Browne Jacobson

More guidance on failure to remove claims: what are the implications for children's services and SAR teams?

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Local authorities now have the benefit of a flurry of recent judgments on the issue of the existence of a duty of care in children's 'failure to remove' cases.

These claims commonly concern an assertion that a local authority ought to have applied for a Care Order, in relation to children being harmed within the family home, earlier than in fact they did. Sometimes, but not always, these cases are enmeshed with potential claims under the Human Rights Act for breaches of ECHR Convention rights.

2021 has been busy. In HXA v Surrey County Council [2021] EWHC 250 (QB), Deputy Master Bagot QC was prepared to strike out large chunks of the claimant's case, approving previous and more senior court decisions. These had concluded a duty of care arose only when a care order is made because, until that point, the local authority does not have parental responsibility.

In HXA the claim concerned allegations that social workers had failed to protect children from physical abuse and neglect at the hands of their mother, and sexual abuse from one of her partners. The judge rejected arguments that not removing the children from their mother's care added to the danger. He also dismissed any assertion that the local authority had failed to control the wrongdoers, since there was not control over or right to control those wrongdoers. Finally, he rejected the argument that the council prevented others from protecting the claimant, particularly since no positive evidence on that issue had been put to the court.

In May this year, the long-awaited judgment in DXF v Coventry City Council [2021] EWHC 1328 (QB) was delivered, after a long and detailed trial of all the facts. Mrs Justice Lambert found that, although there was a long period of social services involvement, no assumption of responsibility arose on the facts of the case. She also found for the council both on the question of breach of duty and on causation.

A few days later, another strikeout was ordered for a Browne Jacobson client in the case of YXA v Wolverhampton City Council. In this case, as in so many cases local authorities will face, the child had been in residential care organised by the local authority for short periods of time. It is common, in 'failure to remove' cases, for claimant solicitors to assert that where a child has been accommodated under section 20 of the Children Act 1980, on this voluntary basis, that gives rise to a duty of care by way of assumption of responsibility. The Master rejected this assertion, and also rejected arguments that the council had increased the danger to the claimant by returning him home to his family at the end of a period of respite care, had failed to control wrongdoers and had, in any way, prevented others from protecting him. The court concluded that when a child went home to his parents after respite care, all that was happening was a return of the child, in accordance with the legislation, as the council was required to do.

So, does this mean an end to 'failure to remove' claims and the associated expense of disclosure and witness statementing?

Regrettably, the answer is probably not, at least for the short to medium term. We know from experience that some claimant firms, without regard to the issues of proportionality or consideration of the guidance given by the Court of Appeal in various judgments about disclosure, often seek unredacted disclosure of all records in relation to children in order to see if there might be a claim.

This puts local authorities and sometimes SAR teams in the invidious position of having to assess what if any disclosure ought to be made, despite not having a letter of claim, any indication as to what alleged duty might be owed and how it is breached or detail about what Convention rights have allegedly been breached.

Perhaps more guidance will be available shortly, as an appeal in HXA is listed for determination on 7 July 2021.

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