Upfront

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INSURANCE & SOCIAL SERVICES EDITION

Professional
SECRECY DISCUSSED

Section 20 Children Act 1989
WHERE DO WE STAND?

Extending
BEREAVEMENT DAMAGES

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SOCIAL CARE LIABILITY

What does this case actually tell us?

Poole Borough Council -v- GN & Another

Those of us who are involved with claims that deal with the actions of local authority social services have been waiting with baited breath for the handing down of the Supreme Court judgment in **Poole BC -v- GN & Another** for almost 12 months. However, with the flood of contradictory press coverage on the subject, you could be forgiven for thinking that this judgment is in fact all things to all people.

The claimant press have put out articles with titles such as "Local Councils can be sued for not protecting vulnerable children, due to landmark ruling", with the defendant press titling articles with "Supreme Court reaffirms limits of duty of care to children". So which is it? To explain the actual position we must briefly revisit the history of the case of **Poole BC -v- GN & Another.**

As many will no doubt recall, the claimants in this case were children, one of whom had significant physical and learning disabilities, who were housed by the local authority near a family who severely harassed both them and their mother. The claim went through various permutations, but the allegations were essentially that the council knew of the severe anti-social behaviour and failed to intervene to protect the children, primarily by not taking action to take the children into care.

The Court of Appeal previously dismissed the claimants' appeal. Lord Justice Irwin gave the lead judgment. It was suggested on behalf of the claimants that the boys should have been removed from the care of their mother.

LJ Irwin described this as a "startling proposition" which was highly artificial and argued that it could not be right that a highly vulnerable disabled child and his younger brother should be removed from their single parent mother because of harassment from neighbours. He continued to remark that the reality is that after the claimants were forced to accept that they could not sue the defendant as Housing Authority, the claim had been brought pursuant to the Children Act.

LJ Irwin also considered the implications of imposing liability in such situations and noted that it would only serve to further complicate the decision making process in delicate situations. He was conscious of the need to avoid "stimulating caution and defensiveness" on the part of social workers and to minimise "ill feeling and litigation" arising from such disputes.

In addition, the Court of Appeal pointed to the long established legal principle that there is no liability for the wrongdoing of a third party, even where that

wrongdoing was foreseeable. The local authority did not bring about the risk nor did they have any control over the individuals representing the risk. In conclusion, LJ Irwin commented that the case illustrated perfectly why it was unjust to extend liability to one agency (the social services department of the local authority) when other agencies (the housing department, the housing provider and the police) were at least as involved and arguably more centrally involved in the relevant problem.

It would seem to be this last point that was the cause of the claimant legal community's major concerns. Those aware of litigation against the police will be aware of a long held assumption that the police were essentially "immune" from prosecution, in relation to operational matters. The Court of Appeal judgment tends to suggest that it is an all or nothing situation and therefore, if there is no liability for other agencies then there should be none for social care. This logic had the potential to bar all failure to remove claims, and from the claimant's perspective, remove access to justice for vulnerable claimants.

Whilst we awaited the recent judgement in **GN**, the Supreme Court heard another case, that of **Robinson -v- Chief Constable of West Yorkshire [2018] UKSC 4**.
The Supreme Court in that case clarified that the police did not enjoy "general immunity from anything done by them in the course of investigating or preventing a crime".
The court concluded that the police may be under a duty of care to protect an individual from danger of injury which they have themselves created. This case essentially reaffirmed the basic principles of negligence that anyone, including a public body, can be liable for a positive act, but not an omission. The legal argument in social care cases, therefore, focused on the contention that the "failure" to take a child into care was an omission and not a positive act. On that basis, there could be no liability in negligence unless, as in **Robinson**, the person or body had injured a claimant by a positive act - a further concern for those bringing failure to remove claims.

continued overleaf...

Fast forward to GN in the Supreme Court.
The Supreme Court has confirmed the position that a local authority is generally in the same position as a private individual in that they have no duty to prevent harm. Statutory duties do not, by their mere existence confer a duty at common law upon a local authority and indeed, there is no cause of action provided in the Children Act and therefore, no statutory remedy. As such, the local authority has no duty to protect someone from harm perpetrated by a third party. That is unless the local authority or the employees or agents have created the danger complained of (a fairly easily understandable concept) or they have assumed a responsibility upon which a reliance has been placed (a more complex question and one likely to require further scrutiny). The Supreme Court has therefore clarified that bringing such a claim remains possible, if the relevant exceptions can be made out, and has not followed the same logic as the Court of Appeal with regards to the concerns about imparting any liability at all. This would appear to be why the claimant legal community are claiming a significant victory and in some cases an expansion of the law as it stands. This is not an accurate analysis of the position in our opinion.

As to what an assumption of responsibility actually means, some attempt has been made to provide clarity. An assumption of responsibility is essentially a duty that would not exist at all but for it having been voluntarily accepted and undertaken. A council cannot be deemed to have assumed responsibility merely by dint of the fact that they are operating a scheme for the benefit of society. This would seem to counter arguments, raised by claimant solicitors over the last 12 months, that the mere fact that social services have investigated child protection concerns or placed a child on the child protection register, amounts to an assumption of responsibility. It is clear that a local authority cannot be deemed to have assumed responsibility merely by the performance of what is statutorily required of them.

The difficulty that we face is that this particular case was unusual and was not a typical failure to remove case. As such, the effect that this judgment is to have on all permutations of failure to remove cases should be considered with caution. However, the findings by the Supreme Court on the basis of the facts in this case were as follows;

1. The local authority did not have a general duty to prevent harm by a third party.

2. Applying the relevant exceptions to that rule, the local authority clearly did not create the danger which was complained of and did not have any control over the source of the danger.

3. There was no assumption of responsibility. The local authority did not accept responsibility for the care of the children nor did they indicate that they would do so. Although there was reference to an email purporting to accept responsibility for action to be taken, it was found that a vague promise was not enough for this to bind the local authority in liability.

4. Alternatively, the Court found that, in any event, there was no real prospect of the local authority successfully removing the children under a care order. The criteria for this to have reached the threshold for intervention would have required the parent to be the source of the danger. The danger came from a third party. There was no question that the mother was loving and caring and as such it was found that the Court would not have removed them even if care proceedings had been brought.

The position with regards to negligent acts by social care when a child is already in their care, and the position with regards to negligent removal, remains as it has been previously accepted, namely that a potential liability exists. However, the **GN** case is still extremely beneficial to local authorities facing numerous claims for actions taken in the pre-care

investigation periods of involvement and one which provides a myriad of further arguments able to be submitted by way of defence. It does not however cover all scenarios due to the Supreme Court being limited by the facts of this particular case. What about situations where a child is placed in section 20 accommodation and then returned to an abusive environment? Is that a creation of a danger or merely the return to the status quo? What if the source of the danger is in fact the parents and a care order is likely to have been approved as reaching the threshold if brought earlier? What is the situation with regards to the application of the Human Rights Act? Many claimant solicitors have already re-pleaded their cases in this vein and although the Supreme Court spent some time looking at the issue of the Human Rights Act they did not comment on its use going forward.

In short, contrary to the position proposed by many claimant practitioners, the case is very helpful to local authorities in providing some clarity of the basis of the law after many years of conflicting positions from different courts. However, it does not provide a total panacea or a straight forward answer to every future case involving pre-care involvement by social care. Unfortunately, therefore we do expect further lengthy argument in the future in such cases and potentially further litigation on the subject.

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PROFESSIONAL SECRECY

Discussed

Local Authorities routinely obtain and process special category data when seeking to protect the vulnerable in society. Special Category Data is that which reveals a living person's race, ethnicity, religion or belief, trade union membership, political persuasion, biometric data, health, sex life or orientation [GDPR Article 9(1)]. From a social work perspective, they are perfectly entitled to process this data when they are publicly tasked to provide necessary health or social care or treatment to an individual pursuant to a state system [GDPR Article 9(2)(h)].

It is clearly stated, however, in GDPR Article 9(3) that special category data may only be processed for the purpose referred to in Article 9(2)(h) above if the processing is "subject to the obligation of professional secrecy".

So what is professional secrecy?

The term has entered our language from continental constitutions (France, Belgium, Luxembourg, Italy, Netherlands, Germany etc.), and, unlike our common law legal professional privilege, it is not just limited to solicitor/client privilege, and its rules of waiver differ.

Essentially, legal privilege, legal confidentiality and professional secrecy are all derived from the core principle that clients must be able to openly and honestly communicate with professionals, confident that those said communications will be protected from disclosure. Globally, the nature of this duty, its scope and application varies. Article 90 of the GDPR allows member states to create their own rules in relation to controllers or processors that are subject to obligations of professional secrecy.

What are the risks?

Insurers, local authorities, health, social care and legal professionals - to name just a few - routinely use email, video conferencing and information sharing forums and technology, which renders information prone to widespread dissemination. This dissemination can easily undermine the confidentiality of a document or a communication and give rise to discrimination, identity theft or fraud, financial loss, damage to reputation, loss of confidentiality of personal data protected by professional secrecy, unauthorised reversal of pseudonyms, and potentially significant economic or social disadvantage.

Recent war stories

There have been a number of recently reported decisions or articles, which highlight the perils of handling special category data.

In April 2019 a county council locum social worker was handed a 36-month long caution notice by the Health and Care Professions Tribunal Service for failing to keep confidential documents secure. She had emailed them from her secure work account to an insecure personal email account. The breach was admitted by the social worker and remedial DPA training provided by her employer.

In **R (on application of M) -v- Chief Constable of Sussex 15th April 2019**, the Administrative Court held that Sussex Police had unlawfully disclosed information about a vulnerable 16 year old "M".

The police had attended a local Business Crime Reduction Partnership (BCRP), and had agreed to share information about suspected offenders with other members who managed an "exclusion notice scheme" designed to prohibit persons entering their commercial premises. Sussex Police provided the BCRP with a photograph of M and informed them of M's name, date of birth, and bail conditions, advising that M had been excluded from a number of local businesses. Additionally, however, the Police disclosed details of M's vulnerability to child sexual exploitation. Following judicial review, the High Court ruled that the disclosures made regarding vulnerability to sexual exploitation breached the teenager's data protection rights and fell outside of an otherwise lawful information-sharing agreement.

“ It is important that public authorities are able to make full and lawful use of information for their statutory purposes.. ”

In March 2019 a mainstream newspaper published an article entitled “social workers ‘spying’ on families through Facebook…”. The use of unofficial “surveillance” is a thorny issue. The gathering of data by a state employed worker about a private individual on a public forum to use in, say, child protection decision-making may seem attractive, but caution is required. Unless covert surveillance (monitoring/observing/listening) is done under the protection of the Regulation of Investigatory Powers Act 2000 (RIPA), agents of the state leave themselves exposed to a Human Rights Act based claim. The Home Office: Covert Surveillance and Property Interference, Revised Code of Practice August 2018 is probably worth a look. At paragraph 3.10 it states; “It is important that public authorities are able to make full and lawful use of information for their statutory purposes [and] much of it can be accessed without the need for RIPA authorisation….but if the study of an individual’s online presence becomes persistent, or where material obtained from any check is to be extracted and recorded and may engage privacy considerations, RIPA authorisations may need to be considered…”.

Interestingly at paragraph 3.12 the Code states that “where a public authority has taken reasonable steps to inform the public or particular individuals that the surveillance is or may be taking place, the activity may be regarded as overt, and a directed surveillance authorisation will not normally be available. So, a simple letter to a family or parent notifying them how you intend to undertake your child protection investigation - indicating this may include unannounced visits and social media monitoring - may provide some protection. Clear management direction as to lawfulness, necessity and proportionality are imperative here.

Lastly, the case of **Various claimant -v- Wm Morrisons Supermarket PLC** from 2017 reminds us that an employee’s rogue act - legally termed “frolic of their own” - exposes his or her employer to vicarious liability for wrongful acts. In this case, the employee’s decision to deliberately and unlawfully steal and then publicly share the special category data of 100,000 Morrisons’ employees was held by the Court of Appeal to trigger vicarious liability. The Court of Appeal went on to state that the solution was to insure against such catastrophes!

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Pressure on local authorities and social workers increases

The extent of pressure being felt by Local Authorities and, in particular, Social Workers working with children is starkly laid bare by recent statistics produced by the Department of Education.

The headline grabbing figures are somewhat shocking. Councils in England started almost 200,000 investigations into possible harm in 2017/18. An average of 188 children a day in England are being put on protection plans due to risk of abuse or neglect. Councils reported an increase in new child protection plans of 2,360 over the last year with a total of nearly 69,000 child protection plans commenced in that year.

The 198,090 investigations into possible harm is a 56% increase from 2012/13. Little surprise then that the Local Government Association (LGA) commented that Councils were being "pushed to the brink by unprecedented demand".

It will come as no surprise to learn that the ten local authorities with the most new referrals in 2017/18 were all in the north of England, with north-east authorities occupying no less than 6 of the "top ten" places.

The rise can probably be explained, at least in part, by greater public awareness and a willingness to report abuse following recent high profile cases. However, it would be churlish not to also factor in the effect of years of austerity and changes in the welfare benefit system, as well as significant cuts in early intervention services designed to provide support. This rising workload is inevitably putting councils under further financial strain and it is sadly ironic that they have been forced to reduce or even stop many of the very services which are designed to help children and families before problems escalate to the point where a child might need to come into care.

The effect on individual social workers should not be underestimated, with rising caseloads. They also face external media pressure, which is often critical and must have a detrimental effect on morale. Social Work expert, Andrew Bilson, told the BBC that Councils were increasingly "firefighting and responding, rather than looking for ways to prevent harm and support families".

As a solicitor working in the abuse field I come across many examples of social workers "going the extra mile" and performing their duties with great skill and dedication. Ironically, a recent change in the law might have the effect of causing local authorities to adopt a lighter approach in investigating and intervening when in receipt of reports of neglect or harm. In the Court of Appeal in late 2017, the judgment in **CN & GN -v- Poole Borough Council** determined that a local authority did not owe a duty of care in deciding whether care proceedings should be commenced or in exercising its powers to investigate and take action to prevent significant harm to children. Unless it could be established that action taken by the local authority amounted to an "assumption of responsibility", any duty of care would arise only once a child had been removed into care.

That decision was appealed to the Supreme Court and the eagerly anticipated judgment was announced on 6th June 2019. The appeal in fact failed, but the Judges attempted to clarify matters which affect more generally this area of law. You will see many articles debating the implications and some claimant practitioners have hailed the judgment as a return to the "status quo" which had existed for some time . This is not how I see it.

The position with regards to negligent acts by social care when a child is already in their care, and the position with regards to negligent removal, does remain as has previously been accepted, namely that a potential liability exists. However, the **GN** case is still extremely beneficial to local authorities facing numerous claims for actions taken in the pre-care investigation periods of involvement and one which provides numerous arguments to mount defences to such claims. It does not however cover all scenarios due to the Supreme Court being limited by the facts of that particular case (which was not a typical "failure to remove" situation).

Even if the Supreme Court upholds the decision, I suggest that when it is all chewed over and analysed to the nth degree **GN** will not result in an intentional drawing back of involvement of Social Services where harm or neglect to children is suspected. It may, however, cause a change, and probably a reduction in compensation claims against local authorities in such cases. If such savings can be used to support families in need and reduce the need for care orders that must surely be a welcome result.

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Are the Courts becoming stricter in their use of the Section 33 discretion to extend limitation in historic sexual abuse cases?

"One cannot put a cause of action onto a shelf with a view to taking it down again sometime later in the indeterminate future when you feel like using it."

This quote, from the earlier case of **RE -v- GE [2015] EWCA Civ 287**, reared its head again in the recent case of **Murray -v- Devenish & Others [2018] EWHC 1895 (QB)**, where the Court was considering whether to exercise their section 33 Limitation Act 1980 discretion to allow a claim resulting from historic sexual abuse to continue, despite a lengthy delay in bringing the claim. It is a powerful sentence, indicating that the Courts are becoming more aware, and perhaps more sympathetic, to the arduous task defendants are being faced with in relation to this type of claim.

The Court found that the claimant's delay had a major impact on the ability to hold a fair trial, and caused difficulties for defending both liability and quantum. The claimant was inconsistent about the period of alleged abuse and his age when the abuse allegedly commenced and ceased and his accounts altered several times throughout the claim process. The death of the alleged abuser meant that Defence Counsel could not question the veracity of the claimant's account and limited any cross-examination of both the claimant and witnesses. The 34-year delay in commencing proceedings was significant and when undertaking a balancing exercise as regards respective prejudice, the Court decided that it would not be equitable to allow this claim to proceed.

Kimathi -v- The Foreign and Commonwealth Office [2018] EWHC 2066 (QB) is another historic abuse claim where the Court refused to disapply limitation. The Court provided excellent guidance as to what key factors will be considered when making a determination on exercising section 33 discretion:

- Witness availability;
- Quality of evidence; and
- Effects of the availability (or non-availability) of documentation.

Interestingly, the claimants introduced international and public law arguments to assist in allowing the claims to continue, but they were rejected by the Court who stated that Section 33 already conferred "the widest possible discretion within bounds" to allow personal injury claims to continue.

Another recent case, **Catholic Child Welfare Society -v- CD [2018] EWCA Civ 2342**, stated that a Judge should not have exercised their discretion under Section 33 to allow a claim to proceed based on a claimant's allegation that he had been raped by a member of staff when he was a school pupil 24 years earlier. Clearly pertinent to the outcome in this case was the fact that eight years earlier the claimant had brought a claim for physical abuse against the same defendant for the same time period. The Court stated that disapplication of the limitation period was an exception to the purpose of the Statute of Limitation, which had been designed to protect defendants from stale claims and to best serve society. Delay in itself may not preclude disapplication; the Court emphasised that the resulting prejudice suffered by the defendant was the determining factor.

Forbes comment

There is no hard and fast rule to be applied when assessing prejudice, indeed the Court in **Murray -v- Devenish** clearly stated that each case should be considered on its own facts. Yet the statutory limitation defence is not without risk and can additionally attract unpleasant media comment. The cases cited above, however, are useful reminders that limitation defences can be effectively and legitimately used when real prejudice to the defendant can be evidenced.

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Section 20 Children Act 1989 Where do we currently stand?

Since the handing down of the Supreme Court judgment of **Williams and another -v- London Borough of Hackney [2018] UKSC 37** in July 2018, it has become the go-to case in relation to the appropriate use of section 20 when accommodating children in need (as defined by section 17 Children Act 1989), both for social workers and legal professionals alike.

By way of reminder, the Williams case sets out the powers and duties of a local authority when providing and/or arranging accommodation for children in need in accordance with section 20 and sets out good practice for social workers when implementing such arrangements, without the sanction of a Court Order. The case remains good law.

For many years, the use of section 20 has come under frequent scrutiny by the courts due to it enabling some cases to 'drift' without further long-term consideration and/or planning for the accommodated child. The Williams case now provides much clearer guidance, which is summarised as follows:

- It is imperative that local authorities and social care departments remain aware that in every case parents and/or legal guardians are provided with clear and accurate information as to their rights in accordance with section 20, as well as the rights and responsibilities of the accommodating local authority. In cases of abandonment however, this will not be applicable.
- Should a person with parental responsibility of the child unequivocally object to the continuing provision of section 20 accommodation then the local authority must explore other avenues in order to appropriately safeguard the child in need.
- Whilst there is no limit on the length of time a child may remain accommodated in accordance with section 20 of the Children Act 1989, the local authority must be aware of their continuing assessment and planning responsibilities for the accommodated child, in order to avoid criticism.

In taking all of the above into consideration, local authorities must also remain aware of their statutory duties in accordance with the Human Rights Act 1998.

Whilst a local authority may not be in breach of section 20 should a child remain accommodated for a lengthy period of time without care proceedings being initiated, in some instances, this may result in a breach of the child's or parent's rights in accordance with Article 8 of the European Convention of Human Rights and/or Article 6.

At the time of writing, we are noticing an increasing number of actions alleging breaches of the Human Rights Act, mostly relating to breaches of Articles 6 and 8. Local authorities should therefore remain aware of their statutory duties and responsibilities and act accordingly, as summarised above, in order to avoid future criticism and potential litigation in this regard.

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HISTORICAL SEXUAL

Abuse

Limitation arguments are commonplace within the context of historical sexual abuse claims. It is not unusual for a claimant's solicitor to request a moratorium to extend limitation given the nature of the claim. However, the case of **Archbishop Michael George Bowen -v- JL [2017] EWCA Civ 82** considers the wide powers of judicial discretion conveyed to judges when determining whether an application to extend limitation under section 33 Limitation Act 1981 is equitable having regard to the prejudice suffered by the parties.

The claimant, JL, was groomed and sexually assaulted by Father Laundy, who was a priest and a scout chaplain for approximately eight years until his arrest in 1999.

Father Laundy was subsequently convicted on five counts in relation to JL, but contested his guilt by stating he pleaded guilty to avoid adverse publicity for the church. However, despite this criminal conviction, JL failed to issue a civil claim until November 2011 having undergone therapy in late 2009. By the time the trial took place in March 2015, the alleged abuser had passed away.

Liability was contested by the employers of Father Laundy on three grounds, one being that the claim was brought out of time and was therefore statute-barred.

However, at first instance the trial Judge found that Father Laundy had sexually abused JL between 1984 and 1987 and so The Scout Association and the Archbishop were held vicariously liable for his actions. JL was awarded £20,000 in general damages by the trial Judge despite the claim having been brought outside the limitation period.

On appeal, the Court applied **AB -v- Nugent Care Society [2009] EWCA Civ 827** finding that the Judge had erred in his findings due to the failure to consider the effect of the delay in bringing the claim and the cogency of evidence prior to determining substantive issues. It was considered that the correct approach is to adopt an overall assessment of the evidence and the effect of the delay of the same, applying **Raggett -v- Society of Jesus Trust of 1929 for Roman Catholic Purposes [2010] EWCA Civ 1002**. The Court of Appeal therefore allowed the appeal and dismissed the claimant's claim on the basis that it was wrong of the trial Judge to disapply the primary limitation period.

A combination of Father Laundy's death, the number of years that had lapsed since the incident occurred, and the negative publicity affecting the guilty plea therefore made the investigation almost impossible at such a late stage.

Forbes comment

There is no hard and fast rule to be applied when assessing prejudice, indeed the Court in **Murray -v- Devenish** clearly stated that each case should be considered on its own facts. Yet the statutory limitation defence is not without risk and can additionally attract unpleasant media comment. The cases cited above, however, are useful reminders that limitation defences can be effectively and legitimately used when real prejudice to the defendant can be evidenced.

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THE INDEPENDENT INQUIRY INTO CHILD SEXUAL ABUSE

Where are we now?

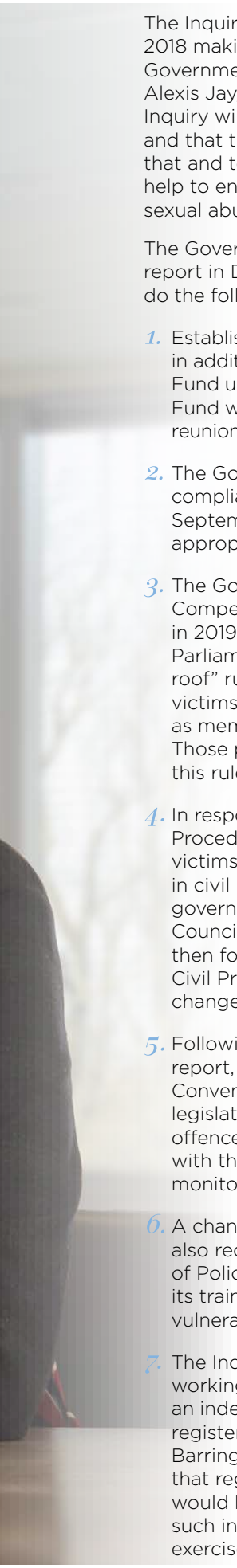
For those local authorities and institutions that have been involved with one of the various investigations currently being conducted by the Independent Inquiry into Child Sexual Abuse ("IICSA"), the experience will have been all encompassing. Already limited resources will have had to be allocated to the huge disclosure efforts, witness sourcing and attendance at the various seminars and hearings.

For those who have not been directly involved, the reduction in media attention given to the Inquiry over the past four years, in favour of general elections, leadership challenges and Brexit, may mean that IICSA may have somewhat fallen out of the collective consciousness, but for the odd "Truth Project" television advertisement.

However, IICSA has completed some of its work and provided some reports and interim position statements. It also continues to have the potential to have a significant effect on social care, safeguarding policy, practice and civil claims generally.

There are currently thirteen investigations covering various residential and custodial institutions, child sexual exploitation, child migration, religious institutions, the internet, Westminster, specific individuals and accountability and reparations. The Inquiry has also stated that over one thousand victims and survivors have participated in the associated Truth Project.

It goes without saying that the extent of the work which the Inquiry has been tasked with doing is substantial. Indeed some of the investigations stated above have either not yet commenced or are still at preliminary stages and the Truth Project, which gives survivors an opportunity to share their experiences with the Inquiry, is likely to continue for some time yet. However, we can glean some inkling of the Inquiry's intentions from the reports that have already been release and from gaps in the Inquiry's scope.



The Inquiry published its interim report in April 2018 making a number of recommendations for the Government to consider. The Inquiry Chair, Professor Alexis Jay, commented that it was expected that the Inquiry will have made substantial progress by 2020 and that they believed that they were on target to do that and to make recommendations, which should help to ensure that children are better protected from sexual abuse in the future.

The Government responded to the Inquiry's interim report in December 2018 confirming its intention to do the following:

1. Establish a redress scheme for former child migrants in addition to continuing the Family Restoration Fund until the end of the scheme, by which time the Fund will have provided over £8 million to support reunions, over more than a decade.

2. The Government will hold agencies to account for compliance with the Victim's Code, published in September 2018, to ensure victims are receiving appropriate entitlements.

3. The Government will review the Criminal Injuries Compensation Scheme and will consult publically in 2019. The Government will also lay before Parliament an amendment to abolish the "same roof" rule, which denies compensation for some victims who continued to live with their attacker as members of the same family prior to 1979. Those previously denied compensation under this rule will be able to re-apply.

4. In response to a recommendation that the Civil Procedure Rules should be reviewed to ensure that victims and survivors are given similar protection in civil proceedings as those in criminal ones, the government has arranged for the Civil Justice Council to consider these issues. The intention is then for the Ministry of Justice to liaise with the Civil Procedure Rule Committee as to whether any changes or other provision is appropriate.

5. Following the publication of the Inquiry's interim report, the Government ratified the "Lanzarote Convention". This requires signatories to establish legislation to criminalise all possible kinds of sexual offences against children. The UK is fully compliant with the Convention and will continue to be monitored against it.

6. A change in culture in the police service was also recommended by the Inquiry. The College of Policing has confirmed that it is improving its training in respect of safeguarding and vulnerability at all levels.

7. The Inquiry suggested the registration of all staff, working in care roles within children's homes, with an independent body, and that the keeper of the register has a duty to inform the Disclosure and Barring Service when someone is removed from that register. The Government identified that this would be a major change for the sector and as such intends to launch an "evidence-gathering" exercise in order to consider the recommendation.

8. The Inquiry found it very difficult to clarify how much is currently spent on victim support for victims and survivors of child sexual abuse, and therefore recommended that the Government review this. The Government will present the Inquiry with its findings by the end of 2019.

The recommendations and Government action referred to above largely do not touch local authority social care practice as yet, other than the possibility of an extra tier of care home staff registration. That said, the Accountability and Reparations Inquiry is currently taking evidence and holding seminars as to how abuse claims have been handled historically and the recommendation thus far, as one might expect, leans heavily towards improved support and access to justice.

Several other Inquiries around the world have considered this issue, largely with regard to abuse in residential settings and, like with the child migration recommendation stated above, have recommended redress schemes. This could therefore be a consideration of the IICSA Inquiry. However, redress scheme funding has proved complex for other countries, and is likely to be so here. The Inquiry has recommended that consideration be given to a register of public liability insurers to help claimants locate the information that they need in order to bring claims relating to child sexual abuse. I understand that this is currently being considered by the Association of British Insurers. However, what the Inquiry may not have appreciated is the complexity of the structures of local authorities particularly going back many years. Such a register may not provide the simple answer that is anticipated.

The investigations being undertaken by the Inquiry also seem to relate mainly to institutional and residential settings and do not therefore touch on situations which may fall in what is colloquially referred to as "failure to remove" scenarios. Any redress scheme will be easier to implement in a clear vicarious liability situation, than in situations involving social care practice around familial abuse. Whether the Inquiry will make such a distinction remains to be seen.

With the review by the Civil Justice Council of the Civil Procedure Rules, it is likely that we will see some changes in how these claims are handled in the future. Indeed, the Forum of Insurance Lawyers Abuse Claims Practice and Procedure Sector Focus Team, of which I am a member, have already engaged with the Civil Procedure Rule Committee in an attempt to create a more workable pre-action protocol to deal with abuse matters.

In short, therefore, changes are afoot, and although interim recommendations have not required a sea change in local authority social care practice, the Inquiry has the potential to make sweeping changes to both social care practice and civil litigation in the future. Watch this space.

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Changes afoot to extend bereavement damages to co-habitees

Relevant case: **Smith -v- (1) Lancashire Teaching Hospitals NHS Foundation Trust; (2) Lancashire Care NHS Foundation Trust; (3) Secretary of State for Justice Court of Appeal; [2017] EWCA Civ 1916 28th November 2017**

Case Facts

Jacqueline Smith's long-term partner died as a result of admitted negligence by the Trust. Her substantive claim for clinical negligence was settled and included damages for dependency claimed under the Fatal Accidents Act 1976. During those proceedings however, Jacqueline Smith became aware that under the same Act she was unable to claim statutory bereavement damages because the entitlement only applied to spouses.

Whereas dependency damages can be claimed under the Fatal Accident Act 1976 ("FAA 1976") by a cohabitee of two years' standing, currently, bereavement damages are only available to the wife, husband or civil partner of the deceased.*

Ms Smith sought a declaration of incompatibility under the Human Rights Act 1998, stating that section 1A of the Fatal Accidents Act 1976, which governs the award of bereavement damages in England and Wales, was incompatible with the European Convention of Human Rights. The Court of Appeal held that section 1A(2)(a) of the 1976 Act was incompatible with Human Rights Act 1998 articles 8 and 14 - discrimination in the enjoyment of Convention rights and freedoms, and the right to family life.

While the Court could not grant bereavement damages to Ms Smith, it strongly suggested that the issue should be considered by Parliament with a view to changing UK law.

Proposal to amend the FAA 1976

On 8th May 2019, the Ministry of Justice published a proposal to amend the FAA 1976 to extend bereavement damages to a bereaved co-habiting partner, to address the Court's findings in **Smith -v- Lancashire Teaching Hospitals**, and to rectify the incompatibility with the European Convention. Interestingly, the Remedial Order proposes that where a qualifying cohabitant and a spouse are both eligible (i.e. where the deceased was still married and not yet divorced or separated but had been in a new cohabiting relationship for at least two years) the award should be divided equally between eligible claimants.

Cohabiting partner is defined as any person who -

(a) was living with the deceased in the same household immediately before the date of the death; and

(b) had been living with the deceased in the same household for at least two years before that date; and

(c) was living during the whole of that period as the husband or wife or civil partner of the deceased".

Forbes comment

Section 1A of the FAA 1976 provides for a fixed sum of bereavement damages to be awarded to a limited category of persons in the event of a fatal accident caused by wrongful act, neglect or default. The level of the award is currently £12,890.

Cohabiting couples are said to be the fastest-growing family type in the UK, yet many in England and Wales remain unaware that they have few or no legal rights. Calls for reform commenced in 1984 with **Burns -v- Burns** and continued in 2007 when the Law Commission disputed that cohabiting couples should have access to exactly the same remedies as married couples and civil partners. The perceived injustice is becoming more visible following recent judicial review cases of Siobhan McLaughlin (re state benefits) and Denise Brewster (re entitlement to occupational pension). The Cohabitation Rights Bill still awaits a second reading in the Lords on a date to be announced.

This targeted amendment to the Fatal Accident Act has attracted various comment already. Many couples do not want the state to interfere at all. Others criticise changes to the law and instead advocate individuals taking personal responsibility for their legal status instead. Yet others petition for better education on the subject. Some warn that any definition of cohabitee is open to interpretation, and could encompass a lodger or friend who has resided in your home for too long... One anonymous commentator has said "it's like saying I want the benefit of insurance; I didn't pay for it but I think it should pay out anyway...".

The Ministry of Justice has acknowledged that there is likely to be some impact on the insurance industry and on small businesses in meeting claims for bereavement damages from an additional category of claimant under this amendment. However, they state that they have assessed the likely number of future awards for damages under this amendment to be low and the "financial impact too small to justify preparing a full Impact assessment for this instrument."

The Ministry of Justice document indicates that any queries about the proposed Remedial Order may be sent for the attention of Anthony Jeeves at the Ministry of Justice on 07580 927398 or via email: anthony.jeeves@justice.gov.uk.

Contact Lucy Harris

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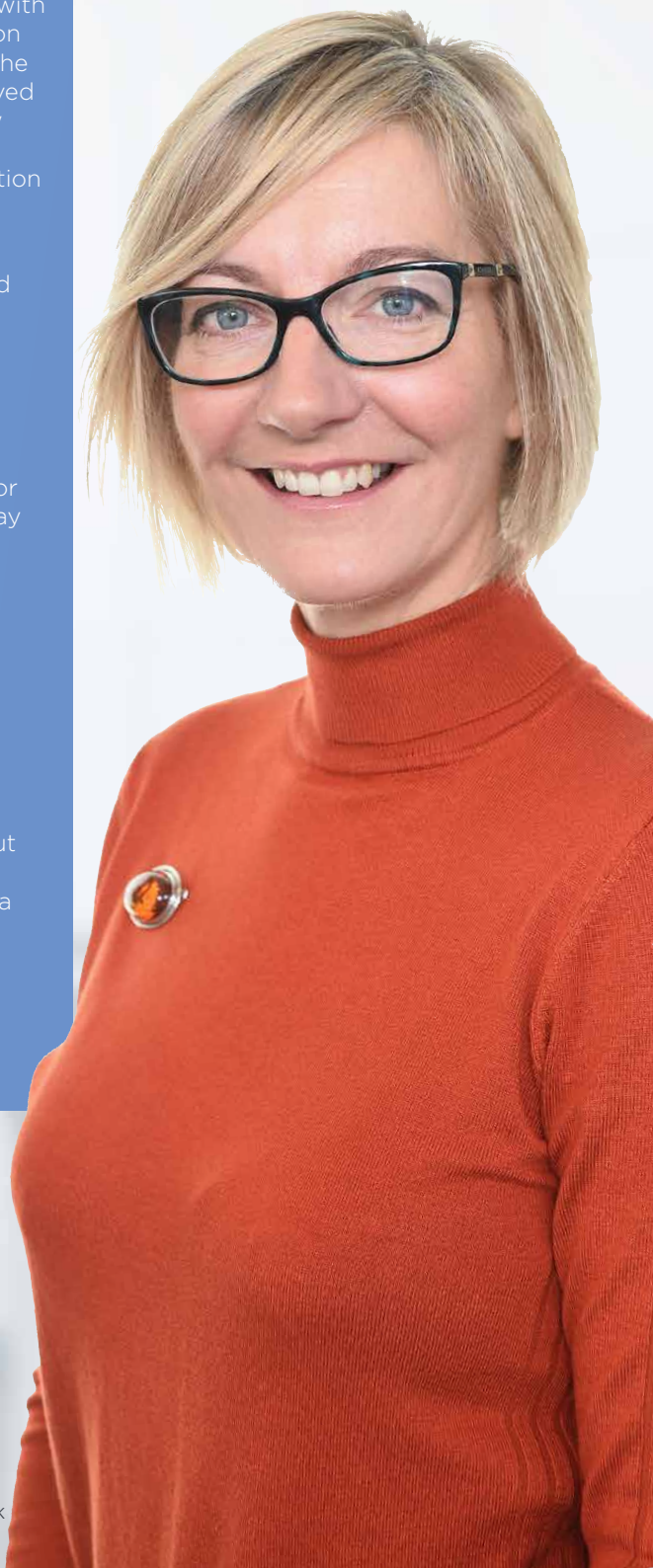
01254 222443

*Please note that bereavement damages can also be claimed by a deceased minor's mother [if the child was illegitimate] or the award can be shared by the minor's parents [if he or she was legitimate] where the deceased was a minor who had never married or had a civil partner.



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