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PART 1

STATEMENT OF FACTS

1. The facts are accurately summarised in the appellants' Statement of Facts.

2. On July 10, 2003, the Intervener, Vancouver Rape Relief And Women's Shelter ("VRR") was granted leave to intervene and the Honourable Chief Justice ordered that the question of whether VRR will be permitted to make oral submissions on the appeal was adjourned for determination by the panel hearing the appeal.

PART 2

ISSUES ON APPEAL

3. What test of causation applies to claims for negligence brought against police for inadequate response to complaints of male violence against women?

4. Do police owe a duty of care to women who complain of male violence and, if so, what is the applicable standard of care?

5. What role, if any, does the doctrine of contributory negligence play in a claim for negligent police response to a complaint of male violence against women?

PART 3

ARGUMENT

INTRODUCTION

6. Male violence against women is a form of male domination, control, and oppression of women. It is also a serious criminal offence.

Dobash , R.E. and Dobash, R.P. "Women, Violence and Social Change" (Routledge – London, 1992), p.16-17 ("Dobash"); *R. v. Lavallee*, [1990] 1 S.C.R. 852; [1990] S.C.J. No. 36 ("*Lavallee*") p. 14; Violence in Relationships Policy, Appeal Book ("AB") p. 311-345 ("the Policy")

7. Canadian police forces are obliged to take reasonable steps to protect women from crimes of male violence. Extensive operational policies in this regard have long been in place. At the heart of these policies lie the common sense propositions that male violence against women will likely recur in the absence of appropriate intervention and aggressive police response to such violence is effective in reducing its incidence and the serious harm that it represents.

1998 Report of Josiah Wood, "Recommendations for Amendments to "E" Division R.C.M.P. Operational Policies Pertaining to Relationship Violence and the Processing of Firearms Applications, Federal Government Publication (the "Wood Report"); B.C. Institute against Family Violence Newsletter ("B.C. Institute Newsletter"); Dobash, p. 201; the Policy, A.B. p. 311-345

8. These common sense propositions are well supported by research and experience, and they are widely understood. In particular, it is common knowledge amongst those who work in the field that the need for aggressive police response to male violence against women arises out of its predictable pattern of recurrence and escalation. In the words of Josiah Wood in the Wood Report:

"Abusive relationships are not, generally speaking, characterized by isolated acts of violence. Research demonstrates that violence in such relationships is recurring and follows a recognized pattern including an initial phase of tension building, followed by a violent outburst, followed by a resolution phase during which the abuser will manipulate the victim to forgive and forget. Research also demonstrates that frequently the level of violence in such a relationship, or its potential, increases with the passage of time."

Wood Report, p. 18; the Policy, A.B. p. 311-345

9. Front-line workers who work with battered women have noted common patterns in connection with male violence against women and police response to it. For example, women are typically at particular risk of recurrent acts of male violence within the first eighteen months of leaving an abusive relationship. In addition, women are more vulnerable to further attack if a complaint has been made and little or no police response has followed. This is not surprising, given the implicit condonation of male violence associated with such non-response.

National Action Committee on the Status of Women, "99 Federal Steps to END Violence Against Women", December, 1993 ("99 Federal Steps")

10. The police know that compliance with their policies reduces male violence against women. The policies themselves expressly acknowledge that this is so. Nonetheless, police officers often fail to comply with their own policies and, as a result, respond to male violence against women in an inadequate manner. These failures are due, in part, to sexist tendencies not to take women's complaints seriously.

B.C. Institute Newsletter; Rigakos, G. "The Politics of Protection: Battered Women, Protective Court Orders and the Police in Delta", Simon Fraser University, 1994 ("Rigakos")p. 56-58, 60, 81-89, 91-110; the Policy A.B. p. 311-345

11. In 1993, Mr. Justice Oppal headed a Commission of Inquiry into Policing in British Columbia (the "Commission"). Many women's groups, including VRR, consulted with the Commission and a unity statement was produced. Included in that unity statement were the following remarks:

"We know that inherent sexist, racist and classist bias in the policing system result in many women choosing not to involve the police and many women getting a poor response from the police ... Women describe their complaints being discounted, trivialized and disbelieved by individual officers. They are often treated with disrespect, suspicion, and contempt. The initial response and the subsequent investigation is often slow or there is no response at all. Individual police have demonstrated ignorance of the law and ignorance of the realities of women's experience of male violence...

In many ways women face the implication that she is to blame for being attacked. Police give advice, suggestions about what she should do to change his behaviour, get him to

stop, protect herself, change her lifestyle and when she has made a different decision, chosen a different strategy to stay safe, to be free from violence she is judged as to blame for the violence done to her. She is condemned for reporting too late or she is judged as overreacting and therefore condemned for reporting too soon.”

Unity Statement of Women’s Groups presented to the Commission, May 4, 1993, Vancouver, p. 5

12. As is apparent from the foregoing, police attempts to privatize relations between violent men and the women they assault have long been matters of particular concern for women’s groups, including VRR. When police respond to complaints of male violence with mere advice, for example, responsibility, without power, is shifted to women and their complaints are treated as being outside the public realm. In addition, the “deputization” of violent men by, for example, informal police requests that they “settle down” (and thus, in effect, police themselves) is a serious concern of longstanding.

13. The dissatisfaction women feel regarding inadequate police response to complaints of male violence was made known to Justice Oppal in many presentations made to the Commission. In his report on the Commission’s findings he wrote:

“Women’s groups, multicultural associations, native people and gay/lesbians have expressed concern about the manner in which police often treat women and minorities. Of the approximately 1,100 submissions received by this inquiry 26 percent related to violence against women as an issue. Three full days of hearings were held solely to hear women’s concerns ... Some of the complaints that we continue to hear involve police attitudes, reluctance to become involved or recommend charges, failure to take complaints seriously and failure to understand the dynamics of the problem.”

The Honourable Mr. Justice W.T. Oppal, *Closing the Gap: Policing and the Community*, Commission of Inquiry (Victoria, B.C., 1994), p. xv (letter of transmittal); See also *Recommendations of Ontario Association of Interval and Transition Houses to Hadley Inquest Jury and Hadley Inquest Jury Recommendations*

14. The police policy in place when Bonnie Mooney sought protection from Roland Kruska was substantially the same policy in place when Mr. Justice Oppal wrote his report. As is clear from this case and the quotations referenced above, inadequate police response to women’s

complaints of male violence has been a well-known problem for a very long time. In VRR's submission, police awareness of the problem and ameliorative policies are plainly not enough.

15. This is not surprising. Sexist beliefs, doctrines, and practices within Canadian society generally, and police forces in particular, are widespread and their eradication has proven to be remarkably difficult, despite high levels of awareness and statements of concern and intention to change. As MacFarland J. noted in *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, ameliorative policies and public assurances of change by police may amount to little more than "impression management" while, in fact, the status quo remains unchanged.

Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1998) 160 D.L.R. (4th) 697 (Ont. Gen. Div.) ("Doe #3), p. 28; see also, *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1989) 58 D.L.R. (4th) 396 (H.C.) ("Doe #1"), p 35-42 and *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* [1990] O.J. No. 1584 (Div. Ct.) ("Doe #2") p 7-18; *R. v. Osolin*, [1993] 4 S.C.R. 595 paras 48-84, *R. v. Seaboyer*, [1991] 2 S.C.R. 577, para. 125-272; *R. v. O'Connor* [1995] 4 S.C.R. 411 ("O'Connor"), para 120-133; Randall, M., "Sex Discrimination, Accountability of Public Authorities and the Public/Private Divide in Tort Law: An Analysis of *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*" (2001), 26 Queen's L.J. 451-495 ("Randall"); Moran, M. "*Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto: Case Comment*" (1993) CJWL Vol. 6, p. 491 ("Moran"); Rigakos; Dobash

16. The status quo is, however, unacceptable. It is often discriminatory, ineffective, and alienating for those women the justice system is designed to serve and protect. As noted in "99 Federal Steps to END Violence Against Women":

"The system discredits women at every level both actively and passively and women know it. 70 – 90% of women talking to rape crisis centres and transition houses have already refused to initiate or participate in criminal proceedings because they will be disregarded, disbelieved, discredited and blamed. Many of those who did initiate or cooperate have been rejected or abandoned by the same system."

99 Federal Steps, p. 8

17. In VRR's submission, it is apparent that Bonnie Mooney was one of the many women "abandoned by the system," to her very great cost. It is also apparent that real change, not impression management, is required as inadequate police responses to women's complaints of

male violence contributes to its perpetuation, devalues women, and fails to protect their security of person. In the result, violent men are not stopped or deterred from engaging in further acts of violence, women reasonably lose confidence in the justice system, and women's **Charter** rights to equality and security of the person are violated.

Doe #1; Doe #2; Doe #3; Dobash; 99 Federal Steps p. 11-12; Randall; Moran; N.C. H. Hoyano "Policing Flawed Police Investigations: Unravelling the Blanket" (1999) 62 Mod. L. Rev. 912 ("Hoyano")

18. This appeal provides the Court with an opportunity to promote positive change in police response to male violence against women and, in so doing, to affirm the **Charter** rights of women to equality and security of the person. It concerns the extent to which the civil law will hold police accountable for their failures to respond adequately to women's complaints of male violence and thus the extent to which it will contribute to a reduction in such failures. It is an appeal of specific importance to the parties, but also one of general importance to all women and to the society within which we live.

19. In VRR's submission, the long, sad history of failure by Canadian police to respond adequately to women's complaints of male violence is an important element of the relevant context in this appeal. That history, and its lessons, should inform the Court's analysis of causation, duty of care, standard of care, and contributory negligence, particularly with respect to what, in context, is practical, just, and in accordance with common sense.

20. In VRR's submission, the law should respond to the larger context by imposing civil liability for police negligence in cases where it is established that police responded inadequately to male violence against women and harm from such violence ensues. In particular, police should not be insulated from civil liability for negligence by a traditional, but impractical, "but for" test of

causation. Rather, a sufficient causal link should be found in such cases based on the increased material risk of harm presented by police failure to fulfil their duty of care to provide adequate protection.

21. In addition, the special relationship between women who turn to police for assistance and the officers to whom they turn should be affirmed, as should the obligation of those officers to provide reasonable protection.

22. Further, sexist stereotypes concerning battered women should not be permitted to infect the law through the doctrine of contributory negligence.

23. In VRR's submission, the foregoing legal developments would have a salutary effect on police practice by deterring police neglect of male violence against women, affirming women's **Charter** rights to equality and security of the person, and promoting the over-arching tort law goal of fair compensation.

Randall; Hoyano; (*K. v. M. (H.)*), [1992] 3 S.C.R. 6, para 106; *Bazely v. Curry*, [1999] 2 S.C.R. 534; Cooper-Stephenson, K., "Charter Damages Claims" (Carswell, 1990) ("Cooper-Stephenson")

TORT LAW AND CHARTER VALUES

24. The appellants' claim was framed in negligence, which does not preclude consideration of relevant **Charter** values. On the contrary, the Supreme Court of Canada has repeatedly held that the common law must be developed in a manner consistent with **Charter** values. In the words of Iacobucci J. in *R. v. Salituro*:

“The courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society.”

R. v. Salituro, [1991] 3 S.C.R. 654 at p. 678; [1991] S.C.J. No. 97; See also *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *A.M. v. Ryan* [1994] B.C.J. No. 2313 (BCCA)

25. Women are overwhelmingly the victims of male violence and are thus disproportionately affected, in negative ways, by the results of inadequate police investigations in such cases. As noted above, inadequate police investigations of these crimes typically arise out of sexist tendencies and beliefs and male violence against women and inadequate police responses to it compromise women’s rights to security of the person. Accordingly, in VRR’s submission, women’s **Charter** rights to equality and security of the person are implicated in cases involving male violence and inadequate police responses to it.

Seaboyer; Osolin, 48-84; *O’Connor*, para 120-134; *Doe # 3*; see generally *Eldridge v. B.C. (A.G.)* [1997] 3 S.C.R. 624 and *Law v. Canada* [1997] 1 S.C.R. 497; the Policy A.B. p. 311-345

26. According to Wilson J. in *R. v. Lavallee*:

“The gravity, indeed, the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life. Far from protecting women from it the law historically sanctioned the abuse of women within marriage as an aspect of the husband’s ownership of his wife and his “right” to chastise her. One need only recall the centuries old law that a man is entitled to beat his wife with a stick “no thicker than his thumb”.

Laws do not spring out of a social vacuum. The notion that a man has a right to “discipline” his wife is deeply rooted in the history of our society. The woman’s duty was to serve her husband and to stay in the marriage at all costs “till death do us part” and to accept as her due any “punishment” that was meted out for failing to please her husband. One consequence of this attitude was that “wife battering” was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles to this day.

Fortunately, there has been a growing awareness in recent years that no man has a right to abuse any woman under any circumstances. Legislative initiatives designed to educate police, judicial officers and the public, as well as more aggressive investigation and charging policies all signal a concerted effort by the criminal justice system to take spousal abuse seriously....”

Lavallee, paras. 32-34

27. The need to ensure that reasonable steps are taken to eliminate discriminatory and dangerous police responses to male violence against women is one of Canadian society's most compelling, as is the need to compensate women who suffer male violence following inadequate police response. These are needs that the civil, as well as criminal, justice system must take seriously; impression management is not good enough. In fact, mere impression management by police of the real problem of inadequate response to male violence against women is highly dangerous in a civil society that reasonably requires effective service from, and control over, its police force.

28. In VRR's submission, the courts, as custodians of the common law, should respond to these pressing needs by developing the law in a manner that supports and promotes the **Charter** values of women's rights to equality and security of the person. Holding police to account for failures to act in accordance with these values and follow their own policies in connection with male violence against women will have such an effect.

CAUSATION

29. The principle of causation has been described by this Honourable Court as a "tool of justice". It is a practical question to be approached in a pragmatic, robust manner and answered by the application of ordinary common sense.

Haag v. Marshall (1989), 39 BCLR (2d) 205, p. 7; *Snell v. Farrell*, [1990] 2 S.C.R. 311, para22&33

30. It would be unjust to require a defendant to pay damages unless he or she caused the plaintiff to be deprived of a right and that deprivation caused the plaintiff some harm.

Accordingly, for civil liability to be imposed, a plaintiff must establish that there is a link between the defendant's breach of duty, on the one hand, and the injury and damages suffered, on the other.

Cooper-Stevenson; *Athey v. Leonati et al*, [1996] 3 S.C.R. 458 (“*Athey*”); *Q. v. Minto Management Ltd.* (1985), 15 DLR (4th) 581 (Ont. HC).

31. Injury and damage may, however, result from the interplay of many causes and, in such cases, it would be unjust to require a plaintiff to establish that the defendant's breach of duty was the sole cause of the harm suffered. Accordingly, for civil liability to be imposed a breach of duty need only contribute materially (beyond the *de minimus* range) to the harm or risk of harm at issue.

Cooper-Stevenson; *Athey*; *Gerstel v. Penticton (City)* 1995 9 B.C.L.R. (3d) 49 (BCSC) (“*Gerstel*”)

32. There is no difference, for causation purposes, between making a material contribution to harm and materially increasing the risk of harm by failing to take reasonable steps to bring about its reduction.

Fairchild v. Glenhaven Funeral Services Ltd., [2002] 3 All E.R. 305 (“*Fairchild*”) para65-74, 106-108; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (“*McGhee*”), para 1012; *Gerstel*

33. Analysis of whether a breach of duty caused or contributed materially to harm, or the risk of harm, is necessarily speculative. This is so because it requires examination of hypothetical facts that did not occur and will never occur: an assessment of what would have happened had the allegedly causal breach not taken place. As a result, in some cases the need for proof of causation, in a scientific sense, may present an insurmountable evidential burden for a plaintiff who has been the victim of a breach of duty, leaving her without compensation for her injuries. This may be unjust and common law courts have, therefore, departed from the traditional “but for” test of causation in certain types of cases.

Cooper-Stephenson, p. 251-260; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *K.L.B. v. British Columbia* [2003] S.C.J. No. 51 (“*K.L.B.*”); *McGhee*; *Walker Estate v. York-Finch General Hospital* (2001) 198 D.L.R. (4th) 193 (SCC); *Fairchild*

34. One area of departure has been cases in which a defendant's negligence created a risk or increased the risk of injury and such injury ensued, but neither party could prove positively whether the increase in risk did or did not materially contribute to the injury. According to Lord Wilberforce in *McGhee v. National Coal Board* in these circumstances:

“... if one asks which of the parties....should suffer from this inherent evidential difficulty, the answer as a matter in policy or justice should be that it is the creator of the risk who should bear its consequences.”

McGhee, p. 6

35. The House of Lord recently discussed the *McGhee* approach to causation in *Fairchild v. Glenhaven Funeral Services Ltd.* A number of Law Lords stated therein that, pursuant to *McGhee*, a sufficient causal link is established in certain cases where: the defendant's conduct exposes the plaintiff to a greater degree of risk of harm than would otherwise have been present; harm ensues; and complexities of proof render it impossible for causation to be proven in the usual way. This approach has often been interpreted as one of factual or legal “inference”, however, the speeches in *Fairchild* suggest that it is neither; rather, it is a different, less stringent legal test of causation that is justified in exceptional cases on policy grounds. In VRR's submission, this is the preferable interpretation of the ratio of *McGhee*.

Fairchild, paras. 10-13, 20-22, 30-35, 52, 67-170

36. Two primary policy grounds are identified in *Fairchild* and *McGhee* as justifying a different, less stringent test of causation in certain cases. As previously noted, the first is the practical impossibility of proof of causation, in a “but for” sense, due to the factual matrix of a case, together with the injustice of denying compensation to a plaintiff who has suffered a breach of duty. The second is the prospect that application of a traditional “but for” approach to causation

would, in effect, empty the defendant's duty of care of all content and provide *de facto* immunity from liability for its breach.

Fairchild, para. 160-171; *McGhee*

37. A recent Canadian case in which a less stringent approach to causation was adopted is the Supreme Court of Canada's decision in *K.L.B.* The Court considered causation in *K.L.B.* in the context of inadequate government monitoring and supervision of foster parents who sexually or physically abuse foster children in their care. Liability for negligence was imposed despite the fact that the harm at issue was inflicted by abusive foster parents and the defendant's duty was limited to taking reasonable steps to protect the plaintiffs from the risk of suffering that harm.

K.L.B. paras. 1-17

38. The Court in *K.L.B.* acknowledged that the private nature of foster care child abuse heightened the difficulty of proving its connection to the government's failure to follow an adequate system of monitoring and supervision. There, as here, it was not possible to prove positively whether the increase in risk of sexual or physical violence was causally connected, in a "but for" sense, to the government's failure to take adequate protective steps. In addition, there, as here, where a failure to protect adequately was proven and the harm from which protection was required ensued, dismissal of the claim on the basis of causation would have amounted to a finding that supervision would have had no real causal effect in any event. Such a proposition affronts common sense and renders the duty of care meaningless for practical purposes. In these circumstances, the Court adopted a robust, pragmatic approach to the issue of causation and liability was imposed.

K.L.B. paras. 12-17

39. The Court in *K.L.B.* concluded that the government should be held accountable for foster parents' abuse when it was reasonably foreseeable that its conduct would *expose* the plaintiffs to harm of the sort that they sustained. It was reasonably foreseeable that some people, if left in charge of children, would physically or sexually abuse them and the government was obliged to follow adequate supervision policies and procedures "to *lessen the likelihood* that either form of abuse will occur" [emphasis added]. It failed to do so. Given its duty to bring about a material reduction in the risk to which the plaintiffs were exposed, the Court concluded that the government's failure was sufficiently causally linked to the abuse for liability to follow.

K.L.B. paras. 12-17

40. In VRR's submission, a less stringent test of causation should also apply to cases of police failure to take reasonable steps to protect women who complain of male violence. In particular, this Court should find that where police breach their duty of care to provide reasonable protection to a woman by failing to respond adequately to her complaint of male violence and such violence ensues, a causal link will necessarily exist between the breach and the injury. That link arises out of the inevitable increase in the risk of harm created by police failure to take reasonable steps to bring about its material reduction through protective measures. This modified test of causation is justifiable, and highly desirable, for the reasons outlined below.

41. Like sexual and physical abuse by foster parents, repeated acts of violence by wife beaters are foreseeable. As noted above, police policies are premised on this fact, as is their duty of care to take reasonable protective steps. The details of when, where, and how a particular man's violence against a woman may erupt are no more precisely predictable than are the details of when, where, and how the sexual or physical abuse of a child may occur. This does not detract, however, from the fundamental foreseeability of either for the purposes of a causation analysis.

Rather, the relevant area or scope of risk concerning which police have a duty to protect is the risk that generally foreseeable male violence or child abuse in any form will ensue. The duty of protection is directed toward reduction of that over-arching risk.

42. When a woman's right to reasonable police protection from the foreseeable risk of male violence is established, the negligent denial of such protection increases the risk of harm to which that woman is exposed. As police policies acknowledge, an aggressive police response to male violence lessens the likelihood that it will be repeated. It follows, therefore, that a non-aggressive police response necessarily increases the risk of repeated acts of such violence, particularly when the violent male knows that his conduct was reported and the complaint was not acted upon.

43. Although the risk of male violence is foreseeable and aggressive police response is known to reduce the risk materially, it will rarely, if ever, be possible to prove, scientifically, whether a particular act of violence would have occurred had police responded adequately, rather than inadequately, to a particular complaint. The science of human behaviour is incapable of assessing the effect of specific interventions on specific individuals in specific circumstances with such precision. Accordingly, the application of a traditional test of causation would impose a virtually impossible burden of proof on women who have suffered a breach of the duty of protection owed to them by police and prevent them from obtaining compensation for such breaches when violence ensues.

44. As in *Fairchild* and *McGhee*, the central question on this appeal is, as a matter of justice, which of the parties should suffer from this inherent evidential difficulty - the police who breached their duty of protection or the woman to whom the duty of protection was owed. Neither can prove positively that police intervention would or would not have prevented or altered the

particular act of violence that actually erupted, but it is incontrovertible that appropriate police intervention would have materially reduced the generally foreseeable risk.

45. In VRR's submission, the answer to the foregoing question is clear: it is wrong in policy and principle to impose the burden of this evidential difficulty on women in cases of this kind. Indeed, to do so would be not only to deny women compensation when police materially contribute to the risk of harm they have suffered, but also to empty the police duty to protect of content and insulate police from liability for its breach. This would be highly undesirable, particularly given that discrimination against women through police failures to treat their complaints seriously is a socially damaging activity that denies women their **Charter** rights to equality and security of the person.

46. A context-sensitive approach to causation of the sort advocated above was adopted by Moldaver J. (as he then was) in a preliminary decision in *Doe #2* and MacFarland J. in *Doe #3*: a case that is strikingly similar to the case on appeal in a number of significant respects. The Court found, in *Doe #3*, that the police had a duty to warn potential victims of a serial rapist, including the plaintiff, that they were at risk of attack and thus to provide them with a measure of protection and an associated reduction of the risk. They failed to implement this protective measure, the likelihood of attack was not thereby reduced, and civil liability was imposed when the unreduced risk ripened into harm and the plaintiff was attacked.

Doe #2, p. 1-5, 6-8, 13; *Doe #3*, p. 8-13, 19-23, 24-32

47. MacFarland J. took a common sense approach to causation in *Doe #3*, although she did not engage in a detailed causation analysis. The plaintiff in *Doe* was, by police negligence, denied her right to reasonable police protection against the foreseeable risk of attack by a violent male, harm

ensued, and liability followed. Scientific proof in connection with causation was apparently not required, nor should it have been. Rather, the Court's focus was on the nature of the police's protective duty, the breach of that duty, the plaintiff's right to equality and security of the person, and the requirements of justice. In the words of Moldaver J. in *Doe #2*:

“Where the negligent conduct alleged is the failure to take reasonable care to guard against the very happening which was foreseeable, the claim should not be dismissed for want of causal connection.”

Doe #2, p. 8; see also *Doe #3*, p. 30-32

48. In VRR's submission, the needs of justice – individual and social – will be met by adoption of the foregoing modified test of causation in cases of police failure to respond adequately to complaints of male violence against women. A plaintiff who suffers police negligence will not be left without a remedy in the face of an impossible evidential burden and police will not be insulated from civil liability for their negligent failures. In addition, and importantly, police will be deterred from practicing “impression management” by adopting, but not implementing, policies that combat male violence against women and the inherent sexism that such violence, and inadequate police response to it, represents. The common law will thus be developed in a manner that promotes women's **Charter** rights to equality and security of the person.

49. In VRR's submission, Collver J.'s causation analysis was inconsistent with the approach advocated above. It was, therefore, erroneous and it should not survive this appeal.

DUTY OF CARE AND STANDARD OF CARE

50. Public authorities, including police authorities, are generally held to civil account for their negligent acts. In such cases, liability is imposed on the basis of policy and principle.

Just v. British Columbia [1989] 2 S.C.R. 1228 (“Just”); *Schact v. O’Rourke* [1976] 2 S.C.R. 53 (“Schact”); *Doe*; *Funk v. Clapp et. al.* (1986) 35 B.C.L.R. (2d) 222 (BCCA) (“Funk”); *Edgar v. Richmond (Township)* [1991] BCJ, No. 598 (BCSC) (“Edgar”); *Gerstal v. Penticton (City)* (1995) 9 B.C.L.R. (3d) 49 (BCSC) (“Gerstal”); *Beckstead v. Ottawa (City)* (1997) 155 D.L.R. (4th) 382 (Ont. C.A.) (“Beckstead”)

51. As a matter of principle, foreseeability of risk must coexist with a special relationship of proximity between a public official and an individual member of society for a private law duty of care to arise.

Doe #1; *Doe #2*; *Doe #3*; *Anns and others v. Merton and London Borough Council*, [1977] 2 W.L.R. 1024; *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2

52. When an individual woman is, or should be, known by police to be part of a narrow and distinct group of potential victims of crimes of male violence a special relationship of proximity exists between them such that a duty of care on the part of police is established. In these circumstances, the police have a duty to take reasonable steps to protect the woman from the foreseeable risk of repeated crimes of male violence.

Doe # 1, p.26-42; *Doe #2*, p. 6-13; *Doe #3*,p.24-32; *Schact*; *Funk*; *Edgar*; *Gerstal*; *Beckstead*

53. In VRR’s submission, a woman who complains of male violence and turns to police for assistance is obviously someone known by them to be a potential victim of crime. That potential typically actuates the complaint.

54. In VRR's submission, a woman who complains to police of male violence is also someone who reasonably expects them to fulfil their duty of protection. "Reliance", in this sense, is implicit in the act of complaining, and exists irrespective of whether the police respond appropriately and thereby demonstrate such reliance to have been well placed.

55. The risk of repeated acts of male violence against women is tragically, but notoriously, foreseeable. As noted above, police are well aware of this fact and of the effectiveness of aggressive police response in reducing the risk. It follows, therefore, that police must reasonably contemplate that carelessness on their part through failure to respond aggressively, as required by their domestic violence policies, might cause damage to a woman who has complained.

Lavallee, paras. 32-34; *Dobash*; the Policy A.B. p. 311-345

56. Conduct is negligent if it creates an unreasonable risk of harm. In the context of police duty to protect women from male violence, an unreasonable risk of harm is created when police fail to take reasonable steps to lessen the risk of foreseeable male violence by following their own policies of aggressive intervention.

Ryan v. Victoria City [1999] 1 S.C.R. 201, *para. 28.*, *KLB*, *paras 12-17*; the Policy A.B. p. 311-345

57. In VRR's submission, in determining what constitute reasonable steps in this context this Honourable Court should take into account the grave harm done to women, individually and collectively, by crimes of male violence and by inadequate police response to it. As MacFarland J. noted in *Doe #3*, women generally conduct their daily lives in such a way as to avoid the pervasive threat of male violence that exists in our society. That is true, and it is terribly wrong. As outlined above, it is also true that Canadian police forces have, and know they have, a long history of inadequate response to male violence and policies have been adopted to bring about

needed change and improvement. It is surely not too much to require police to follow their policies and to respect the **Charter** rights of women to equality and security of the person.

Doe #3, p. 4

CONTRIBUTORY NEGLIGENCE

58. The respondents assert that the appellant negligently contributed to her own damages by failing to take reasonable steps to protect herself from her violent, abusive former spouse. This assertion is, at best, ill conceived and unsupportable. In VRR's submission, it should be dismissed out of hand.

59. In some circumstances, gender is germane to an assessment of what is reasonable. This is particularly true of women's responses to male violence. Unfortunately, sexist myths and stereotypes have long infected assessments of women's conduct in this context such that women have been condemned as willing masochists when they stay in abusive relationships and manipulative exaggerators when they leave or complain. In VRR's submission, such myths and stereotypes must be clearly and unequivocally rejected whenever they arise.

Lavallee, para. 34; Dobash

60. The fear, paralysis, and isolation that battered women experience is now widely acknowledged and the historical tendency to blame women should be accordingly reduced.

In the words of Josiah Wood in his report to the R.C.M.P.:

“It is a notorious fact that many women who are victims of violence in a relationship find it impossible either to complain to the police when they are abused or to cooperate with a subsequent criminal investigation when that abuse finally comes to the attention of the police. All of the available research on the subject confirms that there are a host of complex reasons for this phenomena, many if not most of which are related to the power imbalance that characterizes abusive relationships and leaves the woman victim convinced that she must suffer in silence. Such victims frequently feel shame or guilt and blame

themselves for what they perceive to be their failure in making the relationship a success. Many mistakenly believe that the abuse will stop, if only they try harder and become more compliant. All of these, and many more, complicating factors explain why the average woman in a violent relationship will suffer abuse as many as 35 times before making her first complaint to the police.”

Wood Report, p. 15

61. In VRR’s submission, in the light of the foregoing it is remarkable that the respondent has attempted to resurrect the practice of “victim blaming” through the doctrine of contributory negligence. This attempt merits the summary rejection it was accorded by Collver J., which rejection should be affirmed by this Honourable Court.

PART 4

NATURE OF ORDER SOUGHT

62. The Intervener seeks an Order setting aside the Order of the Honourable Mr. Justice Collver, pronounced June 5, 2001.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Gail M. Dickson, Q.C.
Counsel for the Intervenor

Vancouver, B.C.
November 18, 2003

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