

Assumption of responsibility – the new battle ground for social care cases

The Supreme Court decision in the case of Poole Borough Council v GN & another (6 June 2019) addresses key legal principles in relation to when a local authority will owe a duty of care in negligence to children in its areas who are known or suspected to be suffering or at risk of harm.

17 June 2019

The Supreme Court decision in the case of Poole Borough Council v GN & another (6 June 2019) addresses key legal principles in relation to when a local authority will owe a duty of care in negligence to children in its areas who are known or suspected to be suffering or at risk of harm.

In this article, we seek to clarify the judgment, to anticipate what it means for local authorities and other public bodies, and to consider practical responses to the evolving legal landscape.

What was the case about?

The decision is relevant to all government agencies who work with children and in particular those who form part of the multi-disciplinary system set up to protect children from harm. It was handed down in the teeth of widespread publicity about another set of Serious Case Reviews following the deaths of children on the edge of care, and when [recent research](#) conducted by Bath Spa University shows social workers nationwide complaining of high workloads and insufficient support.

The original claim brought on behalf of children GN & CN was that Poole Borough Council had been under a common law duty to protect them from harm. The council became involved with the family after they had been placed in accommodation near another family known to engage in anti-social behaviour. The children had been identified as Children in Need and social workers had been allocated to them. One of the boys was severely disabled and was subject to harassment and mistreatment by the anti-social family. The other boy suffered years of physical and mental abuse, leading him to run away from home after leaving a suicide note.

The question before the Supreme Court was whether a duty of care could be owed by the Social Services Team of Poole Borough Council. Those acting for the children had asserted that, since their own mother was unable to protect the children from the anti-social neighbouring family, the council should have removed them from their mother's care in order to protect them from the harassment they suffered.

What did the court decide?

The Supreme Court struck out the claim on the basis that:

- The council did not owe any duty of care in relation to the exercise of its child protection functions and
- On the pleaded facts of this case there was no basis for the assertion that the council would have been able to remove these boys from their mother's care.

Established case law, laid down most comprehensively in claims concerning the police, makes it clear that defendants cannot ordinarily be sued for alleged failure to protect individuals from harm caused by the actions of third parties. Claimant lawyers are very pleased to report that the Supreme Court indicated that there could be some exceptions. These included cases where there was:

- Creation of the danger by the defendant
- A sufficient level of control over the third party causing the damage
- An assumption of responsibility to the claimant. An assumption of responsibility may be an express undertaking that reasonable skill will be taken but more commonly it is implied from the foreseeable reliance of individuals on the exercise of reasonable care. Their Lordships did not accept that an assumption of responsibility can never arise out of a performance of statutory functions.

In this case it was accepted that the council could not be said to have created the danger in its part in placing this family near to the anti-social family, nor did it have control over the anti-social family.

The Supreme Court concluded on the pleaded facts in this case that there was no arguable assumption of responsibility; the operation of the statutory scheme for child protection was not sufficient to infer such an assumption of responsibility. The mother did not rely on the council's social workers, nor had she entrusted her sons' care to them. There was no reliance on her part.

What is the impact of the decision?

Different stakeholders are inevitably taking a very different view of the case.

Most defendant lawyers are of the view that this will reduce many of the traditional 'failure to remove' type cases local authorities now see, often following criticisms by the court in care proceedings.

By contrast lawyers usually acting for claimants put rather a different spin on it, asserting that in this decision the Supreme Court has made it clear that a duty of care could be owed by local authorities when undertaking social welfare functions.

Claimant lawyers focus closely (as they have been doing for nearly a year now) on the concept of an assumption of responsibility. The Supreme Court identified this as "*an undertaking that reasonable care will be taken, either express or more commonly implied, usually from the reasonable foreseeability of reliance on the exercise of such care*". We suspect this will be where the principal battle ground will be over the next few months and years.

Where next for local government?

We can say with some confidence that the vigour with which 'failure to remove' cases are likely to be pursued by claimant's solicitors will diminish, at least in the short term while lawyers regroup, and consider alternative ways of presenting the claims. They will not only be relying on potential arguments that social workers and other professionals, by their actions, have created a source of danger, or that had assumed a responsibility to protect children from harm.

It is likely there will however be an increase in the number of challenges brought under the Human Rights Act 1989 relying on arguments that local authorities caused infringement of children under the European Convention on Human Rights including in particular:

- Article 3 (Prohibition of Torture, inhuman and degrading treatment)
- Article 6 (Right to a Fair Trial)
- Article 8 (Respect for Private and Family Life)

Similarly health contractors providing social care and police services are likely to face increased claims from individuals who assert that they assumed a responsibility in a child protection context, causing reliance to be placed on those bodies, and thereby creating a duty of care.

Care proceedings

We do see a few 'failure to remove' cases brought by adult claimants alleging that local authorities failed to protect them from some sort of abuse or neglect in the past. However the vast majority of cases we now see are brought on behalf of children and young people represented by the Official Solicitor. It is quite common for criticism to be made of a local authority's actions or inactions during the course of care proceedings, and as a result of this to see the Family Court make a referral to the Official Solicitor (OS) in order that the OS can explore whether a claim either in negligence or under the Human Rights Act (HRA) ought to be brought.

HRA claims should normally be brought within one year of the events complained of. Unlike common law claims, the one year limitation period is not extended by the lack of capacity or the infant status of a claimant.

Whilst lawyers have been waiting for the GN & CN decision to come out a number of limitation moratoria had been granted nationwide. Local government lawyers need to be thinking carefully about whether those moratoria ought to be lifted, and to what extent more insistence ought to be made within the context of care proceedings for claimant's solicitors to set out exactly what the claim is there and then.

Careful reference should be made to the guidance given in 2017 by the Honourable Mr Justice Keehan in the case of [H v NCC and LAA \[2017\] EWHC282](#).

Where should local government be looking to apply their resources next?

Whatever the medium to long-term holds, we can be reasonably confident that there will be an increase in the number of applications for either subject access requests or for pre-action disclosure in contemplation of claims.

Lawyers acting on behalf of potential claimants will have to examine the facts of each case very carefully, in order to ascertain whether the facts justify an argument that local authorities either assumed some sort of responsibility that was relied upon (and exactly what that responsibility was) or created a source of danger.

Historically claimant's solicitors have often endeavoured to arrange for some of that research to be carried out through the complaints procedure, and so complaints officers ought to take legal advice where the wording of complaints are unusual, perhaps focusing on some sort of alleged agreement or accountability on the part of individual social workers.

Finally, where there has been criticism of local authorities' conduct whether it is in the complaints system, during the course of care or other proceedings, or with reference to Serious Case Reviews careful consideration ought to be given as to the likelihood of claims. Training should be given to all those working in adult and social care.

Three things for public authorities to consider now:

- Each should check their public liability insurance policy wording to see what types of claims are provided for. Those brought wholly or partly under the Human Rights Act may not always be covered.
- Those working with troubled families and vulnerable groups should carry on doing exactly what they are doing to the best of their ability, but really good record keeping about what decisions have been made and why will always make future litigation much easier to defend.
- Think about human rights claims moratoria – the time has probably come to terminate these, so you know exactly about each claim you might face, and can investigate it fast and proportionately, before you lose your witnesses.

Authors: James Arrowsmith and Sarah Erwin Jones are partners in the social care and abuse team at law firm Browne Jacobson.

This article was originally published by localgovernmentlawyer.co.uk on 14 June 2019

Contact

Sarah Erwin-Jones

Partner

Sarah.Erwin-Jones@brownejacobson.com

+44 (0)115 976 6136

Related expertise

Government

Social care