

Negligence in performance of statutory functions

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Though the case itself is about social care services, the decision is likely to become a reference point on negligence arising from failures to act in a variety of circumstances.

Poole Borough Council v GN and another

GN, his mother and his brother were housed in a property near a family known to engage in antisocial behaviour. GN and his brother suffered severe harassment as a result. Their mother, through no fault on her part, could not protect them. Both children were identified as children in need by Poole Borough Council and social workers were allocated.

The claim examined by the Supreme Court was against Poole Borough council alone. It was pleaded on the basis of negligence, and alleged the council owed the claimants a duty by virtue of the social work intervention. It was asserted that the council should have removed the claimants from their mother's care.

The claim was struck out by the Court of Appeal. The Supreme Court upheld the strike out, though on a different basis.

The Supreme Court decision

Lord Reed gave the judgment, which was unanimously agreed.

Statutory obligations do not of themselves give rise to a duty of care in negligence. However, in some circumstances a duty may arise from what is done or not done in the operation of a statutory scheme. To the extent *X v Bedfordshire County council* [1995] 2 AC 633 limited liability on public policy grounds, it is no longer good law.

In *GN*, the claim was not linked to an act but to an omission, more specifically it was alleged there was a duty to protect the claimants from the acts of a third party. In such cases, a specific basis for asserting a duty of care must be established. These include:

- an act which prevents another from protecting the claimant from the danger
- a sufficient level of control over the third party causing the damage; or
- an assumption of responsibility to the claimant (the only basis pleaded in *GN*)

Assumption of responsibility might arise from 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.

Such reliance is inferred where a hospital admits a patient, where an education authority accepts a pupil into a school, and where a child is taken into care. In such cases, the reliance can be inferred from the nature of the function being performed.

In other cases, assumption of responsibility may be inferred from '*the manner in which a public authority has behaved towards the claimant in a particular case.*'

Phelps v Hillingdon London Borough Council [2001] is an example in a different context of how such an assumption may arise. In Phelps an educational psychologist 'assumed *responsibility for the professional advice which he provided about a child in circumstances where it was reasonably foreseeable that the child's parents would rely on that advice.*'

The judgment provides limited insight into the factual matrix required for an assumption of responsibility in a social work context. Lord Reed was clear that anxiety in relation to the outcome on the part of the claimant's mother was insufficient, and also rejected argument that an email from an antisocial behaviour coordinator established a duty as '*a duty of care cannot be brought into being solely by a statement that it exists.*'

What comes next?

Poole v GN provides a clear overarching theory of duty of care in negligence relating to the operation of a statutory scheme, and resolves inconsistencies in earlier authorities. Absent are any specific statutory provisions on liability, organisations responsible for delivery of statutory services are in no better or worse position than private individuals or businesses.

Therefore, a duty exists in relation to actions taken in the context of a statutory service, and where negligent performance has caused harm there may be a claim.

It is trite that many omissions can be re-cast as acts and cases such as Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4 demonstrate the challenge of distinguishing these two categories. A bystander injured in the course of an arrest was able to claim as the defendant's officers had been engaged in the act of arresting a suspect at the time.

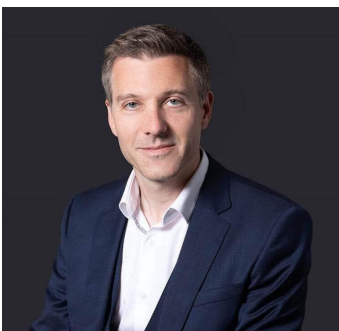
Robinson and now GN distinguish such cases from alleged 'failure to confer a benefit', or 'to prevent harm caused by the conduct of third parties'. For a duty in these circumstances, additional elements such as an assumption of responsibility must be present.

It is likely these omissions claims will fall into a number of broad categories, such as those which arise from alleged reliance, or those which involve statements said to be express assumptions of responsibility.

However, GN does not provide significant guidance as to the factual circumstances required in order to show that there was a duty in the new contexts in which the test is now likely to be applied. More test cases might be expected, but Lord Reed's comment that 'assumption of responsibility can be highly dependent on the facts' suggests clarity will be hard won.

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