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Public Sector

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04

Keoghs
a Davies business

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WELCOME

Welcome to the Autumn edition of Keoghs Public Sector Aware newsletter. As we approach 2024, the public sector has faced a year marked by budget constraints, global instability and a continuous rise in service demand. Unfortunately these challenges are likely to persist into the coming year, making 2024 equally demanding for public sector organisations.

As our public sector team has significantly expanded in 2023 along with our dedicated lawyers, specialized offerings, and added value, we hope that these have been of assistance to you and remained central to our partnership during these trying times.

In this edition, we are delighted to present a collection of articles from our team, covering various topics such as:-

Associate, Michael Davies, examines a compelling Highways Case involving Karpasitis v Hertfordshire County Council, KBD 20 October 2023. This case delves into a dispute encompassing common highway issues, including questions about dangerousness and a breach of section 41, the defendant's section 58 defence, and considerations of contributory negligence.

Cynthia Watts, Lead public sector Casualty Partner delves into the details of Jennings v Otis Ltd and Bristol City Council. This involves an appeal challenging a case management order in a personal injury case related to employer liability, exploring its implications.

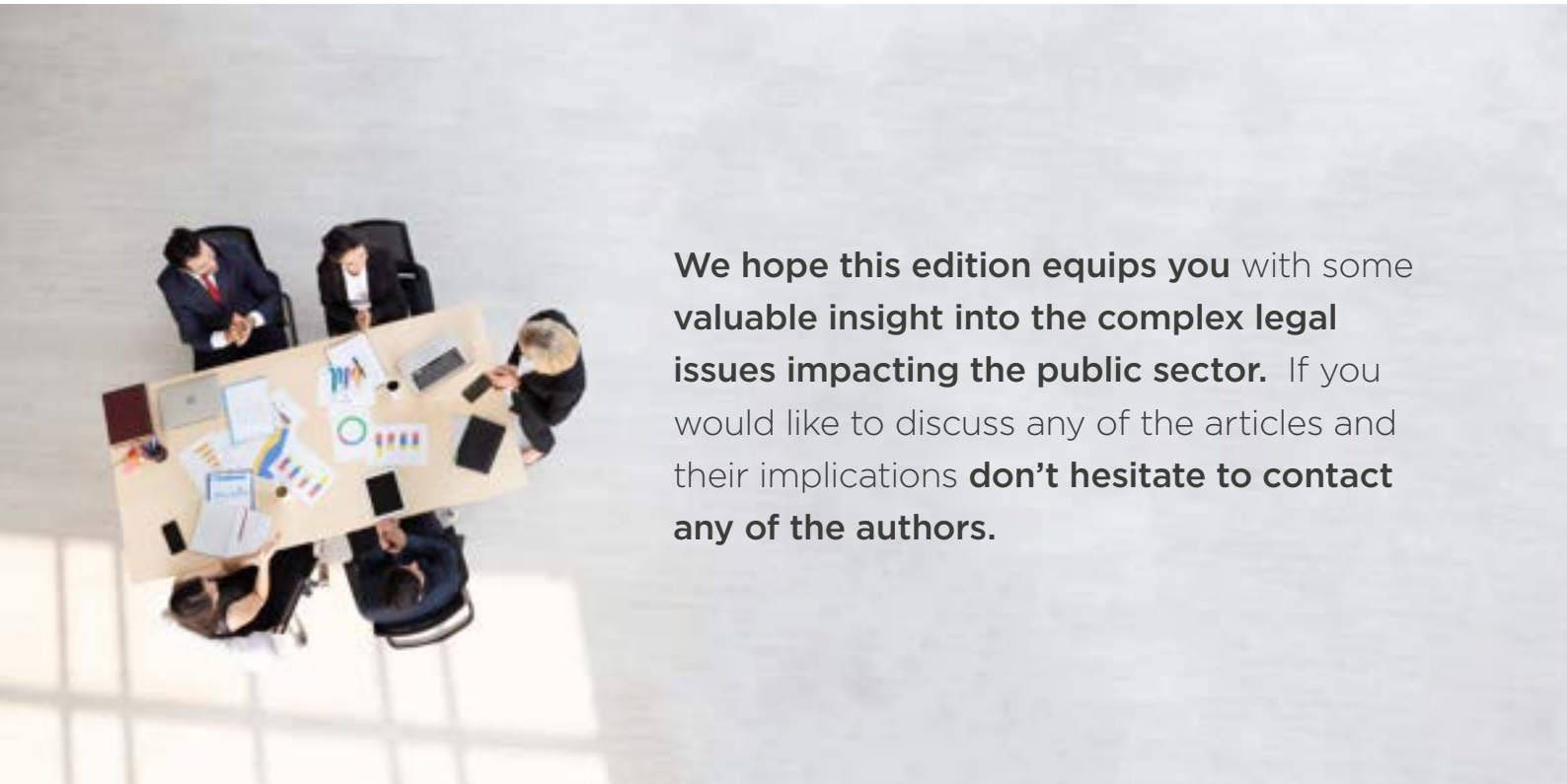
Anna Churchill explores the Court of Appeal's insights into failure to remove claims in this intricate and continually developing area of law. This analysis follows the Court of Appeal's ruling in AB v Worcestershire County Council & Birmingham City Council earlier this year.

Lauranne Nolan, our Associate and Safeguarding Lead, guides us through essential safeguarding considerations within the education sector that merit careful attention. These considerations are drawn from a report by Tes, a global education company offering support to teachers and schools worldwide. The report sheds light on the primary safeguarding concerns currently facing schools.

Lauranne also updates us on the Mandatory Reporting of Abuse, including the government's response and a call for evidence. After the Independent Inquiry into Child Sexual Abuse (IICSA) published its findings in October 2022, Lauranne examines the central recommendations from the inquiry's work, the current status, and the provided recommendations.

Paul Edwards, Director of Costs, engages in an intriguing discussion on whether we have reached a conclusion in terms of Jackson costs.

Finally both **Anna Churchill and Daniel Tyler** delve into the compelling analysis of Vicarious Liability within the framework of a family foster placement. This exploration follows the High Court's issuance of the judgment in DJ v Barnsley MBC [2023], which offers clarity on the stance regarding claims involving vicarious liability against family foster placement.



We hope this edition equips you with some **valuable insight into the complex legal issues impacting the public sector.** If you would like to discuss any of the articles and their implications **don't hesitate to contact any of the authors.**

Highway Case update

Karpasitis v Hertfordshire County Council , KBD 20 October 2023

An interesting case in which all the regularly encountered highway issues were in dispute: dangerousness/breach of section 41, the defendant's section 58 defence, and contributory negligence.

Facts

On 22 April 2020 the claimant, an experienced cyclist, was riding his mountain bike on a path adjacent to the A10. The path was narrow – approximately 1m in width – and the surface was slightly undulating. The claimant encountered a jogger travelling in the same direction. He decided to overtake the jogger, which involved riding onto a grass verge to the right of the path. The verge was slightly higher than the path at this point, so there was a slope. The main A10 itself was then to the right of the verge. Unfortunately, as the claimant rode onto the verge he encountered a hole which threw him off his bike and caused a serious spinal injury.

He brought an action against Hertfordshire County Council (HCC) as the highway authority, alleging a breach of section 41 of the 1980 Act and also negligence at common law.
The status of the path was in dispute. Elsewhere, south of a nearby bridge, the path was much wider (2.5m), perfectly flat and signposted as being a shared pedestrian and cycle route. The claimant had been on that wider part of the path earlier in his ride, before turning around.
HCC asserted that the section of path where the claimant's accident occurred was not a shared cycle route but was a footpath only and, therefore, that the claimant's presence on the path on his bike was unlawful. HCC had raised the defence of illegality (that is, the argument that the claim under section 41 was barred by virtue of his riding illegally on a footpath), but that was not pursued at the trial.

Witness evidence was provided by an acquaintance of the claimant, who said that he had been riding on this part of the path for 40 years. Publicly available data from the Strava platform also revealed usage of the path by cyclists.

There was a dispute about the size of the hole which caused the accident, which at some point later was refilled, though HCC claimed they did not ask for such works to be carried out.

A motorist who stopped to help at the scene claimed she had noticed a "very large" and "very deep" hole on the grass verge, though she said it was quite difficult to see as the grass was overgrown. She claimed that if she had stepped into the hole it would have been up to her knees.

The claimant's father had taken photos of the area on 6 May 2020, showing the presence of a hole.

HCC brought evidence from several grass cutting operatives employed by its highway partner to the effect that the verge had been mowed only weeks earlier, on 7 April, and had they seen a hole of that size it would have been reported. The hole was not reported in that way – the inference that HCC asked the court to make, therefore, was that the hole was not present at the time.
The last routine inspection of the path and verge had been carried out on 13 February 2020 and the highway inspector did not identify the hole said to be responsible for the accident. If he had seen it, he would have put a metal footway plate over it to make it safe and then reported the issue. The inspection on 13 February did reveal defects elsewhere.

The inspector had signed a witness statement in the course of the case but had since retired from his employment and he was not called to give oral evidence at trial. The claimant sought to challenge the weight to be given to his evidence for that reason.

Given the seriousness of the injury and value, the court was assisted by expert evidence on liability issues. This was firstly from highway engineers and secondly from cycling experts, though the latter did not add much to the case.

The claimant's highway engineering expert felt that the hole must have been present for a long time, certainly more than a few weeks, and was likely to have been present at the date of the last inspection in February. He had been instructed early in the case and had attended the area on 19 May 2020, measuring the hole to be 55cm in depth and about 70cm x 80cm in horizontal dimensions.

HCC's highway engineer on the other hand thought that the offending hole was likely to have been present for only a short time and was probably caused or contributed to by burrowing animals or by an underground rotting tree stump (the experts had the benefit of jointly observing an excavation of the refilled hole in the course of their investigation).

HCC's expert added that the hole photographed by his counterpart on 19 May 2020 was not a Category 1 danger but a Category 2 matter (therefore, not an immediate danger). This assessment took into account various factors, including low expected usage of the path generally, but particularly on the verge.

Judgment

The judge found that the most reliable evidence of the size of the hole at the time of the accident was from the motorist who stopped to help and described the hole as "very deep". Her description of the hole coming up to around her knees was consistent with the claimant's expert's assessment a month later of the depth being 55cm.

Despite the low predicted usage of the verge, the judge found that the hole did amount to a danger and a breach of section 41. He believed that the claimant's actions were a normal usage of the verge and the HCC ought to have foreseen it could be used for passage at some times.

Given its size, it is no surprise that the judge concluded the hole was a breach of section 41. The hole would be a hazard to pedestrians, not just to cyclists.

The key issue was HCC's section 58 defence.

The inspection system as a whole was reasonable. Despite the absence from the trial of the highway inspector, the judge found that the hole probably was not present at the time of the last inspection in February 2020. The judge relied in part on the evidence of HCC's expert, about the hole probably developing a short time before the accident due to animal activity. The judge preferred HCC's expert's view of the longevity of the hole over the claimant's expert.

The section 58 defence, therefore, succeeded. HCC had taken reasonable care by virtue of its inspections.

The judge dealt briefly with the claimant's other claim, based on negligence. The claimant had alleged that HCC should have placed a sign marking the end of the shared cycle path, so the claimant would have known not to ride on this section, and that this was negligent.

Such guidance which exists does not generally require 'end of route' signs to be placed where cycle paths terminate. The judge anyway agreed that HCC had not done anything positive to create a danger. Instead, it was an omission for which common law does not generally allow a claim in negligence (adopting the more recent terminology, the court might have said that HCC was guilty of 'failing to confer a benefit' rather than characterising it as an omission).

The judge went on to say that if he had found in favour of the claimant on liability he would have found contributory negligence of 33%. This was because the claimant's speed (about 10mph) was too fast to ride on the verge. He ought to have anticipated the presence of undulations on the verge and ride at a speed which allowed him to look for and avoid any defects present.

Keoghs **Comment**

Highway authorities can generally be confident that the standard of maintenance the court will expect to be applied in verges is lower than in carriageways or footways. Nevertheless, a hole as deep as 50cm is likely to be a danger to any expected highway user and it is not a surprise that the court concluded there was a breach of section 41, notwithstanding HCC's expert's attempt to categorise it as a Category 2 matter.

There is surprisingly little case authority dealing with the consequences for an injured claimant who has exceeded his permission to be on the highway, particularly cyclists who are injured by defects on footpaths and footways (which are quite distinct things). Authority from Northern Ireland on broadly equivalent statutory provisions concluded that the potentially unlawful highway usage was no bar to a claim and that has generally been the position adopted by highway authorities in England & Wales in such cases. The crucial point is that the standard of maintenance to be applied is only that which is reasonably safe for expected users.

The absence from trial of a highway officer who carried out the crucial last inspection before an accident is a common scenario faced by those dealing with the defence of claims.

In this case, the inspector's retirement was correctly held not to be a good reason for his absence from trial. Despite that, the court accepted that the inspection was done properly and that the offending hole was not present at the time.

It was helpful that HCC had managed to obtain a witness statement from the inspector and that he had identified other defects elsewhere during the inspection, evidencing that it was properly done (the claimant had argued the inspection was not done at all, relying on apparent discrepancies in GPS data).

There was also documentary evidence of inspection, namely the records. A crucial factor in this finding was also the evidence of HCC's engineering expert, who was of the view that the hole was likely to have been only formed shortly before the accident.

Where there is positive evidence (or expert opinion) that the offending defect arose after the date of the last inspection, that makes the highway authority's prospects of success with the section 58 defence better.

Author:

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Associate

Jennings v Otis Ltd and Bristol City Council 2023 EWHC 2039 (KB)

Introduction

Keoghs acted for the defendant local authority in this matter. The claimant appealed case management orders that required the claimant to unilaterally serve his witness evidence and to provide proper responses to Part 18 questions. **The claimant's particulars of claim and previous Part 18 responses had not provided an adequate description of how he alleged the accident had occurred.** The costs and case management conference (CCMC) was otherwise adjourned so that the claimant could comply with these orders to clarify his case. By the case management stage in a case, the defendants are entitled to know the case they had to meet.

Factual Background

The claimant was a lift engineer who sustained a severe injury resulting in a traumatic forearm amputation when his right arm came into contact with the moving parts of the lift drive machinery he was working on at the local authority's premises. The claimant alleged the accident occurred when his arm accidentally bypassed the machinery guarding that was in place. He alleged the guarding on the machinery was inadequate. However, his particulars of claim was very unclear as to how this could have happened. The defendant's response was that it was near impossible that the claimant's right arm had bypassed the guard unintentionally. It troubled the Master at the CCMC that the mechanism of injury still remained unclear. Hence, he ordered the claimant to serve his witness evidence unilaterally, rather than the more usual order for the parties to exchange their witness evidence simultaneously. This was despite all the parties seeking permission for expert engineering evidence and the defendants requesting the claimant's attendance at a site visit with the experts to provide an explanation as to how his accident had occurred. Provision for a site visit by the trial judge was also sought.

The Appeal Court's Decision

The orders for unilateral service of the claimant's witness evidence on liability and that he respond to a request for information seeking clarification of his case as to how his accident occurred were the subject of the claimant's appeal before Mr Justice Cotter.

The appeal on both aspects was unsuccessful. Cotter J made no criticism of the Master's orders and was supportive of the view that the claimant should make his case clear before the case progressed further.

He was similarly troubled by the vague way the claimant's account of the accident was pleaded and the failed attempt by Part 18 questions to secure some clarity about how the accident had occurred, "The claimant is unaware of what caused him to stumble and/or lose his balance, although there may be a number of factors which could have done so, which will be explored in evidence in due course." Cotter J described this response as "opaque". His view was that it was wrong for the defendants to be left to guess what it might cover and that the claimant should have set out any potentially relevant causes. In the context of that response, the Master was entirely justified in making the case management orders he did requiring the claimant to explain exactly what his case was as to what caused him, or is likely in his view to have caused him, to stumble and/or fall.

Cotter J approved the view that in the circumstances of this case where the claimant was the only witness to his accident, unilateral service of the claimant's witness statement was an obvious route to seek the necessary clarity for the defendants. The judge rejected the argument that it was wrong in this situation to order unilateral service of the claimant's witness and that this would prejudice him. He thought the Part 18 request could simply have been responded to by early disclosure of the claimant's witness statement and this would have saved a lot of costs.

The Master's order under appeal was for unilateral service of all the claimant's witness statements on liability, not just his. The appeal judge was not persuaded to limit the order to the claimant's own evidence.

Neither did Cotter J accept the argument questioning whether it had been appropriate to order both unilateral service of the claimant's witness evidence as well as a proper response to the Part 18 questions. The costs of the response should only be minimal if all that was needed was to refer to the content of the witness statements. To the extent the position was not made adequately clear in the witness evidence, then there needed to be a proper response.

In relation to the other steps the defendants were seeking to obtain clarification of the claimant's case as to how his accident occurred, the judge emphatically resisted as "unwise" the suggestion that the claimant should attend a site inspection with the defendants' engineering experts to explain how his accident came about. He could accept there was merit in the trial judge visiting the accident locus, particularly if the case was transferred from London to Bristol District Registry where he considered the case should properly have been issued. The premises where the accident occurred are very close to the Bristol Civil Justice Centre.

The judge was also critical of the claimant's actions in appealing the case management decision and, thereby, causing further delay in the case.
In his judgment, Cotter J spent several paragraphs bemoaning the claimant's solicitor's decision to issue proceedings on the case in London rather than Bristol where the accident had occurred, the claimant, second defendant and witnesses were based and the claimant's solicitors have an office. He considered there was no proper basis for this practice and he considered it was contrary to the principle set out in the Civil Courts Structure Review reports that no case is too big to be resolved in the regions.

Keoghs Comments on the Practical Implications of the Judge's Decision

- In a case where the mechanism of injury is relevant to liability and/or contributory negligence, potentially a defendant can successfully argue that it is appropriate to seek clarification by means of an order for unilateral service of the claimant's witness evidence and a CPR 18 request for information.
- Careful consideration should be given as to whether it is appropriate to appeal a case management decision in circumstances where compliance with the decision will not cause undue prejudice and an appeal will cause further delay.
- Solicitors whose practice is always to issue proceedings in London should review whether issuing in London is appropriate in each individual case.
- Overturning a case management decision is a high hurdle for a party to overcome.

Author:

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Partner

The Court of Appeal provides guidance on failure to remove claims

On 17 May 2023, the Court of Appeal handed down its judgment in AB v Worcestershire County Council & Birmingham City Council. This case was initially heard in November 2021 with Deputy Judge Margaret Obi's judgment being released on 20 January 2022. Refer to our article prepared by Nicola Markie for further information relating to the first instance hearing of this matter: **Court Guidance on the Human Rights Act 1998 in 'Failure to Remove' Claims | Keoghs**

Following this judgment, the claimant appealed to the Court of Appeal on six grounds. The Court of Appeal heard this matter on 25 and 26 April 2023, with the judgment being released on 17 May 2023.

On 21 November 2023, the UK Supreme Court refused the Claimant permission to appeal.

The facts

Our previous article gives a detailed summary of the facts of this claim. In brief, the claimant brought a claim alleging abuse within his family home, and that both defendant local authorities had failed to remove him from his mother's care when they were resident in their respective areas. The claimant's allegations were of mistreatment by his mother, but did not include allegations of sexual abuse. He brought the claim in both negligence and the Human Rights Act on the basis that the actions of the defendants were in breach of Articles 3, 6 and 8 of the European Convention on Human Rights. The defendants applied to strike out the claims and sought summary judgment. By the hearing, the claimant had discontinued his claims in negligence and under Article 8 of the ECHR. At first instance, DJ Obi granted the defendants' application and struck the claim out. The claimant appealed to the Court of Appeal.

The Grounds of Appeal

The six grounds of appeal were:

- It was incorrect of the judge to find that the operational duty under Article 3 was not applicable as the claimant was not under the 'care and control' of the defendants while living in their area.
- This ground was not pursued by the claimant, but initially related to the investigative duty under Article 3.
- The finding of the judge that there was no realistic prospect of the claimant establishing that he was subjected to ill-treatment that falls within the scope of Article 3 was wrong.
- The judge was wrong to refuse the appellant permission to amend the Particulars of Claim.
- The judge was wrong to find the claim was bound to fail.
- The judge was wrong to order the appellant to pay the respondent's costs.

No appeal was put forward relating to Article 6 as the claimant conceded this point. The claimant also conceded ground 2.

Prior to the Court of Appeal hearing, the defendants conceded ground 1 and did not pursue the argument that children in the community were not owed a duty under Article 3 as they were not under the 'care and control' of the local authority. At paragraph 85 of the judgment, the Court of Appeal agreed that this concession was correct.

Grounds 4, 5 and 6 all followed from the other grounds of appeal. In practice, it was, therefore, ground 3 – whether there was a realistic prospect of establishing that the claimant was subject to treatment that met the threshold for 'inhumane or degrading treatment' under Article 3 ECHR.

The Judgment

Lord Justice Lewis gave the leading judgment in the Court of Appeal, with Lord Justice Baker and Lord Justice Dingemans in agreement.
The claimant's appeal was dismissed. The district judge was said to be correct to find that there was no realistic prospect of the appellant establishing that either local authority violated Article 3 of the ECHR.

The Court of Appeal helpfully set out a clear test to consider whether a public body is in breach of the positive operational duty imposed by Article 3 as follows:

- The ill-treatment must reach a minimum level of severity to fall within the scope of Article 3. This must be considered on a case-by-case basis, but it was expressed that this must be serious and prolonged ill-treatment and neglect;
- The risk of ill-treatment contrary to Article 3 must be real and immediate, in that the risk must be present and continuing;
- The authority must have known, or ought to have known at the time that there was a real and immediate risk of ill-treatment contrary to Article 3. When considering this, the court must assess matters without the benefit of hindsight; and
- The public authority must have failed to take measures within their powers which judged reasonably might have been expected to avoid the risk.

The court also noted that both Article 8 (the right to respect for family and private life) and the Children Act 1989 stress the importance of keeping families together wherever possible. Article 3 must not be developed to contravene these rights.

The judgment does not attempt to provide a comprehensive account of circumstances which can meet the threshold under Article 3. However, on the facts of this matter, the threshold was not met and the appeal was consequently dismissed.

Comment

The Court of Appeal has provided a clear test for parties to consider when dealing with claims under Article 3. Public bodies have seen an increase in 'failure to remove' claims being brought under the Human Rights Act in light of recent judgments (such as HXA v Surrey CC and YXA v Wolverhampton and DFX v Coventry) which have restricted these claims in negligence.

It is of note that AB does not include allegations of sexual abuse. This claim failed at stage 1 of the above test, on the grounds that the treatment alleged by the claimant did not meet the threshold of inhumane or degrading treatment under Article 3 of the convention. In claims relating to physical or emotional abuse, ill-treatment or neglect, the facts of each case will need to be carefully reviewed to consider whether the threshold will be met. This will be a high bar and evidence of severe treatment will be necessary.

In cases involving sexual abuse, the threshold and stage 1 of the test will be more easily met. However, that does not mean that all cases of sexual abuse will be successful under Article 3. The remainder of the four-stage test must also be proven. It is important to note the Court of Appeal's comment at paragraph 57 that even in cases of sexual abuse, the risk may have been concealed or hidden and the authority may have had no reason to know of the risk and, therefore, the claim could fail at stage 3.

It is also important for all parties to remember the emphasis on keeping families together in both the ECHR and the Children Act. Removing children from their families is not to be taken lightly, and where alternative steps are appropriate, a local authority should not be penalised for taking steps to try to avoid removing children from their home.

This judgment has provided clarity as to the circumstances where a failure to remove claim under the Human Rights Act may be successful, by way of the clear four-stage test. It has cleared the way for such claims to be brought, particularly in cases of sexual abuse, albeit the test will not be easily met. The interplay of Article 3 and Article 8 is key and a delicate balancing act must be carried out. Children should only be removed from their families as a last resort.

It is anticipated that case law will develop around the four-stage test set out in this judgment. In the meantime the Court of Appeal judgment has provided parties with a clear test and principles to apply when considering failure to remove claims brought under Article 3, and each stage of the test set out in the judgment.

It is noteworthy that the UK Supreme Court has now refused the Claimant permission to appeal, confirming its agreement with the Court of Appeal judgment.

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Key safeguarding concerns for schools

The global education company Tes – which provides support to teachers and schools worldwide – recently issued a report highlighting the key safeguarding concerns for schools now. **Lauranne Nolan, Associate and Safeguarding Lead in the specialist abuse team at Keoghs,** considers a number of these concerns in more detail below. First, it is useful to understand what is meant by safeguarding, child protection and a safeguarding allegation.

What is safeguarding?

This is providing a safe and welcoming environment where all children, young people and adults are respected and valued, where everyone is alert to the signs of abuse and neglect and follows procedures to ensure that children, young people and adults receive effective support, protection and justice. It requires education and training to recognise the signs and dangers of abuse in order to prevent and protect those at risk.

What is child protection?

Child protection is the activity of recognising abuse and acting on it to protect children from harm and enable them to have the best outcomes, regardless of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

What is a safeguarding allegation?

This may relate to any member of staff or volunteer who works or engages in activity with children who has:

- Behaved in a way that has harmed, or may harm a child
- Possibly committed a criminal offence against a child or related to a child
- Behaved towards a child or children in a way that indicates they may pose a risk of harm to children
- Behaved, or may have behaved in a way that indicates that they may not be suitable to work with children.

The key safeguarding concerns for schools right now

As there can be countless opportunities for perpetrators to come into contact with children and young people, it is crucial that staff are up to date with the latest issues.

1. Child sexual abuse material (CSAM)

Children and young people have been brought up with the internet – while there are many positives to this such as enabling children and young people to socialise, learn and experience many things in a variety of different ways, the concern is that children are spending more time in the digital world than ever before, especially following the Covid-19 pandemic. Sadly, CSAM is now commonplace on mainstream social media and online gaming platforms. One of the main risks identified is that of 'self-generated' content with the number of confirmed URLs containing images or videos of such material rising from 38,424 confirmed cases in 2019 to 199,363 in 2022. Self-generated content includes images or videos featuring children under the age of 18 that are subsequently shared online. Some images will be produced to share with a sexual or romantic partner, though many are obtained through coercive measures or grooming without the abuser present in the room and have then been put online. These images are most often taken at home, in a child's bedroom or a bathroom. As a result, everyone working with children and young people needs to be:

- Aware of risks online
- Have appropriate online safety training
- Make sure that any technology used within the organisation is used appropriately
- Ensure children have appropriate routes to support and reporting

2. Child-on-child sexual violence and harassment

Over recent years, concerns have been growing about sexual violence and harassment between children. Due to the diverse nature of child-on-child abuse, the number of children affected is difficult to estimate. All reports and concerns must be taken seriously as downplaying these incidents could foster an environment in which children won't feel safe or comfortable enough to report abuse. It is suggested that schools should promote and support a whole school ethos to help prevent sexual harassment and sexual violence.

3. Extremism and radicalisation

Children and young people are particularly vulnerable to radicalisation. Adolescence is a time of huge turmoil, during which people constantly re-evaluate their beliefs. This period of self-exploration means that for some young people, extreme groups and worldviews can be appealing. What may begin as genuine curiosity may lead to a process of radicalisation.

To tackle radicalisation and extremism schools and colleges should:

Assess the risk of children and young people being drawn into radicalisation, including support for extremist ideas that are part of terrorist ideology.

- Ensure children are safe from extremist material when accessing the internet in school by having clear IT policies in place and a suitable filtering system
- Integrate internet safety into the curriculum
- Encourage and promote positive values and community cohesion
- Provide information on the support available to staff, pupils and parents

4. Domestic abuse

This is defined as an incident or pattern of incidents of controlling, coercive, threatening, degrading and violent behaviour, including sexual violence, in the majority of cases by a partner or ex-partner, but also by a family member or carer. Witnessing domestic violence can have a profound direct and/or indirect impact on children and young people. Recent research has shown that children and young people are not only impacted negatively by witnessing violence but are also harmed by coercive and controlling behaviour even when physical violence is not present. School staff need to be aware that some children could be experiencing these issues that may impact their school life.

5. Mental health

It is important to realise that everyone has mental health needs – having positive mental health is a fundamental component of overall good health. The most important thing when trying to spot if a child or young person is experiencing a problem is to have someone in school who knows them well. The Government recommends that all schools and colleges should have a designated senior mental health lead by the end of 2023.

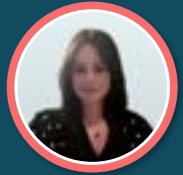
In order to be able to identify a child's needs, all staff should be given training on the most common issues and the potential warning signs such as:

- Change in behaviour from what is normal for that particular young person
- Absence from school or sickness
- Becoming socially isolated and/or withdrawing
- Erratic behaviour or mood swings
- Risk-taking behaviour
- Anger and aggression
- Not being able to concentrate and seeming distracted
- Avoiding friends and activities they used to enjoy
- Seeming jumpy or nervous for no obvious reasons
- Experiencing panic attacks
- Being tired in school
- Changes in appetite

Conclusion

The above highlights some of the key concerns for schools to be aware of at this time. However, safeguarding is everyone's responsibility and, in order for it to be effective, every organisation must take part. It is important that members of staff not only know about safeguarding concerns but should have a clear understanding of the reporting procedures. If there are legitimate safeguarding concerns about a child, then data protection laws allow for the recording, sharing and retaining of even the most sensitive personal data, as necessary.

Author:



Lauranne Nolan

Associate and Safeguarding lead

Mandatory Reporting

An update

The Independent Inquiry into Child Sexual Abuse (IICSA) was published in October 2022. As part of its final report, one of the centrepiece recommendations of the Inquiry's work was the introduction of a statutory requirement for mandatory reporting of abuse.

Current position

In England, there is currently no statutory obligation requiring individuals or institutions to report child sexual abuse. The guidance available states that anyone who has concerns about a child's welfare "should make a referral to local authority children's social care". This referral should be made immediately if there is a concern that the child is experiencing significant harm or is likely to do so. However, it only creates an expectation that individuals will make a report – it does not impose a legal requirement to do so.

The recommendation

IICSA formally recommended that the Government introduce laws requiring certain people to report child sexual abuse and that these people be known as "mandated reporters". These individuals would be placed under a statutory duty to report child sexual abuse where they:

- Receive a disclosure of child sexual abuse from a child or perpetrator; or
- Witness a child being sexually abused; or
- Observe recognised indicators of child sexual abuse.

The following persons should be designated mandated reporters:

- Any person working in regulated activity in relation to children (under the Safeguarding and Vulnerable Groups Act 2006, as amended);
- Any person working in a position of trust (as defined by the Sexual Offences Act 2003, as amended); and
- Police officers.

For the purposes of mandatory reporting, "child sexual abuse" should be interpreted as any act that would be an offence under the Sexual Offences Act 2003 where the alleged victim is a child under the age of 18. However, the IICSA report considers that in some limited circumstances, a different approach may sometimes be necessary. It proposes that where the child is aged between 13 and under 16 years old, a report need not be made where the mandated reporter reasonably believes that:

- The relationship between the parties is consensual and not exploitative or coercive; and
- The child has not been harmed and is not at risk of being harmed; and
- There is no material difference in capacity or maturity between the parties engaged in the sexual activity concerned, and there is a difference in age of no more than three years.

The reason for this is that consensual sexual activity between teenagers is unlikely to be prosecuted unless there are aggravating features such as an element of abuse or exploitation. As it would not be considered to be in the public interest to prosecute children and young people in a consensual relationship, it would, therefore, not be in the public interest to criminalise mandated reporters for failure to report consensual teenage sexual activity.

Where the child is under the age of 13, a report must always be made. In addition, irrespective of the age of the child, where the alleged perpetrator is in a position of trust as defined by the 2003 Act, a report must be made.

The response

In April 2023 the Home Secretary announced that the Government would seek to deliver a mandatory reporting regime, which would be informed by a full public consultation. It also accepted that implementing a new mandatory reporting duty could improve the protection and safeguarding of children as well as holding to account those who fail in their responsibilities.

Call for Evidence

A call for evidence on the potential implementation of such a duty began on 22 May 2023 and concluded on 14 August 2023. Views were sought from persons working in regulated activity, volunteers undertaking regulated activity, anyone working with children in any capacity, people working in positions of trust, police officers, local authorities, NHS trusts, those working in education settings as well as members of the public, on how implementing the duty was likely to impact children and organisations, as well as workforces and volunteers, and how different aspects could be implemented, for example, if the duty should relate to child sexual abuse only or be extended to cover other forms of abuse and neglect. It received over one thousand responses.

Present position

The Government has now collated the views produced via the call for evidence and is launching a consultation to set out proposals for delivering a mandatory reporting duty and test the remaining undecided policy questions. It then intends to issue a single response to address both exercises. This current consultation is shorter than the call for evidence, opening on 2 November 2023 to run to 30 November 2023. The Government has indicated that responses will be produced within 12 weeks, which would be mid to late February 2024.

Outcome of the call for evidence

It is understood that the call for evidence demonstrated several areas of general agreement, such as who should be considered to be a mandated reporter and the potential benefits of the creation of such a duty in order to improve the child protection system. There was also agreement on the critical importance of ensuring the new duty contains appropriate protection for individuals who make their reports in good faith.

However, there were points which generated mixed opinions. While it was agreed there should be protections for reports made in good faith, views were split on whether or not failing in the duty to report should be a criminal offence, with many saying different forms of punishment should be available based on the context and severity of failures. It appears that views were also split on what should be reported. Many consider that the duty to report should only apply when they are directly told of sexual abuse by a child or perpetrator or witness it themselves, whereas other respondents felt that being required to report when recognised indicators were observed would highlight the importance of early identification preventing more severe harm.

The call for evidence has also identified a range of issues that require further consideration before the duty is implemented, including reporting processes, training and guidance. In addition, a consultation impact assessment has been prepared – this indicates

that certain groups are likely to be particularly affected by the introduction of a mandatory reporting duty as it may lead to additional costs for businesses, charities, the voluntary sector, and the public sector. Most of these costs are expected to impact the public sector, driven by an increase in the cost of police investigations into child sexual abuse. Costs to police are estimated between £15.8 million and £84.9 million with a central estimate of £48.7 million over ten years. Other affected groups are likely to include the Crown Prosecution Service for prosecuting additional offences, and victim organisations to cover additional victims who need to access support services.

The Consultation

The Government is seeking further views on:

- **How the Government should define who is subject to the duty:** IICSA recommended that the duty applies to persons engaging in regulated activity, persons occupying positions of trust, and police officers. It is thought that while this is to be the foundation for who is subject to the duty, the Government is proposing to create a bespoke list of additional roles that would also be subject to the duty, rather than relying on the positions of trust legislation.

- **What protections should be in place for reporters:** It is proposed that there will be specific protections for individuals when reports are made in good faith, as well as protection against repercussions on the basis of having made a report or having raised that a report has not been made.

- **Limited circumstances in which the reporting duty may not apply:** IICSA suggested that where there is a consensual relationship between young people this would not be considered child sexual abuse in the absence of coercion or significant differences in age or maturity, and an exception should be made under the duty in such circumstances. However, as the Inquiry did not set out any further exceptions which should apply to the reporting duty, the Government is seeking views on whether there are other circumstances in which a report may not need to be made.

- **Whether the duty should apply to known or suspected incidents:** IICSA recommended that the duty applies where a reporter is told about abuse, witnesses abuse or recognises signs which may indicate abuse is taking place. The current view appears to be that the duty should be limited to disclosures and incidents the reporter has personally witnessed. This means that breaching the duty will involve deliberate inaction, rather than a subjective assessment of indicators.

- **What sanctions should apply in respect of the duty:** IICSA recommended that failure to report disclosures or witnessed incidents should be a criminal offence. A number of respondents to the call for evidence suggested that sanctions for breaching the duty should be determined and imposed by professional regulators for those in regulated professions. All mandated reporters, whether professionally regulated or not, should be referred to the Disclosure and Barring Service (DBS) for discretionary barring consideration. The Government is seeking views on whether non-criminal sanctions might provide more proportionate penalties which take into account the different levels of responsibility and experience applicable to the wide range of people who undertake regulated activities in relation to children, including volunteers. The Government is, however, considering a separate criminal offence reserved for anyone who deliberately obstructs an individual from carrying out the duty by destroying or concealing evidence or applying pressure on an individual to prevent them from reporting.

Conclusion

The Government has received much criticism on the basis that it is now over a year since the final report was published and not one of the main recommendations has been implemented, despite the amount of money spent on an inquiry that lasted eight years. However, it does appear that while progress may be slow, the Government remains committed to this recommendation and the implementation of a mandatory duty to report child sexual abuse.

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‘Jackson, we are finished’

The biggest package of reforms to the civil justice regime in a decade has now come into force. In a recent lecture, the Deputy Head of Civil Justice Sir Colin Birss, a Lord Justice of Appeal, stated that with the reforms that came into force on 1 October 2023: “one can say probably from now, ‘Jackson, we are finished’.”

With a package of amendments due in April 2024 and an extension of fixed costs to clinical negligence matters also due it might well be that the end of the road – insofar as costs reforms are concerned – has been reached. Despite this, a decade of satellite litigation appears inevitable.

Fixed costs and anything that brings certainty to reserving is, on the face of it, to be welcomed. Birss summarised the FRC reforms as this: “This new system is designed to produce an answer that is dependent on only three parameters: the sum at stake, the track and the complexity band.” Unfortunately, this desired simplicity has not been achieved and significant levels of clarification from the courts or amendments to the rules are required. At that point, an efficient, cheaper way of bringing claims may well fall into place.

The new regime extends the fast track horizontally and introduces the intermediate track for claims between £25,000 and £100,000. Some claims remain exempt, including abuse, housing disrepair, mesothelioma or asbestos lung disease claims and many claims against the police; however, those sectors will likely also be affected by the reforms. Sectors in which hourly rate costs still apply face new players in the market, or disruptive influences seeking what they believe might be more profitable work.
The biggest initial problem with the new regime is that insofar as the transitional arrangements apply they do not do what was intended regarding non-personal injury claims. The intention is that the new FRC regime applies to all such claims where proceedings were not issued before 1 October. Unfortunately, the rule has been framed in such a way that it actually says FRC only applies once proceedings are commenced. While an urgent rule change is likely, in the meantime there is considerable scope for argument.
There are differing views on the financial level of the new FRC – in some areas, such as NIHL, it is felt that the new costs regime is actually generous. As such it is something to be monitored and in the meantime, it seems prudent not to change good claims handling processes. Nobody should seek ‘fixed costs at all costs’.

Rather unusually, allocation is something that now applies to all aspects of a claim. The parties are going to need to agree what track and band a claim would be allocated to, even if a claim settles without litigation. This will be necessary as it is the allocation that defines the level of recoverable costs. The fast track sees allocation based on subject matter, while the intermediate track is based on issues. There is going to be an awful lot of litigation regarding arguments such as ‘what is an issue?’, and ‘when is an issue in dispute?’. While such disputes filter through the system it would appear sensible for parties to apply a commercial outlook and to try to meet compromises when it comes to what costs are payable.

In a fixed costs regime, the final area that requires further guidance is, rather ironically, the costs themselves. The costs are not fixed but follow a matrix not dissimilar to those from previous costs regimes. They are, however, subject to fluctuation. While increases for Part 36, London weighting and the like are common sense, the potential increases for vulnerability and a general escape clause are more problematic. The “unreasonable behaviour” provisions allow for costs to be increased or decreased by 50%. There are no criteria as yet for this to apply, and the bar feels to be lower than perhaps it should be. The increase is not based on conduct but on behaviour. Parties are going to need to track all unreasonable behaviours in the knowledge at the end of a claim every little point – chasing correspondence for example – could be used in unsavoury mudslinging in order to increase costs.

While the reforms are a big step forward and will facilitate more accurate reserving, it feels as if there is a long way to go before calm descends and, in the meantime, practical solutions and collaboration between the public sector and their advisors are going to be essential in order to track and respond to the challenges that inevitably arise.

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Vicarious liability in the context of a family foster placement

Introduction and background

On 18 July 2023, the High Court handed down its judgment in DJ v Barnsley Metropolitan Borough Council [2023] EWHC 1815 providing clarification of the position regarding claims brought in vicarious liability against family foster placements.

The case concerned Stage 1 of the two-stage test for the imposition of vicarious liability, i.e. whether the relationship between the defendant and the tortfeasor was one of employment or "akin to employment".

Since the judgment in Armes v Nottingham County Council [2017] UKSC 60, it has been established that vicarious liability extended to foster parents, despite foster parents not being employees of the local authority. However, the position was less clear-cut in the context of children placed with family.

Facts

In January 1980, aged nine and following the breakdown of his parents' marriage, the claimant was placed by Barnsley MBC in voluntary care with Mr and Mrs G, who were the claimant's aunt and uncle, with the wife being the claimant's mother's sister. Mr and Mrs G became the claimant's foster parents and the claimant remained with the family for many years. It is relevant in this case that, prior to Christmas 1979, the claimant had never met AG or his wife, and didn't know they existed.

During the placement, the claimant alleges that he was sexually abused by his uncle AG. AG was also in the proceedings as the Part 20 defendant.

The claimant alleged that the defendant was vicariously liable for the actions of AG.

On 13 August 2021, a trial of the preliminary issue of whether vicarious liability could apply took place. The claimant relied on Armes in support of his assertion that Barnsley MBC was vicariously liable for the tortious acts of AG. The defendant argued that Armes did not apply in these circumstances as they were relatives of the claimant. Instead, the defendant argued that similar conclusions could be drawn as those drawn when children in care are placed in the care of their own family. This circumstance was addressed at paragraph 71 of Armes. The claimant's claim was struck out by Mr Recorder Myerson KC on the basis that the relationship between the defendant and AG was not akin to employment and, therefore, vicarious liability could not apply. The claimant appealed the Order to the High Court where it was heard by Lambert J

Judgment

Lambert J dismissed the claimant's appeal. Lambert J observed that in potential "akin to employment" cases such as this, the court should consider those "features of the relationship" which are similar to, or different from, a contract of employment. These may include: "whether the work is being paid for in money or in kind; how integral to the organisation was the work carried on by the tortfeasor; the extent of the defendant's control over the tortfeasor in carrying out the work; whether the work is being carried out for the defendant's benefit or in furtherance of the aims of the organisation; what the situation is with regard to appointment and termination and whether there is a hierarchy of seniority into which the relevant role fits". She added that in difficult cases it is necessary to consider the balance of the policy reasons underpinning the imposition of vicarious liability. These are the so-called incidents outlined by Lord Phillips in The Catholic Child Welfare Society and Others v Various Claimants and The Institute of the Brothers of the Christian School and others [2012] UKSC 56.

In this case, some features of the relationship suggested it was "akin to employment". These included the fact that Mr and Mrs G were both interviewed for the role, that they were monitored and supervised and that there were regular reviews of the claimant's welfare, health, conduct,

appearance and progress. However, other features pointed in the opposite direction, such as the fact that they were "not recruited for the role … or selected by the local authority" and that they were not "trained for the role".

Consequently, this was one of those difficult cases where it was necessary to consider the incidents referred to in the Christian Brothers case, in particular, whether Mr and Mrs G's care for the claimant "was integral to the business of the defendant or whether it was sufficiently distinct from the activity of the defendant to avoid the imposition of vicarious liability". Like the Recorder, Lambert J considered that there was a sufficiently sharp line between what Mr and Mrs G were doing and the activity and business of the defendant. In her view, the most compelling factor was the context in which they came to be involved. Mr and Mrs G took the claimant in because other family members were unable or unwilling to do so; not only that there was a clear inference that they would not have done so "had he not been their nephew". As such, Mr and Mrs G "were intending to and, in fact, did, raise their own nephew because he was their nephew and that their purpose was to raise him as part of the family of which he was a member and in the interests of the family, including the claimant". Other evidence included the fact that Mr and Mrs G "used family photographs to remind the claimant that he was with his family and to demonstrate family links in order to settle him" and that they appeared "to be encouraging of the claimant maintaining contact with his wider family". Although Lambert J did not accept all the Recorder's findings, none fatally undermined his conclusion "that Mr and Mrs G were engaged in an activity which was more aligned to that of parents raising their own child and that the activity was sufficiently distinct from that of the local authority exercising its statutory duty". As such the defendant could not be vicariously liable.

Comment

Although each case turns on its facts, the judgment strongly indicates that family fostering arrangements in which a child is raised as a family member will not satisfy Stage 1 of the vicarious liability test. Consequently, the judgment further limits the expansion of vicarious liability, which at one time was said to be 'on the move'.
Of course, this does not prevent claims potentially being brought in negligence. Local authorities may, therefore, face such claims in negligence, although these will be more difficult to prove as there is no automatic liability for the tortious act, as there would be in vicarious liability. Instead, claimants will have to prove a breach of a duty of care owed to them by the local authority. This will require the claimant to prove that the local authority knew or ought to have known about the wrongful act. Although such claims may be presented, and at times may be successful, this is a welcome limitation to the expansion of vicarious liability into a family situation which is very far removed from an employment relationship.

This case is particularly relevant in the context of the 'Stable Homes, Built on Love' report which was published in February this year. This report recommends an expansion of kinship carers, and encourages placement with family members where possible, with £9 million to be invested into developing such placements. Placements with family members are, therefore, likely to increase and this judgment provides some welcome clarity as to the legal position regarding such placements.

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