was not believed. CH. also alleges that between November, 1977 and March, 1978 he informed a social worker at Arden Park that Mr. Critchley had forced him to engage in oral sex, but the social worker called him a liar. This statement, of course, was subsequent to the Surrey runaway investigation. There were substantial discrepancies between the statement originally made by this plaintiff to the police and his trial evidence but the learned trial judge accepted his trial evidence. 5. The DS. Complaint (February, 1977)

[42] As already mentioned, DS. mentioned to Ms. Souster that he had been slapped by Mr. Critchley, "... hard" and that "...he deserved it." 6. The Complaint of the plaintiff LK. (February, 1977)

[43] Also in mid-February, 1977, Mr. Eggleton received a letter from LK.'s social worker describing considerable fighting amongst the boys, some physical abuse of residents at Arden Park by Mr. Critchley and his foster son following various misconduct, and about homosexual incidents among the boys. LK. had been a resident from 6 November, 1976 to 24 January, 1977. He described three incidents of sexual contact with Mr. Critchley during the period he was at Arden Park. In the first one, Mr. Critchley demanded oral sex but did not ejaculate; in the second incident, Mr. Critchley lay down on his bed and touched him sexually; in the third incident there was oral sex with ejaculation.

[44] LK. ran away from Arden Park three times, but was returned on the first two occasions. The third time he was picked up by the R.C.M.P. and taken first to Ashcroft and then to Kamloops. He did not tell the police why he had run away. When in court, he did not complain about sexual abuse by Mr. Critchley. He said: A. And they wanted to know some stuff. Why I ran away, and what they should do with me, where they should send me, I guess. Stuff life that, I imagine. And I tried the best I could to tell them why I ran away and stuff, but I was a little bit scared, so I just kind of -- I said stuff like other kids were picking on me and that there, because I didn"t want to say John Critchley was doing that, because I figured -- I kind of thought I was going to another place. Like, there was a couple other ranches and that I had known about in, wherever, for kids and that, and I just figured if I started saying too much, people have friends all over the place, you know, so maybe I would end up some place else, and who knows, maybe it's a friend of his, and I"m in for more trouble there. So I just kind of said some of the other kids were picking on me and giving me a rough time, and weird stuff was going on there. That's about all I really said. Somebody believed me, I guess. Q. Is that all you remember saying? A. Yeah. I don"t -- I don"t think I blamed -- I don"t think I said anything about John Critchley. I just think I said, 'stuff was going on there." I gave no names. I didn"t want to give names. Q. And do [sic] whom did you say this? A. I don"t really know who they were. Maybe a Crown prosecutor. I don"t know. One or two other people that were in the courtroom took me out of the courtroom. Well, I said stuff like that in the courtroom, and then, I don"t know, later that day or some -- maybe 10 minutes later, maybe a day later, I was in some room where you might pay fines, or do something in the courtroom up in Kamloops. And there was a couple people in the room, maybe social worker, maybe a probation officer, I"m not sure who it was, two or three people, I think, and I said, 'some stuff goes on there. Some weird stuff's going on", and what I just said a second ago. I don"t know who it was. To be honest, I don"t remember anybody's name. I don"t know if anybody told me a name. Q. Were you any more explicit about what kind of weird stuff? A. No, I don"t think so. Just -- I think I kind of pushed it around, like the sexual nature stuff and that. Maybe I might have said -- to be honest, I don"t really know what I told them. I just know I was just letting them know bad stuff was going on there.

[45] LK. also said he didn"t tell his parents about these matters because he was afraid his dad might think he was "gay", and because he just didn"t want to talk about it. He didn"t mention it again for about 15 years.

[46] The letter the Regional Manager received does not mention any sexual actions by Mr. Critchley. LK., of course, had left Arden Park by the date of the Surrey runaway.

[47] As already mentioned, LK. described a number of incidents of physical beatings, and a number of sexual encounters, usually involving oral sex, which LK. assumed was intended to be punishment for not working or for running away. He also described cruelty perpetrated by Mr. Critchley on the boys, such as being made to run until exhausted, or to run back to Arden Park naked when caught running away. As with the other plaintiffs, LK. did not disclose the sexual encounters to the social or probation workers to whom he had access.

[48] On 28 February, 1977, the Area Manager, Mr. Friend submitted a report to Mr. Eggleton which doubted many of the complaints that had been made by the runaways. He mentioned that the facilities at Arden Park were not first class accommodation, but noted, "We are not providing a holiday resort accommodation for model clientele, but a resource for hard core juveniles who cannot be cared for in their communities."

[49] Notwithstanding this, the Regional Manager, having also received the Surrey Runaway Report, directed that all previous residents of Arden Park be interviewed to determine whether they had been mistreated. The Manager's letter of 8 March, 1977 demonstrates the level of his concern. It

states: You may be aware that we have received a complaint of abuse against John Critchley as a result of alleged acts committed against the residents of Arden Park. Although I have investigated these specific allegations and found there was not enough evidence to substantiate the complaint of abuse, vague evidence was, nonetheless, presented which indicated that the level of child care in the home may be questionable. The allegations made specific references to threats against the boys and the encouragement of violence, namely, beatings among the residents themselves. I am sufficiently concerned by these reports and ask that past residents of the home be interviewed to see if they experienced similar treatment. I am specifically interested in the following. 1. Were the boys threatened physically by the houseparents or any other adults associated with the home. 2. Were the boys encouraged to take matters into their own hands by inflicting physical beatings on other boys. 3. Were their [sic] any incidences of homosexual behaviour in the home? 4. Any other points related to the child care practices in the home. I understand from Mr. Friend that the following boys were placed in Arden Park from Kamloops and have subsequently been discharged. I do not know which offices are presently supervising these boys, so I am providing a list of all the Kamloops boys and would ask that you interview only those who are under your jurisdiction. 1. [A: B] 2. [J: S] 3. [S: J] 4. [N: D(V)] (Emphasis added)

[50] The responses to this initiative were inconclusive. Three respondents raised serious allegations of excessive physical force by Mr. Critchley as a matter of discipline but there were no allegations of sexual misconduct. The other responses were at least neutral. The learned trial judge summarized the reaction of the Regional Director to these responses, and the other information he had as follows: Although the interviews of previous residents disclosed some complaints regarding physical abuse and threats, Mr. Eggleton testified that he also received many positive reports. He said he considered closing Arden Park because of the complaints "which were certainly of major concern to us' but he balanced them against the positive responses. He considered some, but not all, of the allegations to the Surrey workers to be true. The social workers and probation officers reported that there were no signs of physical abuse. Mr. Friend assured him that he had cautioned Critchley that the type of behaviour complained of would not be tolerated. Mr. Eggleton concluded that the boys were not in danger. He expressed his concerns in a letter to two District Supervisors in Kamloops: . . . vague evidence was, nonetheless, presented which indicated hat [sic] the level of child care in the home may be questionable. The allegations made specific references to threats against the boys and the encouragement of violence, namely, beatings among the residents.

[51] As a result of all this, the Regional Manager reviewed the management of Arden Park and in a letter dated May 3, 1977 commented: Although this resource has had considerable success in helping the children placed, it has, nonetheless, been most apparent that it has operated under a very loose administrative structure, and also that the number of staff has been inadequate to meet the program needs.

[52] Accordingly, the Regional Manager recommended the establishment of a two tiered administrative system with a Management Committee with various officials and Mr. Critchley being responsible for hiring staff etc. and an Operations Committee which would be responsible for the direct care of the residents. He noted: I think it is important that the Director Manager will not work directly with the children but will rather be responsible for the total operation and program of Arden Park, being specifically responsible for fulfilling a supervisory role and meeting the managerial requirements of the resource. 7. The complaint of CV. (February, 1997)

[53] CV. was one of the boys who ran away to Surrey. In his interview, he told Ms. Souster that he expected to be severely beaten when he returned to Arden Park. 8. The complaint of AS. (March 17, 1997)

[54] Ms. Lyons, AS.'s social worker, reported to Mr. Eggleton that AS. complained he had been threatened with physical punishment by Mr. Critchley once and kicked once by GL. He related an incident where Mr. Critchley had hit SJ., who was knocked out when he fell back on a bar on the bed. 9. The complaint of WA. (March 17, 1977)

[55] Ms. Diskin, WA.'s social worker, reported to Mr. Eggleton that WA. had complained that the boys were both threatened and punished physically by both house parents. The boys were also sent to work by themselves all day without supervision. 10. Complaint of SJ. (March 25, 1977)

[56] Ms. Robinson, SJ.'s social worker, stated that SJ. complained that GL. had beat him up three times and Mr. Critchley, who knew of the beatings, did nothing. He also complained that Mr. Critchley had knocked him out twice. He said there was little supervision by the houseparents. 11. The complaint of KM. (August, 1977 to June, 1978)

[57] This witness described a number of beatings and four sexual assaults, one in a hotel room in Vernon. He ran away but was returned to Arden Park where he was forced to run until he dropped. He alleges he told social workers about these matters but nothing was done. He arrived at Arden Park after the Surrey runaway investigation. 12. The complaint of the plaintiff CA. (August 1977 - January, 1978)

[58] This plaintiff made very serious allegations of some physical and much sexual abuse by Critchley both at Arden Park and on two trips to Vancouver. Except for confiding in one friend, he made no complaints or disclosures to anyone about this abuse until long after they occurred. He, too, arrived at Arden Park after the Surrey runaway investigation. 13. The complaint of BR. (October, 1978)

[59] In October, 1978 Mr. Critchley admitted breaking a plate over BR.'s head, cutting his ear. Mr. Critchley informed an official of this incident, explaining that he had grown weary of complaints from residents about the quality of the meals being served. It is apparent that this incident can have no bearing upon the complaints of the two plaintiffs who had left Arden Park by that date. 14.

The complaint of the plaintiff MD. (January, 1979 - April, 1979)

[60] This plaintiff was physically and sexually abused by Mr. Critchley during the time he was there. He eventually ran away with other boys who complained to the police about sexual abuse. This led to the closing of Arden Park.

[61] This completes my review of most of the complaints described in the evidence. The trial judge concluded: I have no hesitation in finding that each of the plaintiffs was repeatedly abused, both physically and sexually by Critchley. Allegations of procedural irregularities

[62] In addition to the actual abuse perpetrated by Mr. Critchley, Ms. Ellis for the plaintiffs argued that the failure of the officials of the Ministry of Human Resources establishes original fault upon the Crown apart entirely from its alleged vicarious liability for the wrongs done by Mr. Critchley. The basis for this argument includes failing to respond appropriately to notice of abuse at Arden Park, failing to establish an adequate registry of complaints or incidents so that developing patterns of conduct would be recognized, and generally failing to provide minimum standards of care required and described in various manuals and directives established for such purpose, including the requirement of special diligence imposed upon them by law.

[63] I do not propose to review all those matters. The findings of the learned trial judge are sufficient, in my view, to permit the appeal to be decided upon a proper basis without detailing the precise language of these many statutes and policy directives. Again, however, I must comment that strict compliance with all these requirements would not likely have alerted Ministry officials of any unusual risk prior to the date of the Surrey runaway.

[64] Based upon these facts, the plaintiffs argued at trial that they could succeed on three grounds:

1. breach by the Crown of its fiduciary duty;
2. negligence; and
3. vicarious liability for the deliberate wrongs of Critchley.

[65] I shall now discuss each of these heads of liability.

Fiduciary Duty

[66] First, a general observation.

[67] The learned trial judge in her Reasons for Judgment essentially accepted everything the plaintiffs and their witnesses said, and found fault with virtually everything the servants and agents of the various Crown agencies did or failed to do. There was evidence to support the former. The evidence, however, does not persuade me that the Ministry officials, in the difficult contexts in which they operated, acted other than with good faith in what they thought were the best interests of those entrusted to their care and without any possibility of conflict with any personal or other interests. There are, however, no findings by the trial judge on this question of good faith.

[68] These officials had extremely limited options regarding the kind of placements available for the troubled youths in their care, and they were receiving complimentary as well as contrary reports

about Arden Park. They tended to discount some complaints (which is not the least surprising considering their source), and they may have made some bad judgments, particularly after the Surrey runaway investigation, but they did not act dishonestly or breach any duty of honesty or loyalty. It is accordingly necessary to consider whether, in such circumstances, a finding can be supported that they breached a fiduciary duty with the dreadful stigma such a finding imports.

[69] I accept that this mass of evidence from the plaintiffs and their witnesses was sufficient to put the Crown on notice at some point in the chronology that the plaintiffs were at serious risk. However, the evidence does not support, nor did the trial judge find, that these officials had failed other than in their honest appreciation of the risk faced by these youths and in the procedures they employed in the discharge of their duties.

[70] Next, it is useful to note that there are at least two paths to Crown liability. The first would be through vicarious liability for the deliberate wrongs of Mr. Critchley. This requires a careful analysis of the circumstances in which the Crown, in these circumstances, might be vicariously liable. I do not propose to deal with that question at this stage of my analysis.

[71] The second path, of course, is through original fault on the part of Ministry officials apart from the wrongs of Mr. Critchley. This requires an analysis of the difference between negligence and fiduciary duty. (Battery is not in issue as the Ministry officials committed no direct wrongs against the plaintiffs.) It is this question that I shall consider in this part of my judgment.

[72] The learned trial judge has described the statutory framework within which the Ministry officials acted. It is not necessary to requote all those statutory passages. Instead, it will be sufficient to recognize that, by statute, the Ministry owed a duty of special diligence in providing suitable facilities for the care of the plaintiffs: see Protection of Children Act, S.B.C. 1960, c. 303, as amended, particularly ss. 4(2) and 11.

[73] It was argued at trial that these provisions, and the common law, in effect placed the Ministry and all of its officials in the place of parents. This is undoubtedly so on a theoretical level because the former actually replaced the parents or guardians of the plaintiffs in their day-to-day care. This flows historically from the old principle of wardship long known to the law, but it hardly describes the relationship between a major agency of government and a child in its indirect care. These modern agencies must necessarily operate through officials, many of whom have no opportunity to participate in or even physically to oversee the care of every child committed to the care of the agency. Thus, it becomes important to consider whether, as a matter of law, the Crown is to be held liable for every misfortune that befalls a child in the legal care of the Ministry, or, if not, where the line is to be drawn.

[74] The law relating to fiduciary duty arose out of the responsibility assumed by everyone who undertakes to act for another to act honestly and loyally, and not to profit personally from that responsibility except, of course, for proper remuneration. Until recently, this remedy was used for the purpose of requiring disloyal agents to disgorge secret or unlawful profits. Quite recently, fiduciary law has been extended to cover a myriad of circumstances usually but not always related to the law of trusts. In a speech delivered in 1988 to a Canadian - Australian legal judicial exchange in Canberra, Mason C.J.A. commented humorously, but with considerable accuracy, that: "All Canada is divided into three parts: those who owe fiduciary duties, those to whom fiduciary duties are owed, and judges who keep creating new fiduciary duties!"

[75] Our Supreme Court of Canada has led the way in the common law world in extending fiduciary responsibilities and remedies but it has not provided as much guidance as it usually does in emerging areas of law. The law in this respect has been extended by our highest court not predictably or incrementally but in quantum leaps so that judges, lawyers and citizens alike are often unable to know whether a given situation is governed by the usual laws of contract, negligence or other torts, or by fiduciary obligations whose limits are difficult to discern. Many lawyers plead cases in the alternative not knowing where the line should be drawn. This case, and a number of other recent trial judgments seem to suggest that Crown liability, and indeed the liability of all citizens, may be absolute in many circumstances even in the absence of personal fault.

[76] Without doubt, there are many differences between the consequences of a breach of fiduciary duty and the more traditional basis for liability such as negligence. Some of these differences are mentioned briefly by McLachlin J. in M(K) v. M(H), [1992] 3 S.C.R. 6 at 86, but others relate to foreseeability and limitations of actions.

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

[78] This question was foreseen and discussed by Southin J., (as she then was), in Girardet v. Crease & Co. (1987), 11 B.C.L.R. (2d) 361 at 362: Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g. by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty - if not of deceit, then of constructive fraud. See Nocton v. Lord Ashburton, [1914] A.C. 932 (H.L.)

[79] Notwithstanding this clear statement of the law, which was quoted with apparent approval by the Supreme Court of Canada in the Lac Minerals case, infra, cases in the Supreme Court of Canada before and after Girardet have failed to make the law as clear as it should be.

[80] Fiduciary obligations have been imposed by the Supreme Court Canada in the following circumstances: 1. Federal officials leased Indian lands on terms less favourable to and contrary to what the Indian Band had agreed to. It was held that the Crown breached fiduciary duties created by the Indian Act. It was not suggested the Crown officials, or the Crown, deliberately acted wrongly or that they benefited privately from the lease: Guerin v. The Queen, [1984] 2 S.C.R. 335.

2. A wife having custody of children of her marriage refused access to her husband. The husband sued for damages but his action was dismissed as not alleging a cause of action: Frame v. Smith, [1987] 2 S.C.R. 99. It was held by Wilson J., dissenting, that the wife owed a fiduciary obligation to provide access. She declared that the requirements for a fiduciary obligation are: a. the fiduciary has scope for the exercise of some discretion or power; b. the fiduciary can unilaterally exercise that power or discretion so as to effect the beneficiaries legal or practical interest; and c. the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. In several subsequent cases, the Supreme Court of Canada expressed approval of these three principles. 3. A mining company owning valuable mineral rights disclosed confidential drilling information to a potential partner which indicated adjacent claims could be valuable. The proposed partner, in breach of a later found implied obligation of confidentiality, bought up the adjacent claims in competition with the first company. It was held the second company owed a fiduciary obligation to the first company: Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574. 4. A solicitor acted in two transactions. First he acted for a purchaser of a piece of property at a low price. Second, he acted in a transaction between the original purchaser and third parties in which he transferred the same property directly from the original owners to the original purchasers and the third parties jointly at a higher price without disclosing the flip. It was held that the solicitor breached his fiduciary duty to the third parties: Canson Enterprises Ltd. v. Boughton & Company, [1991] 3 S.C.R. 534. 5. A physician traded drug prescriptions for sexual favours from his patient. The majority decided the case on the basis of non-consensual battery, while the minority found the physician breached a fiduciary obligation owed to the patient: Norberg v. Wynrib, [1992] 2 S.C.R. 226. 6. A father committed incest against his daughter. It was held that he committed both a battery and a breach of his fiduciary duty: M(K) v. M(H), [1992] 3 S.C.R. 6. 7. A financial advisor recommended investments in MURB projects without disclosing that he had a financial arrangement with the developer. The investor retained the right to approve or disapprove each investment. The majority of the Supreme Court held that the adviser breached his fiduciary duty; the minority found only a breach of contract: Hodgkinson v. Simms et al., [1994] 3 S.C.R. 327.

[81] The foregoing are just examples of the kinds of fiduciary duty cases the Supreme Court of Canada has considered during the last several years. No doubt, there are many others. In delivering its judgments in these cases, the Court has written hundreds of pages. Yet it is difficult to find a comprehensive statement of the law. In some cases, there are multiple sets of reasons, and, as already mentioned, the Court was divided in some cases on whether the conduct in question amounted to a breach of a fiduciary duty. In other cases, the Court was as concerned to

explain the differences, usually on the question of damages, between conduct that might sound in either tort or fiduciary damages, thus raising once again the spectre of the result depending upon the cause of action in which the case is framed. Moreover, in a number of lower court cases, where liability might be decided in tort, the outrage of the judge seems to elevate the case to one in fiduciary duty. With respect, this is no way to decide important legal questions since some judges have higher (or lower) outrage levels than others.

[82] We have no way of knowing how the learned justices of the Supreme Court of Canada might view this case. History suggests they may have a number of different views. Clearly, there seems to be a decided trend toward the view noticed by Mason C.J.A., especially in cases of high indignation, but it is time, in my view, for the law to be made more certain and less subjective. Certainly I regard it as part of this Court's responsibility to urge the Supreme Court of Canada to clarify the law as best it can.

[83] With this in mind, I note that in all the above cases except Guerin, the defendants personally failed to discharge a legal duty for their own benefit. In Lac the defendants betrayed their proposed partner; in Canson the lawyer failed to disclose the "flip" to his client; in Norberg the physician betrayed his patient; in M(K) v. M(H) a father violated his daughter; and in Hodgkinson, the advisor failed to disclose his personal interest. In each of these cases the defendant was guilty of something more than negligence or battery.

[84] Thus, only in Guerin was the defendant held to have breached a fiduciary duty without personal wrongdoing beyond possible carelessness or negligence. Guerin may be regarded as a case where a fiduciary disobeyed the instructions of the beneficiary, although even on that basis, there was no personal advantage accruing to the fiduciary. Guerin, however, was a special case where the aboriginal right in question was said to be unique. In that respect Guerin is obviously a case that should be confined to its particular facts and we should not be timid just because one case does not fit a useful pattern. Experience, rather than logic, governs the development of the law.

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

[86] On this basis, I would allow the appeal of the Crown against the finding of liability based upon a breach of fiduciary duty by its officers and employees, who were found to have acted honestly throughout.

[87] I turn next to consider the other bases for liability relied upon by the plaintiffs. Negligence

[88] As already mentioned, the trial judge did not make any findings based upon negligence. She did, however, observe at par. 204 of her Reasons that the harm suffered by the plaintiffs at the hands of Mr. Critchley was foreseeable by the officials of the Crown charged with the care of these boys. This, however, was such a general finding that it would apply to every child in the legal care of the Crown.

[89] The trial judge also furnished a convenient chronology of complaints upon which any finding of negligence must depend because, assuming there was no negligence in approving the use of Arden Park as a residence for these boys in the first place (a point that was not argued), these officials could not be found negligent in the absence of notice of facts or circumstances requiring their attention.

[90] Inasmuch as the plaintiffs LK. and CH. both left Arden Park for the last time in January 1977 and March 1977, respectively, the first real notice the Crown officials had of sexual abuse by Mr. Critchley should have arisen out of the investigation of the Surrey runaways following their trip to Surrey on 15 February, 1977. The only possible exception to this is the evidence of SR. and of WA. With regard to the former, I have already described the details of disclosure. Apart from the fact that he was deliberately evasive, there was apparently an adverse judicial determination of his credibility that confirmed the social worker's views. These facts go some distance insulating the defendants from liability on that account.

[91] As to WA., he testified he made his disclosure about excessive discipline to an unidentified probation officer about two months before he left Arden Park in January, 1977. He did not recall whether he mentioned sexual abuse. The trial judge made no finding with respect to the evidence of this witness.

[92] As already described, the Surrey runaway episode, and the subsequent investigation, which took some time, led the Regional Director to question whether Arden Park should be closed. On the basis of the trial judge's findings, the various allegations made by the Surrey runaways were not adequately investigated, but even if they were, it is not likely, having regard to the unfolding of this awful narrative, that the Regional Director and others responsible for the care of these children would have had enough information in their databases to be fixed with responsibility in negligence for the harm done to LK. and CH.

[93] Similarly, the institutional failings found by the trial judge, such as the failure to keep proper records of complaints, would not likely have led to the development of a recognizable pattern prior to the departure of these two plaintiffs from Arden Park.

[94] Accordingly, I find no basis for a finding of negligence against the Ministry with respect to these two plaintiffs. Their action in negligence must be dismissed.

[95] There is evidence supporting the findings of the trial judge that the harm done to the other plaintiffs by the depredations of Mr. Critchley was foreseeable, particularly after the Surrey runaway investigation. Unfortunately, however, it is difficult to reach any conclusions on this question, in the absence of findings by the trial judge, particularly on the question of good faith on the part of public officials which might provide a defence on the negligence issue. As it is unnecessary to reach a conclusion on this issue respecting the plaintiffs CA. and MD. I would make no disposition on that question. The Vicarious Liability of the Crown

[96] The liability of Mr. Critchley to these plaintiffs for his breaches of fiduciary duty and sexual assault is obvious and not contested by the Crown. The question then arises whether the Crown is vicariously liable for his unlawful misconduct. This is, of course, especially important to the plaintiffs LK. and CH. who have failed on both fiduciary duty and negligence.

[97] Prima facie, Mr. Critchley was an independent contractor discharging responsibilities on behalf of the Ministry that the Ministry could not, on an operational basis, discharge itself except with respect to children in actual custody. Such a setting was possible for children on remand or sentence, but would be impractical in the extreme for foster care when countless citizens often take on the care of troubled children. Assuming proper care in the selection of its agents, the question is whether the particular circumstances of this case created a context where liability must rest with the Crown for all harm deliberately done to children in care by those in operational charge of them.

[98] It is not seriously suggested that the Crown should be held liable for initially funding and authorizing Mr. Critchley to begin his Arden Park venture. Moreover, it seems obvious that liability could not properly accrue to the Ministry for every harm done by, for example, a qualified foster parent or other type of residential care. In fact, in many cases, a real parent who was unable to manage a child, and with the same knowledge possessed by the Crown, might have welcomed a facility such as Arden Park and could easily have made the same error of judgment about Mr. Critchley that the Crown made.

[99] Judges in a number of traditional cases have attempted to define classifications where the wrongdoer could be characterized as an employee of the Ministry or as an independent contractor. In this case, the contract between Mr. Critchley and the Ministry expressly stated that the latter was an independent contractor and not an employee of the Crown.

[100] More recent authorities make it clear, however, that like so many formerly "well established principles', this distinction between independent contractors and employees may be blurred in many cases where there are overlapping obligations.

[101] An early authority on this question is Lloyd v. Grace, Smith & Co., [1912] A.C. 716 (H.L.) where a firm of solicitors was held vicariously liable for the frauds of a clerk in their employ. The basis for this finding, taken from the speeches of Lord Halsbury at p. 727 and Lord McNaughten at p. 738, was that the firm that put the clerk in a position of trust and made it possible for him to cheat the client should be responsible. The question then arises whether the clerk was acting in the course and scope of his employment. This question has vexed judges and lawyers ever since because employees do things that are totally unconnected with the discharge of their duties. The

problem becomes even more difficult when the wrongdoer is not an employee of the party sought to be made vicariously liable. For some years the cases often drew a distinction between an employee, and an independent contractor, and various tests have been formulated for the purpose of determining whether the liability should be passed on to the principal.

[102] This question was recently carefully discussed in the trial and appeal court judgments in B.(P.A.) v. Currey, [1995] 10 B.C.R. 339 (B.C.S.C.); affirmed as B. v. Children's Foundation et al v. Superintendent of Family and Child Services et al. (1997), 146 D.L.R. (4th) 72, which was decided by a five judge panel of this court and from which an appeal has been taken to the Supreme Court of Canada.

[103] In that case, relied upon by the trial judge in this case, a non-profit foundation operated a group home for children one of whom was sexually assaulted by an employee. The assaults occurred both in the residence maintained by the Foundation and elsewhere, both during working hours and at other times. Vicarious liability was imposed upon the Foundation which, it will be noted, was blameless except in employing an apparently qualified employee.

[104] Unfortunately, there is no clear ratio in the Children's Foundation case. All members of the panel found the Foundation vicariously liable and the reasons for judgment of both Huddart and Newbury JJ.A. are filled with much useful scholarship which need not be repeated here. Each of those learned judges decided the case on slightly different grounds, while Hollinrake and Donald JJ.A. found no difference between them and Finch J.A. agreed with both of them. Nevertheless, the judgments in that case clearly establish the nature of the enquiry that we must undertake.

[105] It is clear that both Huddart and Newbury JJ.A. adopted the emerging view that vicarious responsibility for the intentional tort of the employee should be determined by considering the relationship between the wrongdoer and the party sought to be made liable. Huddart J.A. focused most closely upon the conferral by the Foundation of parent like authority and the likelihood of wrong occurring in such circumstances. Newbury J.A., on the other hand, thought the creation of opportunity for harm was not enough and that there must be a close connection between the exercise of the authority conferred by the person sought to be made liable and the wrongful acts actually committed.

[106] Adopting this approach, the trial judge in this case found at par. 216 and par. 226 that: It is... necessary to focus on the actual relationship between the Superintendent and Critchley rather than the characterization of the latter as an employee or independent contractor. ... Through its funding and direct involvement in the operations of Arden Park, the Crown controlled Critchley and determined the extent of the resources available, including staffing levels. The Crown had control over all aspects of Arden Park including the placement of children there and the level of supervision and monitoring.

[107] The second passage just quoted constitutes findings of fact that are supported by the evidence and this appeal must be decided on that basis. The trouble I have with all the above is that the culture in the "care industry of the day" a culture in which workers did not speak with residents directly and the understandable reluctance of the patients to complain, combined to hide the real facts from the supervising officials of the Crown. The question is whether the Crown should be liable, as a matter of law, for the early wrongs of Mr. Critchley in the circumstances of this case, keeping in mind that his designation as an independent contractor may not be a significant factor in the modern law that tends to look not at traditional classifications but rather at the true nature of the relationship.

[108] A major difference between cases such as Lloyd v. Grace, Smith & Co., and this case is that in the former, the function of the employee was narrowly circumscribed. He was authorized to deal with specific problems in which there was a readily foreseeable opportunity for fraud in the course of financial transactions. In this case, on the other hand, Mr. Critchley became a surrogate parent who had day-to-day charge of every aspect of the life of the residents. Moreover, it seems to me that predatory sexual molestation is so totally different in kind and quality from what is reasonably to be expected from an experienced care giver that there may be room for distinguishing these various kinds of cases in a vicarious liability analysis. I pause to note that, absent such a distinction, parents who employ a qualified but secretly deviant nanny could possibly be vicariously liable to their children for damages and interest many years later for harm done to their children by the nanny even though the parents were entirely without fault.

[109] I raise these questions only because vicarious liability is such a harsh principle that its application to historical cases (of which there are a great many) might possibly be reviewed. Speaking for myself, I question whether a principal without fault should be liable for the intentional

crimes of an agent unless there was negligence in the actual employment of the agent or subsequently as may have been reasonably foreseen.

[110] The present state of the law, however, both in Canada and the United States makes it almost impossible for an innocent principal to avoid liability even for the deliberate wrongs of an employee or agent: Lewis (Guardian ad litem of) v. British Columbia (1995), 12 B.C.L.R. (3d) 1 (S.C.C.); Moshinski v. Treadline Industries Ltd. (1997), 154 D.L.R. 4th 212 (S.C.C.); Burlington Industries, Inc. v. Ellerth, F. 3d 490 (7th Circuit, 1998) and Faragher v. City of Boca Raton,

[111] F. 3d, 1530 (11th Circuit, 1998). MATH On the other hand, the law in Great Britain seems to be far more conservative: see Regina v. Associated Octel Ltd., [1996] H.L.J. No. 36, and S.T. v. North Yorkshire County Council, [1998] E.W.J. No. 951 (C.A.) where the significant distinction between the liability of a principal for the torts of employees or independent contractors has been maintained.

[112] In the present state of the law I do not think it is open in this case to depart from the approach adopted in the Children's Foundation case. It is my view that on either approach described in the Children's Foundation case, by analogy, vicarious liability must be imposed upon the Crown in this case because:

[113] 1. The Crown through its officials conferred virtual 24 hour a day parental authority over the residents of Arden Park to Mr. Critchley;

[114] 2. The Crown had the power to, and did effectively control the operation of Arden Park. In this respect see par. 220 of the Reasons for Judgment of the trial judge; and

[115] 3. The wrongs done by Mr. Critchley occurred either on the premises of Arden Park or while the plaintiffs were otherwise in his care. The connection between Mr. Critchley's authority and the wrongs he committed could hardly have been closer.

[116] In other words, the wrongs were committed by a surrogate parent in the course of discharging on behalf of the Crown the very responsibilities imposed by law upon the Crown.

[117] This accords with the views of the trial judge who, at par. 242 said: In this case I find that all of the indicia of a relationship which would attract vicarious liability are present. Moreover, utilizing either an analysis of a "conferral of authority" test or a "closeness of connection" test, I conclude that there are ample policy reasons for holding the Crown vicariously liable for Critchley's sexual assaults of the plaintiffs.

[118] It seems to me with respect that the principal policy reason supporting the imposition of vicarious liability upon an innocent principal for intentional crimes is one based upon deep pockets. It is true that text writers and others have attempted to assign other reasons for the rule as described by Mr. Justice Donald, but such reasons are only examples of deep pockets that are suggested as a way of providing compensation for every loss even those caused deliberately and outside the scope of the agency from principals who may not have the resources to lay that loss off on others. The law must apply equally and many defendants sought to be made liable cannot insure themselves against this kind of a loss, and certainly cannot raise taxes in order to spread the loss.

[119] Thus, while I would not necessarily subscribe to the views of the learned trial judge regarding policy reasons for imposing liability upon the Crown, I conclude upon a consideration of binding authority that she did not err in imposing vicarious liability upon the Crown for the wrongs of Mr. Critchley in this case. This makes it unnecessary to give further consideration to the question of whether, in any event, the Crown could escape liability by the delegation of its statutory responsibility to Mr. Critchley.

[120] If the result of this or other similar cases imposes too heavy a burden upon the Crown then the government can cause the Legislative Assembly to prescribe a different result for future cases poin It follows that the appeal against the trial judgment imposing liability upon the Crown with respect to all four plaintiffs must be dismissed.

Aggravated Damages

[122] The plaintiffs' individual damage awards expressly reflected the aggravated circumstances of the sexual and other assaults committed by Mr. Critchley. Although the trial judge expressly

recognized that, generally speaking, there cannot be joint and several responsibility for aggravated damages because they can only arise from the misconduct of a particular defendant, she did not accept the Crown's submission that it should be relieved of the aggravated damage component of those awards. Instead, the trial judge held the Crown responsible for all of the harm done by Mr. Critchley and for the additional damage done by the Crown in breaching its fiduciary duties to the plaintiffs.

[123] Notwithstanding the different conclusions I have reached about fiduciary duties in this case, I would not interfere with the plaintiffs' compensatory awards because the Crown has not appealed against those awards except to the limited extent just mentioned and it is not feasible to quantify the aggravated damage components in each award.

[124] In addition to the foregoing, however, the trial judge awarded a further $20,000 in aggravated damages to each plaintiff on two grounds.

[125] On the first ground, the trial judge made two points. First, she referred to the fact that when the truth about Mr. Critchley's misconduct became known, three residents who had run away were returned to Arden Park for three or four more days before it was closed. Only the plaintiff MD. was then a resident there. Second, she was very critical of the Crown because the parents of boys who had been residents at Arden Park were not informed that there was a risk their children had been abused. She found that this omission "contributed to and exacerbated the inability of the plaintiffs to cope with the effects of the sexual abuse."

[126] On the second ground, the trial judge, while accepting that the Crown witnesses were "decent and dedicated individuals', was scathingly critical of their failure at trial to accept responsibility for Mr. Critchley's "cruelty and depredations' and she said they seemed more anxious to justify their own behavior. She added: No one expressed regret as to what had happened to the children at Arden Park. No one articulated a concern that their acts or omissions raised any culpability, legal or moral, on their part. I formed the impression that the witnesses' evidence was unduly influenced by an implied or explicit directive to deny liability on the part of the Crown. The effect of that testimony was to yet again deny the very real harm done to the plaintiffs who, with the exception of LK. listened to most of the Crown's case.

[127] Aggravated damages are awarded not as punishment, but as additional compensation for mental suffering or humiliation. They are not usually assessed as a separate award for the harm done to the victim by the tort.

[128] As the first point mentioned above, namely the return of three residents to Arden Park, this was not a proper ground for an additional award of aggravated damages to these plaintiffs. It is unlikely the plaintiff MD. was harmed by these three days as Mr. Critchley was not there then, and the fact the same award was made to each plaintiff makes it apparent the award was more for punishment than for compensation.

[129] Next, with respect to the failure to notify the parents of all Arden Park residents of Mr. Critchley's misconduct, the judge's finding that this contributed to the inability of these plaintiffs to cope with the effects of their abuse, makes this a possible basis for damages but this failure on the part of the Crown did not contribute to the humiliation but rather to the extent of the damage suffered by the plaintiffs which should be included within the general damage award. To classify this award out as aggravated damages, in my view, creates a risk of duplication, and is not in any event a proper basis for aggravated damages.

[130] Moreover, the evidence to which we were referred did not disclose any basis for concluding that such notification was reasonably to be expected in 1977. The common use of counseling as an aid to coping with tragedy had hardly begun, and there is no evidence any amount of therapy would have been effective to ameliorate the grief and misery suffered by these plaintiffs who were obviously unwilling to talk to anyone about their suffering. One of the plaintiffs did tell his mother but she did nothing about it.

[131] With respect to the attitude of Crown witnesses, it must be remembered that liability was being disputed, and mea culpas can hardly be expected in such circumstances. It is usually dangerous, and possibly misleading, for judges to speculate about why witnesses approach a case, especially an historical case, from any particular viewpoint. Witnesses are often operating on a different database from the judge, and these witnesses may have known a great deal more about these cases than was disclosed in the evidence. If defendants or their representatives honestly believed they had done the best they could (and the judge found they were "decent and dedicated" people), they might properly be criticized for what they say but usually not for the way they say it.

Credibility, of course, is different, and falls within the judge's special province and the judge in this case freely expressed her views on that question throughout her reasons for judgment.

[132] It follows that the award for aggravated damages for each plaintiff must be set aside. Punitive Damages

[133] The trial judge found that the Crown's conduct did not attract an award for punitive damages. The plaintiffs cross-appeal against the dismissal of this claim.

[134] Unfortunately, the three days committed for the hearing of this appeal did not permit Ms. Ellis to argue this ground of cross appeal and she relied upon her excellent factum as her argument. She relies, of course, on the same grounds as were alleged to support the claim for general damages, all of which are coloured with an understandable measure of indignation that anything as horrible as Arden Park could have occurred, even in the mid 1970's.

[135] Apart from the fact that the trial judge did not award punitive damages, it must be remembered that the Crown has been found liable only for negligence in extremely difficult circumstances with respect to two plaintiffs, and liable to all plaintiffs by reason of vicarious liability rather than egregious or high handed failings of its own. It must also be remembered that Arden Park was a continuum which began innocently but became worse over a two year period.

Accepting that the danger signs were not adequately recognized soon enough, the Crown's failings, in the circumstances, were not so egregious that we can say the trial judge was wrong in assessing the case as one where punitive damages should not be awarded. I would not disturb that disposition and I would dismiss the cross-appeal. Conclusions

[136] 1. The Crown appeal against the finding that it breached fiduciary duties owed to the plaintiffs is allowed and that claim is dismissed;

[137] 2. The claims of the plaintiffs LK. and CH. against the Crown in negligence are dismissed;

[138] 3. The Crown appeal against the award of damages for all plaintiffs based upon vicarious liability for the torts of Mr. Critchley is dismissed;

[139] 4. The Crown appeal against the award of aggravated damages to each plaintiff is allowed and such claims are dismissed;

[140] 5. The plaintiff's appeal against the dismissal of their claims for punitive damages is dismissed;

[141] 6. As the plaintiffs have successfully defended their trial judgment, they should have the costs of the appeal. There should be no costs on the cross appeal. "The Honourable Chief Justice McEachern" Reasons for Judgment of the Honourable Madam Justice Ryan:

[142] I have had the privilege of reading in draft the reasons for judgment of the Chief Justice and Mr. Justice Donald in this appeal.

[143] I agree with my colleagues that it is not open to us to depart from the approach adopted in the decision of this Court in B.(P.A.) v. Children's Foundation et al. (1997), 146 D.L.R. (4th) 72. I agree with the Chief Justice, for the reasons he has given that the Children's Foundation case governs the disposition of this appeal as it relates to vicarious liability.

[144] I agree with the conclusions of the Chief Justice with respect to the grounds of appeal relating to negligence, the grounds relating to the damage awards and the cross appeal.

[145] I agree with the Chief Justice that the Crown appeal against the finding that it breached fiduciary duties owed to the plaintiffs should be allowed. I wish to add my own comments about this issue.

[146] In concluding that the Crown had breached its duty as a fiduciary to the plaintiffs the learned trial judge said this, at para. 212: In my view, liability arises from the Crown's failure to document and respond adequately to the complaints and incidents of abuse and mistreatment by Critchley between late November or early December 1975 and April 9, 1979. Those occurrences should have led the social workers and probation officials to conduct a more thorough investigation and enquiry. The Superintendent's breach of that duty materially contributed to the harm the plaintiffs suffered. In addition, by failing to inform the plaintiffs and their parents in 1979 of the reason why

Arden Park was closed, the Crown lost an opportunity to contain the damage already suffered by the abused children. That information would have contained the psychological damages and enabled the boys to begin the rehabilitative process at an early date. I conclude that the Crown is liable to the plaintiffs for breaching its fiduciary duty to them.

[147] At trial, and in this Court, the Crown conceded that its role as legal guardian of children apprehended under the Protection of Children Act, R.S.B.C. 1960, c. 303 as amended, gave rise to a "presumptively fiduciary relationship" between the Crown and the plaintiffs in its care. The Crown took the position however that the findings of the trial judge, characterized by the Crown as findings of negligence, could not amount in law to breaches of fiduciary duty.

[148] Counsel for the Crown began his argument by reference to the fundamental point that the duty owed by a fiduciary is one of loyalty or fidelity. Counsel for the Crown submitted that a breach of the duty of loyalty consists in an abuse of the trust reposed in the fiduciary or conduct contrary to the fiduciary's undertaking to act in the interests of the beneficiary. Applying this to the case at bar, counsel for the Crown submitted that the findings of the trial judge did not support the conclusion that the Crown had breached its duty through an abuse of power. At best, counsel for the Crown submitted, the conclusions of the trial judge supported the finding that the Crown had pursued its obligations toward the plaintiffs in an incompetent manner. But this incompetence did not amount to disloyalty. I agree with this analysis.

[149] In Norberg v. Wynrib, [1992] 2 S.C.R. 226, McLachlin J. spoke of the classic duties required of a fiduciary in connection with the physician/patient relationship. She said this, at pp. 275-76: As a physician, he [Dr. Wynrib] owed her [Ms. Norberg] the classic duties associated with a fiduciary relationship the duties of "loyalty, good faith, and avoidance of a conflict of duty and self interest".

Closer examination of the principles enunciated by Wilson J. in Frame [[1987] 2 S.C.R. 99] confirms the applicability of the fiduciary analysis in this case. The possession of power or discretion needs little elaboration. That one party in a fiduciary relationship holds such power over the other is not in and of itself wrong; on the contrary, "the fiduciary must be entrusted with power in order to perform his function": Frankel, ["Fiduciary Law" (1983), 71 Calif. L. Rev. 795], at p. 809.

What will be a wrong is if the risk inherent in entrusting the fiduciary with such power is realized and the fiduciary abuses the power which has been entrusted to him or her. As Wilson said in Frame, at p. 136, in the absence of such a discretion or power and the possibility of abuse of power which it entails, "there is no need for a superadded obligation to restrict the damaging use of the discretion or power". [Emphasis added]

[150] It follows from this explanation of the law that a breach of the duty will occur when the risk inherent in the relationship materializes; that is, when the fiduciary exercises the power entrusted to him or her to the detriment of the beneficiary or for the benefit of someone other than the beneficiary. In Norberg the patient was a drug addict. She was desperate for drugs. In return for sexual favours Dr. Wynrib prescribed her drugs. McLachlin J. found that Dr. Wynrib breached his relationship of trust with his patient when he prescribed her with drugs he knew she should not have, when he failed to advise her to obtain counselling when her addiction was apparent to him, and when he placed his own interest in obtaining sexual favours from Ms. Norberg in conflict and above her interest in obtaining treatment and becoming well.

[151] This conduct, amounting to a breach of fiduciary duty, can be contrasted with conduct which is simply negligent. As Southin J. (as she then was) made plain in Giradet v. Crease and Co. (1987), 11 B.C.L.R. (2d) 361 at p. 362: Counsel for the plaintiff spoke in this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising the settlement of a claim for injuries suffered in an accident. The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty if not deceit, then of constructive fraud. . . . [Emphasis added]

[152] The difference between Dr. Wynrib in the Norberg case and the physician in the example provided by Southin J. highlights the differences between a breach of fiduciary duty and negligence. In the Norberg case, the physician abused his position of power over the patient. He dishonestly acted against her interest when he supplied her with drugs he knew she should not have. He placed self interest above his duty of loyalty when he accepted sexual favours in return for drug prescriptions. In the second example, the physician in attempting to fulfil his duties to his patient falls below the requisite standard of care. The physician in the second example has not abused the power relationship, he has performed his duties badly.

[153] Some formulations of the duty owed by the fiduciary to the beneficiary specify that the fiduciary "must act in the best interests of the beneficiary". Examining the action, or inaction, of the Crown as found by the trial judge in this case, one might say that by failing to take action the Crown did not act in the best interests of the plaintiffs. Counsel for the respondents submitted that the facts in Guerin v. The Queen, [1984] 2 S.C.R. 335, amounted to the same sort of breach. In Guerin officials in the Department of Indian Affairs had induced an Indian band to surrender its land on the understanding that the land would be leased on certain terms. The officials then negotiated a lease on different, unfavourable terms. Four members of the court (Dickson C.J., Beetz, Chouinard and Lamer JJ.) found that this behaviour was unconscionable and thus a breach of the fiduciary duty owed to the band. Three members of the court (Wilson, Ritchie and MacIntyre JJ.) found that the Crown acted in breach of trust when it negotiated the lease on terms which were wholly unacceptable to its cestui que trust, the band. The other member of the court, Estey J. found a breach of agency. Thus there is no clear majority in this case. Apart from that difficulty, I do not think that the case assists the respondents in any event. At the heart of the wrong in Guerin was a failure to act honestly with the band. By inducing the band to surrender their land in return for certain terms, then negotiating a different lease without further consultation, the officials abused their position of power with the band to the detriment of the band.

[154] A fiduciary does not breach his or her duties by simply failing to obtain the best result for the beneficiary. A fiduciary is not a guarantor. He or she does not guarantee the best result for the beneficiary. This point was summed up recently in the English Court of Appeal decision in Bristol and West Building Society v. Mothew, [1997] 2 W.L.R. 426. In the Bristol case a solicitor was sued for both negligence and breach of fiduciary duty. The defendant solicitor acted for a husband and wife in the purchase of a home as well as for a mortgage company to whom the husband and wife had applied for a loan. The mortgage company offered to advance the husband and wife the funds on the express condition that there be no financing from another source. The mortgage company gave the defendant solicitor express instructions to advise it if the borrowers planned to obtain other funds. The solicitor knew that the borrowers were arranging a second mortgage with another institution but, through an oversight, failed to advise the mortgagee. The English Court of Appeal found that the solicitor's conduct in providing the mortgagee with the wrong information was a breach of duty but was not dishonest or intentional. It was unconnected to the fact that he was also working for the borrowers. The solicitor thus had not committed a breach of fiduciary duty. In the course of his reasons for judgment Millett L.J. made this point, at p. 450: The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

[155] In my view the alleged incompetence of the Crown in the case at bar did not amount to a breach of its duty of loyalty to the plaintiffs. I would allow the appeal against the finding that the Crown breached fiduciary duties owed to the plaintiffs and dismiss the claim. "The Honourable Madam Justice Ryan" Reasons for Judgment of the Honourable Mr. Justice Donald:

[156] I agree with the Chief Justice that the finding of breach of fiduciary duty should be set aside and that the judgment on vicarious liability must be upheld. I also agree with his disposition on the negligence claim.

[157] With respect, I do not share the Chief Justice's view that there should be no vicarious liability in cases of intentional crimes. That would reverse long standing authority and deny recovery in such leading cases in England as Lloyd v. Grace Smith, [1912] A.C. 716 (H.L.) (fraud by a solicitor's clerk); and in Canada, R. v. Levy Brothers Co. (1961), S.C.R. 182 (theft of diamonds from the mail).

[158] In my opinion, vicarious liability for intentional torts or crimes cannot simply be dismissed as an unfair quest for deep pockets. It is not just a question of who amongst innocent parties is better able to bear the loss; the law struggles with the question of who should bear the loss. Financial

capacity is only one of the elements. Others identified by text writers include the ability of the principal to redistribute the loss by insurance or by charging higher prices for the goods and services provided, or by raising taxes if a public body. Another element, based on the idea that the principal controls such matters, is the incentive to ensure more careful recruitment and supervision of personnel placed in the position where they could harm others.

[159] While this Court did not articulate a common rationale for the result in B.(P.A.) v. Curry (1992), 146 D.L.R. (4th) 72, all five judges agreed that the Children's Foundation should be responsible for Mr. Curry's crimes. The "deep pockets" consideration was not a significant feature in any of the four judgments in that case. "The Honourable Mr. Justice Donald"