

Children's right to sue for social workers negligence: the impact of the Human Rights Act 1998

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Abstract

In *D & Others v East Berkshire Community Health & Others* and *JD (FC) v East Berkshire Community Health NHS Trust & Others* the English judiciary held that children wrongly diagnosed as having been abused or mistakenly taken into care can now sue the social workers responsible. Lord Phillips ruled that the House of Lords ruling in 1995 which barred claims against social workers in child abuse cases could not survive the Human Rights Act 1998. In this article I will examine the development of the law in this area and the implications of this recent landmark decision for children who have suffered as a result of local authority negligence and their parents.

Keywords

Local authorities, negligence, vicarious liability, Human Rights Act 1998

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Introduction

In *D & Others v East Berkshire Community Health & Others* [2003] EWCA Civ 1151; [2003] All ER (D) 547 (Jul) the English Court of Appeal lifted the established immunity enjoyed by health and social work professionals in child abuse cases. Lord Phillips held that it was no longer legitimate to rule that there was no duty of care owed to a child over child abuse investigations or care proceedings. The court ruled that the Human Rights Act 1998 superseded the previous House of Lords ruling in *X (A Minor) v Bedfordshire County Council and Others* [1995] 2 AC 633, [1995] 3 All ER 353 (HL), which barred claims against social workers in child abuse cases. Therefore children wrongly diagnosed as abused or mistakenly taken into care can now sue the social workers responsible. This decision was approved by the House of Lords in *JD (FC) v East Berkshire Community Health NHS Trust and others* [2005] UKHL 23 in which the House of Lords confirmed that while child care professionals may owe a duty of care to children, no such duty was owed to parents suspected of abuse.

D & Others v East Berkshire Community Health & Others and *JD (FC) v East Berkshire Community Health NHS Trust and others* represent a profound change in the right of children to seek redress where social workers' have been negligent in respect of their child protection duties. This article will examine whether English children can now hold local authorities accountable where the authority has failed to adequately discharge their child protection duties and consequently caused harm or suffering to children. I will examine how the Human Rights Act 1998, and the jurisprudence of the European Court of Human Rights, has impacted upon the

development of children's rights in this area from *X v Bedfordshire County Council* to *D & Others v East Berkshire Community Health & Others*. I will assess the effect of the Human Rights Act 1998 in restricting social workers' immunity; and I will consider the impact of *D & Others v East Berkshire Community Health & Others* and *JD (FC) v East Berkshire Community Health NHS Trust and others* for children, and their parents, who have been harmed by social workers negligence.

Liability of local authorities: *X (A Minor) v Bedfordshire County Council*

The House of Lords in *X (A Minor) v Bedfordshire County Council and Others* [1995] 2 AC 633, [1995] 3 All ER 353 (HL) clarified the scope of the private law remedy of an action for damages for breach of duty in the context of alleged failures by a local authority in connection with their child protection duties. This case concerned a local authority which failed to take appropriate action to protect the five child plaintiff's against parental neglect and the risk of abuse. The local authority had received reports from relatives, neighbours, the police, the family's general practitioner, a head teacher, the NSPCC, a social worker and a health visitor that if the plaintiff children continued living with their parents they would be at risk of abuse, including sexual abuse, that their living conditions were appalling and that the children were hungry and dirty. Despite these reports the defendant local authority took little or no action with regard to the children from 1987 until 1992, when it finally decided to seek care orders in respect of them. In 1993 the children brought an action against the local authority claiming damages for breach of statutory duty and negligence. They claimed that the authority had failed to have regard to their welfare and that its failure to do so had caused them to suffer ill-treatment, illness, impairment of their health and poor development.

Bedfordshire County Council conceded that there was a relationship of proximity between themselves and the plaintiffs, and that the damage suffered by the plaintiffs was foreseeable. Nevertheless the House of Lords held that public policy considerations negated the imposition of a duty of care. Lord Browne Wilkinson identified five such considerations,¹ namely:

- a) the interdisciplinary nature of the child protection system and the consequent difficulties of allocating responsibility between agencies;*
- b) the delicacy of the authority's task in dealing with children at risk;*
- c) the risk of local authority's adopting a cautious and defensive attitude through fear of liability;*
- d) potential conflict between parents and social workers could generate ill-feeling and litigation;*
- e) the existence of alternative remedies.*

Lord Browne Wilkinson considered that professional standards are likely to suffer in the face of potential litigation. Fear of litigation could lead those fulfilling the duties imposed by the relevant legislation to discharge their obligations in a detrimentally defensive frame of mind, consequently the local authority might put children at risk by making extended inquiries to obtain concrete facts. The House of Lords also found that the duty imposed upon the local authority in relation to the welfare of children was so general and unspecific that it conferred a wide scope to exercise subjective judgment. Lord Browne Wilkinson insisted that where a public authority enjoyed such a statutory discretion it was for that body and not the courts to exercise the discretion. Therefore nothing which the body did within the ambit of its discretion could give rise to an action at common law. The plaintiffs, in seeking to show that the authority acted outside its discretion, would have to prove that it acted manifestly unreasonably so that its actions fell entirely outside the ambit of statutory discretion.² Their Lordships therefore concluded that a child has no cause of action for harm arising from: (a) an

¹ at p. 749

² at 736, 749, 761

alleged failure of a local authority to comply with its statutory duties under children's welfare legislation; (b) careless performance of a statutory duty by an authority; (c) negligence in respect of alleged failure; and (d) actions or decisions where a common law duty of care might arise, if they came within the ambit of a statutory discretion.

It is clear from the majority judgment given by Lord Hoffmann in *Stovin v Wise* [1996] 3 All ER 801 that the courts in England and Wales were inherently very reluctant to impose a duty of care on a public body in the context of a claim concerning failure to exercise a statutory power. Lord Hoffmann expressed the view that the fact that Parliament has conferred a discretion must be some indication that the policy of the Act in question was not to create a right to compensation. Two minimum conditions for basing a duty of care on the exercise of a statutory power in respect of an omission to exercise the power, were laid down: (1) it must have been irrational for the authority not to have exercised the power, so that there was in effect a public law duty to act; and (2) there must be exceptional grounds for holding that the policy of the statute conferred the right to compensation on those who suffered loss if the power was not exercised. The doctrine of general reliance developed in the Australian High Court by Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424³ was accepted in limited circumstances by Lord Hoffmann. This doctrine, as propounded by Mason J, is based on the idea that the legislature may well have conferred powers on a public body in relation to matters which were of such complexity or magnitude that individuals could not be expected to take adequate steps for their own protection. Such a situation generates a general expectation on the part of the individual that the power would be exercised, and a realisation on the part of the public authority that there would be general reliance on the exercise of that power.

³ at 464

Lord Hoffmann held, in *Stovin*, that it was essential to this doctrine that the benefit or service provided under statutory powers should be of a uniform and routine nature, so that one could describe exactly what the public authority was supposed to do.⁴ Thus if a service was provided as routine, it would be irrational for a public authority to provide it in one case and arbitrarily withhold it in another.

These cases underline the aversion of the judiciary in England and Wales to imposing liability on public authorities. *X v Bedfordshire* clearly established that a decision by a local authority whether or not to take a child into care, with all the difficult aspects that such a decision involves and all the disruptions which may come about, is not a decision which the courts will review by way of a claim for damages in negligence, though there may be other public law remedies such as judicial review. In *X v Bedfordshire* the House of Lords also confirmed that an action for vicarious liability would be ‘inappropriate’ as it could adversely affect the local authority, and social workers in the employment of the local authority. This view was also unequivocally expressed in *M v Newham London Borough Council* [1995] 2 AC 633, [1995] 3 All ER 353, HL, in which the House of Lords refused to impose a common law duty of care upon the local authority for the alleged negligence of its servants. In *Newham* the child, who had been sexually abused, was unnecessarily removed from her mother’s care because a psychiatrist and social worker failed to take an accurate case history from the child’s mother. The child and the mother alleged that the defendant’s failed to investigate the facts with proper care and thoroughness or to discuss them with the mother and in so doing were in breach of their duty to safeguard the welfare of the child. The House of Lords held that the local authority was not vicariously liable for the actions of the social workers and psychiatrists whom it

⁴ [1996] AC 923, 953-955

instructed. Since the function of social workers and psychiatrists was to advise the authority rather than the children, they did not assume any general professional duty of care towards the children. Moreover the investigations carried out by the psychiatrist had an immediate link with possible care proceedings brought in pursuance of a statutory duty, and accordingly the psychiatrist was entitled to the immunity from suit accorded to witnesses and potential witnesses.⁵ These cases mark a decisive rejection of the use of vicarious liability to question a local authority's decision in the child care field.

The House of Lords judgments in *X v Bedfordshire County Council* and *M v Newham London Borough Council* were influential judgments which resonated with judiciaries around the world. In particular, the House of Lords judgments influenced the Australian judiciary in the cases of *Hillman v Black* (1996) 67 SASR 490 and *Sullivan v Moody* [2002] HCA. In both these cases the social workers, and medical practitioners, were alleged to have acted negligently in examining the appellants' children and investigating the possibility of sexual abuse. No criminal charges were laid against the appellants, but the allegations of sexual abuse resulted in the breakdown of the appellants' marriages. In *Hillman v Black*, Matheson J in the Supreme Court of South Australia was strongly influenced by the decision of the House of Lords in *X v Bedfordshire County Council*. Matheson J believed that if liability in damages were imposed local authorities would adopt a more cautious and defensive approach to their duties (at p750). Likewise in *Sullivan v Moody* Doyle CJ in the High Court of Australia was strongly influenced by the reasoning of Lord Browne-Wilkinson in *X v Bedfordshire County Council*. The jurisprudence of the United States is also adverse to the imposition of liability on public authorities. The

⁵ per *Evans v London Medical College* [1981] 1 All ER 715

Federal Constitution of the United States does not place an affirmative obligation on the government to protect or provide for children, although a number of state constitutions place affirmative burdens on states to provide for indigent citizens. The position of the Federal Constitution was reaffirmed by the United States Supreme Court in the tragic case of 4 year old Joshua De Shaney, who was brutally beaten by his father.⁶ Joshua DeShaney and his mother brought a claim against social workers and other officials who failed to protect Joshua, despite suspecting that Joshua's father was abusing him. In dismissing the action the Supreme Court explained that the Constitution is:

“phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security ... Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.”⁷

The Supreme Court concluded that no constitutional right is infringed when a state fails to protect a child from harm inflicted by a private citizen. More recently in *S.S. ex rel. Jervis v McMullen* (225F. 3d 960 (8th Circuit 2000)(en banc) cert. Denied, 121 S. Ct. 1227 (2001)) the United States Court of Appeals for the Eight Circuit applied *DeShaney* and thus confirmed the Federal Court's steadfast determination not to recognise torts brought by aggrieved children. The *McMullen* court noted the public policy mandating that children remain with, or be returned to, their natural parents, if to do so is in the best interest of the child. The court recognised that the conflict between this policy and the inherent charge of such agencies to combat the scourge of child abuse too often presents underpaid and overworked case workers with an impossible choice. It would therefore wreak havoc on a troubled child welfare system

⁶ *DeShaney v Winnebago County Dept. of Social Services* (1989) 489 US 189, 103 L ed 2d 149, 109 S Ct 998

⁷ *Ibid.* p.195-196

to declare open season on its employees by reducing the standard for incurring liability for mistakes in judgment.⁸

In summary, the case law examined thus far has accorded tortious liability little scope and effectively grants local authorities an immunity from suit. Carelessness in investigating abuse or imprudent decisions about whether or not to take a child into care are not issues which the courts will review by way of a claim for damages in negligence or vicarious liability. Therefore for children who have suffered harm as a result of a local authority's negligence the only legal remedy available is by way of judicial review or through extra-judicial routes such as the Ombudsman. However a number of relevant decisions have been given since *Bedfordshire*, including several House of Lords decisions. In none of these do the courts explicitly depart from the *Bedfordshire* decision. Nevertheless it is always possible for the House of Lords to reduce the impact of a previous decision by distinguishing it or confining it narrowly to its particular facts, and it is therefore necessary to consider whether this has occurred in relation to child abuse cases. In the next section I will examine how the steadfast refusal by the judiciary to hold statutory child welfare agencies accountable for negligence, or vicarious liability, in the performance of their child protection functions has been eroded.

Erosion of Local Authority Immunity

The House of Lords decision of *Phelps v Hillingdon London Borough Council* [2000] All ER (D) 1076, has far reaching implications for those concerned with the care of children. In *Phelps* the House of Lords found a local authority vicariously liable for the failure of an educational psychologist to diagnose a child's dyslexia. The Court of Appeal had previously dismissed the claimant's action in *Phelps* [1999] 1

⁸ at 962

All ER 421 on the grounds that an educational psychologist who assessed a child pursuant to the local authority's statutory obligations under the various Education Acts, did not assume responsibility to that child in tort. The Court of Appeal believed that in the absence of such an assumption of personal responsibility, it was not fair, just or reasonable that a duty of care should be imposed, given the difficulties in proving causation in such cases, the inevitable drain on scarce resources which would result from the imposition of such liability, the multi-disciplinary nature of the education process and the existence of a detailed statutory appeals system; almost the same grounds outlined by the House of Lords in *X v Bedfordshire County Council*. The House of Lords in *Phelps* disagreed with this view and held that where an educational psychologist is specifically called in to advise in relation to the assessment and future provision for a specific child, and it is clear that the parents acting for the child and the teachers will follow that advice, *prima facie* a duty of care arises. Lord Nicholls held that the duty to the pupil would march hand in hand with the professional's responsibilities to his own employer, he should exercise reasonable skill and care when assessing the child and advising the local authority. If he fails to do so, the local authority as his employer will be vicariously liable to the child for the negligent acts or omissions of the psychologist committed in the course of his employment. Lord Nicholls described this type of case as "*an example par excellence of a situation where the law will regard the professional as owing a duty of care to a third party as well as his own employer.*"⁹

In reaching this conclusion their Lordships rejected in a robust manner the policy concerns which underlined the Court of Appeal's judgment.¹⁰ For instance, Lord Clyde took the view that the practical problems posed by the multi-disciplinary

⁹ at [2001] 2 AC 619, 666

¹⁰ Lord Slynn at 655, Lord Nicholls at 667, Lord Clyde at 672

context could not create a legal barrier to claims. Lord Clyde argued that the mere fact that there may be practical difficulties should not thwart otherwise deserving cases as justice should not be denied on the ground that a claim is of a complex nature.¹¹ Lords Clyde and Nicholls also asserted their belief that imposing a duty of care could conceivably have the healthy effect of ensuring that high standards are sought and secured.¹² It has long been a fear of the courts that by recognising new duties of care, a flood of unfounded claims would thereby be unleashed.¹³ Lord Nicholls rejected this in broad fashion: “*denial of the existence of a cause of action is seldom, if ever, the appropriate response to fear of its abuse.*”¹⁴ The House of Lords reassured that any fear of a flood of claims may be countered by the consideration that in order to get off the ground the claimant must be able to demonstrate that the standard of care fell short of that set by the *Bolam v Friern* [1957] 2 All ER 118 test. In *Bolam* it was held that:

“A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art...”

This deliberately high standard is a recognition of the difficult nature of some decisions which those to whom the test applies are required to make, and accordingly provides room for genuine differences of view on the propriety of one course of action as against another. Hence social workers will continue to exercise a significant measure of discretion in the course of their child care related work. They can only be held liable where they have reached a decision that no responsible body of social workers would endorse.

¹¹ at 673

¹² at 672

¹³ Fairgrieve, D. “Pushing back the boundaries of public authority liability: Tort law enters the classroom” (2002) Public Law 288

¹⁴ at 667, Lord Slynn at 655

The House of Lords in *Phelps* differs from *Bedfordshire* in that the court in *Phelps* saw no reason in principle why a claim in negligence against a local authority should never be possible. In *Phelps* the House of Lords reviewed and rejected the policy reasons, which had previously prevented the imposition of liability. Although their Lordships only decided the vicarious liability option, its rejection of the policy arguments put forward to bolster vicarious liability makes it difficult to see how the *Bedfordshire* and *Stovin* policy arguments can be sustained in the context of primary liability under common law. *Barrett v Enfield London Borough Council* [1999] 2 FLR 426, [1997] 3 All ER 171 also represents a discernible swing of the pendulum against the over-restrictive position previously applying to negligence claims in child protection cases. The plaintiff, by then in his twenties, brought an action in negligence against the local authority claiming for personal injury. He had been made the subject of a care order when he was a baby and remained in care until his majority. He alleged breaches by the authority of its duty to protect him from physical, emotional, psychiatric and psychological injury and to promote his development. He complained of the authority's failure to arrange his adoption, unsatisfactory placements with foster parents and in community homes, lack of monitoring and failure to manage his reintroduction to relatives. He alleged that if the duties which lay upon the defendants had not been breached, he would not, on the balance of probabilities, have left the care of the local authority as a young man of 18 years with no family or attachments whatsoever, who had developed a psychiatric illness causing him to self harm and become involved in criminal activities.¹⁵ The House of Lords unanimously held that the *Bedfordshire* case did not in the circumstances prevent a claim of negligence being brought by a child formerly in its care. Although no completely analogous

¹⁵ [1999] 2 FLR 426, 434

claim had succeeded, the House of Lords believed that it could incrementally extend the pre-existing duties of care.¹⁶ The question whether it was fair, just and reasonable to impose a duty of care was not to be decided in the abstract on the basis of assumed hypothetical facts but had to be decided on what was proved.¹⁷ The plaintiff was accordingly entitled to have his claim heard and the facts investigated and not to have his case summarily dismissed.

The House of Lords in *Barrett*¹⁸ considered the public policy considerations explored in *X v Bedfordshire County Council*. Whilst not disputing the validity of these policy concerns and thus not overruling this case, their Lordships held that they did not apply with the same force in *Barrett* as *Bedfordshire* had involved the sensitive issue of whether or not to take a child into care, in *Barrett* the plaintiff was already in the care of the authority. Essentially there are four salient points to note from the decision in *Barrett*. First, it was accepted that a claim may lie against a local authority arising from child-care decisions in certain circumstances. Secondly, the court emphasised the general undesirability of striking out claims arising in uncertain and developing areas of the law without full exploration of the facts. Thirdly, the notion of an exclusionary rule conferring immunity on particular classes of defendant was rejected. Lastly, in *Barrett* it was deemed that the policy factors which had weighed with the House of Lords in *X v Bedfordshire* and *M v Newham* did not have the same weight where complaints related to acts and omissions after a child had been taken into care. The risk of local authority's adopting a cautious and defensive attitude through fear of liability was one of the policy reasons militating against a duty of care in the *Bedfordshire* case. Empirical evidence is seldom given for this defensive

¹⁶ [1999] 3 All ER 193, 208

¹⁷ [1999] 3 All ER 193; [1999] 3 WLR 79 (HL); [1999] 2 FLR 426. See also *Phelps v Hillingdon London Borough Council* [1999] 1 All ER 421, [1999] 1 WLR 500 which supports this decision.

¹⁸ [1999] 3 All ER 193, 207, 227

practice phenomenon. It is a matter of impression, expressing a hypothesis rather than any proven conclusion.¹⁹ It also assumes, perhaps unfairly, that public sector workers will adopt a timid approach to frontline public service provision when faced with professional negligence standards, in that it presupposes that those persons subject to the legal duty will misread the standard of behaviour that is required of them and react in an overly cautious manner. Legal arguments cannot be solved, and litigation cannot be determined, on the basis of impressions, hypothesis or hunches, however eminent and experienced their source may be. A robust standard of proof of breach would thwart tendencies towards defensive practice, this approach has been borne out in *Barrett*, as both Lord Hutton and Lord Slynn upheld Evan LJ's contention that:

*“if the conduct in question is of a kind which can be measured against the standard of the reasonable man, placed as the defendant was, then I do not see why the law in the public interest should not require those standards to be observed.”*²⁰

Moreover, the existence of a duty of care can play an important role in contributing to the maintenance of high standards of public service provision, resulting in fewer children wrongly being taken into care and more children rightly being taken into care.²¹ This view is shared by the New Zealand Court of Appeal in *AG v Prince and Gardner* [1998] 1 NZLR 262 which explicitly rejected the House of Lords fear in *X v Bedfordshire* that private law duties would lead to defensive social work. The New Zealand Court of Appeal believed that a private duty of care would reinforce the role of the social worker rather than cut across that role.

Barrett was followed in *S v Gloucestershire County Council, L v Tower Hamlets London Borough Council* [2000] 1 FLR 828, [2001] Fam 313 CA, [2001] 2

¹⁹ Stapleton, J. “Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence” (1995) 11 LQR 301; Wright, J. “Local Authorities, the Duty of Care and the European Convention of Human Rights” (1998) 18 OJLS 1

²⁰ [1999] 3 All ER 193, 208, 228

²¹ Jones, M ‘Immunity from claims for damages: In whose best interests?’ (1994) 6 JCL 161

WLR 909. In both cases the plaintiffs, now adults, had been in the care of their respective local authorities and lived with foster parents. They both alleged that they had been sexually abused by their respective foster fathers and brought actions against the local authorities claiming damages for personal injury, including psychiatric damage, suffered as a result of the negligence and breach of duty of care by the local authorities. May LJ accepted the evidence of the psychiatrists as providing a sufficient case that the negligence alleged did in fact cause the physical and psychological damage.²² May LJ held that cases which might be labelled as child abuse cases were not bound to fail as a class. May LJ determined that there may be circumstances in which a claim in common law negligence might be available to an individual who claims that he has been damaged as a result of the failure of the local authority to look after him. It would therefore be unlikely that local authorities could establish a defence that relied upon blanket immunity.

Phelps, *Barrett* and *S* are illustrative of broader changes in the sphere of public authority liability. In these judgments the courts distinguished *X v Bedfordshire* in a way which comes close to suggesting that its effects should be confined to its own particular facts; for example much of the reasoning advanced by Lord Brown Wilkinson in *X v Bedfordshire* to justify holding that there was no duty of care has been called into question and serious doubt has been cast on the view that a local authority owes no duty of care to children when exercising their statutory powers and discretions. Effectively these cases restrict the effect of *X v Bedfordshire* to the core proposition that decisions by local authorities whether or not to take children into care are not reviewable by way of a claim in negligence. Thus children cannot sue a local

²² at p. 854

authority in relation to decisions taken prior to a child being taken into the care of the local authority.

However even this core proposition of *X v Bedfordshire* has been challenged by the European Court of Human Rights. In England and Wales where children have suffered as a result of a local authority's failure to prevent their injuries, they could bring a complaint under the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the next section I will examine a number of decisions by the European Court of Human Rights which found that the restrictive provisions of tort law in relation to child welfare and protection, as expressed by the House of Lords in *X v Bedfordshire County Council*, fell foul of the European Convention on Human Rights; and I will consider whether the introduction of the Human Rights Act 1998 has affected the common law principles of the law of negligence.

The influence of the European Court of Human Rights

Z & Ors v UK [2002] 34 EHRR 30, [2001] 2 FLR 612 ECHR is the first case in which the European Convention has been held to impose a positive obligation on the state to take operational measures in order to protect children against abuse and neglect in the family. In *Z & Ors v UK* the applicants in *X v Bedfordshire* complained to the European Court of Human Rights that the local authority failed to protect them from inhuman and degrading treatment in circumstances where the local authority was aware of the serious neglect and abuse which the children suffered at home. They also complained of a lack of procedural safeguards, of a lack of access to court and of a lack of effective remedies in respect of their complaints. The European Court found

that Article 3²³ of the European Convention of Human Rights requires states, and therefore local authorities, to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. In *Z* the European Court had no doubt that the neglect and abuse suffered by the four child applicants unequivocally reached the threshold of inhuman and degrading treatment. This treatment was brought to the local authority's attention in October 1987, it was under a statutory duty to protect the children and had a range of powers available to them, including removal from their home. The children were however only taken into emergency care at the insistence of the mother on 30 April 1992. The European Court acknowledged the difficult and sensitive decisions facing the local authority and the important countervailing principle of respecting and preserving family life. Nonetheless, the facts of the case left no doubt as to the failure of the system to protect these child applicants from serious, long-term neglect and abuse. Accordingly, there had been a violation of Article 3 of the Convention.²⁴

The applicants also complained that they had been denied access to court to determine their claims of negligence against the local authority, invoking Article 6 of the Convention. This Article gives everyone the right to have a claim relating to his or her civil rights brought before a court or tribunal.²⁵ The applicants argued that the House of Lords had unequivocally rejected their claim on the basis that actions against the local authorities for decisions taken in relation to child protection were excluded and that the English court had given no consideration to the seriousness,

²³ Article 3 of the Convention provides that “*No one shall be subject to torture or to inhuman or degrading treatment or punishment*”.

²⁴ at para. 75

²⁵ Article 6(1) provides: “*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*”

nature or degree of the negligence alleged or rights violated. However the European Court found there was no breach of Article 6, the European Court observed that the applicants were not prevented in any practical manner from bringing their claims before the domestic courts. Indeed, the case was litigated with vigour up to the House of Lords, the applicants being provided with legal aid for that purpose. To bring Article 6 into play the court held that it is not enough that the non-existence of a cause of action under domestic law may be described as having the same effect as an immunity, in the sense of not enabling the applicant to sue for a given category of harm.²⁶ Moreover, the European Court argued²⁷ that it could not be said that the House of Lords came to its conclusion without a careful balancing of the policy reasons for and against the imposition of liability on the local authority in the circumstances of the applicants' case. The Court concluded that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law. There was no restriction on access to court and the applicants' claims were properly and fairly examined in light of the applicable domestic legal principles concerning the tort of negligence.

Accordingly, the European Court found that there had been no violation of Article 6 of the Convention. Yet the outcome of the domestic proceedings the applicants brought is that they, and any children with complaints such as theirs, cannot sue the local authority in negligence for compensation, however foreseeable and severe the harm suffered and however unreasonable the conduct of the local authority in failing to take steps to prevent that harm. In the European Court's view this is an issue under Article 13, not Article 6.²⁷ In *TP & KM v UK* [2002] 34 EHRR 2, [2001] 2 FLR 549 ECHR the European Court of Human Rights interpreted Article

²⁶ at para. 98

²⁷ Article 13 provides the right to an effective remedy before a national authority where there has been a violation of a Convention right or freedom.

13 of the Convention as guaranteeing a remedy to enforce the substance of the Convention rights and freedoms at the national level in whatever form they might happen to be secured in the domestic legal order.²⁸ In *Z v UK* the European Court found that the applicants did not have available to them an appropriate means of obtaining a determination of their allegations that the local authority failed to protect them from inhuman and degrading treatment, nor did they have the possibility of obtaining an enforceable award of compensation for the damage suffered thereby. The European Court specified that administrative, or quasi-judicial, remedies such as the Ombudsman or the statutory complaints procedure were ineffective given the seriousness of the allegations. Thus while the failure of the law of tort to offer a remedy in damages was not a breach of the right to a fair hearing, under Article 6, the failure to offer any effective remedy for the breach of Convention rights was a breach of Article 13.²⁹

In *X v Bedfordshire* the House of Lords decided that as matter of public policy, local authorities should not be at risk of litigation where the local authority negligently failed to investigate allegations of sexual abuse because it owed the victim no duty of care. It is clear from the judgment in *Z v UK* that such a policy is incompatible with the European Convention. In *Z v UK* the European Court of Human Rights held that children are entitled to an effective remedy when their European Convention rights have been breached as a result of local authority negligence and that local authorities no longer enjoy immunity from suit in respect of their child care functions. In *E v UK* [2003] 1 FLR 348 (ECHR) and in *DP & JC v UK* [2003] 1 FLR 50 (ECHR) the European Court of Human Rights reassured that in cases involving serious child abuse the state will only be held responsible where they were, or should

²⁸ *TP & KM v UK* [2002] 34 EHRR 2, [2001] 2 FLR 549 ECHR at para. 107

²⁹ para. 111. Also *TP & KM v UK*

have been, aware of what was going on and taken steps to safeguard the applicants. A state will only come under a positive obligation to act when there is a real and immediate risk of ill-treatment contrary to Article 3 of which they knew or ought to have known of. Therefore in order to engage the responsibility of the state in child abuse cases there must be a failure by the state authority to take reasonably available measures which could have a real prospect of altering the outcome or mitigating the harm. The positive requirements imposed by the Convention will be determined by the extent of the knowledge at the time rather than the extent of the actual harm as subsequently fully revealed. However it will be no answer to a claim under Article 3 that the public authority was not aware of the ill-treatment where the circumstances are such as to suggest that an investigation should have been made or the situation should have been monitored.

The European Court of Human Rights also ruled on the position of parents and carers who are falsely accused of abusing their children. In *TP & KM v UK* the applicant in *M v Newham LBC* complained to the European Court of Human Rights of the actions and procedures whereby the local authority removed the second applicant into care on the basis of careless assumption of fact. They also complained of a lack of procedural safeguards, a lack of access to the court and a lack of effective remedies in respect of their complaints. The European Court ruled that the local authority failed to respect the family life of the applicant and thus breached Article 8 of the Convention.³⁰ Although Article 8 contains no explicit procedural requirements, the decision-making process involved in child protection cases must be fair and such as to afford due respect to the interests safeguarded by Article 8. The Court considered that

³⁰ Article 8(1) provides: “Everyone has the right to respect for his ... family life...There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

the question whether or not to disclose the interview to the mother should have been decided promptly to allow the mother to answer the allegations against her. The local authority's failure to submit the issue to the court for determination deprived her of an adequate involvement in the decision-making process concerning the care of her daughter and thereby of the requisite protection of their interests. In *TP & d KM* the Court made it clear that the positive obligation on the state to protect the interests of the family requires that the relevant material should have been disclosed to the family even in the absence of any specific request for it. The European Court considered that in these circumstances the applicants right to family life had been breached and that accordingly they should have had available to them a means of claiming that the local authority's handling of the procedures was responsible for the damage which they suffered and obtaining compensation for that damage. Because they had not been afforded an effective remedy, there had also been a violation of Article 13 of the Convention.

The Human Rights Act 1998 makes it unlawful for any public authority to act incompatibly with the European Convention of Human Rights. Local authorities must now ensure that their practices, policies, procedures and service delivery are consistent with Convention rights and the domestic courts are statutorily obliged to take into account the principles applied by the European Court of Human Rights. Therefore the Human Rights Act 1998 requires English courts to take these cases into account when dealing with an allegation of inaction or negligence on the part of a local authority. In *Z v UK*, *TP and KM v UK*, *E v UK* and *DP & JC v UK* the European Court rejected the *Bedfordshire* style blanket immunity for public authorities. *Z*, *E* and *DP & JC v UK* ruled that decisions whether or not to take a child into care no longer enjoyed immunity from suit. Where local authorities have failed in

their duty to act, or have acted negligently there must be available to the victims or their families a mechanism for establishing the liability of state bodies for acts or omissions involving a breach of their rights. The Human Rights Act statutorily obliges English courts to adopt a broader approach to the imposition of liability upon child welfare agencies. The Human Rights Act 1998 therefore brings the law into an area of child protection that was previously free from the possibility of liability and widens the opportunity to challenge the decisions of local authorities.³¹ Consequently it would seem that the children in *X v Bedfordshire* would have had an action under the Human Rights Act had it been in force.³² However the European Court of Human Rights did not hold that a general duty of care in negligence is owed, nor did the Court overrule the decisions of the House of Lords in *X v Bedfordshire County Council* and *M v Newham*. It is in this context that the English judiciary made their landmark judgment in *D & Others v East Berkshire Community Health & Others* and *JD (FC) v East Berkshire Community Health NHS Trust and others*.

The post-Human Rights Act 1998 approach to local authority liability

The process of ‘incremental demolition’³³ of local authority immunity has been accelerated by the Court of Appeal decision of *D & Others v East Berkshire Community Health & Others* [2003] EWCA Civ 1151 and the House of Lords judgment in *JD (FC) v East Berkshire Community Health NHS Trust and others* [2005] UKHL 23. *D & Others v East Berkshire Community Health & Others*

³¹ Arthur, R. “The Immunity of Health Boards in Child Protection Functions: The Changing Tide of Judicial Opinion” (2002) 7 Irish Law Times 102; Arthur, R. “Duty of Care to Children in Care” (2001) 3 Irish Law Times 38

³² Atkin, B., Mc Lay, G. “Suing child welfare agencies – a comparative view from New Zealand” (2001) 13(3) Child and Family Law Quarterly 287; Mole, N. ‘International Law, the Individual’ in O’Donovan, K and Rubin, G.R. (eds.) *Human Rights and Legal History: Essays in Honour of Brian Simpson* (Oxford University Press: Oxford, 2000)

³³ Markesinis, B. “Plaintiff’s tort law or defendant’s tort law? Is the House of Lords moving towards a synthesis” (2001) 9 Torts Law Journal 168

concerned three appeals involving accusations of abusing a child made against a parent by the professionals concerned for the welfare of that child. In each case the accusations proved to be unfounded and the parents claimed damages for psychiatric harm caused by the false accusations. Thus *D & Others v East Berkshire Community Health & Others* relates to a failure by the local authority to investigate alleged instances of child abuse properly, which contrasts with *X v Bedfordshire* where the local authority failed to investigate at all. In *D & Others v East Berkshire Community Health & Others* the Court of Appeal dismissed the appeals by the parents. However in one case the child also claimed, the child was 9 years old at the time she was taken into care after a wrongful diagnosis of sexual abuse by her father. The Court of Appeal allowed the appeal by the child and held that *X v Bedfordshire County Council* was contrary to the Human Rights Act 1998 in relation to the position of the child. The court reasoned that where child abuse is suspected, section 1 of the Children Act 1989 requires that the interests of the child are paramount. Local authorities are also obliged to respect a child's European Convention rights by virtue of the Human Rights Act 1998. Lord Phillips MR held that given these statutory obligations the recognition of a duty of care to the child should not have a significantly adverse effect on the manner in which local authorities perform their duties.³⁴ Lord Phillips concluded that it would no longer be legitimate to rule that, as a matter of law, no common law duty of care was owed to a child in relation to the investigation of suspected child abuse and the initiation and pursuit of care proceedings. Whether the imposition of a duty of care was fair, just and reasonable had to be determined on the facts of each case. Whereas *Barrett* and *Phelps* restricted *Bedfordshire* to the core proposition that decisions by local authorities whether or not to take a child into care

³⁴ at para. 83

were not reviewable, the Court of Appeal in *D* held that this core proposition could not survive the Human Rights Act 1998. This view was upheld by the House of Lords in *JD (FC) v East Berkshire Community Health NHS Trust and others*. This case represents a swing away from *X v Bedfordshire* and *Stovin v Wise* towards more traditional negligence principles of foreseeability and proximity, children are now able to sue when negligence, causation and loss can be established. The public policy considerations which prevented the imposition of liability in *X v Bedfordshire* are no longer applicable. The law in England and Wales now mirrors that in New Zealand since *AG v Prince and Gardner* [1998] 1 NZLR 262 and *B and others v Attorney General of New Zealand* [2003] UKPC 61, [2003] 4 All ER 833, in that child welfare agencies now owe children a duty of care to investigate allegations of abuse with a reasonable degree of care and skill. Child welfare agencies can now be successfully sued if they take a child into care who is not at risk of abuse (for violating Article 8 of the European Convention), or if they fail to take into care a child who is being abused (for violating Article 3 of the European Convention. However in *D* and *JD* the court held that no duty of care was owed to parents when investigating child abuse.

In *JD (FC) v East Berkshire Community Health NHS Trust and others* the parents involved in *D & Others v East Berkshire Community Health & Others* claimed that the professionals responsible for protecting a suspected child abuse victim also owe a duty of care to any parent suspected of having committed a crime against their child; a duty sounding in damages if they act in good faith but carelessly. In a majority decision the House of Lords dismissed the parents' appeal and upheld the judgment of the Court of Appeal. For the House of Lords, the possible conflict between the interests of the child and their parent and the impact that imposing a duty in favour of the parent could have on the process of child protection proved determinative. The House

of Lords believed that a duty of care owed to parents would cut across the duty owed to the children, as social workers and doctors dealing with suspected child abuse cases would always have to take account of the risk that they might harm the parents. This approach would conflict with the need to put the interests of the child first in any case of suspected abuse. Placing children's interests at the centre of abuse investigations is a theme running through the guidance in *Working Together*³⁵ which was issued under section 7 of the Local Government (Social Services) Act 1970. Doctors and social workers are specifically warned in the Guidance that the interests of parents and children may conflict and that in such cases the child's interests should be the priority.³⁶ Guidance issued under the 1970 Local Government (Social Services) Act does not carry the same legal force as the Statute. Nonetheless local authorities are required to act in accordance with such guidance, which is intended to be a statement of what is held to be good practice and are likely to be quoted or used in court proceedings as well as in local authority policy and practice papers. Lord Nicholls believed that the seriousness of child abuse as a social problem demanded that social workers and doctors, acting in good faith in what they believed to be the child's best interests, should not be subject to potentially conflicting duties when deciding whether the child might have been abused (para 86). Lord Nicholls concluded that those investigating suspected child abuse "*must be able to act single-mindedly in the interests of the child*" free from any fears that they might be liable in negligence to the parent (para 85). If a social worker were required to owe a duty of care to a parent in situations such as this, which involved criminal offences, it would mean the social worker owed a duty of care to a suspect.

³⁵ Department of Health *Working Together under the Children Act 1989. A Guide to Inter-Agency Co-operation for the Protection of Children from Abuse* (HMSO: London, 1991)

³⁶ para 6.12

Also the House of Lords in *JD (FC) v East Berkshire Community Health NHS Trust and others* believed that if a duty of care were to be imposed in favour of the parents in these cases, it could then be argued that this duty should be extended to other members of the family, to friends of the family, to teachers and to child-minders, in short, to anyone who might come under suspicion of having abused the child. The potentially wide range of this supposed additional duty could only increase the risk of compromising the key duty of care to the children. Accordingly the House of Lords held that the appropriate level of protection for a parent suspected of abusing their child is that all investigations must be conducted in good faith. This affords suspected parents a similar level of protection to that afforded generally to persons suspected of committing crimes.³⁷ To hold otherwise would abandon the concept of duty of care as a universal prerequisite to liability in negligence and replace it with an adaptable standard of care which could be adjusted to accommodate the complexities arising in fields such as social workers or medical professionals dealing with children at risk of abuse. Lord Nicholls believed such a change would result in uncertainty in this area of law and would be unnecessary as the Human Rights Act already allows claims to be brought directly against public authorities in respect of breaches of European Convention rights.³⁸ Lord Nicholls had previously made a similar judgment in the Privy Council in *B and others v Attorney General of New Zealand* [2003] UKPC 61, [2003] 4 All ER 833. This case concerned the alleged negligent investigation of a complaint that the father had sexually abused his daughters. The Privy Council allowed the appeal by the daughters but dismissed that of the father, holding that a duty was owed to them but not to him. In delivering the judgment of the Board, Lord Nicholls held that no common law duty of care was owed to the father as

³⁷ per Lord Nicholls, para. 90

³⁸ per Lord Nicholls, para. 94

he was the alleged perpetrator of the abuse. In an inquiry into an abuse allegation the interests of the alleged perpetrator and of the children as the alleged victims are poles apart. Likewise, Doyle CJ in the Australian case of *Sullivan v Moody* held that the parents of the child, or at least the parent who was suspected of sexual abuse, could hardly be regarded as a person whose interests they could be expected or required by law to consider (para 42). The Australian High Court concluded that the interests of the child were to be the paramount consideration. If the Department of Community Welfare or its officers owed a duty of care to an alleged abuser, this would discourage or inhibit the performance of their statutory child protection duties.

Although local authorities and health professionals do not owe a duty of care to parents, it might be possible to scrutinise their actions by means of the Human Rights Act 1998. Removal of the child from its parents will undoubtedly constitute an interference with respect for family life in accordance with Article 8 of the European Convention. The issue then will be whether this was justified in accordance with article 8(2), which permits interference with the right as is in accordance with the law and is “*necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*” However in *JD (FC) v East Berkshire Community Health NHS Trust* the House of Lords held that interference with family life did not justify according a suspected parent a higher level of protection than other suspected perpetrators. Also where events predate the Human Rights Act it is clear that parents will have no cause of action. In such cases, although having no claim in negligence, parents might be able to argue breaches of relevant provisions of the European Convention on Human Rights. *TP & KM v UK* promotes parents’ involvement in the

decision making to include allowing parents an effective opportunity to address allegations, and, if necessary, to challenge them. However, the House of Lords has made clear that the interests of the child will be paramount.

The effect of the judgments in *JD (FC) v East Berkshire Community Health NHS Trust and others* and *D & Others v East Berkshire Community Health & Others* is that when considering whether a suspicion of child abuse justifies proceedings for the removal of a child from the parents, a common law duty of care is owed to the child (but not to the parents); therefore providing a legal remedy to children who have been victims of negligence in relation to the investigation of abuse or the initiation of care proceedings. The policy reasons that previously led the House of Lords to hold that no duty of care towards a child exists now cease to apply, and failure to remove a child from the parents could give rise to a valid claim by a child as readily as a decision to remove the child. Thus the ruling in *X v Bedfordshire* will not stand in the way of a claim by the child against a local authority for negligence in the manner in which it contributed to the child protection investigation.

Increased litigation involving cases of children wrongly diagnosed as suffering from child abuse or mistakenly taken into care is now a potential consequence. In such cases the policy reasons relied upon by the House of Lords in *X v Bedfordshire* will not be applicable. Local authorities who act according to accepted standards of practice and who make difficult judgments in good faith and to the best of their abilities will not be considered negligent. However when a local authority fails to follow the laws, rules, standards and procedures, children now have a right to hold the local authority accountable for this failure. It is hoped that holding professionals

accountable through the law will deter malpractice and improve the quality of child protective practice.³⁹

Conclusion

Child protection work is undoubtedly a delicate and difficult task, nevertheless children have a right to a professional service. The United Nations Committee on the Rights of the Child has frequently recommended that in England and Wales children should have an effective remedy for violations of their rights.⁴⁰ There is no obvious reason why public bodies charged with duties framed in objective terms should be provided with protection from challenge and given immunity from liability which is not afforded to others, merely because they are public bodies.⁴¹ The prospect of liability for negligence and breach of statutory duty could encourage local authorities to improve their performance not only in carrying out the legal duties owed to children in need, but also in respect of the overall management of the system.⁴² Introducing liability would require practitioners to show that they took reasonable care and acted with an acceptable level of professional competence. Providing local authorities with immunity from action for damages creates the reverse situation. The courts should therefore seek to ensure that high standards of public service provision are maintained through the imposition of a duty of care.

³⁹ Kanani, K., Regehr, C., Bernstein, M.M. "Liability considerations in child welfare: lessons from Canada" (2002) 26(10) Child Abuse and Neglect 1029; Markesinis, B., Stewart, A.R. "Tortious liability for negligent misdiagnosis of learning disabilities: A comparative study of English and American Law" (2001) 36 Texas International Law Journal 3

⁴⁰ United Nations Committee on the Rights of the Child *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention. Concluding observations: United Kingdom of Great Britain and Northern Ireland* CRC/C/15/Add.188, October 2002, para. 17

⁴¹ Howell, J. 'Public duties and resources: won't pay and won't do' (1998) 3 JLGL 49

⁴² Guthrie, T. "Legal Liability and Accountability for Child-care Decisions" (1998) 28 British Journal of Social Work 403; Kelly, M., Lewis, R. "Child Abuse in Residential Homes" (1994) 144 NLJ 367