CN v Poole Borough Council

Briefing Note on the Decision of the Court of Appeal

On December 21st 2017, the Court of Appeal handed down its judgment in *CN v Poole Borough Council*. This briefing note explains this decision, which is of importance to all those involved in litigating claims in negligence against local social services authorities, and considers its implications. It is prepared jointly by Rob Hams of Wansbroughs Solicitors and Lord Edward Faulks QC and Paul Stagg of 1 Chancery Lane Chambers, London. They were instructed to act on behalf of the council by Zurich Municipal plc, the insurers of Poole Borough Council.

Factual Background

In 2006 Mrs N and her two sons CN and GN, then aged nine and seven, were living in Poole. CN suffers from severe physical and learning disability. He is totally dependent on others and requires a high level of supervision.

In May 2006, the family moved into new accommodation on a housing estate in Poole. The accommodation was arranged by the council as the local housing authority. The accommodation was rented from the Poole Housing Partnership Limited ("PHP").

Over the ensuing years, the family suffered from the effects of anti-social behaviour at the hands of members of a neighbouring family. This behaviour was frequently reported to officers of the council, local police and to PHP. The family viewed the response of the various agencies as inadequate, and made complaints about the lack of response and involved local politicians. Eventually, the Home Office became involved and commissioned an independent case review carried out by Mr Trevor Kennett, whose report in March 2010 was critical of the reaction of the agencies. The family continued to suffer from the behaviour of their neighbours until they were finally provided with alternative accommodation in December 2011.

The Litigation

A claim was initially commenced on behalf of all three members of the family in December 2012. The claim was brought against the council, the police and PHP. It was alleged that the defendants were liable under the Human Rights Act 1998 for breach of Articles 3 and 8 of the European Convention on Human Rights and in negligence. It was said that all three defendants had individually and collectively failed to take appropriate and necessary steps to safeguard the Claimant and her family from the perpetrators of abuse and anti-social behaviour.

Having served the Claim Form, no Particulars of Claim were forthcoming. In August 2013, an application was issued by the claimants' solicitors for an extension of time for service of their statement of case. In December 2013, that application was dismissed by Master Fontaine, and the claim was also dismissed with costs.

In December 2014, a second set of proceedings was commenced on behalf of the family. The council was the sole defendant. The claim was based solely in negligence. The primary allegation was, once again, that the claimants alleged they had suffered personal injury and other losses as a result of the council's failure to take appropriate and necessary steps to re-house them or otherwise safeguard them from the prolonged anti-social behaviour. A second claim was also advanced, on behalf of the sons alone, to the effect that the council had failed to comply with its duties under the Children Act 1989 to safeguard them and promote their welfare.

The council applied to strike out the second claim as disclosing no cause of action. The application was heard by Master Eastman in October 2015. He held that there was no basis to hold that a local authority, whether in its guise as local housing authority or the authority with powers to tackle anti-social behaviour in the area, owed a duty of care in respect of those functions. In relation to the alternative claim advanced on behalf of the sons, he stated that "I am not satisfied that there is any foundation in law for the assertion that there is in fact the common law duty in favour of children provided by that Act particularly in the circumstances of this case". He therefore struck out the claim in its entirety.

An appeal was then mounted on behalf of the sons alone, in respect only of the dismissal of the claim in respect of the council's social services functions. The Appellant's Notice complained that, in striking out the claim based on those functions, the Master had failed to have regard to binding authority, in particular the decision of the Court of Appeal in *JD v East Berkshire NHS Community Trust*, which established that a duty of care could be owed in

respect of the council's failure to remove the sons from the harm that they were suffering at the property where they lived with their mother.

The appeal was heard by Slade J in February 2016. Leading counsel for CN and GN argued that a line of authorities, culminating in *JD*, demonstrated that it was well established that vulnerable children were owed a duty of care by local social services authorities, and that whether or not that duty of care had been breached in this particular case was a matter for investigation with expert evidence at trial, and not suitable for summary disposal. It was submitted on behalf of the council that more recent decisions of the House of Lords and the Supreme Court were inconsistent with *JD*, which should be taken as having been impliedly overruled. Alternatively, the claim was not in reality a claim impugning the failure of social workers to remove the claimants from their mother's care at all. The claimants' real complaint was that the whole family had not been rehoused together, and there had been no appeal from the dismissal of their primary case.

In her judgment, Slade J acceded to the submissions of the claimants. She did not accept that the authority of *JD* had been undermined by the subsequent decisions cited to her. She accordingly concluded that the sons' claims based on the council's social services functions had been wrongly struck out by Master Eastman, and set aside that part of his order. She also gave permission to CN and GN to file and serve Amended Particulars of Claim and made an anonymity order in respect of them.

The Amended Particulars of Claim, when served, clarified the claims of CN and GN as restored by Slade J. The allegations of fault were as set out in paragraph 6.2 as follows:

In the light of this information, the Defendant:

(a) Failed to assess the ability of the Claimants' mother to protect her children from the level of abuse and violence they were subjected to. The Defendant did not carry out any timely or competent risk assessment and such assessments as were carried out were flawed and delayed ....

(b) Failed to assess that the Claimants' mother's ability to protect the Claimants from abuse .... Further failed to assess that the mother was unable to meet the Claimants needs whilst she lived .... with them.

Causation was pleaded as follows in paragraph 6.3:

On the balance of probabilities competent investigation at any stage would have led to the removal of the Claimants from home. A child in need assessment should with competent care have been carried out in respect of each Claimant by September 2006 at the latest. By September 2006 no competent local authority would have failed to carry out a detailed assessment and on the balance of probabilities such detailed assessment if carried out competently would and should have led to the conclusion that each of the Claimants required removal from home if the family as a whole could not be moved. With the information obtained by competent assessment in September 2006 on application to the Court the Defendant would have obtained at least respite care and if necessary by interim care orders in respect of each Claimant. Any competent local authority should and would have arranged for their removal from home into at least temporary care.

The council was refused permission to appeal to the Court of Appeal by Slade J, but was subsequently granted permission by Christopher Clarke LJ on paper. He observed that "the question whether *JD* .... remains good law is one of considerable public importance justifying a second appeal".

A Summary of the Existing Case Law

In *X v Bedfordshire CC*, the House of Lords struck out claims brought on behalf of children who had not been removed from the care of parents who subjected them to neglect and abuse. The reasoning of Lord Browne-Wilkinson, who gave the lead judgment, was subsequently summarised by the Court of Appeal in *S v Gloucestershire CC* as follows:

> *(1) A common law duty of care would cut across the whole statutory system set up for the protection of children at risk. This is inter-disciplinary, involving the participation of the police, educational bodies, doctors and others. It would be almost impossible to disentangle the respective liability of each for reaching a decision found to be negligent. (2) The task of the local authority and its servants in dealing with children at risk is extraordinarily delicate. (3) If there were potential liability for damages, it might well mean that local authorities would adopt a more cautious and defensive approach to their duties. (4) The relationship between the social worker and the child's parents is often one of conflict. This would be likely to breed ill feeling and often hopeless litigation which would divert money and resources away from the performance of the social service for which they were provided. (5) There were other remedies for maladministration of the statutory system for the protection of children in statutory complaints procedures and the power of the local authorities ombudsman to investigate cases. (6) The development of novel categories of negligence should proceed incrementally and by analogy with decided categories. There were no close such analogies. The court should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrong doings of others.*

Subsequent developments, however, restricted the scope of the judgment reached by the House of Lords. First, in *Barrett v Enfield LBC*, the House of Lords reinstated a claim brought by a young man who had been taken into care when he was very young. He alleged that decisions about his upbringing had been made negligently by social workers, which caused him permanent and lasting damage. The claim was struck out by the Court of Appeal, but Lord Slynn, giving the leading judgment in the House of Lords, upheld the claimant's appeal. In relation to Lord Browne-Wilkinson's reasons justifying the decision in *X v Bedfordshire*, he stated:

> *.... it does not seem to me that they necessarily have the same force separately or cumulatively in the present case. Thus, although once a child is in care, there may well be co-operation between different social welfare bodies, the responsibility is that of the local authority and its social and other professional staff. The decision to remove the child from its home is already taken and the authority has statutory powers in relation to the child which do not necessarily involve the exercise of the kind of discretion involved in taking a child from its family into care.*

In *S v Gloucestershire CC*, the Court of Appeal concluded that, in principle, children in care could sue in respect of negligent decisions taken as to who should be their foster carers.

The cases mentioned above all pre-date the coming into force of the Human Rights Act 1998. The Strasbourg court had held in *Z v UK*, on an application made by the claimants in *X v Bedfordshire CC*, that the UK had breached Article 3 of the Convention by failing to take reasonable steps to safeguard them from harm. Similar conclusions had been reached in other cases brought under Articles 3 and 8.

In *JD v East Berkshire NHS Community Trust*, the Court of Appeal considered the continuing authority of *X v Bedfordshire CC* in considering claims by children and parents complaining of the removal of children from their parents' care. The court stated that the "core proposition" from *X v Bedfordshire CC*, following the subsequent cases, was that "decisions by local authorities whether or not to take a child into care were not reviewable by way of a claim in negligence". It held that the policy considerations relied on by the House of Lords had been discredited in subsequent decisions and, in any event, had been robbed of force by the fact that a claim was now available under the 1998 Act for damages for breach of Articles 3 and 8. *X v Bedfordshire CC* should, therefore, no longer be applied.

Subsequently, however, the notion that the 1998 Act could extend the circumstances in which a common law duty of care was owed was questioned in further decisions. In *Smith v Chief Constable of Sussex*, the majority rejected an attempt to utilise such an argument to overturn the long-standing principle that the police owe no duty of care to victims of crime. Seven years later, that

conclusion was affirmed in *Michael v Chief Constable of South Wales Police*. In that case, the relatives of a woman murdered by a former partner sued in respect of alleged failings by the police in dealing with her pleas for help. The claim was advanced both under Article 2 of the Convention and in negligence. In relation to the negligence claim, it was said that previous decisions, including *Hill v Chief Constable of West Yorkshire Police* and *Smith*, should be departed from, due to the availability of a claim under Article 2 and because victims of domestic violence deserved the protection of the common law.

The outcome of the appeal to the Supreme Court was that the Article 2 claim was permitted to proceed, but the negligence claim was struck out. Lord Toulson, delivering a judgment in which five of the seven judges concurred, cited established principles that a duty of care is not normally owed to protect a person from the actions of a third party, and that the law does not normally impose liability in negligence in respect of omissions to act. Those principles were as applicable to public authorities as to other defendants; to state that a public authority owed no duty in such circumstances was not to confer an "immunity" on it but merely to apply the same rules as would be applicable to any other defendant.

> *113. Besides the provision of such services, which are not peculiarly governmental in their nature, it is a feature of our system of government that many areas of life are subject to forms of state controlled licensing, regulation, inspection, intervention and assistance aimed at protecting the general public from physical or economic harm caused by the activities of other members of society (or sometimes from natural disasters). Licensing of firearms, regulation of financial services, inspections of restaurants, factories and children's nurseries, and enforcement of building regulations are random examples. To compile a comprehensive list would be virtually impossible, because the systems designed to protect the public from harm of one kind or another are so extensive.*
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> *114. It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not*

responsible. To impose such a burden would be contrary to the ordinary principles of the common law.

115 The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public. ....

116 The question is therefore not whether the police should have a special immunity, but whether an exception should be made to the ordinary application of common law principles which would cover the facts of the present case.

He went on to reject the notion that the law of negligence should mirror Convention rights:

125. .... The suggested development of the law of negligence is not necessary to comply with articles 2 and 3. On orthodox common law principles I cannot see a legal basis for fashioning a duty of care limited in scope to that of articles 2 and 3, or for gold plating the claimant's Convention rights by providing compensation on a different basis from the claim under the Human Rights Act 1998. Nor do I see a principled legal basis for introducing a wider duty in negligence than would arise either under orthodox common law principles or under the Convention.

....

127. .... Whereas civil actions are designed essentially to compensate claimants for losses, Convention claims are intended to uphold minimum human rights standards and to vindicate those rights. The difference in purpose has led to different time limits and different approaches to damages and causation. Lord Brown recognised that the violation of a fundamental right is a very serious thing, but he saw no sound reason for matching the Convention claim with a common law claim. To do so would in his view neither add to the vindication of the right, nor be likely to deter the police from the action or inaction which risked violating it in the first place.

....

130. .... By introducing the Human Rights Act 1998 a cause of action has been created in the limited circumstances where the police have acted in breach of articles 2 and 3 (or article 8). There are good reasons why the positive obligations of the state under those articles are limited. The creation of such a statutory cause of action does not itself provide a sufficient reason for the common law to duplicate or extend it.

The Decision of the Court of Appeal in CN

The Court of Appeal, comprised of Davis, Irwin and King LJJ, unanimously allowed the defendant's appeal. The main judgment was given by Irwin LJ. After considering the nature of the pleaded claim (paragraphs 6-8) and summarising the decisions below (paragraphs 9-25), he summarised the submissions of the parties (paragraphs 26-39). He accepted the defendant's submission that "the heart of the claim is that this family were placed in the relevant house, and not moved, despite the prospect and then the actuality of significant harassment" (paragraph 41). He described the proposition that the claimants should have been removed from their mother's care as a means of dealing with such harassment as "rather startling" and "highly artificial" (paragraph 41) and noted that the failure of the claims in respect of housing and anti-social behaviour functions meant that "the claim has been re-cast" (paragraph 42).

Having considered the decision in *X v Bedfordshire CC*, Irwin LJ suggested that as claims based on the "central responsibilities" of social workers had failed in that case, the answer would have been clearer still in the present case, where the risk arose not within the family setting but as a result of a housing placement, because the danger of conflict and damage to relationships was all the greater (paragraph 50).

As to *JD*, it was the argument based upon the 1998 Act that "turned the scale" (paragraph 54). After quoting from the decision, he stated (paragraph 55):

> *55. .... it is important to keep in mind the nature of the impugned decision in D v East Berkshire. The Court was considering the decision whether to leave a child in a family where abuse was in question. For the purposes of such a decision there exists no true "third" party, in the usual sense. The actual or potential wrongdoing by those who would*

retain (or gain) custody of a child is central to the decision being taken. It is the mainspring of the relevant decision. That is a significant distinction from the current case.

Irwin LJ then went on to consider previous case law, including the Court of Session and House of Lords decisions in *Mitchell v Glasgow CC* and the Supreme Court decision in *Michael* (paragraphs 57-92). He concluded that two particular aspects of the case law militated against liability; the danger of encouraging defensive decision-making and the general absence of liability for the wrong-doing of others (paragraph 94). It would be unjust for a potential liability to exist on the part of the local social services authority when the housing department of the same local authority, the landlord and the police could not be held liable (paragraphs 95-98):

98. .... I accept .... that society places a high emphasis on protecting vulnerable people, particularly vulnerable children. However, the essence of the common law answer to this problem is that it is not effective, or just, to do so by singling out one agency of the State for tortious liability as against the others, particularly in a crude "sectoral" manner.

He went on to conclude that *JD* was indeed inconsistent with the subsequent decisions of higher authority and should no longer be followed (paragraphs 99-101). He confirmed that there was no basis to conclude that there was an assumption of responsibility on the part of the council (paragraphs 102-103). In conclusion, he acceded also to the defendant's alternative argument that, in reality, the claim had nothing to do with its social services functions but was "in fact a criticism of the housing functions of the local authority" (paragraph 104).

King and Davis LJ both agreed with Irwin LJ that *JD* could not stand with the subsequent decisions at higher levels and had to be taken as overruled (paragraphs 106, 114). They delivered short concurring judgments. King LJ,

with the benefit of vast experience of the family courts, was critical of the notion that such courts would grant a care order on the application of a local authority in the circumstances of the case. She pointed out the high threshold for the making of a care order (paragraphs 110-112) and that even where the threshold is met, the court would only sanction removal from a parent if it was clearly required by the child's safety (paragraph 112). To bring such proceedings would have been "legally unsustainable" (paragraph 113). For his part, Davis LJ described the claim as presented to the Court of Appeal as "most disconcerting" (paragraph 116) and suggested that care proceedings purportedly to protect the sons by removing them from the mother would have been "utterly heartless" and "utterly wrong" (paragraph 118).

The appeal was therefore allowed on a unanimous basis, and subject to the possibility of the claimants being given permission to the Supreme Court (which has been sought from the Court of Appeal), the proceedings have now been struck out.

The Implications of the Decision

The first question for consideration is where this leaves claims which, in the *lingua franca* of those practising in the field, are termed 'failure to remove' cases. It will be apparent that the facts in *CN* are not those of a conventional case of that type. Typically, the allegations in such cases are that the claimant's parents or guardians were subjecting him or her to sexual, physical or psychological abuse or neglect of which social workers were or should have been aware, and that insufficient action was taken to take them into care. In *CN*, of course, the threat came not from within the household but from outside it.

It is on that ground that Irwin LJ pointed out the distinction between the facts of *CN* and those in *JD* (paragraph 55). It is suggested, however, that it is not possible simply to distinguish the 'typical' failure to remove case from *CN* on the facts, for at least two reasons. The narrower, legalistic reason is that each of the judges in *CN* expressly stated that *JD* was inconsistent with higher authority and should no longer be followed. Although it has been consistently assumed by those practising in the field and in the case law in the fourteen years since *JD* was decided that *X v Bedfordshire CC* was no longer good law, the decision in *CN* demonstrates how that assumption can no longer be justified. *X v Bedfordshire CC* has been restored as a governing authority which establishes that no duty of care is owed by the local authority, at least in the making of decisions as to whether care proceedings should be commenced.

Another reason is that there is, in reality, no clear factual distinction between *CN* and other 'failure to remove' cases. They can be seen as a continuum; at one end is the case of the abusive parent and at the other is the situation in *CN*, where the parent is perfectly able to provide adequate care for the child in an appropriate home but is unable to do so due to the behaviour of third parties unconnected with the family or environmental factors. In between these are cases where the threat to the child comes not from a member of the household but from a non-resident family member or a partner, however fleeting, or a friend of a parent with care. As a matter of legal principle, the policy justifications for holding that it is not fair, just and reasonable that a duty of care should be owed, as reiterated by Irwin LJ, retain their strength.

The second issue is whether a 'failure to remove' claim could nevertheless succeed by focusing on other parts of the process into investigating and

dealing with child abuse. For example, could it be said that there was a failure to investigate an allegation of abuse, and that had an investigation been carried out competently, care proceedings would have been the result and that they would have succeeded? It is suggested that such an approach suffers from the same sort of artificiality as was criticised in *CN*, and that furthermore it was recognised in *JD* that the "core principle" in *X v Bedfordshire CC* extended beyond the decision as to whether care proceedings should be brought; it applied to "the investigation of suspected child abuse and the initiation and pursuit of care proceedings" (paragraph 84).

Thus, following *CN*, no duty of care can be owed by a local social services authority in the exercise of its child protection functions to investigate and take action to prevent significant harm to children, whatever its source.

The third question for consideration is where this leaves cases of 'in-care' abuse and neglect. The recent Supreme Court decision in *Armes v Nottinghamshire CC* will remove the need to prove negligence on the part of the local authority in any case where abuse and neglect is perpetrated by local authority foster carers, since the local authority will be vicariously liable for torts committed by the foster carers. In any case, it was no part of the council's argument in *CN* that cases such as *Barrett* and *S v Gloucestershire CC* were wrongly decided. *Barrett*, for all the woolly nature of its reasoning, remains good law for the time being. That said, it is suggested that the basis of liability in these cases deserves re-examination by the higher courts in light of the ground-breaking analysis by Lord Toulson in *Michael*. The House of Lords in *Barrett* was clearly influenced, whether the members of the court admitted it (Lord Browne-Wilkinson) or not, by the spectre of the possibility of the Strasbourg court finding that for it to strike the claim out would be an

infringement of Article 6 of the Convention (a heresy recanted two years later in its decision in *Z v UK*). The only true analogy with non-public sector liability available in such a case, where the local authority has taken on the role of a statutory parent, is that of a parent to his or her own child. At least one of the judges in *Barrett*, Lord Hutton, denied the validity of such an analogy, noting that the courts have been reluctant to impose liability on parents towards children: see eg *Surtees v Richmond-upon-Thames LBC*, *XA v YA*. It is highly arguable that the logic of Lord Toulson's analysis in *Michael* would be held to apply to 'in-care' cases as well as 'failure to remove' cases.

For so long as 'failure to remove' and 'in-care' claims fall to be treated differently, a further question that arises is the treatment of cases where claimants have been accommodated with the agreement of parents pursuant to section 20 of the Children Act 1989. The degree of control which a local authority has over a child's life in such cases is significantly different from cases where a care order is in place, not least because parents have the right to terminate such agreements at any time. It is likely that careful consideration would have to be given to the facts of a particular case and whether the error or errors giving rise to the child's injury can be said to arise from matters within the ambit of the local authority's control.

Finally, whilst this is a decision of considerable legal significance, it must not be forgotten that underlying it is a human tragedy with deeply concerning circumstances. It should be borne in mind that children who have suffered abuse or neglect by not being taken into care still have a range of remedies open to them. Claims under Articles 3 and 8 of the Convention may be available under the 1998 Act. Some perpetrators of abuse do have assets that make them worth pursuing. If the child has suffered a "crime of violence", a

CICA claim can be made. More general cases of maladministration by a local authority can be investigated by the Local Government Ombudsman, and a recommendation made that compensation should be paid. The effect of the Court of Appeal's ruling will not, therefore, leave aggrieved individuals who have suffered abuse or neglect in childhood wholly without any recourse.

You can read the full judgment here:
http://1chancerylane.com/download/Njcx