Issue 5

PUBLIC SECTOR AWARE

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Welcome

Welcome to Keogh's Public Sector Aware newsletter. Heading towards the end of 2024 and beginning of 2025 brings a host of new challenges and opportunities for public sector organisations. From navigating policy changes and adopting innovative technologies to addressing workforce needs and sustainability goals, the public sector is evolving rapidly. In this newsletter we aim to keep you updated through our insights on the current trends, horizon scanning and critical issues affecting public sector professionals. Whether it's policy shifts, advancements in digital governance or strategies for resilient public services, we are here to provide the information and analysis that you need to stay ahead in a dynamic landscape.

As our public sector team continues to grow alongside our specialist lawyers and enhanced services, we hope that these developments have supported you and strengthened our partnership throughout 2024. In this edition we are excited to share a range of articles from our team:-

Vanessa Latham, Employment Partner, explores the upcoming wave of employment reforms, with a focus on the Employment Rights Bill and what it means for public sector employers.

Cynthia Watts, Partner and Technical Lead Lawyer, dives into the complex challenges around Section 20 Accommodation under the Human Rights Act, examining the historical struggles faced by local authorities and the current legal landscape.

Luke Ashton, Partner, delves into the rising trend of housing disrepair claims, with a particular look at the role of medical evidence in these cases—a growing area of interest for the public sector.

Sarah Swan, Public Sector Abuse Partner, shares insights on the anticipated shifts in abuse civil claims affecting the public sector in the coming year, along with effective strategies to navigate them.

Our Education Sector Abuse Partner, **Chris Wilson,** addresses the urgent actions needed to fix the SEN system in England and Wales, providing a thought-provoking summary of key findings and recommendations.

Lauranne Nolan, Associate and Safeguarding Lead, builds on the findings from Dame Rachel de Souza, the children's commissioner, by examining the purpose and future of Child In Need Plans.

Paul Edwards, Lead Costs Lawyer, highlights the increasing risks of neglecting Alternative Dispute Resolution (ADR), discussing its implications for case law and the Civil Procedure Rules (CPR) reforms.

Lastly, Associate **Daniel Tyler** reviews the recent Supreme Court decision in Tindall v Chief Constable of Thames Valley Police [2024] UKSC 33, exploring its impact on police negligence and potential liabilities under the interference principle.

We hope you find our team's insights valuable. Our experts are always here to assist you with any questions you might have so don't hesitate to contact us.

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The Employment Rights Bill: Implications for Public Sector Employers

The implementation of Labour's pledge to make work pay started with the introduction of the Employment Rights Bill. This has reached the committee stage on its journey through Parliament, and a report to Parliament is expected by 21 January 2025. It is unlikely that it will become law until the summer of 2025, with many changes not proposed to take effect until 2026.

The bill introduces a range of employment reforms which would result in a radical change to employment rights. We look at the proposed changes that are likely to have the greatest impact on public sector employers.

1 Trade Union Reform

The bill, as anticipated, repeals restrictions on trade union activities, such as minimum service level requirements during strikes, and simplifies statutory recognition for unions. It also adds a requirement for employment terms to include a statement of union rights, agreements over access to the workplace and protection against detriment for taking part in strike action. It is expected that these will be some of the first changes to come into force, so all public sector employers will need to consider changes to their current arrangements.

2 Equality Action Plans

Employers will be required to publish an 'equality action plan' setting out the steps taken to close the gender pay gap and support employees going through the menopause. Details will follow regarding the frequency and requirements of this. It will apply to employers who have more than 250 employees so will affect most public sector employers. This will enhance the existing public sector equality duty.

3 Transfer of Employees from the Public Sector

The bill proposes that where employees transferring from the public sector maintain their terms and conditions, any staff working on those outsourced contracts will be offered no less favourable terms and conditions than those who transferred from the public sector. This is likely to have a significant impact on outsourcing public services, as private companies will be unable to take advantage of lower pay and benefits for non-public sector staff.

4 Expanded Unfair Dismissal Protection

The bill removes the two-year qualifying period for unfair dismissal claims. A consultation is expected in 2025 on how the 'initial period of employment', when grounds for dismissal are likely to be modified, will work. The government's preference is for this to last for a nine-month period. While this will only provide protection to those who have actually commenced work for the employer, this would likely result in a substantial increase in unfair dismissal claims by employees.

5 Zero-Hours Contracts

The provisions are complex but include the requirement to offer guaranteed hours, a right to reasonable notice of shifts, and short notice cancellation payments, with workers entitled to regular contracts after a reference period (originally expected to be for 12 weeks), although the specifics of this period will be defined in secondary legislation. Much of the detail of this will be subject to future regulation, which means it is difficult to predict the likely impact for the public sector.

6 Fire and Rehire

This is a process whereby an employee who has refused a variation to their contract is dismissed but offered a new contract on the varied terms. Except in very limited circumstances, the bill will make it automatically unfair dismissal if an employee is dismissed for refusing a contract variation. This could have a significant impact on public sector organisations seeking to implement widespread change.

7 Collective Redundancy Rights:

Where an employer is proposing redundancies, the number of employees to trigger collective consultation is calculated by separate establishments. The bill proposes that this figure will be calculated across the entire business. This is likely to result in an increased frequency in the requirement for public sectors to collectively consult.

8 Flexible Working

With the expectation that flexible working will become default from day one of employment, employers will only be able to refuse a request for flexible working if it is reasonable to do so and for one of the list of specific reasons which must be confirmed in writing to the employee. Most public sector organisations will already have good flexible working policies so this will only result in minor changes to bring the law into line with current Acas guidance and is unlikely to have any substantial impact.

9 Day One Rights

In addition to making flexible working a day one right, it is also proposed that paternity and parental leave will also become day one rights. Statutory sick pay will also be available from day one, with the removal of the lower earnings limit.

10 Protections for Pregnant Women and Family Leave

The bill enhances protections, making it unlawful to dismiss a woman during pregnancy or for a period after her return (likely to be six months), except in specific circumstances. There is also the potential for regulations to be made to protect employees returning from other types of family leave.

11 Establishment of New Agencies

The bill lays the groundwork for a Fair Work Agency, tasked with enforcing employment law and coordinating targeted proactive enforcement actions. It also proposes a School Support Staff Negotiating Body and an Adult Social Care Negotiating Body whose remits will be remuneration and terms and conditions.

12 Third Party Harassment:

Legislation that came into force at the end of October places a duty on employers to take reasonable steps to prevent sexual harassment. The bill strengthens this by making it an obligation to take "all" reasonable steps to prevent harassment by third parties. This will be significant for public sector employers as it is common for their workforce to interact with the public in their day-to-day work. Reporting sexual harassment will also become a protected disclosure for the purposes of whistleblowing.

The introduction of the Employment Rights Bill marks a pivotal moment in UK employment law, with Labour aiming to deliver many of the reforms it had promised. The changes proposed in the bill present significant challenges to navigate, particularly for public sector employers who are likely to be most affected if the bill becomes legislation. All employers will need to closely monitor the bill's progress, particularly as consultations on key areas such as probation periods and secondary legislation unfolds. We will continue to keep you updated on the progress of the bill and any amendments that arise.

Author: Cynthia Watts - Partner

Section 20 accommodation and Human Rights Act challenges – Where are we now?

Section 20 (s20) Children Act 1989 is used to facilitate a voluntary arrangement, i.e. with the consent of the child's parents.

Over the past ten years or so, local authorities have faced numerous challenges for alleged human rights breaches in relation to these arrangements, principally under Articles 6 (the right to a fair trial) where the child is deprived of recourse to the protection of the courts that comes with the commencement of proceedings and the appointment of a guardian ad litem (GAL), and Article 8 (the right to respect for private and family life) where the child/parent is deprived of access to their family life.

The issues giving rise to alleged breaches of human rights have related to the validity of the s20 agreement, withdrawal of parental consent and the duration of time the child is accommodated. These issues have arisen both in the course of care proceedings during which local authorities have been urged to make concessions and pay damages for alleged human rights breaches and in subsequent or stand-alone civil proceedings.

It came to be considered that the general rule was that as soon as it becomes clear that accommodation pursuant to s20 is likely to be required in the longer term and what is required is more than a temporary 'emergency' measure then a decision must be made either to return the child to their family or to start care proceedings.

For younger children, the length of time that was deemed acceptable to accommodate a child under s20 was shorter than for older children.

In the Medway Council v M and T [2015] 13 October 2015 Family Case Number ME15C00859, HHJ Lazarus comprehensively reviewed the decided cases and the awards granted in each case. However, the exercise of assessing damages was acutely fact sensitive in each case. That case also set out the general factors that are to be taken into account when considering the appropriate level of damages. These are (1) the length of proceedings, (2) the length of the breach, (3) the severity of the breach, (4) the distress caused, (5) insufficient involvement of parent or child in the decision-making process, and (6) other procedural findings.

Local authorities were advised to carry out urgent reviews of the children they were accommodating under s20 arrangements.

Several of these cases attracted considerable publicity and local authorities were publicly criticised for seriously and serially failing to address the needs of the children in their care, and for misusing or abusing the provisions of s20 to accommodate children over prolonged periods.

Re S and Re W (A Child: Section 20 Accommodation) [2023] EWCA Civ 1, [2023] 2 FLR 302

However, the Court of Appeal in the case of Re S and Re W (A Child: Section 20 Accommodation) [2023] EWCA Civ 1, [2023] 2 FLR 302 has emphasised that s20 can be used to accommodate a child on a long-term basis in appropriate cases.

The main provisions of s20 under consideration were:

Children Act 1989 Section 20 (1)

(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –

(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

(4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare.

(7) A local authority may not provide accommodation under this section for any child if any person who –

(a) has parental responsibility for him; and

(b) is willing and able to –

(i) provide accommodation for him; or

(ii) arrange for accommodation to be provided for him, objects.

Re S – the facts

At the date of the hearing, S was a nine year-old boy with complex needs that included ASD, ADHD and a lack of awareness of danger together as well as with significant behavioural issues. He had one younger male sibling.

S's parents were separated since June 2017. S and his sibling were in the exclusive care of their mother. Over time S's behaviour became increasingly challenging. By January 2021 his mother was struggling to cope. The siblings were placed on Child Protection Plans and the local authority increased support to the family. Despite these additional measures, S's mother reached the point where she could no longer manage to look after him at home and she made the "agonising decision" for S to move to a residential unit where he had remained making good progress.

Initially it was envisaged S would return to the care of his mother; however, she did not perceive a situation where she would be able to care for S in the future but she did not want the local authority to commence care proceedings. S's father simply agreed to the s20 accommodation.

The local authority issued care proceedings; they perceived S's mother was unable to commit to S's return to home and she could not agree to a timescale for his rehabilitation.

The care plan was for an interim supervision order with a view to rehabilitation of S into his mother's care or alternatively an interim care order (ICO). No ICO was made, and S continued to be accommodated under s20 without proceedings.

An independent clinical psychologist assessed that an individual could not meet S's needs on their own. S required a specialist residential unit with a high staff to child ratio "in order to reduce the compassion fatigue that would be associated with caring for a child with such complex needs". A high level of contact with S's parents was recommended.

The local authority filed a balance sheet in the proceedings setting out the pros and cons of S remaining accommodated under section 20.

The social worker had reported to the Cafcass officer that had it not been for the case law regarding the misuse of s20 she would not have been certain about the need for a care order. She also regarded S's mother as an extraordinary mother. Despite S's father's inconsistent contact there were real positives to his continued involvement.

The local authority continued with the care proceedings on the basis that s20 was not appropriate on a long-term basis and neither parent felt able to assume S's care in the foreseeable future. This position was "significantly elevated in the guardian ad litem's (GAL) Position Statement". The matter came before the judge with an agreed Care Plan that S would remain at the residential unit. However, the parents argued that the threshold criteria were not satisfied, but that in any event there should not be a care order made in favour of the local authority.

The judge found the threshold was satisfied on the basis that S was beyond parental control, and he went on to conclude that it was in S's best interests to make a care order and not in his best interests simply to say that matters should continue as they have under s20.

Re W – the facts

W was adopted by her parents in 2008 aged one. She has a complicated diagnosis of ASD, ADHD, ARND (alcohol-related neurodevelopmental disorder), FASD (foetal alcohol spectrum disorder), attachment disorder, dyspraxia, dyslexia, sensory processing difficulties and bladder bowel dysfunction. The early years with her adoptive parents (both of whom were described as devoted and dedicated) had gone well, but on reaching puberty, there was significant deterioration with incidents of aggression and violent behaviour by W particularly directed at her mother.

W was enrolled in a residential school during the week but the relationship between W and her mother deteriorated further such that they could not live together. W was placed with foster carers, which was intended to be long-term. She was settled and happy and her adoptive parents had been able to work with the foster carers with considerable success.

W's adoptive parents initially agreed to a care order being made, but subsequently indicated that they wished to "parent from a distance" under a s20 arrangement.

The local authority applied for a care order.

It was accepted that the section 31 threshold was met on the basis that W "is beyond parental control". A care plan had been agreed and the application for a care order was supported by the GAL.

W's adoptive parents opposed the making of a care order on the basis that the s20 arrangements should continue and that a s31 order was neither necessary nor appropriate.

However, a care order was made on the basis that s20 orders should not be used as a "a long-term tool" and in circumstances where medium to longer term foster care is envisaged a care order is "necessary and proportionate" despite everyone's very positive support of W in her placement and where the parents were clearly "collaborative, cooperative and engaged", which was reflected in agreed recitals to the order.

The parents appealed the care order on the grounds that use of s20 was not restricted to short-term and temporary accommodation and the judge was wrong to have relied on that as the primary reason for making a care order, and that she was wrong to consider that she could "influence or fetter" the local authority's exercise of its parental responsibility during the care order; and she was wrong to conclude that the "no order principle" and least interventionist approach was rebutted in this case, and in failing to identify the welfare benefits to W of her parents retaining sole PR.

The Court of Appeal – Discussion

Lady Justice King gave the leading judgment with which Lord Justice Arnold and Lord Justice Warby agreed.

The court considered the comparative roles of s31 care orders and s20 accommodation orders. In particular it was noted that a local authority's exercise of its PR may 'trump' that of the parents whenever there is an issue between them, whereas a s20 order "facilitates partnership".

A s31 care order cannot be made unless the threshold criteria are satisfied under section 31 (2). Even if the threshold criteria are satisfied, this does not automatically lead to the making of care order and the court has to have in mind the "no order principle" (s1(5). Nor does the satisfaction of the threshold criteria necessarily equate to culpability on the part of the parents.

In both appeals the threshold was satisfied on the basis that the likelihood of harm was attributable to "the child's being beyond parental control".

It was also noted that children in these circumstances could be assisted under s17, i.e. "provision of services for children in need, their families and others", but this had not been raised in these appeals. Care proceedings are not the only means of assisting children such as S and W and s17 services may include the provision of accommodation.

The court reviewed the parameters of s20 detailed within the legislation itself and the leading authority of Williams & Another v London Borough of Hackney [2018] UKSC 37, [2018] AC 421 which Baroness Hales summarised and made it clear that "compulsory intervention in the lives of children and their families requires the sanction of a court process. Providing them with a service does not". In that case she set out a comprehensive review of the scheme of s20.

The examples of cases in which it may be appropriate for a local authority to accommodate a child under s20 without commencing care proceedings listed by Keehan J in Worcestershire County Council v AA [2019] EWHC 1855 (Fam) was also examined by the Court of Appeal, none of which precisely matched the facts in the two appeals before it.

However, the common thread in those cases was acknowledged, namely the "need by parents who are not at fault to secure longer term support and services by way of accommodation without the need for a section 31 order in circumstances where they will work in partnership with the local authority".

The Court of Appeal also considered Dame Siobhan's Keegan's judgment in In the matter of H-W (Children) [2022] UKSC 145 in relation to the engagement of the Article 8 rights of the parents and children in relation to the making of a care order in that a judge considering a care order has an obligation not to act incompatibly with the Article 8 rights involved, which she said equates to the long-standing proposition of English childcare law that the aim must be to make the "least interventionist possible order".

Therefore, in each of the appeals before the Court of Appeal it had to consider whether in each case the judge in granting the application for a care order, made the "least interventionist order possible".

The Court of Appeal also referred to the Public Law Working Group (PLWG) report published in March 2021. The Working Group was established by the President of the Family Division Sir Andrew McFarlane and chaired by Keehan J.

Simultaneously with the publication of the report, the President issued a 'message' on

1 March 2021 in which he expressed the view that the recommendations made were

"both sound and necessary".

The PLWG report first referred to the judgment of Sir James Munby P in Re N (Children) (Adoption: Jurisdiction) [2015] EWCA Civ 1112; [2016] 2 WLR 713 ('Re N').

Following this judgment there had been a sharp decline in the use of s20 and a significant increase in public law applications for care orders where the use of s20 may have been better. Importantly, the PLWG report noted there was no imposition of time limits for the use of s20 contained within the legislation itself: "However it is recommended that, where possible, the purpose and the duration of any section 20 accommodation is agreed at the outset and regularly reviewed." Appendix G of the PLWG report contained Best Practice Guidance.

Recognising that s20 itself does not impose a limit on the length of a s20 order, Lady Justice King stated:

"For my part, I can see no inhibition on a section 20 order being made in appropriate circumstances for a longer period of accommodation provided that proper consideration is given to the purpose of the accommodation and that regular mandatory reviews are carried out."

Her view was that the Court of Appeal's decision in these appeals will add little to the careful consideration given to s20 in both the Williams v Hackney LBC case and the PLWG's detailed consideration of its use.

Lady Justice King concludes: "These strands together should serve to disabuse all those involved with the provision of services for children in need of continuing support of the notion that a section 20 order can only properly be utilised to provide short-term accommodation for a child."

Re S – Judgment

Lady Justice King considered that the judge did "fall into error in his assessment of the risk presented by the father to the stability of S and to his placement. This in turn resulted in his making what was in her view a disproportionate order."

Citing Dame Siobhan Keegan in In the matter of H-W at para. [52], "It is necessary as a matter of law for the court when asked to decide whether to make a care order to consider: (a) the nature and likelihood of risk of harm arising; and (b) the consequence of harm, if suffered."

While noting there were considerable risk factors, S's father had never interfered in the care of S both when he was living at home and subsequently. He acknowledged that he had declined to sign the section 20 accommodation forms initially because the local authority had failed to properly keep him informed. Lady Justice King also considered that the risk factors in reality amounted to a risk of the father disengaging with the council and failing to come and visit S rather than disrupting his placement. Accordingly, she concluded that the making of care order was not a proportionate response to the identified risk. The mother's "unimpeachable behaviour" and S being secure in residential care were also important factors and there was nothing to justify restricting the mother's exercise of PR by way of a care order.

Re W – Judgment

Lady Justice King commented that "it was clear that the judge was heavily influenced by her belief that section 20 orders should only be used as a short-term measure. That error led the judge to approach the risk and proportionality exercises with the balance too heavily weighted in favour of the making of a care order." The recitals included in the order were a reflection of the judge's "discomfort about making a care order against the factual background" in the case. The recitals, even after having been "carefully crafted by counsel came perilously close to purporting to dictate the manner in which the local authority's care plan was to be implemented." She commented that such recitals have no place in a care order.

Lady Justice King also noted that while the judge referred to the "no order principle" she did not review the welfare checklist. Had she done so there may have been a sharper focus from that analysis of the welfare benefits for and against the making of care order.

The Court of Appeal concluded that the behavioural difficulties that may well arise during W's teenage years did not justify the making of a care order. There was no evidence to support the judge's speculation that given W's history there would be difficulties ahead of the type that necessitated the local authority having parental responsibility to manage her behaviour. Pursuant to s20 the parents have delegated the exercise of their parental responsibility to the local authority and effectively to the foster carers with whom they had worked well with over many difficult and challenging months and it was noted that W's mother at every stage had accepted the advice she was given.

The Court of Appeal also noted that the Care Planning, Placement and Case Review (England) Regulations 2010 required the local authority to review W's case at least every six months regardless of whether it was pursuant to a care order or a s20 order. While not statutory parental responsibility, the delegated parental responsibility under s20 gave the local authority significant input into the arrangements for a child in their care through the review process and consequently the ability to be highly influential in any decisions that relate to the child's welfare. It was always it was also open to the local authority to issue care proceedings if the situation changed.

While the appeal on the ground that the judge had used recitals to influence or fetter a local authority's exercise of parental responsibility was dismissed, the Court of Appeal considered the judge had fallen into error in her approach to the use of s20 which impacted her approach to the "no order principle".

Both Cases

In each of the appeals, the appeal against the making of a care order was allowed. Both children were to remain in the long-term s20 placements provided by the respective local authorities. It was noted that this was the first time the use of s20 in this type of situation had been before the court for consideration.

Keoghs thoughts on the cases:

The case emphasises that s20 can be used to accommodate a child on a long-term basis in appropriate cases.

Section 20 should not be dismissed as a suitable option in situations where longer term accommodation is required.

If continued s20 accommodation is appropriate to the circumstances, practitioners will need to identify the context and purpose for which s20 is being considered

The Best Practice Guidance at Appendix G of the PLWG report referred to in the Court of Appeal's judgment should be familiar territory for practitioners. It acknowledges that s20 accommodation "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". While it is guidance and not statutory, it will be of some persuasive force.

In situations where s20 is considered appropriate for longer periods of accommodation, the practitioner will need to record in clear terms that proper consideration and care planning has taken place and the purpose and reasons for the decision that continued s20 accommodation is suitable in the specific circumstances of a case. This is particularly important as these types of claims are often brought outside the usual one-year limitation period for pursuing a claim for a human rights breach.

Robust record keeping should also include clear evidence to demonstrate that the regular mandatory reviews have been carried out and the reasons for the decision to either continue the s20 accommodation or alternatively to commence care proceedings.

This case also demonstrates that parental attitude to the making of a care order and its inevitable interference with the Article 8 rights of both parent and child are important factors for a court to weigh up.

Hence, prolonged s20 accommodation of a child will not always be a breach of their or their parents' respective human rights.

Author: Luke Ashton - Partner

Medical evidence in housing disrepair claims

There can be no doubt that housing disrepair is an area of significant activity in the claimant market affecting the public sector at present. This is driven largely by the exemption of housing disrepair cases from the fixed recoverable costs regime until at least October 2025. A simple Google search for 'housing disrepair claims' returns numerous firms all vying to attract new clients in this area. A spike in claim numbers presents the need to identify any key behaviours in the claimant market.

An interesting trend arising from the more recent cases we have encountered is the poor quality of medical evidence being relied upon, especially in the disease sphere. This begs the question for those of us defending housing disrepair disease claims: how can practitioners deal with this?

What is the problem?

The most commonly encountered injury claims in a housing context are respiratory claims relating to damp/mould in a property. This can be anything from mild cold-like symptoms to exacerbation of constitutional medical conditions to even more serious injury. As exposure is usually over a period of time, these claims meet the CPR definition of 'disease'.

Ordinarily speaking, we would expect to see an injury of this nature supported by evidence from an expert sufficiently qualified to comment. The gold standard discipline for an expert in cases of this nature would be a consultant respiratory physician. We have also seen the use of consultants in A&E medicine who can, depending on their clinical experience, provide suitable insight.

What we are commonly encountering are cases supported by reports from GPs. If the case is particularly low value (i.e. small claims track level), a GP report may well suffice. However, the vast majority of cases will be at the very least pleaded above the small claims track limit and/or will have an ongoing property disrepair element taking it outside of the scope of the small claims track.

We find that the reports we see in support of the claims are not fit for purpose.

Why is a GP report insufficient?

The problem with GP reports, in our experience, is that they do not provide any form of analysis of the case and/or insight into the complexities of causation. The reports will often be rudimentary.

The report will usually state that the claimant has reported damp/mould in the property, is experiencing respiratory issues and, therefore, the state of the property is the cause. There will be no proper examination of their medical records, no consideration of any other potential causes, no physical testing of the claimant, and generally the report will not really add any value to assisting the court in deciding if any of the underlying health issues complained of do, in fact, relate to the state of the property.

We find that the reports we see in support of the claims are not fit for purpose.

What can be done?

At a pre-litigation stage, it is crucial that handlers obtain full copies of the claimant's medical records and review the same themselves to consider any other potential conditions of concern and to also consider whether the claimant had sought any medical treatment for the alleged respiratory injury.

Once the case is litigated, it will ultimately become an issue for case management. A robust defence will need to be drafted raising the issues around the poor quality of the medical evidence. The problem is that a lot of these cases will sit on the fast track and the courts are loath to grant permission for separate medical evidence on the fast track.

However, this isn't really a situation where we are looking for our own evidence but rather we are challenging the usefulness of the medical evidence provided in support of the claim at the point of service.

In this regard, an effective strategy can be to ask for permission for a single joint medical expert to be directed. The defendant then has an input on which expert will provide a report and can, therefore, ensure it is someone in a suitable discipline.

What is critical when handling these types of cases is to raise concerns and issues with the medical evidence as soon as possible, especially if it is from an expert who may not be sufficiently qualified to comment. This enables submissions to be made at any subsequent CMC.

Commercial considerations

This is certainly an approach to consider in cases that are more finely balanced factually .

We are not advocating the above is undertaken in every single case. There is an inherent increase in the costs spend on the case if, for example, a respiratory physician is involved in the matter.

There needs to be a costs benefit analysis. For example, if the property in question was riddled with damp and mould issues and the claimant is seeking a modest amount supported by a GP report then it may well be prudent to consider an economic resolution.

Summary

As the volume of claims of this nature increases, the potential for this trend to continue is high and the impact on public sectors will be noteworthy. It will need a concerted effort across the market to require claimants to provide better evidence in support of the claim. There is a tactical benefit here because the claimant's solicitors will be less likely to incur the significant disbursement associated with say a respiratory physician on borderline cases where they aren't guaranteed to succeed and, therefore, recover the cost from the defendant at the point of settlement.

Even though these claims tend to sit at the lower end in terms of valuation, it does not mean we should accept substandard expert evidence. Allowing the claimant market to rely on cheap and perfunctory medical reports will only fuel the volume of claims.

Author: Sarah Swan - Partner

The Future of Abuse Civil Claims in the Public Sector

An examination of potential civil claims involving allegations of abuse that may impact the public sector in the future reveals several growing and worrying areas of risk. These risks are likely to intensify due to years of persistent underfunding, heightened scrutiny, public inquiries, updates to legal frameworks, increased media coverage, and greater government oversight:

1 Institutional Abuse in Social Services

This has long been a concern for local authorities within the public sector, but claims of abuse, particularly concerning the elderly and disabled, are now on the rise. Contributing factors include ongoing funding shortages, a lack of sufficient care staff, and an increasing focus on transparency in case management and reporting systems.

2 Police Misconduct and Excessive Force

High-profile incidents covered by the media have spurred attention and reform in this area, likely leading to an increase in misconduct claims. These claims commonly involve allegations against police officers related to sexual misconduct, excessive force, detention practices, harassment, and racial incidents. Police forces are currently conducting internal investigations into both recent and historical allegations against officers, making a rise in these types of civil claims inevitable.

3 Sexual Harassment

Public sector organisations are implementing stricter policies on sexual harassment and misconduct as more incidents gain media attention and reviews of past allegations are conducted. These claims are expected to increase and will likely include allegations within schools, colleges, universities, healthcare settings, as well as prisons and young offender institutions.

4 Abuse in Immigration Centres

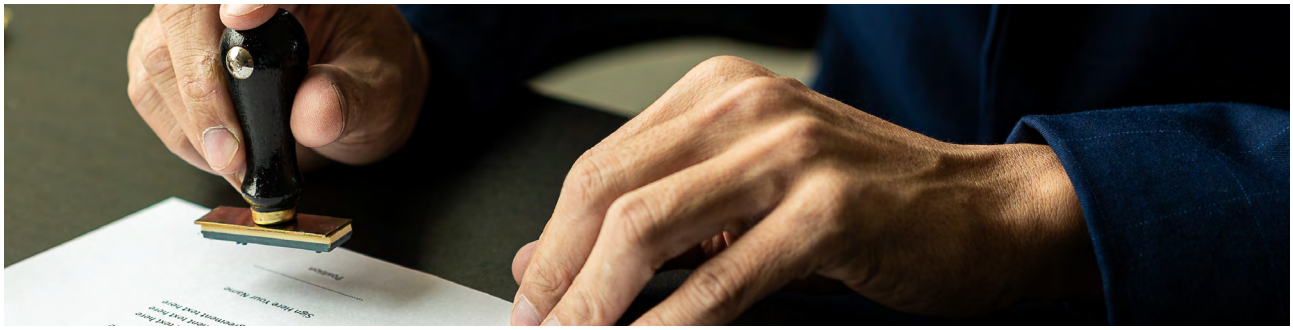
Allegations of abuse within immigration centres are on the rise, involving both peer on peer abuse and staff misconduct towards individuals. Reports of physical and sexual abuse, as well as instances of medical neglect, are becoming increasingly prevalent. These issues are likely to result in future claims, primarily under the Human Rights Act.

5 Abuse in Public Sector Employment

Claims are increasingly being filed by employees in public sector workplaces, alleging harassment, discrimination, sexual abuse, and issues related to race, gender, and sexual orientation. This area is particularly challenging for public sector bodies, with grooming cases, especially involving teachers, on the rise. Most claims are brought after employment ends, and there is also an anticipated increase in claims seeking damages for emotional distress and hurt feelings.

6 Child Sexual Exploitation (CSE)

Funding shortages in public sector organisations, including those for mental health, counselling and other critical services, have impacted specialised efforts to address CSE. This includes limited outreach and educational programmes aimed at raising CSE awareness and providing support.



7 Serious Case Reviews

The lack of oversight by public sector organisations and personnel for children and vulnerable individuals during Covid has led to an increase in serious case reviews (SCRs), covering instances of severe neglect, injury, and even death. This upward trend is expected to persist.

8 Human Rights Act Claims

Human Rights Act claims related to failures to remove individuals in cases of abuse are likely to increase. This is expected as case law remains fluid in this area, pending court hearings, and as claimants' solicitors continue to explore nuanced and varied claims.

9 Image-Based Abuse

the public sector is also likely to see a rise in civil claims related to image-based abuse, including incidents involving social media and deepfake technology, particularly amongst school pupils.

In addition to the anticipated rise in various types of abuse allegations within the public sector, it is expected – and already being observed – that more claims will be brought by groups of individuals making similar allegations and pursuing joint actions, rather than as individual cases. Also, due to the higher awards in the 17th edition of the JSB Guidelines, it is anticipated that claims will increase, as special damages will often include compensation for the impact on education and employment.

What Strategies Can Help?

Based on our experience of acting for many different sectors, including the public sector, over a substantial number of years, our view is that implementing key strategies can significantly reduce the risk of incidents occurring and civil claims being filed. These strategies, which are outlined below, should prioritise transparency and accountability:

Fostering Collaboration: Understanding the challenges faced by public sector organisations in relation to potential civil claims can promote collaboration, leading to:

+ Shared knowledge and intelligence
+ Joint funding efforts
+ More innovative and effective solutions for managing claims

Prioritising Funding: Whilst funding has been an issue for many years and may remain so for the immediate future, public sectors should focus on directing funding to the most critical services to ensure resources are allocated effectively.

Clear Policies and Guidelines: Each at-risk sector or service should develop and communicate clear policies defining abuse and outlining expected behaviour. These policies and guidance need to be considered and updated frequently. Encouraging individuals to report concerns early is vital to preventing escalation.

Mandatory, Scenario-Based Training: Training programmes should be mandatory and scenario-based, focusing on recognising abuse. Open and anonymous channels for communication should also be established.

Accountability for Leadership: Service leaders must be held accountable for any lack of oversight. This can be achieved through frequent, unannounced audits and independent oversight bodies.

Regular Policy Updates: Training and policies should be reviewed and updated regularly based on audit insights to ensure they evolve in response to emerging risks.

Strengthening Whistleblower Protection: To encourage reporting of misconduct without the fear of retaliation.

Public Awareness Campaigns: Launching awareness campaigns to educate employees, service users, and the general public about their rights and the processes for reporting abuse.

Improved Data Collection and Analysis: Establishing comprehensive systems for collecting and analysing data related to abuse incidents to identify trends and potential risks proactively.

Independent Oversight and External Audits: Engaging external experts or independent bodies to regularly audit practices, ensuring impartiality in identifying risks and ensuring accountability.

Cultural Change Initiatives: Fostering a culture of zero tolerance for abuse within the organisation, emphasising respect, integrity, and accountability at all levels of staff.

A proactive and strategic approach to these risks is important to minimise potential liability and gain public trust. Preventative measures such as effective training, clear protocols, communication and transparency help to identify issues before they occur and which then subsequently escalate into civil claims. A transparent and accountable culture also enables public sector organisations to protect their employees and service users while maintaining their reputation and much-needed resources.

Author: Chris Wilson - Partner

Urgent action needed to address the SEN system in England & Wales

On Thursday 24 October 2024, the National Audit Office published its findings in respect of how well the current system is delivering for children and young people in England who have been identified as having special educational needs (SEN).

Summary of Findings and Recommendations

1 Since the Children and Families Act 2014, there has been a significant increase in the number of children identified as having SEN, particularly those with education, health and care (EHC) plans specifying a need for support in more expensive settings.

2 Demand for EHC plans has increased by 140%, leading to 576,000 children with plans in 2024.

3 There has also been a 14% increase in the number of those with SEN support, to 1.14 million pupils in school.

4 Although the Department for Education (DfE) has increased high-needs funding, with a 58% real-terms increase over the last decade, the system is still not delivering better outcomes for children and young people or preventing local authorities from facing significant financial risks.

5 The DfE estimates that some 43% of local authorities will have deficits exceeding or close to their reserves in March 2026, contributing to a cumulative deficit of between £4.3 billion and £4.9 billion when accounting arrangements that stop these deficits impacting local authority reserves are due to end.

6 As such, the current SEN system is not achieving value for money and is unsustainable.

7 While the DfE has been implementing its 2023 plan for system improvement, significant doubts remain that current actions will resolve the challenges facing the system and there is little confidence among stakeholders that current plans would be effective.

8 The government has not yet identified a solution to the management of local authority deficits arising from SEN costs, and ongoing savings programmes are not designed to address these challenges. Given that the current system costs over £10 billion a year, and that the demand for SEN provision is forecast to continue to grow, it is recommended that the government urgently addresses how its current investment can be better spent, including through more inclusive education, identifying and addressing needs earlier and developing a 'whole system' approach to help achieve its objectives.

Implications

The report comes along with yet further bad news for local authorities and councils in particular, many of whom are already struggling desperately to control their dwindling reserves. Earlier this week, a local government agency (LGA) survey revealed that one in four councils in England believe they will have to apply for emergency government bailout agreements to stave off bankruptcy in the next two financial years and the County Councils Networks (CCN) estimated that special educational needs and disabilities services (SEND) deficits risk bankrupting almost three quarters of England's largest councils within the next three years.

In light of these latest findings, it is clear that urgent government action is needed and it remains to be seen whether any provisions will be made in the upcoming autumn budget (30 October 2024). Bridget Phillipson, the Education Secretary, commented that the SEN system had been *"neglected to the point of crisis"* by the previous government and that she was *"determined to rebuild families' confidence in a system so many rely on"*. However, she also conceded that any reform will take time to implement and while she was confident that the current government could achieve this, she was unable to provide any details of what reform might look like or when it might be achieved.

Arooj Shah, the Chair of the LGA's Children and Young People Board and Leader of Oldham Metropolitan Borough Council, commented that the LGA is hoping the government will set out in the upcoming budget just how it will reform and adequately fund the SEND system and whether this will include writing off all high-needs deficits so councils do not need to cut other services to balance their budgets.

Of course, while it remains to be seen how the government will tackle this crisis in the coming months and years, it is clear that local authorities and educational establishments need to be alive to the potential knock-on effect caused by such financial pressures in respect of how SEN services and EHC plans are provided and implemented in the short term, in order to avoid being exposed to further liability in the future by way of claims.

Author: Lauranne Nolan - Associate

The purpose of child in need plans

As many of you are aware, a child in need is defined as a child who is unlikely to achieve or maintain or have the opportunity to achieve or maintain a reasonable standard of health or development without support and/or intervention from their local authority. Under section 17 of the Children Act 1989, the local authority has a duty to provide the required support and access to services. Recent statistics have found that just over 400,000 children living in England are defined as 'children in need'. As of 31 March 2023, around a quarter of these children have child in need plans. Lauranne Nolan, Associate and Safeguarding Lead in the Keoghs Specialist Abuse team, considers the purpose of child in need plans and the recommendations to improve them.

Children on child in need plans make up the largest group of children supported by children's social care in England. These children have varied needs: they might be young carers, being targeted for criminal exploitation, have a parent struggling with substance misuse or domestic abuse, or they might be disabled. The main purpose of a child in need plan is to prevent children being taken into care and to keep families together. However, the support they receive is poorly monitored and the progress made by families on child in need plans is hard to track.

Some of the issues that have been identified are:

- The purpose of child in need plans is not clear;
- There is a lack of consistency in support offered through child in need plans;
- It is hard to measure the progress of child in need plans;
- Lack of recording of why child in need plans close.

The way forward

Dame Rachel de Souza, the children's commissioner, considers child in need plans to be a fundamental part of the child protection system but in their current form they are impossible to assess. In a report conducted by the children's commissioner entitled "what is the plan for?", the following recommendations were made:

1 A comprehensive review of the Children Act 1989

at the time of its implementation the Act was and remains a key piece of legislation governing child protection. However, there have been significant changes to the risks children now face and there are calls to reassess the Act, specifically in relation to Section 17 to provide clearly defined national thresholds of need for children and families so that a uniform approach can be taken at local levels. There should also be guidance on how often children receive the help identified and how frequently that help is reviewed.

2 The need for a national child in need outcomes framework

for the intervention of a local authority to be meaningful, a national framework would provide a consistent method to evaluation progress and assess the impact of the child in need plan. It will also ensure that families are accessing the right kinds of support.

3 Supporting disabled children under section 17

depending on where a disabled child and their family lives leads to inconsistencies in accessing the support they are entitled to and there are huge disparities within the system.

4 Education is a vital source of support for a child in need

schools and the education system play a vital role in supporting many children on child in need plans. It is therefore essential that schools are adequately trained in understanding how to support children in need and that they have the necessary resources to implement the right help.

5 Improved data collection and reporting on child in need data

government statistics do not currently distinguish between children who are being assessed for a child in need plan, those awaiting assessment, and those already on a plan. There is a suggestion that more data should be published to indicate whether the 45 working days target for conducting assessments is being met and to identify which children in need are on child in need plans and how long for.

6 There is an urgent need for an enhanced early help offer

the early help system is under-resourced and unable to keep up with the demand for preventative early intervention services. In addition, when a family is on a child in need plan and has made sufficient progress so that the plan can come to an end but they are still considered to require early help services, there is no requirement for the local authority to ensure that those services are available to the family, which presents huge challenges for families to maintain the progress they have made. Introducing a statutory duty to deliver early help and increased investment and spending on these services would be greatly beneficial to all children and families so that support can be given before matters escalate to reach a higher threshold.

Conclusion

To achieve the above the Children's Wellbeing Bill outlined in the King's Speech in July 2024 presents a crucial opportunity for reforms and improvement in the support for families and children's social care. The aim of the bill is to put children and their wellbeing at the centre of education and children's social care and to ensure that every child has a fulfilling childhood in which they can succeed and thrive. The bill is to be introduced as soon as parliamentary time allows. Keoghs will be sure to monitor this and provide updates on further developments.

Author: Paul Edwards

The growing risk of failing to use ADR

Encouragement for parties to engage in Alternative Dispute Resolution (ADR) is nothing new, however recent months have seen a drive towards compulsory ADR, in terms of both case law and reform of the Civil Procedure Rules. This drive encompasses not just resolving claims, but also the costs issues that arise thereafter.

The term 'ADR' encompasses all forms of dispute resolution, including mediation, the use of Joint Settlement Meetings, early neutral evaluation, and arbitration. The intention of ADR is obviously to encourage negotiations, settlements and to save the costs of litigation while easing pressure on an overburdened court system.

The irony of this new push toward ADR in costs is that, for the first time in some time, the Senior Courts Costs Office in London actually has capacity to conduct hearings in a timely fashion and paper assessments can be turned around quickly. As such, the cost of failed ADR in advance of a final assessment might ironically increase the parties costs of assessment. That said, defendants should carefully consider the circumstances – and risks – before refusing a reasonably made request for ADR, not least when the majority of the court system is under extreme pressure.

It is also the case that ADR is no longer voluntary, with a recent flurry of case law confirming it can be compulsorily mandated for the parties. Churchill v Merthyr Tydfil County Borough Council [2023] EWCA saw the Court of Appeal confirm that the court can stay proceedings in order for the parties to engage in non-court dispute resolution (NCDR), including mediation. Previous court decisions that disagreed were held to be obiter, and therefore not binding on the lower courts.

The court held that such an order would not be an unacceptable obstruction to a parties right of access to the court, citing a Civil Justice Council Report that noted "any form of ADR which is not disproportionately onerous and does not foreclose the parties' effective access to the court will be compatible with the parties' article 6 rights". Further guidance confirmed that any such order must not impair the claimant's right to proceed to a judicial hearing, and be proportionate to settling the dispute fairly, quickly and at reasonable cost. As such, one needs to carefully examine the sums in issue and the proposed method of ADR. A JSM where both parties bear their own costs, for example, may be more appropriate than a more expensive mediation involving a mediator and where both parties attend with large legal teams and then seek all their costs. In smaller cost disputes, where bills are less than £75,000 it seems certain that provisional assessment is almost always going to be cheaper than other forms of ADR.

The most recent, high-profile decision on compulsory ADR was given by Master McCloud, in her final decision before she retired as a Judge and became a mediator. In Charles Elphicke v Times Newspapers ([2024] EWHC 2595) she noted that detailed assessment proceedings can be expensive and time consuming. As such she concluded that, "it would be remiss of a judge not to order ADR before the proceedings were begun".

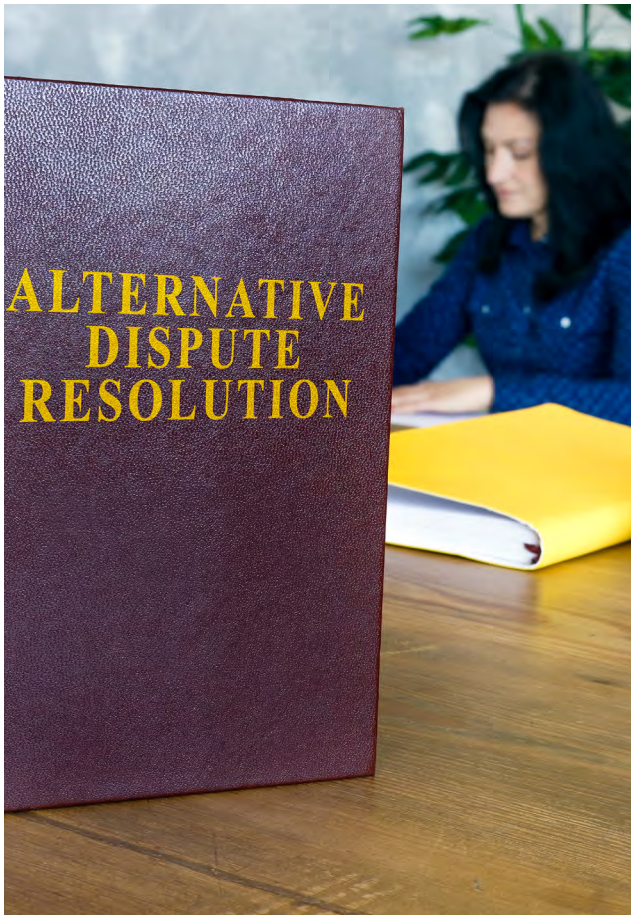
She added that, "I fully expect such an order to (need to) become the norm when a judge directs detailed assessment unless costs are agreed". The case she was dealing with was a significant one, so she noted that she expected mediation via Costs Lawyers would be appropriate.

This approach also underpins recent amendments to the CPR. CPR 44.2 is a provision that deals with the court's discretion as to costs. Paragraph 5 lists the types of conduct the court will have regard to when considering the exercising of that discretion. There is a new para (e) giving the courts greater power to impose sanctions in costs for failure to engage in ADR.

A failure to comply with such orders can be expensive. In Conway v Conway & Anor (Rev1) [2024] EW Misc 19 (CC), HHJ Mithani KC reduced a successful defendant's costs by 25% for rejecting a proposal to mediate "out of hand".

Under the new fixed costs regime costs can be reduced, or increased, by 50% due to "unreasonable behaviour". CPR 45.13 defines this as "conduct for which there is no reasonable explanation". It seems certain that this will include a refusal to mediate.

There are many reasons why ADR should be encouraged, however it is not always right for many cases. There is now a risk that ADR will be proposed by some parties when not appropriate, simply as a ploy to secure a costs advantage. As such, all paying parties need to carefully consider such proposals and the consequences of any response.



Author: Dan Tyler - Associate

Supreme Court finds police were not negligent in road accident case

The Supreme Court has given judgment in Tindall and another (Appellants) v Chief Constable of Thames Valley Police (Respondent) [2024] UKSC 33.

The facts

The claim was brought by Valerie Tindall, widow of Malcolm Tindall and administratrix of his estate. It arises from a road traffic accident on the A413 on 4 March 2014 in which Mr Tindall sadly died.

An hour before the accident, another motorist, Mr Kendall, had been driving along the same stretch of road. There was black ice about, which caused Mr Kendall's vehicle to skid off the road into a ditch. Mr Kendall sustained non-life-threatening injuries. He called emergency services and informed them about the ice. He also warned drivers by signalling to them to slow down. About 20 minutes later, officers from Thames Valley Police attended the scene. After advising them about the ice, Mr Kendall was taken to hospital in an ambulance. It is said that, but for the arrival of the police, Mr Kendall would have continued trying to alert drivers to the danger. The police were present for about 20 minutes, during which time they put up a 'Police Slow' sign and cleared the debris. Having done that, they left the scene, taking their sign with them. They did not do anything about the ice. Shortly afterwards Mr Tindall entered the same stretch of road in his vehicle. An oncoming car skidded on the ice resulting in a head-on collision. Mr Tindall died, as did the other motorist Mr Bird.

The claim

The claimant brought an action in negligence against the Chief Constable of Thames Valley Police and the Highway Authority. The claimant's case against the Chief Constable was that the police had made the danger worse. Alternatively, the police had assumed responsibility. The Chief Constable applied to strike out the claim as disclosing no reasonable cause of action or, alternatively, for summary judgment. The application was refused by Master McCloud, who considered that the claimant had a real prospect of success. However, the Chief Constable succeeded in the Court of Appeal. The court did not accept that the police made matters worse or that the police had assumed responsibility. Consequently, the claimant appealed to the Supreme Court.

The Supreme Court unanimously dismissed the claimant's appeal with Lord Leggatt and Lord Burrows giving judgment. On the facts, the police intervention did not give rise to any possible liability for making matters worse. Further, none of the possible exceptions to the general rule that there is no duty of care to protect a person from injury applied (including an assumption of responsibility).

The law

The Supreme Court provided a helpful distillation of the case law especially over the distinction between making matters worse on the one hand and on the other, failing to confer a benefit (where generally there is no duty of care owed). When considering whether a defendant has made matters worse, *"the relevant comparison is with what would have happened if the defendant had done nothing at all and had never embarked on the activity which has given rise to the claim … it is only if carrying out the activity makes another person worse off than if the activity had not been undertaken that liability can arise."* The court added that *"a person owes a duty to take care not to expose others to unreasonable and reasonably foreseeable risks of physical harm created by that person's own conduct."* In contrast, *"no duty of care is in general owed to protect others from risks of physical harm which arise independently of the defendant's conduct."* It is also important to view the defendant's activity *"as a whole"*.

Why the police intervention did not give rise to any possible liability for making matters worse

The claimant's case was that the police made matters worse. This was based on the allegation (which was accepted as fact) that but for the police's arrival, Mr Kendall would have continued trying to warn motorists about the black ice. The argument runs that the police made matters worse by *"displacing Mr Kendall's efforts without taking any comparable steps of their own to warn motorists of the hazard"*. Once the police had left, taking the sign with them, they exposed motorists to a greater risk of injury than if they had not attended in the first place and with Mr Kendall carrying on as he had been.

In making this case, the claimant drew on *"the interference principle"* as set out by Nicholas McBride and Roderick Bagshaw in *Tort Law,* 6th ed (2018), pp 213–217: *"[I]f A knows or ought to know that B is in need of help to avoid some harm, and A knows or ought to know that he has done something to put off or prevent someone else helping B, then A will owe B a duty to take reasonable steps to give B the help she needs."* It was argued that the principle applied to this case, with the police officers being *"A"*, other road users *"B"*, and Mr Kendall being the*"someone else"*.

The Supreme Court considered the interference principle in detail. While noting that there had been no previous English case clearly accepting and applying it, the court confirmed that it is a correct statement of the law and that there can be liability under it. In short, *"it is simply a particular illustration or manifestation of the duty of care not to make matters worse by acting in a way that creates an unreasonable and reasonably foreseeable risk of physical injury to the claimant"*.

However, while the court accepted for the first time there can be liability under the interference principle, it concluded there was no liability in this case. For a duty of care to arise under the interference principle it is necessary to show that a defendant knew or ought reasonably to have known that its conduct had or might have the effect of putting off or preventing someone else from helping a claimant.

In this case, then, *"the claimant would need to show that the police knew or ought reasonably to have known that their conduct had or might have had the effect of putting off or preventing Mr Kendall from warning other motorists of the ice hazard"*. The court concluded that it was here that the claimant's case broke down: *"There is no pleaded allegation that the police were aware that, before calling 101, Mr Kendall had been attempting to warn other motorists of the ice hazard. Nor is it alleged that Mr Kendall said anything to the call handler or to any of the police officers who attended the scene of his accident to suggest that he had any intention of making such attempts. Nor are any other facts alleged from which such an intention could reasonably have been inferred"*. From the police's perspective, then, Mr Kendall was a victim, not someone who was trying to protect others. Consequently, it was not reasonably foreseeable to them that their actions would cause Mr Kendall to stop trying to warn other motorists.

As such, on the facts alleged, there was "no reasonable basis for the argument that a duty of care was owed by the police to Mr Tindall because the police made matters worse by displacing Mr Kendall as a rescuer." The suggestion that evidence to the contrary might emerge at trial cut little ice: "the attitude of Mr Micawber is never a good reason to avoid summary disposal of a claim".

Why none of the possible exceptions to the general rule that there is no duty of care to protect another from injury applied here

Alternatively, the claimant argued that one (or more) of the exceptions to the general rule applies here. The exceptions that were raised were assumption of responsibility, control and status. During submissions, the claimant's counsel focused largely on control.

The Supreme Court noted that an assumption of responsibility "involves the idea that a person may, by words or conduct, expressly or impliedly promise (or undertake or give an assurance) to take care to protect another person from harm." It found there was no assumption of responsibility in this case. The key was "the complete absence of any communication or interaction between the police officers who attended the scene of Mr Kendall's accident and Mr Tindall".

Next, the court considered control. Here, the claimant's case was that even if the police did nothing to make things worse, they took control of the accident scene and that this gave rise to a duty of care to protect motorists from the danger posed by the ice. The court rejected this. The source of the danger was the black ice and the police did not take control of that. Indeed, they did not even inspect it. While this was one of the criticisms made of the police, *"that cannot be turned around to say that there was a duty of care consequent on their having taken control of the patch of ice."*

While the claimant's counsel made much less of status, the court confirmed that no duty of care could arise simply on the basis of the status of the police as professional emergency responders.

Consequently, "none of the possible exceptions to the general rule that there is no duty of care to protect a person from harm can be made out".

Comment

It is significant that the Supreme Court accepted for the first time that there can be liability under the interference principle. This will potentially lead to more claims arising from emergency situations involving multiple actors. However, as the judgment also makes clear, for a duty of care to arise it is insufficient to show that the defendant acted in a way *"which had the effect of putting off or preventing someone else from helping the claimant."* Rather, as one would expect, it is also necessary *"to show that the defendant knew or ought to have known (i.e. that it was reasonably foreseeable) that its conduct would have this effect"*. As such, a careful analysis of the facts will be vital.

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