CN v Poole Borough Council

Briefing Note on the Decision of the Supreme Court Handed Down on June 6th 2019

Introduction

On June 6th 2019, the Supreme Court will hand down its judgment in *CN v Poole Borough Council*, over ten months after the case had been argued before it. The decision has been eagerly anticipated by those involved in litigating claims against social services authorities and public authorities more generally. The Supreme Court unanimously dismissed the claimants' appeal, holding that the council owed the claimants no duty of care to remove them from their mother's care as a means of preventing them from suffering the harmful effects of the anti-social behaviour of those living nearby the family.

This briefing note seeks to explain the Supreme Court's decision and its implications. It is prepared by Paul Stagg of the Chambers of Simon Readhead QC, 1 Chancery Lane, London, who was first junior counsel for the local authority, with input from Lord Edward Faulks QC and Katie Ayres who were respectively leading and second junior counsel, and Rob Hams of Wansbroughs Solicitors, who instructed them on the appeal. They were instructed to act on behalf of the council by Zurich Municipal plc, the insurers of Poole Borough Council.

This briefing note is sent out together with an executive summary of the decision to enable readers to see the essential points of the Supreme Court's decision at a glance.

Factual Background to the CN Case

In 2006 Mrs N and her two sons CN and GN, then aged nine and seven, were living in Poole. They were anonymised by orders made by the courts, and were respectively referred to in the Supreme Court's decision as Amy, Colin and Graham which are not their real names. 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 *D v East Berkshire Community NHS 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 *D*, 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 *D*, 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 *D* 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:*
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> *(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 ....*
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> *(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 [sic] 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 *D* .... 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 considered two cases involving the alleged negligence of social workers: the Bedfordshire case in which the claimants were children who had not been removed from the care of parents who subjected them to neglect and abuse, and the Newham case in which a child had been removed from her mother's care on the basis of a mistaken belief that the child had identified her mother's partner as having subjected her to sexual abuse. The reasoning of Lord Browne-Wilkinson, who gave the lead judgment, ranged across a wide area and is summarised at considerable length by Lord Reed in his judgment in the CN case (paragraphs 36-48). Lord Browne-Wilkinson rejected claims based on breach of statutory duty and stated that mere careless performance of a statutory duty does not give rise to liability unless a duty of care is owed at common law. He held that no such duty existed, based on a number of reasons of public policy as to why it was not fair, just or reasonable that a duty of care should be owed by local authorities or by the social workers employed by them. Those reasons were 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 *D v East Berkshire Community NHS 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 (paragraphs 125-130).

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. He considered the 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). He went on to conclude that *D* was indeed inconsistent with the subsequent decisions of higher authority and should no longer be followed (paragraphs 99-101). 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 *D* 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 Court of Appeal refused permission to appeal against its decision, but on March 15th 2018 permission to appeal was granted by the Supreme Court. It directed an expedited hearing of the appeal.

The Robinson Case

A further important decision was given by the Supreme Court between the giving of judgment by the Court of Appeal and the granting of permission to appeal by the Supreme Court. *Robinson v Chief Constable of West Yorkshire Police* concerned a claim brought by an elderly lady who had been knocked down and injured in the street in the course of a struggle between police officers and a suspected drug dealer. At trial, the police were found to have had insufficient regard for the safety of passers-by when conducting their arrest, but the trial judge found that the police were immune from suit in negligence. The Court of Appeal upheld the trial judge's ruling of law and also held that he had been wrong to find that they had been negligent.

Before the Supreme Court, the claimant's appeal succeeded by a majority of four to one. Lord Reed gave the principle judgment in favour of allowing the appeal, with which Baroness Hale and Lord Hodge agreed. He began his judgment by referring to a point made by Lord Toulson in *Michael*, namely that fallacy of the common understanding that *Caparo Industries plc v Dickman* required a consideration in every case of whether it was fair, just and reasonable for a defendant to owe a claimant a duty of care. Lord Bridge, who had supposedly formulated that element of the test for the existence of a duty of care, had said no such thing (paragraphs 21-25). Instead, the starting point was to look at the existing situations in which it had been concluded that a duty of care was owed and then develop them, if appropriate, by analogy, by "identifying the legally significant features of the situations with which the earlier authorities were concerned" (paragraph 27). In doing so, the reasons for and against imposing liability would be considered (paragraph 29).

Lord Reed then went on to consider the position of public authorities. He reiterated that public authorities are generally in the same position as private individuals and bodies in terms of liability in tort, subject to the terms of any legislation which might authorise conduct which would otherwise be tortious (paragraphs 32-33). Public authorities, like private individuals and bodies are generally under no duty to prevent the occurrence of harm save in certain established circumstances (paragraphs 34-35). The mere fact that the public authority had statutory duties or powers to prevent the harm did not mean that it owed a duty at common law (paragraph 36). Similarly, they generally owe no duty of care to protect individuals from harm caused by third parties, save in circumstances which included cases where the public authority has created the danger or where it has assumed a responsibility for the individual's safety on which reliance has been placed (paragraph 37). It was only where established principles did not provide a clear answer to whether a duty of care was owed that it was necessary to consider whether the recognition of it was just and reasonable (paragraph 42).

Lord Reed acknowledged later in his judgment that the distinction between acts and omissions could be "difficult to draw in borderline cases". He referred to Lord Hoffmann's formulation of the distinction in *Stovin v Wise* as requiring that "it is necessary to be able to say, according to common sense principles of causation, that the damage was caused by something which the defendant did" (paragraph 69). Thus *Barrett* had involved an assumption of parental responsibility by the local authority when a care order was obtained.

Lord Mance delivered a separate judgment generally agreeing with Lord Reed's approach, though he thought it was unrealistic to state that public

policy considerations could properly be marginalised in the way that Lord Reed thought (paragraph 84). Lord Hughes dissented.

The majority found for the claimant on the basis that the police's decision to arrest the suspect when they did gave rise to circumstances where they had to take care to avoid causing harm to bystanders, and held that the Court of Appeal were wrong to overturn the trial judge's conclusion that they breached their duty of care to the claimant.

The Decision of the Supreme Court in CN

The Supreme Court, comprised of Baroness Hale, the President, Lord Reed, the Deputy President, Lord Wilson, Lord Hodge and Lady Black, heard the appeal on July 16th and 17th 2018.

The sole judgment on the appeal is given by Lord Reed, who had given the majority judgment in *Robinson* and with whom all the other members of the court agreed. Although the appeal has been dismissed, Lord Reed's reasons differ considerably from those given by the Court of Appeal.

The General Principles for Liability in Negligence

Having summarised the facts (paragraphs 2-7), the history of the litigation (paragraphs 8-17) and the relevant provisions of the Children Act 1989 (paragraphs 18-24), Lord Reed commences his reasoning with a general overview of the basic principles for public authority liability in tort and the development of the law of negligence (paragraphs 25-35). A good deal of that part of his analysis harks back to his judgment in *Robinson*, summarised above. He reminds us that, subject to statutory provision, public authorities

are subject to the same principles as to tortious liability as private individuals and bodies (paragraph 26). He restates the distinction between acts and omissions, although he appears to have recognised the difficulty of applying that bald distinction in practice and uses slightly more helpful language (paragraph 28):

> *Like private individuals, public bodies did not generally owe a duty of care to confer benefits on individuals, for example by protecting them from harm .... In this context I am intentionally drawing a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better), rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale of the distinction drawn in the authorities, and partly because the distinction between acts and omissions seems to be found difficult to apply.*

Having done so, he then goes on to identify how the importance of those principles became obscured with the decision in *Anns v Merton LBC* in 1978 and had only been restated by the decisions in *Stovin v Wise* and *Gorringe v Calderdale MBC* (paragraphs 29-35). One new point of emphasis in his analysis relates to the significance of the statutory scheme being operated by a local authority (paragraph 27). He affirms that the mere fact that a local authority was acting under statute would not be a defence if the authority's actions would otherwise be tortious, but then goes on to point out that where a local authority was exercising a statutory discretion, then the question is whether it was being exercised lawfully. If it was, the actions of the authority were to be taken to be authorised by Parliament. We will return to this point below when considering the implications of the decision.

Review of the Previous Case Law

Lord Reed then goes on to review the existing case law at considerable length (paragraphs 36-65). Most of the cases discussed by him have been considered above and so we will not recite his analysis in minute detail. However, the following points should be noted:

- He emphasises the factual difference between the Bedfordshire and Newham cases decided in *X v Bedfordshire CC*: the former involved a failure to protect the children from harm which would not ordinarily give rise to a common law liability absent an assumption of responsibility, and the latter involved the removal of the child from its parents' care on grounds which were later found not to have existed, and in which it was not necessary to establish that the social workers assumed responsibility for their actions (paragraphs 38 and 43).

- He refers to Lord Browne-Wilkinson's rejection in *X v Bedfordshire CC* of the claims for breach of statutory duty and for careless performance of a statutory duty as being correct (paragraphs 39-40). He also approves a passage in Lord Browne-Wilkinson's speech reiterating that the exercise of a statutory discretion would have to be unlawful if tortious liability would be found to exist (paragraph 39).

- He emphasises that the decision in *Barrett v Enfield LBC* was based on an assumption of responsibility to the child by virtue of the local authority accepting him into his care (paragraph 47).

- The liability of the educational psychologist in *Phelps v Hillingdon LBC* was based on the fact that, despite the fact that the psychologist was

engaged to advise the local authority, the child's parents and teachers would also follow that advice and therefore there was an assumption of responsibility (paragraph 50).

- As to *D v East Berkshire Community NHS Trust*, Lord Reed points out that the only case of the three joined cases in which a social worker was sued was the Dewsbury case, in which a daughter was removed from her father's care due to unfounded concerns of sexual abuse. It was therefore akin to the Newham case in *X v Bedfordshire CC* (paragraph 52) and it was not necessary for the child to establish an assumption of responsibility to her, since her case was that she had been directly harmed by the actions of the paediatrician and the social worker (paragraph 55). Although the rejection of the parents' cases was put on the basis of a conflict between their interests and those of the children, it could equally well have been based on the fact that they were inconsistent with the statutory scheme (paragraph 54).

- In considering *Mitchell, Michael* and *Robinson*, Lord Reed refers to exceptions discussed in those cases to the principle that there was no liability for failing to protect an individual: where the defendant created the source of the danger, where the third party was under the supervision or control of the defendant, and where the defendant assumed a responsibility for the claimant (paragraphs 60-61, 63).

- Lord Reed summarises the position as follows (paragraph 65):

> *It follows:*
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> *(1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be*

inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived;

(2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and

(3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation.

What is an Assumption of Responsibility?

In the next section of his judgment, Lord Reed seeks to clarify the concept of an assumption of responsibility as giving rise to a duty of care which would not exist but for it being assumed. Having mentioned its modern genesis in *Hedley Byrne & Co Ltd v Heller & Partners* (paragraph 67), he went on to state (paragraph 68):

.... the principle has been applied in a variety of situations in which the defendant provided information or advice to the claimant with an undertaking that reasonable care would be taken as to its reliability (either express or implied, usually from the reasonable foreseeability of the claimant's reliance upon the exercise of such care) .... or undertook the performance of some other task or service for the claimant with an undertaking (express or implied) that reasonable care would be taken ....

The absence of reliance on the social workers' work is said to be critical to the absence of liability in *X v Bedfordshire CC*, in contrast with the education cases (paragraph 69).

As to the interaction of an assumption of responsibility with a statutory scheme, the fact that the relevant events occurred against the backcloth of the exercise of statutory functions would not of itself give rise to an assumption of responsibility, but it is not correct to state that the operation of a statutory

scheme cannot give rise to an assumption of responsibility. It might do, depending on whether the general criteria were fulfilled (paragraphs 70-73).

Application to the Facts of CN

Lord Reed states that *X v Bedfordshire CC* can no longer be regarded as good law so far as it relied on public policy considerations to exclude liability or to require an assumption of responsibility in cases like the Newham case. It is now necessary to approach claims against social services on the basis of the approach clarified in *Robinson* (paragraphs 74-75):

> *.... Following that approach, it is helpful to consider in the first place whether the case is one in which the defendant is alleged to have harmed the claimant, or one in which the defendant is alleged to have failed to provide a benefit to the claimant, for example by protecting him from harm. The present case falls into the latter category. ....*
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> *.... [The correct] approach is based on the premise that public authorities are prima facie subject to the same general principles of the common law of negligence as private individuals and organisations, and may therefore be liable for negligently causing individuals to suffer actionable harm but not, in the absence of some particular reason justifying such liability, for negligently failing to protect individuals from harm caused by others. Rather than justifying decisions that public authorities owe no duty of care by relying on public policy, it has been held that even if a duty of care would ordinarily arise on the application of common law principles, it may nevertheless be excluded or restricted by statute where it would be inconsistent with the scheme of the legislation under which the public authority is operating. In that way, the courts can continue to take into account, for example, the difficult choices which may be involved in the exercise of discretionary powers.*

Irwin LJ's first main reason for his decision in the Court of Appeal, reliance on public policy grounds, could not be supported. Neither could his conclusion that *D v East Berkshire Community NHS Trust* had been overruled by subsequent decisions, since in *Michael* the court "did not disapprove of *the true ratio* of that decision" (paragraph 75, emphasis added). The reference to "true ratio" here, we suggest, refers back to the fact that the Dewsbury case discussed in *D v East Berkshire* was a case where the damage was said to result

from something that the social worker (and paediatrician) had done, rather than a failure to protect the child from harm.

However, Irwin LJ's second main reason for his decision, that there is generally no liability for the wrongdoing of a third party, is held to have been sound but not conclusive (paragraph 76). The question is whether any of the exceptions to the general rule that no duty of care was owed were present here.

First, Lord Reed rejects a suggestion that the council created the source of danger by housing the family near to the individuals who acted anti-socially, since there is a long line of authority culminating in *Mitchell* establishing that landlords do not owe duties of care in relation to the anti-social behaviour of their tenants (paragraph 77).

Secondly, Lord Reed rejects the suggestion that the claimants' pleaded case provided an arguable case of assumption of responsibility by the council (paragraphs 81-83), or by the individual social workers (paragraphs 85-88):

> *81. In the present case .... the council's investigating and monitoring the claimants' position did not involve the provision of a service to them on which they or their mother could be expected to rely. It may have been reasonably foreseeable that their mother would be anxious that the council should act so as to protect the family from their neighbours, in particular by re-housing them, but anxiety does not amount to reliance. Nor could it be said that the claimants and their mother had entrusted their safety to the council, or that the council had accepted that responsibility. Nor had the council taken the claimants into its care, and thereby assumed responsibility for their welfare. The position is not, therefore, the same as in Barrett v Enfield [LBC]. In short, the nature of the statutory functions relied on in the particulars of claim did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care.*
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> *82. It is of course possible, even where no such assumption can be inferred from the nature of the function itself, that it can nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Since such an inference depends on the facts of the individual case, there may well be cases in which the*

existence or absence of an assumption of responsibility cannot be determined on a strike out application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred. In the present case, however, the particulars of claim do not provide a basis for leading evidence about any particular behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred. Reference is made to an email written in June 2009 in which the council's anti-social behaviour co-ordinator wrote to Amy that "we do as much as it is in our power to fulfil our duty of care towards you and your family, and yet we can't seem to get it right as far as you are concerned", but the email does not appear to have been concerned with the council's functions under the 1989 Act, and in any event a duty of care cannot be brought into being solely by a statement that it exists ....

....

87. .... there is no suggestion that the social workers provided advice on which the claimants' mother would foreseeably rely.

88. As has been explained, however, the concept of an assumption of responsibility is not confined to the provision of information or advice. It can also apply where .... in general or in particular. Such situations can arise where the defendant undertakes the performance of some task or the provision of some service for the claimant with an undertaking that reasonable care will be taken. Such an undertaking may be express, but is more commonly implied, usually by reason of the foreseeability of reasonable reliance by the claimant on the exercise of such care. In the present case, however, there is nothing in the particulars of claim to suggest that a situation of that kind came into being.

Finally, in relation to the Court of Appeal's alternative ground for striking out the claim, Lord Reed adopts the same approach, effectively holding that the claimants had no real prospect of establishing that the council could have removed them from their mother's care even if had sought to do so (paragraph 90):

The case advanced in the particulars of claim is that "any competent local authority should and would have arranged for [the claimants'] removal from home into at least temporary care". As King LJ explained, however, in order to satisfy the threshold condition for obtaining care orders under section 31(2) of the 1989 Act, it would be necessary to establish that the claimants were suffering, or were likely to suffer, significant harm which was attributable to a lack, or likely lack, of reasonable parental care. The threshold condition applicable to interim care orders requires the court to be satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2). Nothing in the particulars of claim suggests that those conditions could possibly have been met. The harm suffered by the claimants was attributable to the conduct

of the neighbouring family, rather than a lack of reasonable parental care. There were simply no grounds for removing the children from their mother.

The Implications of the Supreme Court Decision

Claims by Children Arising Out of Child Protection Functions

It is now clear from Lord Reed's judgment that a distinction must now be drawn between three broad categories of cases in determining whether a common law duty of care is owed to a child in respect of whom children's services exercise their child protection functions:

- 'Failure to remove' cases, where allegations are made such as that the local authority and/or its social workers ought to have carried out more rigorous investigations into allegations of abuse or neglect, or to have instituted care proceedings which would have resulted in their removal from the care of their parents and the cessation of the abuse. The paradigm case is the Bedfordshire case discussed in *X v Bedfordshire CC*. The facts of the *CN* case are a rather unusual variant of this type of case.

- 'Negligent removal' cases, where the complaint is that the local authority and/or its social workers took steps resulting in the removal of the child from its parents where no such steps should have been taken. Typical cases are the Newham case considered in *X v Bedfordshire CC* and the Dewsbury case before the court in *D v East Berkshire Community NHS Trust*.

- 'In care negligence' cases, where no complaint is made of the child having been taken into care but where allegations are made that the decisions made in relation to the child's upbringing were, in all the

circumstances of the case, negligent. *Barrett v Enfield LBC* is a paradigm example of such a case.

Lord Reed's reasoning demonstrates that no duty of care will generally be owed in a 'failure to remove' case, because the essential allegation in such a case involves a failure to protect the child. A reasonably coherent case would have to be advanced to the effect that one of the exceptions to the omissions rule recognised in *Mitchell* and *Michael* applies: creation of the source of danger, supervision or control over the third party causing the damage, or assumption of responsibility. The decision in *CN* gives little encouragement to claimants in that connection. It is hard to conceive of a case in which one of the first two exceptions could arise (especially in light of the rejection of the complaint that the council created the danger by the placement of the children), and Lord Reed's rejection of the claimants' case on assumption of responsibility shows that, for example, vague promises made by local authority officers that "something will be done" will not avail the claimant because they are unlikely to have been relied upon in any way.

On the other hand, it must now be regarded as settled that a duty of care will ordinarily be owed in the second and third categories of case. There may still be an argument to be had about whether the statutory scheme might exclude a duty of care in those situations due to incompatibility. It is unlikely, however, that such an argument could be successfully mounted without a full trial of the facts having taken place (a major plank of the House of Lords' reasoning in *Barrett v Enfield LBC*) and furthermore, it is hard to see that the argument adds anything to the question of whether a duty of care was breached which would also be considered at such a trial. As established in *Barrett v Enfield LBC*, the courts will apply the *Bolam* test, under which it

would have to be shown that no reasonable social worker or local authority could have acted as the defendant did. Such an egregious error is probably practicably indistinguishable from an exercise of discretion that was so unreasonable as to be irrational in a public law sense.

There remain some areas of uncertainty. For example, what about a child that has been voluntarily accommodated under section 20 of the Children Act 1989? The answer is that it probably depends on the nature of the allegation. For example, if the child is accommodated with a relative as a kinship carer who then proceeds to abuse or neglect the child, and it is said that the local authority should have removed the child or sought an immediate care order, that is probably closer to a 'failure to remove' case and no duty of care is probably owed. On the other hand, a child that is left to languish under the section 20 regime without proper planning being made for his or her future might well be able to argue that *Barrett v Enfield LBC* offers a reasonable analogy with his or her case.

Claims by Children For Failing to Provide Services

Although the claimants in *CN* mentioned section 17 of the 1989 Act in their claim, no claim was advanced to the effect that services provided under Part III of the 1989 Act would have brought the anti-social behaviour to an end. However, there may be cases in which it is suggested that while removal from parental care was not warranted, there was a failure to recognise that the claimant was a "child in need" or to provide particular services under Part III. It is suggested that any such claim is now doomed to failure, since such a case is clearly a case of a failure to confer a benefit and no duty of care can be owed in relation to such functions.

Other Claims Against Social Services

The fundamental change of approach heralded by *Michael*, *Robinson* and now the Supreme Court decision in *CN* may also give rise to a re-examination of some of the settled positions that have been reached in relation to other types of claim made against social services. For example, a foster parent complaining that a local authority placed a dangerous child with him or her without adequately assessing the child or providing sufficient information about the risks that the child posed is, under the present case law, owed only a fairly limited duty of care in relation to the provision of information: see *Lambert v Cardiff CC* and other cases. However, could it now be argued that this is a positive step taken by the local authority which would ordinarily give rise to a duty of care, and in respect of which there is no reason to exclude such a duty?

The answer would have to be that the conflict of interest between the foster parent and child excluded a duty of care or, as Lord Reed might prefer to put it, the statutory scheme requiring the primacy of the welfare of the child was repugnant to such a duty of care.

Public Authority Liability More Generally

It remains to be seen what effect the triumvirate of decisions in *Michael*, *Robinson* and *CN* will have in the long term for the liabilities of public authorities. In some respects, they may be expected to expand, particularly in the case of the police who had been widely understood for the last three decades to have a liability in negligence to members of the public only in closely defined circumstances. For example, a claim in negligence will now probably be coupled to virtually any claim in assault and battery for excess

use of force, particularly in the case of planned police operations, providing an additional complication in such cases. The decision in *Robinson* itself came as a big surprise to most police lawyers. The argument about defensive policing, at least at this sort of lowly level, has always seemed unreal; the notion of the individual constable on the beat, or carrying out a planned arrest which necessarily takes place in a public place, fretting about his or her potential liability in negligence is rather far-fetched. However, it cannot be uncommon for passers-by to be caught up in police operations in a similar way to the unfortunate Mrs Robinson and the duty of care found to be owed will need careful calibration by the courts.

On the other hand, the reaffirmation of the omissions rule in *Michael*, and its reinforcement in *Robinson* and *CN* will shut out a large number of novel claims across a wide range of public authority activity, unless the courts adopt an expansive attitude to the concept of an assumption of responsibility. Older cases such as the planning case of *Tidman v Reading BC* will repay careful study as the courts seek to give practical content to what is, in this context, a rather elusive and ill-defined concept.

One important omission from Lord Reed's judgment is any attempt to give a clear ruling on the question on which the parties made a considerable body of submissions and which occupied a lot of time in the courts below; namely, whether the ability to rely on Convention rights in domestic courts influences the circumstances in which a duty of care may be found to be owed. On the one hand, Lord Reed's judgment does not suggest that his conclusion that ordinarily, a claimant who is not protected by a local authority from abuse and neglect within the home cannot bring a claim in negligence would be affected by the possibility that the duty to protect under Art 3 of the

Convention may have been breached. However, the judgment may have lent some credence to the argument in a general sense, in its interpretation of Lord Bingham's speech in *Kay v Lambeth LBC* (paragraph 59 of Lord Reed's judgment in *CN*).

Despite the attempts at clarification by Lord Reed in his judgment in *CN*, the distinction between acts and omissions, or between causing harm and failing to confer a benefit, will remain difficult to apply in practice. Lord Hoffmann's appeal in *Stovin v Wise* to "common sense principles of causation" is of very little practical assistance in resolving the distinction. Time only will tell whether the new approach to duty of care issues championed by Lord Reed leads to more coherence in this troubled area of the law.

Conclusion

Despite the dismissal of the claimants' appeal in *CN*, the legal approach which it affirms will continue to give rise to large volumes of claims, both against social services authorities and public authorities more generally.

Finally, we wish to reiterate a point that we have previously made. It is easy, in seeking to understand the wider legal ramifications of this decision, to overlook the very real suffering endured by the claimants' family and of all those who endure the scourge of persistent anti-social behaviour from neighbours. 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 Human Rights Act 1998. 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 Supreme Court's decision will not, therefore, leave aggrieved individuals who have suffered abuse or neglect in childhood wholly without any recourse.