

**Liability of Social Services Departments
for
Failing to Remove Children
from
Foreseeable Risks of Harm**

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1 STATUTORY DUTIES

(A) The Children and Young Persons Act 1969

Section 1 CYPA 1969 provided that a court could make a care order in care proceedings if satisfied, inter alia, that the child was being neglected or ill-treated.

Section 2(1) CYPA 1969 imposed a duty on the local authority which received information “suggesting that there are grounds for bringing care proceedings” to cause inquiries to be made.

Section 2(2) CYPA 1969: “If it appears to a local authority that there are grounds for bringing care proceedings in respect of a child or young person who resides or is found in their area, it shall be the duty of the authority to exercise their power under the preceding section to bring care proceedings in respect of him....”

(B) The Child Care Act 1980¹

Section 1(1) CCA 1980: “It shall be the duty of every local authority to make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive children into or keep them in care under this Act or to bring children before a juvenile court;...”

Section 2(2) CCA 1980: “Where it appears to a local authority with respect to a child in their area appearing to them to be under the age of 17 ... that his parents ...are, for the time being or permanently, prevented by reason of mental or bodily disease or infirmity or other incapacity or any other circumstances from providing for his proper accommodation, maintenance and upbringing; and ... in either case, that the intervention of the local authority under this section is necessary in the interests of the welfare of the child, it shall be the duty of the local authority to receive the child into their care under this section.”

¹ The Child Care Act 1980 came into force on 1 April 1981.

(C) The Children Act 1989²

Section 17(1) CA 1989: “It shall be the general duty of every local authority ... (a) to safeguard and promote the welfare of children within their area who are in need: and (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children’s needs.

Section 17(2) CA 1989: “For the purposes principally of facilitating the discharge of their duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of schedule 2.”

Schedule 2, Part 1, paragraphs 1(1) and 4(1) provide:

“1(1) Every local authority shall take reasonable steps to identify the extent to which there are children in need within their area.

4(1) Every local authority shall take reasonable steps, through the provision of services under Part III of this Act, to prevent children within their area suffering ill-treatment or neglect.”

Section 20(1) CA 1989: “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.”

Section 47(1) CA 1989: “Where a local authority... (b) have reasonable cause to suspect a child who lives, or is found, in their area is suffering, or is likely to suffer significant harm, the authority shall make, or cause to be made, such inquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child’s welfare....”

Section 47(8) CA 1989: “Where, as a result of complying with this section, a local authority concludes that they should take action to safeguard or promote the child’s welfare they shall take that action (so far as it is both within their power and reasonably practicable for them to do so).”

² The Children Act 1989 came into force on 14th October 1991.

Section 31 CA 1989:

“(1) On the application of any local authority or authorised person, the court may make an order—

- (a) placing the child with respect to whom the application is made in the care of a designated local authority; or
- (b) putting him under the supervision of a designated local authority or of a probation officer.

(2) A court may only make a care order or supervision order if it is satisfied—

- (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
- (b) that the harm, or likelihood of harm, is attributable to—
 - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
 - (ii) the child's being beyond parental control.

(9) In this section—

"harm" means ill-treatment or the impairment of health or development;

"development" means physical, intellectual, emotional, social or behavioural development;

"health" means physical or mental health; and

"ill-treatment" includes sexual abuse and forms of ill-treatment which are not physical.”

2 ACTIONABILITY IN NEGLIGENCE

In X (Minors) v Bedfordshire County Council³, the House of Lords found no duty of care was owed to 5 children who were not promptly removed from their home in circumstances where it was foreseeable that they would continue to suffer significant harm if they remained there. The claims were taken to Strasbourg and heard as Z and Others v United Kingdom⁴. The European Court of Human Rights held there had been a breach of article 3 and article 13 in that the children were subjected to inhuman and degrading treatment and that the English Courts had not provided them with a remedy.

JD and others v East Berkshire Community Health and others consisted of three conjoined appeals. In each case, the parents of young children had brought actions for negligence against health care authorities and, in one case a local authority, claiming damages for psychiatric harm caused as a result of unfounded allegations made by healthcare and child care professionals that the parents had abused their children. The issue was whether a duty of care in tort was owed to the parents by the defendants. It was held at first instance and on appeal⁵ that no such duty of care existed on the ground that it was not fair, just and reasonable to impose such a duty.

By a majority, the House of Lords⁶ dismissed the parents' appeals. The majority view was that, given the seriousness of child abuse as a social problem, healthcare and other child care professionals should not be subject to conflicting duties when deciding whether a child might have been abused and what further steps should be taken to protect the child. Whilst investigations should be conducted in good faith, it was not fair, just and reasonable that the common law duty of care claimed by the parents should be imposed.

³ [1995] 2 AC 633.

⁴ [2001] 2 FLR 612

⁵ [2004] QB 558.

⁶ [2005] 2 AC 373.

However, claims brought by the potential victims of child abuse fall within a different category and are permissible. It was said in the Court of Appeal per Lord Phillips MR at Para 83 and following:

"In so far as the position of a child is concerned, we have reached the firm conclusion that the decision in *Bedfordshire* cannot survive the Human Rights Act. Where child abuse is suspected the interests of the child are paramount - see S.1 Children Act 1989. Given the obligation of the local authority to respect a child's Convention rights, the recognition of a duty of care to the child on the part of those involved should not have a significantly adverse effect on the manner in which they perform their duties. In the context of suspected child abuse, breach of a duty of care in negligence will frequently also amount to a violation of Article 3 or Article 8. The difference, of course, is that those asserting that wrongful acts or omissions occurred before October 2000 will have no claim under the Human Rights Act. This cannot, however, constitute a valid reason of policy for preserving a limitation of the common law duty of care which is not otherwise justified. On the contrary, the absence of an alternative remedy for children who were victims of abuse before October 2000 militates in favour of the recognition of a common law duty of care once the public policy reasons against this have lost their force.

It follows that it will no longer be legitimate to rule that, as a matter of law, no common law duty of care is owed to a child in relation to the investigation of suspected child abuse and the initiation and pursuit of care proceedings. It is possible that there will be factual situations where it is not fair, just or reasonable to impose a duty of care, but each case will fall to be determined on its individual facts.

In reaching this decision we do not suggest that the common law duty of care will replicate the duty not to violate Articles 3 and 8. Liability for breach of the latter duty and entitlement to compensation can arise in circumstances where the tort of negligence is not made out. The area of factual enquiry where breaches of the two duties are alleged are, however likely to be the same.

The position in relation to the parent is very different... we consider that there are cogent reasons of public policy for concluding that, where child care decisions are being taken, no common law duty of care should be owed to the parents."

The House of Lords affirmed this decision. Per Lord Bingham at para 30 "it could not now be plausibly argued that a common law duty of care may not be owed by a publicly employed healthcare professional to a child with whom the professional is dealing".

3 STANDARD OF CARE

Per Lord Bingham in *JD v East Berkshire*⁷ “the duty to the child is breached if signs of abuse are overlooked which a careful and thorough examination would identify, and the obvious risk then is that abuse which would otherwise be stopped is allowed to continue.”

Expert evidence will usually be required.

⁷ At paragraph 37.

4 COMPENSATABLE INJURIES

Causation will usually be an issue.

In AD & OH v Bury Metropolitan Borough Council⁸, AD and OH were mother and son. They brought proceedings against their local authority alleging the authority had negligently commenced care proceedings in respect of OH on the mistaken premise that he had been caused a non-accidental injury by AD. In fact, he had brittle bone disease. The care proceedings resulted in the enforced separation of mother and child (then aged 12 months) for 4 months.

AD's claim was barred by JD v East Berkshire.

The local authority admitted that it owed OH "a duty of care to carry out its reasonable plans of child protection in a reasonable manner", but his claim failed because any harm that he had suffered was transitory and did not sound in damages as no compensation is awarded unless the evidence establishes physical harm or a recognisable psychiatric condition – apprehension, fear and discomfort are not compensatable.

In granting permission to appeal Hale LJ said "it must be arguable that harm to a child's health or development which is recognised as significant for the purposes of section 31 of the Children Act 1989 is also recognised by the law of tort".

Per Wall LJ⁹:

"Speaking for myself, I do not find Hale LJ's reference to significant harm under CA 1989 applicable to this case. The fact or likelihood of significant harm ("significant" not being defined in the Act) are, of course, the so called "threshold criteria" for the making of care orders under CA 1989 section 31(2). In its context, however, such harm is attributable to the care given to the child, or likely to be given to him *by his parents*, if a care order is not made. Such harm would not, accordingly, fall to be considered in the context of an application for damages by a child against a local authority."

That said, however, I respectfully agree with Hale LJ that on the facts of a given case, harm caused by a local authority to a child which could properly be described as significant may well be of a sufficient nature and severity to found an action in tort for damages. On the facts, however, I do not think the point arises in the instant case."

⁸ [2006] EWCA Civ 1.

⁹ At paragraphs 90-91.

5 EVIDENCE GATHERING

Disclosure under CPR, but also obtain the trial bundles etc from the care proceedings.

Rule 10.20(1) Family Proceedings Rules 1991: “Subject to rule 10.21¹⁰, a party to any family proceedings or his solicitor... may have a search made for, any may inspect and bespeak a copy of, any document filed or lodged in the court office in those proceedings.”

Looking for:

- Criticism by Guardian ad Litem in care proceedings;
- Findings by the court in care proceedings;
- Findings sought by local authority;
- Medical reports in care proceedings;
- Convictions etc.

¹⁰ Which enables addresses of private residences to be withheld in certain circumstances.

6 COMPLAINTS TO THE COMMISSION FOR LOCAL ADMINISTRATION IN ENGLAND

Set up by Local Government Act 1974.

Details of the scheme can be found at www.lgo.org.uk

(i) THE SCHEME:

Local commissioners may investigate any written complaint made by or on behalf of a member of the public who claims to have sustained injustice in consequence of maladministration in connection with action¹¹ taken by or on behalf of a local authority¹²

“Maladministration” is not defined, but would include:

- (a) Neglect;
- (b) Delay;
- (c) Incompetence;
- (d) Inadequate record keeping;
- (e) Inadequate liaison;
- (f) Broken promises.

Similarly, “injustice” is not defined, but will be treated by the local commissioner as including:

- (a) Hurt feelings, distress, worry or inconvenience;
- (b) Loss of right or amenity;
- (c) Not receiving a service;
- (d) Financial loss or unnecessary expense.

¹¹ “Action” includes a failure to act – section 34(1) Local Government Act 1974.

¹² See generally section 26(1) Local Government Act 1974.

(ii) EXCLUSION FROM CONSIDERATION:

1. Before the local commissioner will investigate, he must be satisfied that the local authority has been given a reasonable opportunity to investigate and reply to the complaint.
2. The local commissioner cannot consider a complaint if the grievance is or has been the subject of court proceedings.
3. The local commissioner cannot investigate complaints in respect of anything done before 1 April 1974¹³.
4. “A complaint shall not be entertained unless it was made to the local commissioner or a member of any authority concerned within 12 months from the day on which the person aggrieved first had notice of the matters alleged in the complaint, but a local commissioner may conduct an investigation pursuant to a complaint not made within that period if he considers that it is reasonable to do so”¹⁴
5. The local commissioner cannot conduct an investigation into any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law unless the local commissioner is satisfied that in the particular circumstances it is not reasonable to expect the person aggrieved to resort or have resorted to it.¹⁵ According to the information published by the local commissioner, they may consider investigating in the following circumstances:

- (a) Where someone was not aware of their alternative right or remedy and the council had unreasonably failed to inform them of it;
- (b) Where someone has been prevented from appealing due to ill health or through absence;
- (c) Where there is no possibility of making a late appeal and there are good reasons why the complainant did not appeal earlier;
- (d) Where it would be unreasonable to expect someone to take court proceedings because the likely cost would be disproportionate to the possible benefit.

¹³ Section 26(12) Local Government Act 1974.

¹⁴ Section 26(4) Local Government Act 1974 as amended.

¹⁵ Section 26(6)(c) Local Government Act 1974.

(iii) PROCEDURE:

The Ombudsman will set his own procedure for investigating the complaint. However, he will:

- Afford the local authority an opportunity to comment, and
- Conduct the investigation in private.

Disclosure can be required from the local authority.

(iv) REMEDIES:

The local commissioner will send a report setting out the results of his investigation and, if maladministration is found, will make recommendations as to what action the local authority should take to remedy the injustice to the person aggrieved and to prevent similar injustice being caused in the future.

There are detailed provisions setting out the position where a local authority disagrees with recommendations.

The remedy recommended can include the payment of compensation and an apology.

Guidance on determination of the appropriate remedy is published on the web site:

- The remedy will be appropriate and proportionate to the injustice. It should, as far as possible, put the complainant in the position he would have been in but for the maladministration.
- It will take into account the effects of the complainant's own actions such as failure to mitigate or pursuing complaints unreasonably
- Compensation will be considered for distress (including stress, anxiety, frustration, uncertainty, worry, inconvenience or outrage).
- Compensation can include payments for time and trouble and interest.

(v) COSTS

The local commissioner may, if he thinks fit, pay to the complainant sums in respect of expenses properly incurred by him and compensation for loss of his time¹⁶.

Guidance on recovery of professional fees in pursuing the complaint is given at paragraphs 41-44 of “Remedies – Guidance on Good Practice” published by The Commission for Local Administration in England:

“It may sometimes be appropriate to recognise that the nature of the complainant’s difficulty with the authority was such that expenditure on professional fees in pursuing the dispute was justified; for example, legal fees or fees for a planning consultant.

In all such cases, what has to be decided is whether it was reasonable for the complainant to incur these costs in the circumstances of the case, and whether they resulted from the maladministration. Factors which could be taken into account may include:

- The complexity of the case;
- The circumstances of the complainant;
- Whether the complainant is vulnerable; and
- Whether the complainant could reasonably be expected to pursue the matter without professional assistance.

Where appropriate, the recommendation may be for a contribution to costs rather than reimbursement of the whole of the expenditure. (For example, because it was reasonable to engage a solicitor, not at the outset but at a later stage, or because the amount of professional advice commissioned was disproportionate.) In respect of legal fees it may be relevant to establish whether any of the costs were paid with assistance from the Legal Services Commission.

Complainants usually do not need a solicitor or other professional adviser to help them make a complaint to the Ombudsman. So we are unlikely to recommend that fees for this purpose should be reimbursed unless there are exceptional circumstances.”

¹⁶ Section 28(3) Local Government Act 1974.

(vi) EXAMPLES OF DECISIONS:

Essex County Council (05/A/1826) & Kent County Council (05/A/4531)

JM was looked after by Essex County Council and had a statement of special educational needs. He complained about both councils following a decision to move him to a residential placement in Kent. The Ombudsman concluded that Essex had been at fault in deciding to move him to Kent when it was told there was no suitable education available, while Kent was at fault in failing to provide appropriate education while he was living there. The Ombudsman made a number of recommendations for further actions to be taken by both councils and recommended Essex County Council to pay £8,000 compensation and Kent County Council £5,000.

Staffordshire County Council (05/B/10487)

EA was now 19 years old. He was a child looked after by the council in a residential unit. In 2004, after two new residents moved in, he suffered about four months of verbal and physical bullying that left him afraid and isolated. He was assaulted, abused, and his possessions were taken. EA made several complaints to the council, but the council did not handle them properly. The Ombudsman found that there had been significant failures in following the statutory complaints process and that it had failed to take effective action to prevent bullying within the unit.

“Undoubtedly, the council let him down badly,” said the Ombudsman. “EA’s experience was the stuff of nightmares, not knowing whether someone would assault him, abuse him, take his possessions or break into his room while he was asleep. For four months he lived with this anxiety and little was done to help him. The failures in dealing with his complaints and the delay meeting with him meant that the situation persisted for longer than it should have.”

The Ombudsman found maladministration causing injustice and recommended that the council apologise to EA and pay him £3,000.