1 CHANCERY LANE

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February 2018

PERSONAL INJURY BRIEFING
ABUSE

2018 has started with an even greater degree of scrutiny upon abuse than ever before. Almost every corner of life is having light shone onto it in order to expose abuse. Naturally, not all allegations are meritorious, and even the dividing lines are being debated as to what is 'acceptable' behaviour and what isn't, but the sheer scale of abuse cases shows no sign of abating.

The Law has attempted to move with the times and some key cases are examined below. Clearly, Parliament is also trying to keep up (when having a rare day off from Brexit), with a number of issues likely to be debated: removing limitation periods for abuse cases (as already occurred in Scotland in 2017); removing non-disclosure agreements (which can be used to hide abuse); as well as numerous initiatives from charities/NGOs/sports organisations in light of revelations at home and abroad.

Many claims are of course now being dealt with by way of specific redress mechanisms set up as an alternative to Court. A clearer tariff guide on Quantum is surely not far off so that there is consistency. In terms of court proceedings, Abuse has hitherto been seen and treated as a discrete area of law – usually with different expectations when it comes to procedure, for example third party disclosure and even trial timetabling – yet applying traditional legal principles to the facts of an Abuse case can yield unpredictable results...

***Armes v Nottinghamshire County Council* (2017)**

This was one of the most important decisions in the fields of Abuse, Local Authorities & Personal Injury for many years.

The claimant was abused in the 1980s by foster parents into whose care she had been placed by the defendant local authority. She claimed that the local authority was liable for the abuse on the basis that either it owed her a non-delegable duty of care or was vicariously liable for the foster parents' wrongdoing. Her claim was rejected by the High Court, whose decision was upheld by the Court of Appeal. The Supreme Court, however, allowed her appeal on the vicarious liability ground by a majority of 4:1.

In terms of the non-delegable duty argument it was held that the Child Care Act 1980 did not create a non-delegable duty. A care order under the Act conferred upon the local authority the same powers and duties as a parent, and a parent does not owe a non-delegable duty. Further, the abuse occurred in the course of day-to-day care which was not part of the local authority's duty to provide. Its duty was discharged simply by arranging for and then monitoring the performance of this care.

Now for the more controversial part: *vicarious liability*: Lord Reed found that the five factors identified by Lord Phillips in *Christian Brothers* were present, hence this was a relationship justifying the imposition of vicarious liability. The local authority had the money to provide compensation and created the risk of abuse by putting the claimant in this relationship of authority and trust. Due to the local authority's involvement with ongoing care provision, and its cooperation/collaborative decision-making with foster parents, it was impossible to draw a sharp distinction between their respective activities such that the latter could be deemed to be carrying on an independent business of their own. The foster care was an integral part of the local authority's organisation of its child services and was carried out for its benefit. It exercised sufficient control over the foster parents by its powers of approval, inspection, supervision and removal, which had no parallel in ordinary life.

There was plainly a sufficient connection between this relationship and the commission of the tort.

Accordingly, the local authority was held vicariously liable for the abuse.

Why does this case matter?

Will this decision make local authorities less willing to place children in foster care? Lord Reed thought not. There was no evidence that abuse is less likely to occur in residential homes, which are more expensive. We are not so confident. In any event, there is now an attempt to privatise the provision of social care with ACOs so perhaps that will be considered the 'answer'.
Lord Reed's approach could be described as rather unrealistic. It focuses upon evidence of which form of care is objectively riskier. Perhaps the better question to ask is what type of care the local authority will perceive to be riskier in a particular scenario. This is a question more easily answered by common sense and the evidence of the specific case. Foster care occurs largely outside the reach and sight of the local authority, necessarily behind closed doors in a highly intimate relationship based on a dynamic of trust and dependence, and so can pose greater risk of tortious conduct. This perceived greater risk of incurring liability, and the ensuing reputational damage, may lead local authorities to decide that foster care is in fact uneconomic or simply undesirable.

Lord Hughes framed part of his dissenting judgment around this idea of risk shaping care placement choices. He reasoned that if held vicariously liable for the actions of foster parents, local authorities would inevitably also be vicariously liable for the actions of the child's family members where family placements were made. This would be problematic, he said, because: *"It is not impossible that if such liability were to exist, insurers would insist on additional safeguards in relation to family placements, which would discourage their being made. With or without that factor, the liability is likely to make placement panels more cautious"*. Local authorities would instead opt for "safer placements" with foster parents, depriving children of the benefits of being cared for by family members. Surely this logic extends to the residential-foster choice also.

Control
Lord Reed stated that *"…it is important not to exaggerate the extent to which control is necessary in order for the imposition of vicarious liability to be justified"*. Put into the context of appellate decisions such as *Christian Brothers*, and recent first instance decisions such as from Davies J in *Various Claimants v Barclays Bank PLC* [2017] EWHC 1929 (QB), the decision in *Armes* may have effectively sounded the death knell for the requirement of (a meaningful degree of) control. In losing this restraint on its expansion, the law of vicarious liability will move further from the relationship of employment. With legal certainty in jeopardy it is hard to know for sure whether any given relationship would or not would not be deemed suitable for imposing this form of liability. New lines must be drawn. *Armes* provides only some of the answers.

Other questions
Will this lead to a wave of historic sex abuse claims? Are local authorities liable for the negligence of foster parents, as well as deliberate wrongdoing or abuse? Do foster parents constitute 'workers'? Is there likely to be, as predicted by a colleague – Andrew Warnock QC – in an article about this decision in the Law Society Gazette, further litigation exploring the boundaries of parental liability?

Last month's decision in *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, illustrates how the Human Rights Act could be utilised further in abuse cases due to the positive obligations owed by the State when it comes to investigating allegations (in that case, of violence and degrading treatment under Article 3). Is there soon to be a wave of allegations from schools to prisons about, for example, unfair detention, where the relevant authorities are also alleged not to have investigated complaints appropriately? It is notable that in *DSD* a striking feature of the decision is that it related to how the State dealt with the acts of an individual.

On the other hand, the recent case of *CN v Poole Borough Council* (2017), in which colleagues from Chambers were successful, illustrates the Court of Appeal seeking to draw common sense distinctions between where a duty is owed, such that it can be seen as a recent example of the Courts reining in the expansion of duties of care owed by local authorities in abuse cases involving third parties.
That case, and its potential for far reaching consequences, is the subject of a separate briefing, which can be found on the 1 Chancery Lane website.

By Saleem Khalid & Richard Collier (pupil)

Section 20 Children Act 1989: A trap for the unwary Local Authority

One area expected to change further concerns Section 20 of the Children Act 1989. This provision established a duty upon a Local Authorities (LAs) to provide a child with somewhere to live when they lack someone with parental responsibility for them and/or are unable to live at home or their welfare is at risk.

Section 20 is used to facilitate a voluntary arrangement

i.e. with the consent of the child's parent(s). Often s.20 is used to temporarily accommodate a child for a period of time during which his or her family are struggling to cope (at their request). In this way s.20 can be used as a useful mechanism for swiftly accommodating children away from their family without the need for court proceedings. A s.20 arrangement comes to an end upon the objection of a person with parental responsibility for the child who is willing and able to provide suitable accommodation.

The quick and simple process of accommodating under s.20 is, however, both a blessing and a curse. The Courts are acutely aware of the lack of a Children's Guardian to safeguard the child's interests and the fact that s.20 procedures are without the strict timetable of proceedings can mean that the time-frame for the accommodation provided is rather open-ended. Case law establishes that the onus is therefore on LAs to be more vigilant than ever as to the child's best interests both in the near and long term.

Until relatively recently the purpose of s.20 appears to have been 'misinterpreted' by LAs. In defence of LAs the section itself does not set out the gloss that the higher courts have now imposed upon it and, when reading the case-law in conjunction purely with the wording of the Act, one might be forgiven for thinking the two were entirely distinct.

N (Children) (Adoption: Jurisdiction) [2015] EWCA Civ 1112 (at paragraphs 157-171) focuses on the misuse and abuse of s.20. According to Munby P "*There is, I fear, far too much misuse and abuse of section 20 and this can no longer be tolerated*" and "*steps must be taken as a matter of urgency to ensure that there is no repetition ever again*". A spate of case law around this time identified three main problems arising out of the use of s.20:

1. Cases in which a 'voluntary' arrangement has been reached, but for some reason the consent to the arrangement was not valid (either by coercion or a lack of capacity);
2. Cases involving poorly drafted voluntary arrangements;
3. Cases where a child has been accommodated under a s.20 arrangement for a considerable length of time such that the accommodation becomes unlawful.

Consent to Voluntary Accommodation

In *Williams v London Borough of Hackney* [2015] EWHC 2629 (QB) the 'voluntary' agreement was referred to as "*compulsion in disguise*". LA's must be entirely satisfied that the consent to accommodate is obtained without compulsion and with the full knowledge and understanding of the child's parents who have the capacity to give such consent.

Each individual social worker's professional duty is to be satisfied that the parent(s) act with capacity, and give properly informed consent. The social worker must consider the issue of capacity, the physical and psychological state of the parent(s), their understanding of what is proposed, their access to advice and support, whether removal is necessary to ensure safety and whether it would be *fairer* for the matter to be dealt with by court order rather than agreement. A further concern is raised in circumstances where parents are not fluent in English and LA's must explicitly ensure proper understanding in these cases.

Drafting of Agreements

At paragraph 170 of *N (Children)* Munby P offers guidance for future 'good practice' when drafting agreements and advised: "*Wherever possible the agreement of a parent to the accommodation of their child under section 20 should be properly recorded in writing and evidenced by the parent's signature.*"

How Long is Too Long?

Extended accommodation under a s.20 arrangement is likely to result in a breach of either the child's and/or parent's Article 8 or Article 5 or Article 6 ECHR rights. This is because at the same time that the child/parent is deprived from access to his or her family life they are also deprived of the recourse to and protection of the Courts that comes with the commencement of care proceedings.

In *Northamptonshire County Council v AS and Ors* [2015] EWHC 199 (Fam) regarding the serious abuse of s.20 where a newborn remained accommodated for 5½ months before proceedings were initiated, Keehan J stated: "*I cannot conceive of circumstances where it would be appropriate to use those provisions to remove a very young baby from the care of its mother, save in the most exceptional of circumstances and where the removal is intended to be for a matter of days at most.*"

As a general rule, as soon as it becomes clear that accommodation pursuant to s.20 is likely to be required in the longer term (steps should immediately be undertaken to determine this), and what is required is more than a temporary 'emergency' measure, then a

then a decision must be made to either return the child to his or her family or to start care proceedings. For younger children it is likely that the length of time that is deemed to be acceptable will be shorter than for older children (in newborn babies the length of time is likely to be very short; a matter of hours or days only). In every case the maximum length of time should be no more than a matter of days or at most, weeks. LAs are advised to carry out urgent reviews of children being accommodated pursuant to s.20 arrangements and to act accordingly.

Valuing Claims

Medway Council v M &T (By Her Children's Guardian) [2015] EWFC B164, where HHJ Lazarus awarded mother and child each £20,000 damages for breach of Article 8 rights, includes a useful table of case law relating to the award of damages for such breaches.

Effect of *CN v Poole BC* / *Armes v Nottinghamshire CC*?

CN v Poole Borough Council [2017] EWCA Civ 2185 established (noting an appeal is on its way) that 'failure to remove' and 'in-care' claims are to be treated differently: In the former case there is likely to be no duty on LAs to act whereas in the latter there is likely to be a duty of care (both a non-delegable primary duty and, following *Armes v Nottinghamshire County Council* [2017] UKSC 60, the scope for vicarious liability for those entrusted with the child's care).

This distinction poses a question as to whether there is a duty of care in respect of those children accommodated pursuant to s.20 arrangements and/or whether the LA might be vicariously liable for the actions of the carers with whom the child is placed?

Clearly, the control that the LA exercises over the child's living arrangements is far greater when accommodated pursuant to s.20 than when the child resides with his or her family (and may be subject to social services monitoring), however, the control is far less than that provided where a care order is in place. Instead of a 'general rule' it is likely that the imposition of liability will depend upon whether injury suffered by the child can be said to have been caused by a failing in an aspect of the child's care over which the LA can properly be said to have had control.

It is important to remember when considering a claim involving a s.20 arrangement that even if a common law negligence claim looks likely to fail for want of a duty of care, there remains the potential avenue to establish liability and financial compensation that flows from breach of the Human Rights Act 1998.

By Katie Ayres

FORTHCOMING TRAINING SEMINAR on ABUSE:
CN V Poole; Human Rights Act & Abuse; Limitation - Tuesday 27th March 2018 4pm. Venue: 1 Chancery Lane, London, WC2A 1LF. Fee: £30 + VAT