Browne Jacobson

A long period of voluntary child care does not always mean an entitlement to damages

09 September 2024 Sarah Erwin-Jones

Since 2018, following the Supreme Court decision in **Williams and another v the London Borough of Hackney** [2018] UKSC37 there has been the sense that any prolonged period of voluntary care under section 20 of the **Children Act** 1989 might lead to an entitlement to damages under the **Human Rights Act**.

In **Williams** it was found that where the use of section 20 amounts to an interference with a parent's or a child's exercise of their right to respect for family life, it will violate article 8 of the HCHR. Remedies available (and which are most usually sought) include awards of damages. The amounts are not particularly modest — commonly between £10,000 and £30,000 for delays even of a few months, and often the Claimant's costs are in our experience many times more than that.

More recent case law shows that a prolonged period of time in foster or residential care under section 20 of the **Children Act** 1989 does not automatically amount to an unlawful infringement of human rights or lead to an entitlement to damages.

In 2023 the Court of Appeal confirmed that in certain situations long term placements under section 20 are satisfactory.

The Facts

The Court of Appeal was dealing with two cases together.

Re S (a child) at first instance

S was, at the time of the hearing, nine years old. He had a number of complex needs, including ASD, ADHD, behavioural issues and a lack of awareness of danger. Eventually his mother, made what she described as the "agonising decision" to request his accommodation. She did not want the Council to prepare for care proceedings. Initially the Claimant's father (who had separated from the mother) was against the residential placement proposed, but as soon as he saw how well his son had settled and that his needs were being met, he agreed to sign a section 20 agreement.

The Council engaged with S's mother and perceived that she was unable to "commit" either to a plan for her son to return home, or a timescale for rehabilitation. An expert acknowledged that it would be difficult to imagine how a lone parent would be able to meet S's needs. The expert concluded the child required a specialist residential unit with a high staffing ratio.

In the care proceedings the Local Authority explained its understanding that section 20 is not an effective or appropriate mechanism for children requiring long-term care and long-term planning. The Court also had the benefit of a CAFCASS report. It is clear that the Social Worker and CAFCASS Officer had discussed the case and the Social Worker had said that had it not been for case law (i.e., *Williams*) regarding the misuse of section 20 she would not have been certain about the need for any Care Order.

The Court recognised this was in no small part due to the Claimant's mother being so supportive of her son's needs and the continued placement. The child's father was also described as being "patient, tolerant, affectionate and accepting of feedback". He had done nothing to undermine the placement.

At the initial hearing the Care Plan was agreed, but the parents argued that there should not be a Care Order made in favour of the Local Authority. Ultimately, the Judge at first instance concluded that a Care Order was necessary and that it might be necessary for the Local

Authority to have parental responsibility looking ahead. This decision was appealed.

The grounds included an assertion that the Judge had attached excessive weight to the certainty that would be provided for a Care Order and failed to express a view as to whether section 20 agreements could be used for long-term accommodation. It also highlighted the fact that judicial guidance would be of benefit as to the best to be applied on the “no order” principle in the Children Act.

Re W at first instance

This case was based on similar facts. The Claimant had been adopted and as she grew received a complicated diagnosis of ASD, ADHD, ARDN, FASD, attachment disorder, dyspraxia, dyslexia, sensory processing difficulties, and bladder bowel dysfunction. As often happens her behaviour began to deteriorate when she entered puberty, with a particular feature being violence towards her mother. Again, the Court commented on the devotion and dedication of her parents, but they struggled, and in 2020 in order to provide respite she was enrolled in a residential school coming home at the weekends. Despite this, the relationship between W and her mother continued to deteriorate. Initially the parents agreed to the making of a Care Order but having had the opportunity to take legal advice and speak to other adopters, they changed their minds, explaining that they wished to “parent from a distance” under a voluntary arrangement permitted by section 20 of the Children Act.

The Local Authority made an application for a Care Order which was supported by the guardian. Nevertheless, both parents opposed the making of a Care Order on the basis that the arrangements already in place under the agreement should continue. Their argument was that a section 31 Care Order was neither necessary nor proportionate. The Judge observed that section 20 arrangements should not be used as a long-term tool, and that where W was to be in foster care in the medium to longer term, there was a need for a Care Order. The Judge also thought it would be useful for the Local Authority to share parental responsibility from the perspective of W “testing boundaries”.

The Order was appealed, and the grounds included an assertion that the Judge erred in determining the proper use of section 20 which did not restrict or qualify the use of section 20 accommodation. It was asserted that the Judge erred in concluding that the “no order” principle was rebutted in the circumstances of this particular case.

The Court of Appeal

Considering the appeals the Court of Appeal reflected on the comparative roles of Care Orders and section 20 Accommodation Orders. They recognised that Care Orders effectively lead to the Local Authority having parental responsibility for the child in question, as well as the parents and with that parental responsibility the Local Authority may, by section 33 of the Children Act, “trump” the parents wherever there is an issue of dispute between them.

By contrast, a section 20 Accommodation Order simply facilitates partnership. Where that partnership is functioning well under an agreed Care Plan not only is the making of a Care Order not necessary, but it is disproportionate.

The simple fact that the threshold criteria under the Children Act are satisfied does not automatically lead to the making of a Care Order or in fact a Supervision Order. The Court always has to have in mind the “no order” principle under section 15 of the Children Act.

Their Lordships also went on to consider *Williams -v- Hack*ney and the Public Law Working Group set up in March 2021 by the President of the Family Division which gave best practice guidance concerning section 20 Orders. That guidance recognised that section 20 “*may be short term accommodation during a period of assessment or respite; alternatively, it may be a longer period of accommodation, including the provision of education or medical treatment*”.

Having reflected on all of the above, the Court of Appeal was convinced that the statute was unambiguous. There is no time limit on the length of a section 20 Order.

The appeals against the making of Care Orders were allowed. No party in either case was resisting or challenging the idea that neither of the children should move or change their long-term placements. Those placements were meeting their respective needs. The placements were supported by the parents as worth the accompanying Care Plans.

So what does this mean for those Local Authorities facing section 20 claims?

Unfortunately, often Claimants pursuing “pure” section 20 claims do so many years after the events in question and significantly more than one year after the primary limitation envisaged by the Human Rights Act at section 7.

That means that it can be difficult, unless record keeping is really quite vigorous, to demonstrate the reasons why section 20 case continued for a significant period of time and why no Care Order was sought. Rigorous Care Planning regularly reviewed and carefully recorded is essential.

What this decision shows is that the attitude of the parents, their support for or risk of undermining any Care Plan or Provision, and the acceptance that the making of a Care Order itself is an interference in the private and family life of both parents and child are factors to be taken into account.

It follows that delay in itself does not bring an entitlement to damages.

For more information on how to handle section 20 claims quickly and efficiently please contact us.

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