Duty, Causation, and Third-Party Perpetrators: The Bonnie Mooney *Case*

Margaret Isabel Hall*

When Bonnie Mooney's ex-partner threatened and chased her, she went to the RCMP for help. After hearing her complaint against Ronald Kruska and reviewing Kruska's lengthy record of violent offences, Constable Andrichuk told Mooney there was little he could do. Rather than investigating, as required by a provincial domestic abuse policy, he advised her to "stay in public places." Seven weeks later, Kruska broke into Mooney's isolated home with a shotgun, wounding Mooney's twelve-year-old daughter and killing a friend who was staying with Mooney.

Mooney and her two daughters, suffering from post-traumatic stress disorder, sued Constable Andrichuk and the governments of British Columbia and Canada. Both the trial judge and the British Columbia Court of Appeal found that the claim must fail, as causation could not be established.

The author critiques these findings, and argues that it is coherent, principled, and necessary to find both duty of care and causation where police inaction allows domestic violence to continue. Drawing primarily on sources from Canada and the United Kingdom, she explores the extent of police liability, and the responsibility to protect particularly vulnerable individuals. The author argues that it is inappropriate to find that police never owe a duty of care to the public: a duty of care should depend on specific factual circumstances. She also argues that the traditional "but for" test for causation is not appropriate where inaction is the cause of the harm. Just as the material contribution test was developed to allow liability where causation was scientifically uncertain, a new test for causation should be developed where authorities fail to reduce a risk. The author concludes that imposing liability is necessary to deter police from abdicating their responsibility to protect.

Quand l'ex-conjoint de Bonnie Mooney lui proféra des menaces et se lança à sa poursuite, elle sollicita l'aide de la GRC. Après avoir entendu sa plainte contre Ronald Kruska et examiné le dossier de celui-ci, qui contenait pourtant de multiples infractions violentes, l'agent Andrichuk dit à Mooney qu'il n'y pouvait pas grand-chose. Plutôt que de lancer une enquête, ainsi que le prescrivait la politique provinciale en matière de violence conjugale, il lui recommanda de «demeurer dans des endroits publics». Sept semaines plus tard, Kruska faisait irruption dans la résidence isolée de Mooney avec un fusil de chasse, blessant la fille de celle-ci, âgée de douze ans, et tuant une amie qui demeurait avec Mooney.

Mooney et ses deux filles, souffrant d'une névrose post-traumatique, poursuivirent l'agent Andrichuk et les gouvernements de Colombie-Britannique et du Canada. À la fois le juge de première instance et la Cour d'appel de Colombie-Britannique déterminèrent que leur demande devait être rejetée, puisque le lien de causalité ne pouvait être établi.

L'auteure critique ces conclusions et soutient qu'il est cohérent, raisonné et nécessaire de déterminer qu'il existe bien un devoir de prudence et un lien de causalité lorsque l'inaction de la police permet à la violence conjugale de se poursuivre. Se basant surtout sur des sources du Canada et du Royaume-Uni, elle explore l'étendue de la responsabilité policière et l'obligation de protéger les individus qui sont particulièrement vulnérables. L'auteure soutient qu'il est inopportun de conclure que la police n'est jamais tenue à un devoir de prudence envers le public : le devoir de prudence devrait dépendre des circonstances factuelles spécifiques. Elle soutient aussi que le test traditionnel du «but for» pour étudier la causalité est inopportune lorsque c'est l'inaction qui est à l'origine du préjudice. Tout comme le critère de la contribution matérielle a été développé afin de maintenir la responsabilité lorsque la causalité était scientifiquement incertaine, un nouveau critère de causalité devrait être développé lorsqu'il s'agit d'un cas où les autorités ont manqué à leur obligation de réduire un risque. L'auteure conclut qu'il est nécessaire d'imposer la responsabilité afin de dissuader la police de renoncer à son devoir de protection du citoyen.

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Introduction

Do the police have a responsibility to protect women and children from domestic violence? The answer, according to the British Columbia Court of Appeal in *Mooney v. British Columbia (A.G.)*,[1] is no. While the police should use the means available to them to respond to violence against women both threatened and realized, it cannot be said that the failure to do so is itself a cause of harm. The violent man is ultimately uncontrollable, unpredictable, and solely responsible for the damage he causes; no causal connection exists between the law's failure to respond to a perceived threat or the realization of that threat in violence.

This comment concludes that it is coherent, principled, and necessary in this kind of case to find both a duty of care and causation. Just as the material contribution test responds to situations where science can identify risk factors but not a single cause of harm, causation in cases involving third-party perpetrators must take into account the special factual characteristics of these cases.

I. The Events

Late one night in April 1996, Ronald Kruska smashed his way into the isolated cabin of his ex-partner, Bonnie Mooney, using a shotgun butt to break down the cabin's door. Bonnie Mooney was inside the cabin with her two young daughters, Michelle and Kristy, and her friend Hazel White. Believing that Kruska was after her alone, Mooney fled the house, leaving the girls and White inside. Tragically, this belief was mistaken; Kruska shot White dead before firing on twelve-year-old Michelle. Michelle, seriously wounded, managed to help her little sister through a bathroom window before climbing out herself, and the two girls escaped into the night. Michelle ran to a neighbour's house. Six-year-old Kristy was later found hiding in a doghouse. Kruska shot himself after setting the cabin on fire.

The relationship between Mooney and Kruska had been marked by several unreported incidents of violence. Mooney later testified that she feared Kruska and felt powerless under his control. Mooney did complain to the police following an assault committed in 1995, during which Kruska choked her and struck her with a cane. Afraid of going to prison, Kruska implored Mooney to change her story, promising to give up his half-interest in the property they owned as joint tenants if she did so. (Mooney had provided the purchase price for the property; Kruska had made improvements to the cabin on the property.) Mooney agreed, later testifying that she had been too afraid of Kruska's response to do otherwise.

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[1] (2004), 31 B.C.L.R. (4th) 61, [2004] 10 W.W.R. 286, 2004 BCCA 402 [*Mooney* (C.A.) cited to B.C.L.R.], aff'g 2001 BCSC 419 [*Mooney* (S.C.)], leave to appeal to S.C.C. refused, *Mooney v. Canada (A.G.)* (3 March 2005), No. 30546.

After pleading guilty to assault, Kruska was sentenced to twenty-one days in jail and probation of one year, during which he remained under an order to keep the peace and be of good behaviour. Kruska had several prior convictions for assault causing bodily harm, unlawful confinement, manslaughter, two counts of sexual assault, and forcible confinement. He was known to be a violent individual, and had in fact been "flagged" as such in police records.

The 1995 conviction marked the end of the relationship between Kruska and Mooney, but the property issue remained. In March 1996, seven weeks before Kruska's final, murderous rampage, the two met to discuss what should be done. Mooney chose a public park, an open and public space, as the location for the meeting. Kruska soon became agitated. After Mooney managed to leave the park (in spite of Kruska's attempts to prevent her from doing so), Kruska chased the terrified woman until she reached the safety of a friend's house.

Following a brief discussion with her friend, Mooney proceeded to the RCMP detachment office to report Kruska's frightening and intimidating behaviour. The employee taking Mooney's statement later testified that Mooney was visibly very frightened by the incident, her hands shaking violently. The RCMP constable dealing with the complaint, Constable Andrichuk, having noted Kruska's flagging for violence, told Mooney that there was no action he could take. He recommended that she see a lawyer about obtaining a restraining order and "stay in public places in the future."[2] This latter piece of advice was of no use; Mooney was in the privacy of her own home when, over a month later, Kruska's final, terrible acts of violence occurred. It is furthermore notable that Mooney had attempted to make her private space more "public"—to the extent that this was possible—by inviting her friend, Hazel White, to stay.

In fact, there was a course of action open to Constable Andrichuk on that day in April. Despite Andrichuk's statement to Mooney that no action was possible in the absence of an explicit or overt threat by Kruska, section 810 of the *Criminal Code*[3] could—and should[4]—have been invoked in this situation. This section allows the parties to appear before a judge to determine whether one had reasonable grounds to fear the other. If so, the judge may order the defendant to enter a recognizance. In fact, provincial domestic abuse policy dictated that police should apply this kind of proactive approach, rather than sitting back and waiting for the escalation into violence or explicit threat. An internal investigation carried out by the RCMP concluded that Constable Andrichuk's failure to carry out further investigation was improper.[5]

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[2] *Mooney* (S.C.), *ibid.* at para. 22.

[3] R.S.C. 1985, c. C-46, s. 810.

[4] "[A]nyone aware of the troubled [Mooney-Kruska] background could and should have known that [Kruska's] conduct ... would cause [Mooney] to fear him" (*Mooney* (S.C.), *supra* note 1 at para. 54).

[5] See *ibid.* at para. 35.

But was this failure *negligent*? Mooney and her daughters claimed it was, in an action against Constable Andrichuk, the provincial government, and the federal government. They claimed that Constable Andrichuk's inaction materially contributed to Kruska's later attack, and sought damages to compensate for their post-traumatic stress disorder, Michelle's physical injuries, and Mooney's loss of income. Both the trial judge and a majority of the Court of Appeal found that even if Constable Andrichuk owed Mooney a private duty of care and his failure to act was a breach of that duty, no causal connection between the breach and Kruska's later violent actions was established.

II. British Columbia Supreme Court

At trial, Justice Collver found that a private duty of care had come into being because Constable Andrichuk knew of Mooney's fear and concern that Kruska posed a danger to her. Constable Andrichuk was aware that Kruska had been flagged as a violent person, and that he was on probation for an assault carried out against Mooney four months earlier. The RCMP operational manual set out the provincial policy on domestic violence and made it clear that a proactive arrest-and-charge policy was to be followed in situations involving violence against women and children. Constable Andrichuk's inaction contradicted that policy. Justice Collver therefore found that a reasonable RCMP officer in Constable Andrichuk's position, aware of current police policy and of Mooney's reasonable fear of a violent individual who had assaulted her in the recent past (and who was on probation for doing so), should have investigated the matter further.

According to Justice Collver, however, that breach was not the *cause* of Kruska's violent rampage the following month, nor was it possible to show how Constable Andrichuk's inaction had "materially increased" the risk to Mooney and the others in the cabin with her that night. The shootings had been more immediately preceded by an angry telephone conversation the morning of the attack between Kruska and Mooney. The call was regarding her plan to build a small cabin on the property, to be inhabited by her friend, White. Kruska had perpetrated no violence during the period between Mooney's report to Constable Andrichuk and that conversation. Describing the police as "guardians, not guarantors, of public wellbeing,"[6] Justice Collver concluded that the causal link necessary to sustain an action in negligence was not present in this case.

[6] *Ibid.* at para. 64.

III. British Columbia Court of Appeal

A. Duty of Care

On appeal, the defendant argued that no private duty of care to Mooney could be shown outside the public duty of care owed by the RCMP to all residents of the community. The defendant cited the 1988 English case of *Hill v. Chief Constable of West Yorkshire*[7] to argue that a generally-owed duty of care was enforceable only through the complaint procedures established by statute and internal discipline processes. No duty was owed to a private individual. The House of Lords concluded in *Hill* that two elements or "ingredients" were necessary to create the degree of proximity that would give rise to a private duty of care beyond the generally-owed public duty: (1) the defendant's duty to control the perpetrator; and (2) the plaintiff's membership in a special class of foreseeable victims.[8]

Neither element was found present in *Hill*, which concerned an action in negligence brought by the mother of a victim of the notorious "Yorkshire Ripper" serial killer. At the time of her daughter's death, the killer had remained at large (and so outside of the "control" of the police) and every woman in England was, in the words of Lord Keith, his potential victim: "All householders are potential victims of an habitual burglar, and all females those of an habitual rapist."[9] Even if the necessary proximity had been present in *Hill*, the House of Lords continued, a private duty of care would be inappropriate for the reasons set out in the "policy branch" of the test set out in *Anns v. Merton London Borough Council*.[10] Investigations of major crimes required difficult decision making, and potential liability would be a distracting and possibly malign influence on the decision-making process. Police officers, as professionals, would always strive to carry out investigations to the best of their abilities and in pursuit of public safety objectives. A private duty of care under these circumstances was neither just nor reasonable.

Justice Donald, dissenting, noted that the facts of the *Mooney* case were different from the facts in *Hill* in significant ways. Mooney was an identifiable individual at foreseeable risk, not a member of a vast class of individuals none of whom was individually discernable as being at a greater risk than the others.[11] In the Canadian case of *Doe v. Metropolitan Toronto*,[12] for example, the plaintiff successfully

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[7] (1988), [1989] A.C. 53, [1988] 2 All E.R. 238, [1988] 2 W.L.R. 1049 (H.L.) [*Hill* cited to A.C.].

[8] *Ibid.* at 62. This test is also known as the *Dorset Yacht* paradigm: *Home Office v. Dorset Yacht*, [1970] A.C. 1004, [1970] 2 All E.R. 294, [1970] 2 W.L.R. 1140 (H.L.) [*Dorset Yacht* cited to A.C.]. See text accompanying note 30.

[9] *Hill*, *supra* note 7 at 62.

[10] (1977), [1978] A.C. 728, [1977] 2 All E.R. 492, [1977] 2 W.L.R. 1024 (H.L.) [*Anns* cited to A.C.].

[11] *Mooney* (C.A.), *supra* note 1 at para. 46.

[12] *Doe v. Metropolitan Toronto (Municipality of) Commissioners of Police* (1998), 39 O.R. (3d) 487, 160 D.L.R. (4th) 697 (Gen. Div.) [*Doe* cited to O.R.].

established a private duty of care owed to her as a member of a distinct and identifiable class at risk of attack by a serial rapist at large in a particular area of the city. The rapist preyed on women living in a certain part of Toronto, gaining access through their balconies. Police failed to warn the women that a serial rapist was active in their area, which would have enabled them to take precautionary measures. This failure was found to breach the duty of care owed by police to women in this situation. The decision not to warn was consciously taken by police in order not to cause panic or alert the rapist to police knowledge of his pattern.

Mooney, an identified individual, was the member of a foreseeable "class" of one, and clearly the analysis in *Doe* was more applicable to her situation than *Hill*: "[H]aving made herself known to the police as a person in fear of a violent abuser, Bonnie Mooney established a special relationship of proximity with the police thereby creating a private duty of care. The duty on the police was to act on the complaint promptly."[13]

Justice Hall declined to consider the duty of care issue at any length, noting that the case could be decided "more appropriately"[14] on the issue of causation. He did, however, note the policy reasons given in *Hill* for not recognizing a private duty of care, and dismissed the applicability of *Doe* and other Canadian police liability cases on the grounds that they concerned a duty to warn the potential victims of foreseeable harm.[15] Warning was not a relevant factor in the *Mooney* case, because Mooney had herself brought the information to the police.

B. Causation

Justice Donald, also dissenting on the issue of causation, concluded that the traditional "but for" test was not practical where *in*action was the alleged cause of the harm. Instead, he applied the "material contribution" test set out by the Supreme Court of Canada in *Athey v. Leonati*:[16] where the "but for" test is practically unworkable, causation will be established where the negligence of the defendant has "materially contributed" to the occurrence of the injury. A contributing factor will be considered "material" where it falls outside of the *de minimis* range. The recent decision of the House of Lords in *Fairchild v. Glenhaven Funeral Services*[17] had explained "material contribution" in terms of risk: causation could be established by

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[13] *Mooney* (C.A.), *supra* note 1 at para. 57.

[14] *Ibid.* at para. 138.

[15] *Ibid.* at paras. 136-38. Smith J.A. also gave written reasons in the case concurring in the result.

[16] [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235. See also *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21, 123 D.L.R. (3d) 1; *Bonnington Castings Ltd. v. Wardlaw*, [1956] A.C. 613, [1956] 1 All E.R. 615, [1956] 2 W.L.R. 707 (H.L.); *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008, [1973] 1 W.L.R. 1 (H.L.).

[17] [2002] 3 All E.R. 305, [2002] 3 W.L.R 89, [2002] UKHL 22 [*Fairchild* cited to All E.R.] (involving a victim of mesothelioma whose multiple employers exposed him to asbestos).

showing that an employer had materially contributed (more than *de minimis*) to the *risk* that a claimant would develop a particular condition.

Applying *Fairchild*'s risk-based analysis of material contribution and causation, Justice Donald framed the central issue in terms of the relationship between Constable Andrichuk's inaction and the risk of violence to Mooney. The threatening behaviour reported by Mooney to Constable Andrichuk in March demonstrated that, despite his recent conviction and incarceration for assault and ongoing probation order, Kruska remained a high risk for violence. That he was flagged as such by the police reflected that fact. Under these circumstances, the likelihood of future violence directed against Mooney was reasonably foreseeable. The inquiry should therefore have focused on whether the inaction of Constable Andrichuk failed to *reduce* the risk of future violence in a material way (more than *de minimis*), and not whether the inaction itself inflamed or encouraged Kruska in a way that increased that risk. The provincial domestic abuse policy, which Constable Andrichuk failed to follow, was adopted because it is now known that a proactive response to male violence against women generally reduces the risk of future violence:

> [T]he right to police protection in these circumstances is so strong and the need for teeth in the domestic violence policy so great that the causal linkage must be found sufficient to ground liability. Contemporary authority ... requires flexibility in the rules of causation so that compensation for a wrong will be provided where fairness and justice require.[18]

Justice Donald applied the criteria set out in the British Columbia Court of Appeal decision in *Haag v. Marshall*.[19] When the circumstances make it impossible to establish a definitive causal link, principles of fairness justify an inference of causation where:

> a breach of duty has occurred, and damage is shown to have arisen within the area of risk which brought the duty into being, and where the breach of duty materially increased the risk that damage of that type would occur, and where it is impossible, in a practical sense, for either party to ... establish either that the breach of duty caused the loss or that it did not ...[20]

It was impossible to determine what the exact effect on Kruska would have been if Constable Andrichuk had been more proactive. But it would be unjust if this factual impossibility resulted in a finding of no liability—leaving the loss with the plaintiff—where the defendant had breached his duty of care in a way that materially increased the risk of foreseeable harm to the plaintiff, and where that harm subsequently materialized as damage to the plaintiff:

> Human behaviour is notoriously unpredictable; the behaviour of an erratic, irrational man like Kruska even more so. All that can be determined from the

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[18] *Mooney* (C.A.), *supra* note 1 at para. 12, Donald J.A.
[19] (1989), 61 D.L.R. (4th) 371, 39 B.C.L.R. (2d) 205 (C.A.) [*Haag* cited to D.L.R.].
[20] *Ibid.* at 379. See *Mooney* (C.A.), *supra* note 1 at paras. 72-74, 80.

> evidence is that police intervention is, in many cases, an effective deterrent, and hence, the Attorney General's policy [on domestic violence intervention].[21]

Justices Hall and Smith, giving separate reasons on the causation issue, agreed that in certain circumstances the ordinary "but for" test was unworkable and that, in these cases, a "material contribution" test would be appropriate. The material contribution test would be justified, for example, where concurrent acts were involved and where the causal relationship of each to the harm could not be shown, as where two hunters fire in a forest and one bullet injures the plaintiff.[22] In their view, *Mooney* was not this kind of case. Constable Andrichuk and Kruska were not concurrent actors, but were separated by time, place, the nature of the duty owed, and the nature of the alleged breach.

Harms involving medical treatment and industrial disease also involve factual circumstances in which the "but for" test is practically impossible and, in terms of fairness, over-exclusionary. Where a plaintiff was exposed to asbestos dust by two employers, subsequently developing mesothelioma, it would be impossible to say, applying a "but for" test, which exposure had "caused" his disease. It is possible to say, however, that each period of exposure materially increased the risk that the disease would develop. On this basis the required causal connection may be established.[23] As per Justices Hall and Smith, *Mooney* was not this kind of case either. It was not possible to say that Constable Andrichuk's inaction had increased the risk that Kruska would act out violently. Kruska, whose earlier convictions had resulted in threatened deportation back to his native Germany, who had been jailed in the past for violence, and who was threatened with jail again if he violated his parole, appeared to be impervious to police intervention. It could not be said that intervention on the part of Constable Andrichuk in March would have prevented Kruska's final, fatal rampage. Moreover, the evidence indicated that the immediate trigger for Kruska's rage that night was his conversation with Mooney about her plans to build the guest cottage. If a cause for Kruska's murderous acts lay anywhere outside of his own mind, it lay in that conversation:

> Here, the harm was the result of a discrete traumatic event, not a course of exposure to a potentially pathogenic agent in relation to which science is unable to offer any causal opinion. We know what caused the harm: it was Mr. Kruska's violent actions. The question is whether Constable Andrichuk's inaction played any legally significant historical causal role in Mr. Kruska's acting as he did. Proof that it did is not an impossibility in the sense that scientific knowledge cannot provide a causal connection and an inference of causation cannot be drawn on circumstantial evidence. ... Here, there was evidence of Mr. Kruska's character and violent history and his previous

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[21] *Ibid.* at para. 81.

[22] This was the case in *Cook v. Lewis*, [1951] S.C.R. 830, [1952] 1 D.L.R. 1. See also *Summers v. Tice*, 199 P.2d 1, 33 Cal.2d 80 (Sup. Ct. 1948); *Arneil v. Patterson*, [1931] A.C. 560, [1931] All E.R. 90 (H.L.).

[23] See *Fairchild*, *supra* note 17.

> responses to sanctions imposed by the police and the courts. There was evidence of police and ministerial policies respecting the effect of police action on domestic violence. As well, there were the circumstances of the event itself, including the temporal relationship between Constable Andrichuk's inaction and Mr. Kruska's criminal actions. This is the stuff of which factual inferences based on common sense and experience are made.[24]

IV. Evaluation

A. Duty of care

As F.H. Bohlen has remarked, "There is no distinction more deeply rooted in the common law ... than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive [inaction] ... "[25] The line between "active misconduct" and "passive inaction" is not always bright,[26] but generally marks out the boundaries of our duties to others. This rule usually works to exclude liability for a failure to prevent harms perpetrated by third persons, no matter how foreseeable.[27] A duty of care that will include actions to prevent harms perpetrated by others may exist, however, in the following circumstances: (1) where the requisite proximity is created by a high degree of foreseeability in the context of a special underlying relationship; and (2) where that duty cannot be displaced by the reasons of policy involved in a particular case.

1. Proximity

If I leave a rake lying across the sidewalk, my action creates a foreseeable risk of harm and brings into my "neighbourhood" any person who may subsequently walk along that sidewalk and trip on my rake. Injury to the person who does, in fact, trip over the rake has been caused by my act of leaving it there. All the necessary elements of negligence are traceable to my action of leaving the rake on the sidewalk.

Certain pre-existing relationships arising outside of the chain of events may also give rise to a duty to act where the kind and quality of the proximity inherent in those relationships is insufficient to replace the "causal proximity" [28] created through conduct in cases of ordinary negligence or misfeasance. Relationships of this kind may originate in a range of sources—fiduciary relationships for example, or relationships of obligation

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[24] *Mooney* (C.A.), *supra* note 1 at para. 168, Smith J.A.

[25] Francis H. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability" (1908) 56 U. Pa. L. Rev. 217 at 219.

[26] See *Horsley v. MacLaren*, [1972] S.C.R. 441, 22 D.L.R. (3d) 545.

[27] See *Smith v. Littlewoods Organisation Ltd.*, [1987] A.C. 241, [1987] 1 All E.R. 710, [1987] 2 W.L.R. 480 (H.L.).

[28] *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 (H.C.A.) [*Sutherland*]; *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 289.

rooted in statute or the common law—, but each is characterized by an internal dynamic of risk and reliance involving physical control, expectations of protection, and the control of knowledge.[29] That special underlying relationship must be joined by an enhanced kind and degree of foreseeability. Together, relationship and foreseeability create the proximity at the core of the duty of care.

Formalized relationships of control will give rise to a duty of care owed to the foreseeable victims of the person under control where that control is exercised negligently. It is not necessary that those persons suffering harm be individually foreseeable; it is sufficient that they be members of a bounded foreseeable class. In *Dorset Yacht*,[30] for example, the House of Lords found that a group of officers in charge of Borstal boys owed a duty of care to yacht owners whose boats were stolen and damaged by the boys when they escaped. Two key factors were identified: the boys were under the control of the officers at the time of their escape, and the incidents attendant on that escape—the boys taking to the water, using and damaging the nearby yachts as they did so—were "reasonably foreseeable" as a consequence of that escape. Breach of the standard of care was, in this case, the failure of the officers to control the boys.

Outside of a formal or structural control relationship, involving professional controllers (as in *Dorset Yacht*) or socially designated controllers (such as parents), "situational" relationships of control may also give rise to a duty of care vis-à-vis third-party perpetrators.[31]

Formal control relationships giving rise to a third-party duty of care act as mechanisms for controlling latently risky people: Borstal boys,[32] prisoners,[33] patients with certain mental symptoms,[34] and even children.[35] In each case, the professional controller assumes this responsibility on behalf of society in general. The professional controller is not a "volunteer" but a social specialist compensated through public money. (Parents are a special case, as their children are deemed to be payment in themselves.) Professional protectors—the police, child protection officials—not in a control relationship with the perpetrator may also owe a private duty of care in certain, more narrowly defined circumstances. Where the strong element of proximity supplied by control is missing, a duty of care (in other words, a duty to *protect*) is

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[29] See Margaret Isabel Hall, "Duty to Protect, Duty to Control and the Duty to Warn" (2003) 82 Can. Bar Rev. 645, discussing the conceptual framework set out below in greater detail.

[30] *Supra* note 8.

[31] See Hall, *supra* note 29 at 653 (discussing the intoxication cases, namely *Jordan House Ltd. v. Menow* (1973), [1974] S.C.R. 239, 38 D.L.R. (3d) 105; *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186, 51 D.L.R. (4th) 321, 44 C.C.L.T. 225; and *Stewart v. Pettie*, [1995] 1 S.C.R. 131, 121 D.L.R. (4th) 222, 23 C.C.L.T. (2d) 89.

[32] See *Dorset Yacht*, *supra* note 8.

[33] See *J.S. v. Clement* (1995), 22 O.R. (3d) 495, 122 D.L.R. (4th) 449 (Gen. Div.).

[34] See *Molnar v. Coates* (1991), 5 C.C.L.T. (2d) 236 (B.C.C.A.).

[35] See *Taylor v. King*, [1993] 8 W.W.R. 92, 82 B.C.L.R. (2d) 108 (C.A.).

supported by an underlying relationship of inherent or structural risk, arising from enforced reliance and consequent vulnerability,[36] together with specific or actual reliance and an individually identifiable, foreseeable victim. This specific reliance must be in addition to, yet derive from, the underlying relationship of reliance.[37] A volunteer will never have an obligation to protect me from another person, but a police officer may: "Unlike an individual, a public authority is not an indifferent onlooker. ... Compelling a public authority to act does not represent an intrusion into private affairs in the same way as when a private individual is compelled to act."[38]

Kruska was arguably "under the control" of the police to the extent that he was under a probation order. On the basis of this control relationship, a private duty of care may be said to have arisen with respect to his foreseeable victim, Mooney. Mooney was a member of a "class" of one, just as the yacht owners comprised a foreseeable class of victims in *Dorset Yacht*. "Specific reliance", rejected by the *Mooney* majority on the basis that Mooney knew that the constable would do nothing in response to her complaint and so did not "rely" on his protection, may also be relevant in these circumstances.[39] In a real and important sense, the probation order—granted in lieu of incarceration—is a promise to the victim that the machinery of the legal system, police and courts, are capable of protecting her from her violent attacker.[40] Indeed, the "experienced" trial judge at Kruska's trial for assault had predicted future violence and given Mooney "an assurance that the authorities would respond to any complaint if she was threatened again."[41] Mooney, as a reasonable citizen, had no choice but to rely on that promise.

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[36] Public reliance on professional protectors creates an inevitable degree of risk. I don't look out for other people's children, for example, because I rely on their parents or caregivers to do so or, in an extreme when I am made aware of caregiver failure, state systems for child protection. See *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989): "Through its child-welfare program, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS" (*ibid.* at 210, Brennan J., dissenting). As an individual, I am relatively unguarded and have, to a significant extent, given up to the state my personal ability to defend myself as well as vulnerable others, such as children, in reliance on professional risk controllers. See also *Sutherland*, *supra* note 28 at para. 29, Mason J.

[37] See *McGauley v. British Columbia* (1990), 44 B.C.L.R. (2d) 217 (S.C.), rev'd on other grounds (1991), 56 B.C.L.R. (2d) 1 (C.A.), Huddart J.: "In other words one cannot impose liability upon another simply by choosing to rely upon him. Nor will knowledge that one is being relied on be enough to create liability. The reliance must derive reasonably from the relationship said to be proximate if it is to create a duty of care."

[38] *Stovin v. Wise*, [1996] A.C. 923 at 935, [1996] 3 W.L.R. 388, [1996] 3 All E.R. 801, Nicholls L.J.; see also *Haynes v. Harwood* (1934), [1935] 1 K.B. 146, [1934] All E.R. Rep. 103 (C.A.).

[39] For an example of specific reliance meeting this test, see *Brandon v. Richardson (County of)*, 566 N.W.2d 776, 252 Neb. 839 (Sup. Ct. 1997).

[40] Compare *Taggart v. Washington*, 822 P.2d 243 (Sup. Ct. Wash. 1992).

[41] *Mooney* (C.A.), *supra* note 1 at para. 25.

But even if the probation order did not comprise control, or an undertaking to protect, the known kind and degree of risk to Mooney and the failure to use available means to control that risk is a source of proximity sufficient to create a private duty of care. In this respect, Mooney's case very much resembles the circumstances at issue in *Osman v. Ferguson*.[42] That case concerned a school teacher who had become obsessed with one of his students, stalking the boy and ultimately killing the boy's father during an attack on both father and son. The police were aware of the teacher's bizarre and threatening behaviour and had interviewed each of the parties several times, but had not intervened to protect the boy and his family. Describing the police inaction as a "failure in investigation", Lord Justice McCowan (giving the judgment of a unanimous Court of Appeal) found that, by reason of this failure, "[the boy] and his family were exposed to a risk from [the teacher] over and above that of the public at large. In my judgment the plaintiffs have therefore an arguable case that ... there existed a very close degree of proximity amounting to a special relationship."[43] In *Osman*, as in *Mooney*, there was no control in the sense of the perpetrator's being under arrest, and no promise of protection. Proximity came into being because the police had knowledge of a clearly foreseeable and high degree of risk to an identified individual, from an identified individual, and they had the professional means and mandate to act in a way that would reduce that risk.[44]

The majority of the Court of Appeal in *Mooney* did not determine the threshold question of duty of care, finding the case failed on causation. Clearly, however, a high degree of proximity existed between Mooney and Andrichuk, giving rise to a particular duty of care; unlike *Hill*, this was not a situation in which the perpetrator was unknown and at large and the victim also unknown, the member of an unbounded class. *Mooney* involved an individual, identified victim and an identified perpetrator who had already been brought within the control of the legal system through his probation order. Kruska's violent character was well known and, indeed, recorded so as to alert all officers to his dangerousness. This dangerous nature, together with Kruska's track record, made the likelihood of future acts of violence directed against Bonnie Mooney highly foreseeable. The trial judge's ruling on the issue of duty was therefore correct.

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[42] [1993] 4 All E.R. 344 (C.A.).

[43] *Ibid*. at 350.

[44] A pure duty to warn (not incidental to a broader duty to protect through the reduction of risk) may also arise in a relationship of structural reliance flowing from knowledge imbalance and control. The manufacturer's duty to warn, for example, has been explained by the Supreme Court of Canada in *Bow Valley Husky Ltd. v. Saint John Shipbuilding Ltd*., [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385. See also *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530. *Doe*, *supra* note 12, is perhaps best understood as a case about police breach of a duty to warn arising from the professional control of knowledge. Doe's action, unlike Hill's in *Hill* (*supra* note 7), was allowed. According to the Ontario Court, Doe was not a member of the general public but of a more limited and identifiable class of potential victims, given the relatively predictable patterns of her attacker. See also *Beutler v. Beutler* (1983), 26 C.C.L.T. 229 (Ont. H.C.).

2. Policy

The majority of the Court of Appeal did not have to consider whether police could ever owe a duty of care to an individual at risk of being attacked, but it seems they would have been reluctant to find one. Even where the requisite proximity is established, a duty of care can be negated for policy reasons.[45] In *Hill*, the House of Lords concluded that policy reasons mitigated against finding a duty of care in this context, even if proximity could be established. The reasons given by the majority in the British Columbia Court of Appeal in *Mooney* suggest that they would have followed *Hill* on this point, were the causation issue not determinative.

Negating a police duty of care is problematic, however, given that since *Hill* was decided in 1989, the suggestion that it could stand for a policy-based "blanket immunity" that would protect all police decision making has been put to rest in the UK. The decisive turning point was the 2000 decision of the European Court of Human Rights in *Osman v. United Kingdom*,[46] which arose from *Osman v. Ferguson*.[47] Although the English Court of Appeal had found that a relationship of proximity sufficient to give rise to a duty of care had existed between the Osman family and the police in that case,[48] it went on to find that the "policy reasons" outlined in *Hill* negated that duty.[49] Appeal to the House of Lords was refused.

The plaintiff, the dead man's wife, appealed the case to the European Court of Human Rights. The court found that giving police blanket immunity in negligence was a disproportionate restriction on the complainant's access to justice, as guaranteed by article 6 of the *European Convention on Human Rights*.[50] Where sufficient proximity existed between the parties, as in *Osman*, the question of whether a subsequent duty of care should be negatived for policy reasons should be determined in each situation. Policy reasons would not *always* justify negativing a private duty of care owed by police.[51] The question of whether and why policy considerations will apply in a particular case to affect an otherwise supportable duty

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[45] See *e.g. Anns*, *supra* note 10; *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641.

[46] (1998), 95 Eur. Ct. H.R. (Ser. A) 3124, 29 E.H.R.R. 245 [*Osman v. UK*].

[47] *Supra* note 42.

[48] See text accompanying note 43.

[49] *Osman v. Ferguson*, *supra* note 42. See also *Swinney v. Chief Constable of Northumbria* (1996), [1997] Q.B. 464, [1996] 3 All E.R. 449 (C.A.), finding a private duty of care owed by police to an informant who had been assured of confidentiality.

[50] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S 221 at 223, Eur. T.S. 5, art. 6 [*ECHR*].

[51] See also *Z. v. United Kingdom* (2001), 5 Eur. Ct. H.R. (Ser. A) 1, 34 E.H.R.R. 97; *D. v. East Berkshire Community Health NHS Trust* (2003), [2004] Q.B. 558, [2004] 2 W.L.R. 58, [2003] 4 All E.R. 796, [2003] EWCA Civ 1151, aff'd [2005] UKHL 23.

of care must be decided in the context of each case, weighing the particular circumstances and interests to arrive at the appropriate balance.[52]

Canadian courts are obviously not subject to the *ECHR*. It is nonetheless difficult to defend the position that the suggested "blanket immunity" set out in *Hill* states the law in Canada when England's own courts, following *Osman v. UK*, have soundly rejected that position as an unfair restriction on access to legal remedy.[53] The correct application of policy considerations was described by Lord Justice May in *Costello v. Chief Constable of Northumbria Police* as follows:

> For public policy reasons the police are under no general duty of care to members of the public for their activities in the investigation and suppression of crime (*Hill*'s case). But this is not an absolute blanket immunity and circumstances may exceptionally arise when the police assume a responsibility, giving rise to a duty of care to a particular member of the public (*Hill*'s case and *Swinney*'s case). The public policy considerations which prevailed in *Hill*'s case may not always be the only relevant public policy considerations (*Swinney*'s case).[54]

What were the relevant policy considerations in *Mooney*? Andrichuk acted in direct violation of police policy on domestic violence by refusing to follow up Mooney's complaint; as Justice Donald noted in his dissenting reasons,[55] liability in this case is justified to give the necessary "teeth" to that policy. Further investigation was not an impossible task (as in *Hill*), nor was the decision within Andrichuk's discretion following a professional balancing of the interests involved (as the police force argued in *Doe*). It was the course of action provincial policy directed him to take. A relationship existed between Andrichuk, Kruska, and Mooney above that which always exists between police officers and the general public. The probation order was in effect a promise—a promise explicitly made to Mooney in this case—that the machinery of the legal system (including the police) would use all available means to protect her from Kruska. Upon receipt of Mooney's complaint, Constable Andrichuk had knowledge and means at his disposal, and the provincial domestic abuse policy gave him the explicit imperative to use them.

B. Causation

California courts have used the term "abstract negligence" to describe a situation in which a duty of care has been breached and the foreseeable harm giving rise to the duty subsequently realized, but where causation cannot be established through the

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[52] See *Cowan v. Chief Constable for Avon and Somerset*, [2001] EWCA Civ 1699; *Mullaney v. Chief Constable of West Midlands Police*, [2001] EWCA Civ 700.

[53] *Barrett v. Enfield Borough Council*, [1999] 3 All E.R. 193, [1999] 3 W.L.R. 79 (H.L.).

[54] (1998), [1999] 1 All E.R. 550 at 563, [1998] EWCA Civ 1898.

[55] See text accompanying note 18.

prevailing rule.[56] Dismissing a case such as *Mooney* as "abstract negligence" is unjust, placing a manifestly unfair burden on individual citizens who must rely on the legal system for their protection. A new theory of causation is necessary in the context of third-party perpetrator harms to take account of the particular and unusual factual circumstances of these cases, just as the material contribution test has developed in the context of industrial disease, where the traditional "but for" test was recognized as overly narrow. Any new articulation of causation must be incrementally developed through analogy, ensuring consistency and coherence, as the new categories of duties of care have developed in the common law post-*Donoghue v. Stevenson*.[57] Reference to recent developments in the law of vicarious liability may therefore provide appropriate guidance in the third-party perpetrator context as a fair and flexible approach to responsibility-based causation.

Factually, vicarious liability for intentional torts and third-party perpetrator negligence share important characteristics. Indeed, if we conceptualize a spectrum of tort liability, with strict liability at one extreme and causal proximity negligence at the other, vicarious liability and third-party perpetrator negligence lie next to each other between these extremes. Most obviously, each case involves a third-party tortfeasor whose actions are the immediate cause, in the "but for" sense, of harm to the plaintiff/victim. The causal connection in each case may be expressed as a responsibility to prevent foreseeable harms that is not exercised with reasonable care. In each case a special, underlying relationship is a necessary ingredient; in each case a high degree and kind of foreseeability is required (that what did happen, would happen). The policy rationale for fixing liability in each kind of case is also the same. The responsible party is uniquely placed to take actions that will deter in each case and, through an economic or "enterprise causation" analysis, it is appropriate that the person or body benefiting from a professional relationship of power and dependence should be fixed with responsibility for carrying out that relationship to a reasonable standard of care.

The principles to be applied in the determination of vicarious liability for intentional torts were set out by the Supreme Court of Canada in *Bazley v. Curry*.[58] That case concerned the vicarious liability of a children's home regarding sexual assaults committed by a housemaster. The Court referred to the "Salmond test" to determine if the employer is liable for an employee's wrongful acts:[59]

> A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either

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[56] *Noble v. Los Angeles Dodgers*, 214 Cal.Rptr. 395 (C.A. 1985); *Nola M. v. University of Southern California*, 20 Cal.Rptr.2d 97 (C.A. 1993).

[57] [1932] A.C. 562, [1932] All E.R. 1 (H.L.). On developing categories of duties of care, see *Caparo v. Dickman*, [1990] 2 A.C. 605, [1990] 1 All E.R. 568, [1990] 2 W.L.R. 358 (H.L.).

[58] [1999] 2 S.C.R. 534, 174 D.L.R. (4th) 45 [*Bazley* cited to S.C.R.].

[59] *Ibid.* at 543.

> (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master.[60]

Justice McLachlin explained the second step with reference to two further inquiries. First, one ought to ask whether precedents of significant unambiguous factual similarity existed. If there are such precedents, they should be followed. If not, one ought to ask what outcome would best accord with the underlying purposes of the doctrine: compensation, deterrence, and fairness. The question of whether liability *should* lie must be frankly addressed. The limits that fairness requires—the proximity connection—would be established by showing a significant relationship between the creation or material enhancement of risk and the wrong that actually occurs.

A similar "flexibility" is also required in the rules of causation, "so that compensation for a wrong will be provided where fairness and justice require."[61] "Flexibility" in this case means applying the rule with reference to the special characteristics of cases involving third-party perpetrators. In particular, courts ought to consider the nature and significance of reliance where a professional defendant possesses the ability and authority to control dangerous individuals under circumstances of clear and foreseeable risk. The general principle that particular reliance only (the *promise* of protection not followed through) may be a cause of harm must be excepted where a police officer simply declines to exercise professional responsibilities under the following circumstances:

1. Where the risk of harm is serious, and foreseeable;
2. Where the potential victim is an identified individual;
3. Where the officer is in a legal relationship of control with the perpetrator (as where the perpetrator is under a probation order); and
4. Where the police, uniquely and as part of their professional role, possess significant legal powers granted for the purpose of reducing those risks, and a duty of care that requires their use.

In accordance with the *Bazley* criteria (precedent and analogy), it is important to note the 2003 decision of the Supreme Court of Canada in *K.L.B. v. British Columbia*,[62] implying a policy-based approach to causation analogous to the principle-based inquiry outlined in *Bazley*. *K.L.B.* involved a provincial authority's failure to adequately oversee a foster placement. Chief Justice McLachlin advised a "robust and pragmatic approach" to causation in cases where a "scientific" determination was not possible:

> [I]t is worth noting that the private nature of the abuse may heighten the difficulty of proving the abuse and its connection to the government's conduct in placement and supervision. As in other areas of negligence law, judges

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[60] R.F.V. Heuston & R.A. Buckley, *Salmond and Heuston on the Law of Torts*, 21st ed. (London: Sweet & Maxwell, 1996) at 443.

[61] *Mooney* (C.A.), *supra* note 1 at para. 12, Donald J.A.

[62] [2003] 2 S.C.R. 403, 230 D.L.R. (4th) 513, 2003 SCC 51 [*K.L.B.* cited to S.C.R.].

> should assess causation using ... a "robust and pragmatic approach". ... A common sense approach sensitive to the realities of the situation suffices.[63]

The purpose underlying the authority's responsibility to oversee foster placements was to minimize the opportunities for undetected abuse, that abuse being a risk inherent to the system of placing children in foster homes. The failure to exercise that authority to a reasonable standard of care was, therefore, a failure to reduce those foreseeable risks.

A more flexible approach to causation based on policy and underlying tort principles was also articulated by the House of Lords in the October 2004 case of *Chester v. Afshar*.[64] Concluding that the normal approach to causation "would render the duty useless in the cases where it may be needed most," Lord Hope (a majority concurring) turned to a consideration of fundamental principles:

> The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content. It will have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence. On policy grounds therefore I would hold that the test of causation is satisfied in this case.[65]

Conclusion

The fact that Constable Andrichuk chose not to follow explicit policy direction that day tells us that policy is not, in itself, enough, despite the public illusion of protection it provides. The most important question in *Mooney* is never asked: why did Constable Andrichuk choose not to follow up on Bonnie Mooney's complaint? Perhaps, adhering to a belief traditionally associated with police culture[66] (which the policy was designed to counteract), he thought the matter was a private issue between Mooney and Kruska, and that further investigation was neither warranted nor appropriate. Perhaps, having noted Kruska's flagging as a violent individual, Constable Andrichuk was afraid of confronting him over what was, after all, a private

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[63] *Ibid.* at para. 13 [references omitted].

[64] [2004] 4 All E.R. 587, [2004] UKHL 41. That case applied *Fairchild*'s (*supra* note 17) risk analysis in the context of a doctor's failure to warn his patient of a potential, harmful outcome of medical treatment, which eventually materialized.

[65] *Ibid*. at para. 87.

[66] See G. Kristian Miccio, "Notes from the Underground: Battered Women, the State, and Conceptions of Accountability" (2000) 23 Harv. Women's L.J. 133 at 140-41, 158-59; Lee Lakeman, *Canada's Promises to Keep: The Charter and Violence against Women* (Vancouver: Canadian Association of Sexual Assault Centres, 2003) at 125-28.

matter between the former partners.[67] Whatever his personal reasons, the important point for the rest of us is that policy direction was insufficient to outweigh them.

Policy guides; liability deters. The prevention of violence against women and children requires deterrence. Police officers are asked to do difficult, dangerous things, perhaps carrying out decisions of others which they personally consider ill-advised. Inaction in these situations will often be easier than action, and where an "easy" explanation exists to justify inaction, no one should be surprised when inaction prevails even in the face of guidance to the contrary. Traditional professional-cultural beliefs about domestic violence (that victims invite and then choose to remain within violent relationships, involving police as players in the ongoing domestic drama rather than "real" protectors and enforcers of the law) *work* by legitimizing inaction, especially in difficult and dangerous situations. In cases of violence against women, police inaction has proved deadly.[68] A necessary function of the law here is to counteract the deeply rooted power of cultural framing devices[69] through liability, the ultimate social determination of wrongness.

Police forces have become so integral to modern society that it may be difficult to remember that the police are not inevitable, but the consequence of an historic social bargain through which protection from third parties is provided in return for money and the conferral of authority—authority that itself carries a significant risk of misuse.[70] The police are not, of course, guarantors of public safety. Members of police forces are publicly paid professionals, however, whose mandate explicitly includes the minimization of risk posed by third-party perpetrators. This mandate is, in essence, what police are for: as a society, we have given up the personal right to private deterrence (Bonnie Mooney would have placed herself outside the law, for example, had she used private force to respond to the serious threat posed by Kruska), in reliance on the public deterrence provided by the police.

Having assumed a monopoly on the deterrence of violent and threatening individuals, the police create an unacceptably heightened condition of vulnerability for threatened individuals when the available tools of deterrence are not exercised with reasonable care. It is right to understand that creation of vulnerability as causal in the sense that exposure to industrial toxins has been described as causal in situations where the precise contribution of potentially disease-causing factors is unknowable. In the context of the underlying social bargain, police failure to *reduce* risk by acting non-negligently is directly analogous to the *creation* of risk described by the Supreme

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[67] The dangerousness of domestic violence for police intervenors is an important, if seldom discussed, factor affecting police response: see *e.g.* Randall D. Armentrout, "Car 54 Where Are You? Police Response to Domestic Violence Calls", Note (1991) 40 Drake L. Rev. 361 at 365.

[68] See Miccio, *supra* note 66, and Lakeman, *supra* note 66.

[69] For a discussion of how framing through professional culture operates to legitimize inaction in cases of child abuse and neglect, see Robert Dingwall, John Eekelaar, & Topsy Murray, *The Protection of Children: State Intervention and Family Life*, 2d ed. (Aldershot: Avebury, 1995) at 38-41.

[70] See *Mary M.* v. *Los Angeles (City of)*, 814 P.2d 1341, 54 Cal.3d 202 (Sup. Ct. 1991).

Court in *Bazley*[71] as justifying vicarious liability and by the House of Lords in *Fairchild*[72] as capable of comprising causation. Declining leave to appeal in the *Mooney* case, the Supreme Court of Canada passed over the opportunity to consider the issue of causation in the context of third-party perpetrators and professional protectors; but almost certainly—tragically—that opportunity will come again.

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[71] *Supra* note 58.
[72] *Supra* note 17.