

Is this the end of Failure to Remove claims against Social Workers?

Published 15 November 2021

Failure to remove cases are those where a Claimant seeks compensation for an alleged failure by Social Services to remove them from a harmful environment. The recent appeal decisions affirming the strike outs in *HXA v Surrey County Council* and *YXA v Wolverhampton City Council* ('HXA' and 'YXA'), confirm that Social Services professionals will be liable for a claim for compensation only if they become involved in a case and actively make the situation worse for the child in care. They will not be liable if they fail to act, unless the situation falls into one of a theoretical and vanishingly small number of exceptions. Mrs Justice Stacey in deciding the appeals observed:

'It is now well established that there is no duty of care owed in relation to child protection functions generally...'

This represents an almost complete change of the law over the past few years. This article looks at how this leaves the law, and when a claim for compensation could be brought.

Background

Three Supreme Court decisions have caused this change. *Michael v Chief Constable of South Wales* [2015], *Robinson v Chief Constable of West Yorkshire* [2018] and *CN v Poole Borough Council* [2020]. Between them they established that:

- a) Social Services (along with any private individual, or public or private body), should not cause harm to an individual in any given situation by the way they act, however;
- b) There is no duty on them to take action to protect an individual, unless one of the relevant exceptions apply, which in relation to Social Services are that they have
 - i) accepted responsibility for the child, or
 - ii) taken steps to prevent another person from protecting the child, or
 - iii) a special level of control over the source of the danger.

HXA and YXA

HXA and YXA applied these principles in the context of a strike out application, and at both first instance and on appeal, it was found that there was no sufficient evidence to allow the cases to continue.

In HXA, the Claimant came to the attention of the local authority repeatedly over concerns that she was being harshly disciplined and neglected by her mother from 1994. There were a number of investigations under various provisions of the Children Act. She was placed on the Child Protection Register, but only in 2007 was an Emergency Protection Order obtained, leading to a Care Order, giving the local authority's Parental Responsibility for the Claimant. It was alleged that the Care Order should have been obtained earlier.

In YXA, it was a similar sad tale of abuse and neglect, this time from 2007. YXA was taken into care on a regular basis, under Section 20 Children Act, but always returned to his parents. However, the abuse continued. The local authority obtained a final Care Order in March 2011.

Both claims were that Care Orders should have been obtained earlier. Stacey J decided that failing to do something in time is a failure to act, so there could be no duty subject to the possible exceptions set out above.

Therefore, the Court went on to consider if the case fell in the exception at point b.1, namely that there had been an assumption of responsibility. The Court noted that the following situations, according to the latest judgments, did not amount to an assumption of responsibility giving rise to a general duty to protect the child:

- Investigation and monitoring a child's position
- Exercising a general duty under Section 17 Children Act
- Placing a child on the Child Protection register or investigation under Section 47 Children Act
- Deciding to seek legal advice and undertaking a full assessment
- Deciding to undertake 'keeping safe' work
- Providing temporary accommodation under Section 20 Children Act

Discussion

For those not familiar with the technicalities of the child welfare regime, the bullet point list above covers just about every option available to Social Workers, bar the last resort of obtaining a Care Order. Indeed, the cases suggest in fact that the only situation in which an assumption *may* arguably arise is when Social Services *do* obtain a full Care Order, and take over parental responsibility for the child.

What is also remarkable is that the Courts are saying that any delay or failure to proceed to the obtaining of the ultimate safe guarding device of a Care Order is a failure to act. For example, in *HXA*, the local authority resolved to do 'safekeeping work' before applying for the Care Order, but failed to do the 'safekeeping work'. The court found that this was a failure to act, and even though it delayed the Claimant being taken into care, it did not give rise to a duty. Practically, so long as social workers do not make a bad situation worse, there can be no claim even if they ignore an obvious way to help a child.

In our view, the Courts are also clear that although providing accommodation under Section 20 does entail a duty to ensure that the accommodation provided is safe and appropriate during that period of accommodation, it does not give rise to any wider duty to assess the safety on returning the child to the parent after that, as parental responsibility remains with the parents. Again, a Care Order is the way to safeguard and a failure to obtain that or delay in doing so is to be regarded as a failure to act. We have no doubt that Claimants will seek to distinguish from recent decisions by relying on a longer period in Section 20 care and/or that the local authority did not properly assess the risk of returning the child. This would miss the point of the decisions, namely that such examples still amount to a failure to act and are not an assumption of responsibility.

Further, even the obtaining of a Care Order is not conclusive that a duty of care will automatically exist. *Barrett v Enfield* [2001] has long been put forward as authority for that. However Mrs Justice Stacey made clear that that was simply a case of causing harm by the way the authority acted, and in line with *Michael/Robinson/Poole*.

The future

We predict that

- Claims for assumption of responsibility will become rare as the factual basis to allow an assumption is rare. So, for example, if a child calls social services and says that they are about to be attacked and is told to stay put for their own safety because someone is on their way to help, but that person does not arrive and the child is harmed, then that could amount to an assumption.
- Claims will concentrate on trying to show that actions by Social Services staff made a situation worse, but will struggle to succeed as the factual situation needed to succeed is relatively extreme. Focussing the claim on alleged failings after a Care Order has been made should make a claim easier - a possible example could be moving a child to a harmful environment *after* a Care Order has been obtained.
- Leaves to Appeal will dry up - the Courts have made repeatedly clear that they regard this area of law as settled, meaning that the scope for further change is limited, despite what others may predict.
- Claims will be made under the Human Rights Act, for failure to prevent harm, but to succeed a Claimant will have to show that the local authority was on notice of a 'real and immediate risk of harm', and this does not cover a future risk of harm. Alternatively, they will have to show that the local authority's investigations failed in such a way as to be serious and egregious. That is a higher bar than want of reasonable care. More generally, the hurdles for a Claimant are high, and we query the extent to which the Courts will allow a large body of divergent Human Rights Act case law separate to negligence law to develop.
- Cases will seek to explore the other exceptions (see 'Background b) ii), iii) above), but the upcoming decision of the Court of Appeal in *Tindall v Chief Constable of Thames Valley Police* (in which David Knapp of this firm acts for the Chief Constable) should provide authoritative Court of Appeal guidance for wider claims brought against the public sector, so we will provide further guidance when that judgment is released.

For more information or advice, please contact one of our experts in our [specialist liability team](#).

Authors



Tom Walshaw

London - Walbrook
+44(0)20 7894 6245
twalshaw@dacbeachcroft.com



Andrea Ward

Newcastle
+44(0)191 404 4147
ahward@dacbeachcroft.com

