

The adequacy of remedies in respect of unsubstantiated accusations of child abuse

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The rationale for the need for the state to intervene to protect children from abuse focusses on the welfare of the child. Less attention is given to the ramifications for parents who are suspected of abuse, but where no evidence of abuse is found, or where evidence is inconclusive. Severe and long-lasting harm can be caused by the investigative state processes such parents undergo. In such situations parents may seek redress. Although the question of remedies in relation to harm caused by public family law processes inevitably concerns discussion of the appropriate balance between state powers and private remedies, such discussion tends to focus on the later stages of the child protection process. The question of harm is not adequately addressed, particularly in cases where there is insufficient evidence to progress beyond investigation. Specific provision for adequate remedy that does not upset the balance between state powers and private rights is indicated.

The development of legal protection for children to protect them from parental harm has undoubtedly been influenced by high profile child abuse fatalities and disclosures of historical abuse. Indeed, it has been argued that ‘the media have appeared, at times, to have more influence on child protection policy and practice than professionals working in the field’.¹ Less attention has been given to the complexities and difficulties facing parents who are accused of child abuse, or who are considered to be at high risk of abusing their child, but against whom no evidence of abuse is substantiated.

Measures to protect children are adopted worldwide but the principles on which these measures are based differ. The Anglo-American model is used in England, Canada, America, New Zealand and Australia.² This approach prioritises child welfare and child rights over the rights of adults by intervening to protect the child where abuse is reasonably suspected.³ This model does not make specific provision for protection, remedy or resolution for those wrongly accused of child abuse. The state’s role is to act on behalf of the child.

Despite the policy drive in England since the mid-1990s towards early intervention, this model of child protection does not have its origins in family support. It differs from the Northern European model which focusses its attention upon the family as an inter-connected unit. This approach accepts that families may require support in order to function appropriately and seeks to provide this support at an early stage.⁴ Early intervention in England represents a policy move towards this model but the legal framework remains one that prioritises the child’s

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1 C Goddard and B Saunders, *Child Abuse and the Media*, NCPC Issues No 14 – June 2001 (Australian Government, Australian Institute of Family Studies website), at p 1, available at: <https://aifs.gov.au/cfca/publications/child-abuse-and-media>.

2 C Waldegrave, ‘Contrasting national jurisdictional and welfare responses to violence to children’ (2006) *Social Policy Journal of New Zealand* 27 (March).

3 Under the provisions of Children Act 1989, s 47.

4 M Hill et al, *International perspectives on child protection* (Scottish Executive, 2002).

interests, creating tension between welfare and regulatory priorities.⁵ Consequently the legislation and statutory guidance does not provide parents with a specific remedy for harm caused by the experience of being investigated by the state for suspected child abuse.⁶ However, serious parental harm during and following state welfare processes of acting on suspicions of child abuse is evident in research findings worldwide.⁷ This raises the question of whether there are adequate remedies available for parents in this position.

Allegations and concerns about child welfare are required to be passed to local authority children's social care departments by any person or body having a duty to safeguard children under section 11 of the Children Act 2004. Referrals can be made voluntarily by anyone else. The notification to the local authority will be categorised as requiring no further action, or as a referral requiring assessment.⁸ Assessment entails a very detailed and invasive investigation of the child and their family, carried out by social workers. At the end of the investigation, social work observations and impressions are collated about every aspect of a family's personal lives.⁹ The information informs a decision about what, if any, action should be taken to protect the child.¹⁰

Not all referrals amount to allegations but many do. Those that do not amount to allegations include self-referrals from parents asking for social work help, and families who are referred because they require services. Both fall under the 'children in need' provisions of section 17 of the Children Act 1989. Those that do amount to allegations include suspicions of conduct amounting to significant harm towards children, described as 'child abuse' in the guidance. The guidance sets out four categories of abuse: physical abuse, sexual abuse, emotional abuse and neglect.¹¹ The assessment looks for inter alia evidence of abuse in all categories regardless of whether the trigger for the referral includes an allegation, or is simply a request for supportive services.¹² It is thus an assessment for both welfare and policing purposes. This model of assessment requires the assessor to assume a dual role, creating the welfare/policing dichotomy evident in social work assessment policy and practice.¹³

The assessment framework has its roots in consensual welfare policy. It was designed to be used in the *Framework for the Assessment of Children in Need and their Families*¹⁴ to help social workers assess with a family what support they needed under section 17 of the Children Act 1989. As a consequence of its adoption in the statutory guidance *Working Together to*

5 L Devine, 'Considering Social Work Assessment of Families' (2014) 37(1) *Journal of Social Welfare and Family Law* 70.

6 Children Act 1989; Department for Education, *Working Together to Safeguard Children* (HMSO, 2015).

7 See, for example, S Amphlett, *Working in Partnership; coping with an investigation of alleged child abuse or neglect*, (Parents Against Injustice, 1991); D Howitt, *Child abuse errors: when good intentions go wrong* (Prentice-Hall, 1992); H Cleaver and P Freeman, *Parental perspectives in cases of child abuse* (HMSO, 1995); M Bell, *Child protection: Families and the conference process* (Ashgate, 1995); M Bell, 'Promoting children's rights through the use of relationship' (2002) 7(1) *Child and Family Social Work* 1; T Spratt and J Callan, 'Parents' views on social work interventions in child welfare cases' (2004) 34 *British Journal of Social Work* 199; L Davies, *Protecting Children – A Critical Contribution to Policy and Practice Development* (London Metropolitan University, PhD thesis, 2010).

8 See the latest official statistics for numbers on how many fall into these categories: Department for Education, *SFR 41/2015: Characteristics of children in need: 2014 to 2015*, 22 October (DfE, 2015).

9 Department for Education, *Working Together to Safeguard Children* (DfE, 2015), at p 22.

10 *Ibid*, at p 37.

11 *Ibid*, at pp 92–93; for official statistics concerning types of abuse see: Department for Education, *SFR 41/2015: Characteristics of children in need: 2014 to 2015*, 22 October (HMSO, 2015).

12 Department for Education, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children* (DfE, 2015), at p 22.

13 L Devine, 'Considering Social Work Assessment of Families' (2015) 37(1) *Journal of Social Welfare and Family Law* 70.

14 First version: Department of Health, *Framework for the Assessment of Children in Need and their Families* (DoH, 2000). Latest version: Department for Education, *Managing individual cases: the Framework for the Assessment of Children in Need and their Families* (DfE, 2012).

Safeguard Children,¹⁵ it is also used by social workers to gather evidence of parental insufficiency. Despite its forensic role the framework lacks safeguards and controls analogous to those which exist in criminal justice investigative processes: the focus is on the welfare of the child not the rights of the accused. Following assessment, if the local authority decides it has sufficient grounds, it can take legal action on behalf of the child by bringing a section 31 of the Children Act 1989 action pursuant to a care order. This is an action intended to protect the child, not an action against the parents. If successful, the order results in the local authority assuming parental responsibility for the child. The standard of proof is lower than that of a criminal court; public family law cases are decided on the balance of probabilities, not beyond reasonable doubt. If suspicions remain but there is insufficient evidence to justify litigation, a local authority can take action stopping short of a section 31 application. It has a variety of processes at its disposal which effectively enables continuous and open-ended monitoring of a family.¹⁶ Alternatively a local authority can offer consensual supportive services under section 17, or can decide to take no further action. The processes are set out in the *Public Law Outline 2014*.¹⁷

Parents facing assessment are thus in a difficult position in relation to their reputation, privacy and autonomy. Although there is a clear argument that parents who *are* significantly harming their children should not have the protection of the law in relation to processes that uncover evidence of abuse, it leaves parents who *are not* harming their children in a vulnerable position. This latter category of parents is significant. In 2014–2015 there were 635,600 families referred and 550,810 assessments, the vast majority of which concerned alleged parental maltreatment. The number of substantiated cases was 62,200, leaving 488,610 unsubstantiated.¹⁸

One of the reasons for the large discrepancy between substantiated and unsubstantiated cases is the use of risk prediction. It is recognised that a child protection system that seeks to prevent child abuse before it has taken place by investigating characteristics of families and children will result in a large number of false positives.¹⁹ It is widely agreed that referrals based on third party risk prediction creates a large number of ‘minnows that need to be discarded’ via social work investigation.²⁰ Despite this, referral on the basis of theories of risk prediction as opposed

15 Department for Education, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children* (DfE, 2015).

16 *Ibid.*, at pp 41–49.

17 See Ministry of Justice. *Practice Direction 12a – Care, Supervision and Other Part 4 Proceedings: Guide to Case Management*, 16 May 2014, available at: www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12a.

18 Numbers from: Department for Education, *SFR 41/2015: Characteristics of children in need: 2014 to 2015* (ONS, 2015), see ‘Main tables’. The criterion for substantiated cases follows the methodology of J Gibbons et al, representing those cases where new Child Protection Plans (CPPs) were registered in the year. Formation of a CPP is the first stage of the process where some evidence is required, thus providing the substantiation. Unsubstantiated cases are the class of cases where no evidence is found. These terms can be contrasted with narrower definitions, for example the commonly used concept of ‘false allegations’. ‘False allegations’ refer to cases where the originating allegation is *deliberately* untrue. There is also emerging literature on the wider concept of ‘wrongful allegations’, referring to unjust or unfair allegations, for example as described in R Burnett (ed), *Wrongful Allegations of Sexual and Child Abuse* (Oxford University Press, 2016). These concepts are of growing academic and public concern and link to broader discussions about the impact of allegations on children. For example, the concept of ‘parental alienation’ has received recent attention in relation to the impact on children of a separating parent making allegations of abuse against the other, in the process alienating the child from the accused parent. This area is incredibly complex because of the difficulties of (a) establishing facts; and (b) establishing motivation of the accuser.

19 K Browne and S Saqi, ‘Approaches to Screening for Child Abuse and Neglect’ in K Browne et al, *Early Prediction and Prevention of Child Abuse* (Chichester, 1988), pp 57–85, at pp 70–71; J Gibbons et al, *Operating the Child Protection System: Studies in Child Protection* (HMSO, 1995).

20 J Gibbons et al, *Operating the Child Protection System: Studies in Child Protection* (HMSO, 1995), at p 51.

to disclosures by children has gained popularity since the refocusing debate of the mid-1990s.²¹ This has contributed to the significant number of parents against whom unsubstantiated allegations have been made. If this policy is to continue, the body of evidence reporting that parents and children can be seriously harmed by the suspicion of abuse and its investigation suggests that this issue should be taken seriously.²²

The following discussion concerns remedies that might reasonably be sought by those affected by unsubstantiated allegations that have been investigated via the child protection process. The analysis focusses on parents as they are the most likely to bring an action. Parents are likely to focus on redress in respect of their trauma, particularly if the processes have involved the removal of a child. The particular sensitivities surrounding parental suspicions of child abuse will inevitably impact on parents' ability to navigate the administrative and legal processes. Remedies that may be adequate for minor, administrative disputes may not be so for deeply distressed, fearful and traumatised parents who may still have caring responsibilities towards the children they were suspected of harming. Remedies sought by non-family members are more likely to be focussed on questions of reputation and privacy.

Complaints procedures and judicial review

Aggrieved parents may initially turn to the complaints procedure, or seek judicial review of local authority decisions. It is a requirement under section 26 of the Children Act 1989 that:

‘(3) Every local authority shall establish a procedure for considering any representations (including any complaint) . . . about the discharge by the authority of any of their qualifying functions in relation to the child.’²³

The complaints procedure can be used in relation to Part V of the Children Act 1989²⁴ and can also be used in relation to assessments carried out under the statutory guidance. This process has been shown to be effective in slowing down assessment, if not resolving a family's distress. Unfortunately this has a doubly damaging consequence: one of the reasons noted in the Serious Case Review following the death of Khyra Ishaq to explain why social workers failed to complete an assessment was that following their unsuccessful visit, Khyra's mother lodged a complaint with the local authority about the visit and the proposed assessment.²⁵

Complaints procedures are not designed to address instances of substantial harm and distress to families and therefore provide a very limited practical remedy. The process only has to consider, not resolve. If the internal complaint does not provide satisfaction to the complainant, the unresolved issues can be referred to the local authority ombudsman in relation to questions of maladministration.²⁶ Several evaluations of complaint processes conclude that complainants

21 Exemplified in G Allen, *Early intervention: Smart investment, massive savings, the second independent report to Her Majesty's Government* (HMSO, Cabinet Office, July 2011); and Department for Education, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children* (HMSO, 2015).

22 See above n 7.

23 The 'qualifying functions' were originally complaints relating to Part III of the Act but were extended in 2002 to include complaints under Parts IV and V. The complaints procedure is set out in the Children Act 1989 Representations Procedure (England) Regulations 2006 (SI 2006/1783).

24 Children Act 1989, Part V deals with matters relating to the 'protection of children', as opposed to Part III which deals with consensual family support.

25 J Radford, *Serious Case Review Under Chapter VIII 'Working Together to Safeguard Children' In respect of the Death of a Child Case Number 14*, 26 April 2010 (Birmingham LCSB, 2010), at p 167.

26 In J Murphy, 'Children in need: the limits of local authority accountability' (2003) 23(1) *Legal Studies* 103, at pp 130-132, Murphy explains that Children Act 1989, s 84 allows complaints to be referred to the Secretary of State for Health but this is limited to an alleged failure of the local authority complying with its statutory duties under the Children Act 1989.

had a high chance of dissatisfaction.²⁷ There are also numerous government reports considering reforms to the complaint system following claims of its inadequacy in sensitive situations in response to research findings indicating that complainants do not obtain satisfaction.²⁸ It is therefore difficult to see how parents likely to be distressed and frightened will achieve satisfaction as a result of a complaint.

Internal administrative remedies must be exhausted before an application for judicial review is allowed, so families must use this process before commencing judicial review proceedings.²⁹ Judicial review is intended to be used in relation to *ultra vires* acts by public bodies either in relation to a decision, or failure to make a decision. Illegality, irrationality and procedural impropriety are potential causes of action.³⁰ They are therefore available for parents to use if the complaint procedures have not resolved the issue. However, there is a very short three-month limitation period for commencing actions, which creates an additional barrier for potentially traumatised applicants who may also be litigants in person.

Judicial review decisions are limited by section 31(1) of the Senior Courts Act 1981. The court cannot substitute different decisions following successful applications for judicial review. Consequently, even a successful applicant will find a quashed decision is merely sent back to the local authority for determination. The local authority is then open to the possibility of reaching the same decision for a second time, this time using a different route. Under the Civil Procedure Rules, Part 54, rule 54.19 the courts may quash decisions of public bodies, and either refer the matter back to the public body and ‘direct it to reconsider the matter and reach a decision in accordance with the judgment of the court’, or ‘insofar as any enactment permits, substitute its own decision for the decision to which the claim relates’. Although redetermination is the most likely outcome there are other potential remedies: quashing order, prohibiting order, mandatory order, declaration, injunction and damages. Even if successful, of the range of potential remedies it is redetermination that is the likely outcome rather than overturning of a decision, rendering it an empty remedy for many families.³¹

Judicial review has been found to be very limited as a remedy in cases where the local authority argues the applicant is a risk to children. *Re S (Sexual Abuse Allegations: Local Authority Response)*³² highlights the problems faced by a claimant in relation to his challenge of a local authority’s decision. The claimant, S, was a consultant gynaecologist who sought judicial review of a local authority’s decision to conduct an open-ended risk assessment. His application

27 S Lloyd-Bostock and L Mulcahy, ‘The social psychology of making and responding to hospital complaints: An account model of complaint processes’ (1994) 16 *Law and Policy* 123; J Coyle, ‘Exploring the meaning of “dissatisfaction” with health care: the importance of “personal identity threat”’ (1999) 21(1) *Sociology of Health and Illness* 95.

28 The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 (SI 2009/309) implemented joint complaints procedures for health and social services from April 2009. The following reports are relevant to both: K Simons, *I’m not complaining but . . . Complaints Procedures in Social Services Departments* (Joseph Rowntree Foundation, 1995); Department of Health, *Our Health, Our Say, Our Care* (HMSO, 2006); Health Service Ombudsman, *Making Things Better? A Report on Reform of the NHS Complaints Procedure in England*, National Audit Office (HMSO, 2005); Healthcare Commission, *Spotlight on Complaints* (HMSO, 2006); Department of Health, *Learning from Complaints: Social Services Complaints Procedure for Adults*, Care Services Directorate, July 2006 (HMSO, 2006); Department of Health, *Supporting Staff, Improving Services – Guidance to support implementation of the National Health Service (Complaints) Amendment Regulations 2006* (HMSO, 2006); Department of Health, *Making Experiences Count: A New Approach to Responding to Complaints: A Document for Information and Comment* (DoH, 2007); Health Service Ombudsman, *Feeding Back? A Report on Reform of the NHS Complaints Procedure in England*, National Audit Office, October 2008 (HMSO, 2008).

29 *R v London Borough of Barnet ex parte B* [1994] 1 FLR 592 and *R v Royal Borough of Kingston-Upon-Thames ex parte T* [1994] 1 FLR 798.

30 In *Council for Civil Service Unions v Minister for Civil Service* [1985] AC 374, Lord Diplock laid down that the reason for a judicial review is that the body’s decision was based on either ‘illegality, irrationality or procedural impropriety’.

31 For a comprehensive research paper see: House of Commons Library, *Judicial Review: A short guide to claims in the Administrative Court*, 06/44, 28 September 2006 (HMSO, 2006).

32 [2001] EWHC Admin 334, [2001] 2 FLR 776.

was refused. He had been acquitted in the crown court of four counts of indecently assaulting the daughter, K, of the woman with whom he had been living. The jury was unable to agree on another three counts. The jury directed the prosecution that a re-trial was not appropriate, leading to a formal not guilty verdict. Despite his acquittal the claimant failed to gain agreement from the local authority that they would not continue to risk assess if he were to move in with his new girlfriend and her children. Scott-Baker J held that:

‘If *Re H and Others* governed the approach in cases such as the present the result would be to prevent local authorities from carrying out effective and timely risk assessments. They would be forced to take care proceedings to identify whether grounds for intervention were present. This would be completely contrary to the principle of non-intervention in children cases. I do not accept that a local authority has to be satisfied on balance of probability that a person is an abuser before intervention is justified.’³³

The judge expressed ‘a good deal of sympathy for someone in the shoes of the defendant’,³⁴ but drew the distinction between the need to establish facts on the balance of probabilities in relation to care or supervision orders, as in *Re H (Minors) (Sexual Abuse: Standard of Proof)*³⁵ and the requirement to investigate if a local authority has ‘reasonable cause to suspect a child is likely to suffer significant harm’.³⁶ In the former, evidence is adduced to *prove* on the balance of probabilities that there is a likelihood of ‘significant harm’ unless an order is made. In the latter the duty is on a local authority to investigate if it *suspects* there is a likelihood of significant harm.

There is a difference in objectives and the relevant standard of proof between a criminal prosecution and the duty of a local authority. Scott-Baker J observed that:

‘Acquittal in criminal sexual abuse proceedings does not mean that a local authority is thereby absolved from further responsibility to protect the child who made the allegations or any other children who may in some way be at risk. Far from it, the various statutory duties under the Children Act must, if they are in play, be discharged.’³⁷

Given the different standards of proof and underlying purposes of criminal prosecution and social work assessment it is not anomalous that, following criminal acquittal, social work assessment could be justified. However, one of the main tenets of the applicant’s argument in *Re S (Sexual Abuse Allegations: Local Authority Response)*³⁸ was an objection to open-ended interference into private life without a clear process of resolution to bring it to an end. The question of whether it is reasonable to be subjected to open-ended suspicion is a different question to that of whether it is reasonable for someone acquitted in a criminal court to be re-investigated under a different process. One way to address the problem is for findings of fact hearings to take place in order to assess what can be established on the balance of probabilities. However, with a finding of fact at first instance it is unlikely to be reconsidered on appeal. This was reiterated in *Re T (A Child)* which did allow an appeal, but emphasised this was exceptional, illustrating the difficulties in persuading the Court of Appeal to interfere with findings of fact.³⁹

For parents who have already undergone significant trauma with a local authority these may not be realistic remedies. Using the complaint procedures followed by judicial review if the

33 Ibid, at [35].

34 Ibid, at [37].

35 [1996] AC 563.

36 *Re S (Sexual Abuse Allegations: Local Authority Response)* [2001] EWHC Admin 334, [2001] 2 FLR 776, at [34].

37 Ibid, at [37].

38 Ibid.

39 [2015] EWCA Civ 842, at [5].

issues are not resolved may raise their fear of facing further assessment if redetermination is the outcome. These remedies particularly do not help parents who find the local authority has followed procedures correctly but that those procedures do not take account of their distress or where the local authority argues there is an ongoing risk. Such an assertion is very difficult to disprove.

Defamation

An important issue for parents and others suspected of child abuse is the question of their reputation. Regardless of the reason for referral, an assessment relies on an assessment of parenting capacity as well as looking at specific allegations of child abuse. Whereas some parents may agree that an adverse assessment of their parenting practices may be a fair assessment, others may not. This category of parent may be deeply upset by allegations, opinions and personal comments which are recorded and shared with agencies having contact with their child during the assessment, and stored following it. Children are recorded as potential, if not actual, victims of abuse, and once a concern has been raised the family will be categorised as a high risk in the future even if the outcome is 'no further action'.⁴⁰

This record is not, therefore, benign. It may influence the outcome of future interactions with statutory services, and the standing of parents in their local community. It has long-term consequences for the child, and although the majority of children who have been abused do not maltreat their own children,⁴¹ the adult child is themselves categorised as being a high risk to their own children.⁴² This approach and its evidence base⁴³ has been heavily criticised by Davies on the grounds that it is grossly unfair to victims of abuse who go on to have families of their own. It is argued to create an aura of suspicion which is out of the subject's control.⁴⁴ It is perhaps particularly unfair to children who have not been victims of abuse but who are suspected to have been. In such circumstances it is unsurprising that defamation has been considered as a potential remedy to expunge damaging allegations from records. The situation was described in *X (Minors) v Bedfordshire County Council*⁴⁵ as providing 'fertile ground' for conflict between social workers and parents.

As a general principle statements made in the course of local authority assessments and case conferences are covered by qualified privilege. The deciding case was *W v Westminster City Council*.⁴⁶ The local authority failed in its argument that qualified privilege could be extended to absolute privilege in relation to statements made by a social worker in a child protection conference. The grounds for the argument were that *Taylor v Director of Serious Fraud Office*⁴⁷ had established that courts could in principle extend absolute privilege to new circumstances if the test of necessity was satisfied.⁴⁸ The argument failed. It was held that if the test of necessity were to succeed it would have to be satisfied in respect of statements made over the whole range of the local authority's responsibilities, including statements made to all those

40 Based on an observation of family characteristics of a sample of children on the Child Protection Register in J Gibbons et al, *Operating the child protection system: Studies in Child Protection* (HMSO, 1995).

41 CS Widom, 'Does violence beget violence?: A critical examination of the literature' (1989) 106 *Psychological Bulletin* 3.

42 L Davies, *Protecting Children – A Critical Contribution to Policy and Practice Development* (London Metropolitan University, PhD Thesis, 2010), at p 143.

43 See discussion in: B Egeland, 'Breaking the Cycle of Abuse: Implications for Prediction and Intervention in K Browne, C Davies and P Stratton (eds), *Early Prediction and Prevention of Child Abuse* (Wiley, 1988).

44 L Davies, *Protecting Children – A Critical Contribution to Policy and Practice Development* (London Metropolitan University, PhD Thesis, 2010), at p 143.

45 [1995] 2 AC 663.

46 [2004] EWHC 2866 (QB), [2005] 1 FLR 816.

47 [1999] 2 AC 177.

48 *Ibid*, at 214.

with whom the statutory guidance provided that information should be shared. That was too wide a class of communications and of publishers for which the test of necessity had to be satisfied.⁴⁹

The case was considered exceptional. The claimants contended that the alleged recklessness of the social workers in recording and sharing allegedly irrelevant matter was of a kind which might be evidence that a communication was made for some motive other than a desire to perform the duty in question.⁵⁰ The question of malice turned on whether the defendants acted bona fide in the discharge of their moral duty to raise matters of concern, or whether they acted from some other unjustifiable motive other than a sense of duty. The test in relation to this material was whether it provided evidence from which malice could be inferred. In this case the argument failed.

Following *W v Westminster City Council*, although defamation remains available as a remedy if malice could be shown, the threshold is high. *W v Westminster City Council* illustrates that these circumstances are likely to be restricted and difficult to establish, so although the common law appears to have maintained the ability of parents or children to use defamation as a remedy, its use is restricted. Additionally, it does not address a fundamental problem of decision making in public family law processes: it is the accuracy, or truth, of a statement in relation to a child or their parent that is central to effective decision making, not whether a statement can be made with impunity. Decision making in relation to child welfare on false or inaccurate statements cannot lead to reasonable outcomes for children or their families.

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and the Human Rights Act 1998

Jurisprudence from the European Court of Human Rights (European Court) in relation to the effect of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention) and the Human Rights Act 1998 provides potential remedies by ensuring actions of state bodies are proportionate and reasonable. Adequate remedy is required to be available under the provisions of the Human Rights Act 1998. In practice, these remedies have proved restrictive for parents from whom a child has been removed. The provisions of Article 8 of the European Convention include non-biologically related family, which reflects the rise in non-traditional families.⁵¹ This weakens the position of biological parents in claiming return of their children as a remedy.

Article 3

Article 3 provides a remedy in respect of torture or inhuman or degrading treatment or punishment. The principle has yet to be tested in relation to harm caused by the management of unsubstantiated allegations, although if it is accepted that assessment is punitive the possibility for an action exists.⁵² However, *Z v UK* found in favour of the applicant children in respect of a breach of Article 3,⁵³ suggesting Article 3 has limited use as a remedy in restricted circumstances where the ground for an action is under-interference.

49 [2004] EWHC 2866 (QB), [2005] 1 FLR 816.

50 Ibid.

50 Ibid, at [67].

51 Human Rights Act 1998, Art 8 concerns the right to private family life, but 'family' is not restricted to biological family. See European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as amended by Protocol Nos 11 and 14.

52 L Wrennall, 'Surveillance and Child Protection: De-mystifying the Trojan Horse' (2010) 7(3/4) *Surveillance and Society* 304, at p 309.

53 *X (Minors) v Bedfordshire County Council; M (A Minor) v Newham London Borough Council; E (A Minor) v Dorset County Council* [1995] 2 AC 663, heard in Strasbourg as *Z and Others v United Kingdom* [2001] 2 FLR 612.

Article 6

Article 6 concerns the right to a fair trial. The underlying principle is to ensure that individuals are not denied the right to a fair trial before being categorised as criminals. The question is whether the local authority is determining civil rights in relation to its management of unsubstantiated allegations, in which case Article 6 applies and may demand external scrutiny before a court:

‘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.’⁵⁴

Whereas ‘the appropriate balance of power between courts and local authorities in section 31 care cases has long been debated’,⁵⁵ the appropriate balance of power between parents and local authorities in relation to cases that by their nature do not progress to a section 31 application has not been similarly considered. Although there is no case-law specifically in relation to Article 6 and the management of unsubstantiated allegations, it is possible that the assessment process may give rise to challenge.

With the exception of the possibility of using Article 13 to argue that the assessment process is tantamount to a disguised decision against which there is no remedy, it seems that parents can be tainted by serious stigma without right of redress.⁵⁶ This was confirmed in the decision in *M (A Minor) v Newham London Borough Council*⁵⁷ which was heard in Strasbourg as *TP and KM v United Kingdom*.⁵⁸

The fact that there are procedural duties owed to parents under Articles 6 and 8 of the Convention is a slightly different question. This issue was examined in *P, C and S v United Kingdom*.⁵⁹ However, this case was not limited to the assessment process, as in this case the child had been permanently removed via a successful section 31 application, and had subsequently been adopted. The applicants were a husband and wife and their daughter. The daughter had been removed at birth with no plan by the local authority to reunite her with her parents. The European Court found that there had been breaches of Article 6 and of Article 8. However, the European Court said that it did not propose to attempt to untangle the opposing considerations but confirmed that particular importance is attached to the procedural obligations inherent in Article 8. It could not be asserted that the daughter would not have been adopted but for the flaws in the procedure, and consequently limited damages were awarded to each parent for loss of opportunity. This illustrates the limits of the available remedies which do not prioritise the integrity of the biological family: even where the decision-making process which led to the removal of the child is recognised as faulty, the parents could not compel the return of their child.

The use of Article 6 as a remedy seems to therefore be limited to cases of procedural irregularity. In contrast, if a criminal charge is brought in relation to alleged child abuse there may be some protection as the matter transfers to the criminal jurisdiction and the right to a fair trial becomes a relevant consideration in the proceedings, as it is in public family law proceedings.

54 Human Rights Act 1998, Art 6.

55 J Miles, ‘Mind the Gap . . . Child Protection, Statutory Interpretation and the Human Rights Act’ (2002) 61(3) *Cambridge Law Journal* 533.

56 See, for example, the issues raised in: *Re S (Sexual Abuse Allegations: Local Authority Response)* [2001] EWHC Admin 334, [2001] 2 FLR 776.

57 [1995] 2 AC 663.

58 [2001] 2 FLR 549.

59 [2002] 2 FLR 631.

Article 8

Article 8 concerns the right to respect for private and family life. The remedy is not absolute. It is a qualified right and the judicial interpretation of the ‘paramountcy principle’ in the context of equality applies.⁶⁰ Under Article 8 any interference by a public authority interrupting respect for privacy and private family life must be ‘in accordance with the law’ and ‘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’.⁶¹ As surveillance constitutes interference into private life and consequently falls under Article 8,⁶² it is therefore relevant as a potential remedy for surveillance of families. Surveillance is undertaken to identify risky signs and characteristics in children and families, and also in respect of direct acts of the state responding to these signs, and to specific allegations made in the course of a referral.

Article 8 as a remedy for child protection surveillance

The European Court now clearly recognises that the collection of information on an individual by officials of the state without consent constitutes interference with that individual’s right to respect for his private life, which is guaranteed by Article 8(1) of the European Convention.⁶³ Although Article 8(1) gives citizens the ‘right to respect for his private and family life, his home and his correspondence’, according to Article 8(2) interference with privacy and family life is permitted provided it:

- (i) is ‘in accordance with the law’;
- (ii) serves one of the legitimate aims, for example national security, public safety, the economic well-being of the country, prevention of disorder or crime, protection of health or morals, or the protection of the rights and freedoms of others; and
- (iii) is ‘necessary in a democratic society’ for the purpose in question.

There is case-law establishing that there are two requirements over and above the requirement that interference must have some basis in domestic law:

- (1) The law must be adequately accessible: citizens must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a practice cannot be regarded as lawful unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. These are principles of ‘fair labelling’;⁶⁴ and
- (2) Any law invoked as a basis for an interference with a Convention right must be ‘compatible with the rule of law, which is expressly mentioned in the preamble to the Convention’.⁶⁵ The legal rules in question must not allow for arbitrariness as this is contrary to rule of law. This in turn relates back to the question of how precisely a legal rule is phrased as ‘the

⁶⁰ Children Act 1989, s 1(1).

⁶¹ *Amann v Switzerland* (Application No 27798/95) (2000) 30 EHRR 843, at 47.

⁶² *Ibid.*

⁶³ See I Brown and D Korff, ‘Paper No 4: The Legal Framework – an analysis of the “constitutional” European approach to issues of data protection and law enforcement’ in *Privacy and Law Enforcement, Study for the Information Commissioner* (HMSO, 2004).

⁶⁴ *Sunday Times v United Kingdom* (Application No 6538/74) (1979) 2 EHRR 245, at 49.

⁶⁵ *Malone v United Kingdom* (Application No 8691/79) (1984) 7 EHRR 14, at 67, citing *Silver and Others v United Kingdom* (Application No 5947/72) (1983) 5 EHRR 347, at 90, and *Golder v United Kingdom* (Application No 4451/70) (1979–1980) 1 EHRR 524, at 34.

domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances and conditions on which public authorities are empowered to resort to any such secret measures'.⁶⁶

The principles apply generally to local authorities and government surveillance powers. Legislation granting authorities the power to interfere with fundamental rights must be formulated with sufficient precision:

- (1) To allow individuals who might be affected to foresee, to a reasonable extent, how the rules will be applied in specific cases, and
- (2) To prevent the authorities in question from applying the rules arbitrarily.

If local authorities are granted discretionary powers, that discretion must be fettered: it must be made clear when it is appropriate to use the discretionary powers, and when it is not. In addition, there should be appropriate procedures to ensure that the rules are properly applied, to which citizens should have access, and there should be adequate remedy.⁶⁷ The requirements are set out in *Malone v United Kingdom*:

'The degree of precision required of the law in this connection will depend upon the particular subject matter . . . Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.'⁶⁸

These principles, on the face of it, provide some remedy for families whose private data has been collected and used without their consent. However, in establishing child protection databases the government⁶⁹ mistakenly relied on *Peck v United Kingdom*⁷⁰ in respect of allowing personal data exchanges on the basis of wide statutory provisions. In *Peck* personal data on a CCTV tape on which the applicant could be identified was disclosed by a local authority to the press, acting inter alia under a previous provision similar to Local Government Act 2000, section 2 and Local Government Act 1972, section 111.⁷¹ Section 2 of the Local Government Act 2000 allowed local authorities to do:

'... anything which they consider is likely to promote or improve [the economic, social or environmental] well-being of their area ...'⁷²

Anderson et al observed that this is one of the main provisions on which government and local authorities base the sharing of sensitive data on children and their families, despite the

66 *Amann v Switzerland* (Application No 27798/95) (2000) 30 EHRR 843, at 58.

67 This procedural aspect of the rights protected by the Convention is increasingly acknowledged in case-law. This is consistent with Art 13 of the Convention (notably the only substantive provision in the European Convention that has not been included in the Human Rights Act 1998).

68 *Malone v United Kingdom* (Application No 8691/79) (1984) 7 EHRR 14, at 67–68.

69 Department for Constitutional Affairs, *Public Sector Data Sharing Guidance on the Law – November 2003* (DCA, 2003).

70 (Application No 44647/98) (2003) 36 EHRR 719.

71 See Department for Constitutional Affairs, *Public Sector Data Sharing: Guidance on the Law*, November 2003 (DCA, 2003), s 3(26), referring to *Peck v United Kingdom*, *ibid*. Local Government Act 1972, s 111 states: 'a local authority shall have the power to do anything . . . which is calculated to facilitate, or is conducive or incidental to the discharge of any of their functions'. For a detailed description of *Peck*, see I Brown, and D Korff, 'Paper No 4: The Legal Framework – an analysis of the constitutional European approach to issues of data protection and law enforcement' *Privacy and Law Enforcement, Study for the Information Commissioner* (ICO, 2004).

72 Local Government Act 2000, s 2(1).

provision being restricted in section 3.⁷³ In addition, the main provision the Department for Constitutional Affairs relied on was section 163 of the Criminal Justice and Public Order Act 1994,⁷⁴ which allowed local authorities to establish CCTV systems in order to, inter alia, 'promote the prevention of crime'.

Although it was considered by the DCA that these provisions, read together, were a sufficient legal basis for the disclosure of data without the consent of the data subject, it cannot be assumed to provide a sufficient basis for the disclosure of personal data, nor can it be said that the broadest provision, section 111 of the Local Government Act 1972,⁷⁵ is sufficient on its own. Indeed, it is clear that the collecting of personal data (and especially of sensitive data) constitutes:

'... an interference with the data subject's private life, and that the disclosure of such data will constitute a serious interference if it can have serious consequences for the data subject, and (ii) that such interferences must be authorized in clear and specific legal rules relating to the particular processing.'⁷⁶

Also, in a case in which the HIV status of a citizen had been revealed it was held that:

'... any State measures compelling disclosure of such information without the consent of the patient and any safeguards designed to secure an effective protection call[s] for the most careful scrutiny on the part of the Court.'⁷⁷

Despite this, the DCA Guidance states:

'If there are no relevant statutory restrictions it may then be possible for local authorities to share data either internally or externally in reliance on Section 111(1) of the Local Government Act 1972 or Section 2 of the Local Government Act 2000. The power that is contained in Section 2 of the Local Government Act 2000 is of particular relevance as it is designed to ensure that service delivery is coordinated in ways which minimise duplication and maximise effectiveness.'⁷⁸

Anderson et al concluded that this guidance was:

'... not compatible with the EC Framework Directive on data protection. The guidance is therefore mistaken in terms of EC, and thus (under the ECA) UK law. At the very least, those conditions should be extremely restrictively applied, subject to special rules and special safeguards.'⁷⁹

If it is not in accordance with the law it is potentially a breach of Article 8. The extensive sharing of highly sensitive data about children and their families, wider families and friends involves:

'... serious interferences with the rights of those children under Article 8 ECHR. Under the Convention, such interferences must be based on legal provisions that are clear, precise, foreseeable in their application and compatible with the rule of law. The same applies to the sharing of data on parents, siblings and friends. Vague and open-ended provisions such

73 See R Anderson et al, *Children's Databases – Safety and Privacy, A Report for the Information Commissioner*, 22 November (FIPR, 2006), at p 105.

74 Criminal Justice and Public Order Act 1994.

75 Local Government Act 1972.

76 See note 73 above, at p 106.

77 See note 73 above, at p 106 quoting from: *Z v Finland* (Application No 22009/93) (1998) 25 EHRR 371.

78 Department for Constitutional Affairs, *Public Sector Data Sharing Guidance on the Law – November 2003* (HMSO, 2003), at Section 3.30.

79 See note 73 above, at p 120.

as (again) Section 2 of the Local Government Act 2000 or section 111 of the Local Government Act 1972 do not meet these requirements and cannot therefore legitimise the data sharing in question.⁸⁰

Whether the government is acting *ultra vires* in its surveillance policies determines whether a remedy is available under Article 8. This is a remedy which applies to all families in England; all families are subjected to risk surveillance following sections 11 and 12 of the Children Act 2004, with the intention that risky families will be referred to local authorities and assessed.

Article 8 as a remedy for harm caused by the management of unsubstantiated allegations

Demonstrating a breach of Article 8 is an important potential remedy. However, the qualified nature of the right removes the absolute right to claim a breach under Article 8 in relation to local authority assessment per se even when the grounds for a referral are unfounded.⁸¹ An Article 8 breach may, however, have occurred if the assessment process can be demonstrated to be flawed or inadequate. It is thus the way in which the process is carried out that could amount to a breach of Article 8.

*AD and OD*⁸² illustrates some of the important issues. The case concerned an action brought by a mother and her child in relation to lack of adequate risk assessment as the child's *osteogenesis imperfecta* (brittle bones) were not initially detected, leaving the parents open to suspicion in relation to the child's injuries. The child was placed in foster care whilst the local authority prepared to apply for a section 31 order. This was only halted when an x-ray showed the underlying medical condition following the child's fall and admission to hospital whilst in the care of the foster carer. The mother contended that she had separated from the father as a result of the experience and that she and her child had suffered damage as a consequence.

At the time of her claim in the UK courts, the Human Rights Act 1998 was not in force and she did not have a cause of action in negligence as no duty of care was owed to her.⁸³ The child's claim in negligence failed as no recognised psychiatric damage was found to have occurred. The European Court case was brought on the basis that mother and child had both suffered a violation of their human rights under Article 13 read in conjunction with Article 8.⁸⁴ The Convention demands that parents have an effective remedy for any breach of their Article 8 rights. Section 7 of the Human Rights Act 1998 now provides a remedy for any breach of these rights, but in this case Article 13 applied because the Human Rights Act 1998 was not in force at the time the events occurred. It was held that:

'The [UK] Government . . . accepted that it was arguably obliged to ensure that an enforceable right to compensation was made available for such damage as could have been proved to have been suffered as a result of any violation of Art 8 and that this complaint should be declared admissible. As the applicants acknowledged, there was now an effective remedy provided under the Human Rights Act 1998.'

In addition to the question over the adequacy of Article 8 as a remedy, its use may be restricted. For example, Article 8 may provide a potential remedy only if an existing family relationship can be shown.⁸⁵ The meaning of 'family life' is thus relevant to establishing whether an

80 Ibid, at [7.3(7)].

81 Established in *K v United Kingdom* (2009) 48 EHRR 29, at 36, reiterated in *AD and OD v United Kingdom* (Application No 28680/06) (unreported) 26 March 2010, at 68, 84.

82 Ibid.

83 Ibid, at 99.

84 Ibid, at 95.

85 See, for example, *Frette v France* (Application No 36515/97) [2003] 2 FLR 9, at [32].

applicant has *locus standi*. This issue was considered in *Marckx v Belgium*⁸⁶ in relation to illegitimate children, establishing they held the same position as a legitimate child in relation to their relationship with their mother. The position, however, is not the same for fathers, who have to demonstrate the existence of family life between himself and the child and the mother.⁸⁷

In addition to the negative requirement that Article 8 confers, *Marckx* established that there is also a positive duty on the state to:

‘... act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8, respect for family life implies in particular, in the court’s view, the existence in domestic law of legal safeguards as to render possible as from the moment of birth the child’s integration in his family . . . a law that fails to satisfy this requirement violates paragraph 1 of Article 8 without there being any call to examine it under paragraph 2.’⁸⁸

However, even if a breach of Article 8 can be established, the breach may be claimed to be justified under Article 8(2) by arguing the action or violation to be ‘in accordance with the law’, that ‘it pursued a legitimate aim’ and was ‘necessary in a democratic society’.

In relation to the balancing question of paramountcy and fair balance, *Johansen v Norway* considered how a fair balance could be struck between the child and the parent’s interests. It was recognised that the rights of the parents must be given separate consideration from those of the child:

‘... a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child. In carrying out this balancing exercise, the court will attach particular importance to the best interests of the child, which, depending upon their nature and seriousness, may override those of the parent. In particular, as suggested by the government, the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child’s health and development.’⁸⁹

Johansen has been followed in subsequent cases, although the fair balance approach has been argued to be incompatible with the welfare principle as it is understood by the UK courts.⁹⁰ *Yousef v The Netherlands*⁹¹ held that the interests of the child must prevail if a balancing of interests is necessary:

‘... the court reiterates that in judicial decisions where the rights under Article 8 of parents and those of a child are at stake, the child’s rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail.’⁹²

However, it was argued in the next paragraph of the judgment that this was not incompatible with the rights of the applicant:

‘... the court has not found any indication that the domestic courts in striking the balance they did between the rights of the applicant and those of the child, failed to take the applicant’s rights sufficiently into account.’⁹³

86 (Application No 6833/74) (1979–80) 2 EHRR 330.

87 *Lebbink v The Netherlands* (Application No 45582/99) [2004] 2 FLR 463.

88 (Application No 6833/74) (1979–80) 2 EHRR 330, at 31.

89 (1997) 23 EHRR 33.

90 D Bonner, H Fenwick and S Harris-Short, ‘Judicial Approaches to the HRA’ (2003) 52 *International and Comparative Law Quarterly* 549, 582–583.

91 (Application No 33711/96) [2003] 1 FLR 210.

92 *Ibid.*, at [73].

93 *Ibid.*, at [74].

Since *Yousef*, courts have reiterated the *Johansen* approach. There is judicial reluctance to consider any erosion of the welfare approach, considering it to be compatible with the rights approach, which places the child's rights ahead of their parents and ahead of other children who are not the subject of the proceedings.⁹⁴ Herring identified fundamental differences between the two approaches.⁹⁵ Despite this, there seems to have been an assumption that decisions informed by the best interests of the child will automatically conform to the requirements of Article 8.⁹⁶

Remedies are likely to be restricted to a small amount of damages. Successful parents will be very unlikely to achieve the return of their child. It is generally considered to be in the child's best interests to remain with the adoptive parents so as to minimise disruption to children's attachment to their care-givers. This is not without contention, but is generally accepted in welfare discourse.⁹⁷ This is the consequence and importance of the wide definition of family in relation to Article 8; it is not restricted to biological family but may be taken to include the rights of a child in his new family following enforced placement elsewhere.⁹⁸

In summary, the remedy undoubtedly exists but is inadequate to address the trauma suffered as a consequence of surveillance, allegations and assessment. It has more relevance once a child has been removed where the remedy is inadequate to realistically address the level of trauma and irreversible disruption to family life.

Negligence

Case-law in respect of alleged negligence in child protection matters is pertinent to two key issues:

- (1) When and why a duty of care is owed to a child; and
- (2) When and why (not) a duty of care is owed to the child's parents and other adults.

Most negligence actions concern situations that have progressed to section 31 applications, but there are some cases that exemplify the dilemma of parents, children and the state in relation to the management of allegations. Conversely there are also cases where child abuse is evident but the local authority failed to take robust action to protect children.

*X (Minors) v Bedfordshire County Council*⁹⁹ concerned an interlocutory appeal against the striking out of a negligence action on the grounds that the local authority *inter alia* failed to take action under sections 17 and 47 to assess, investigate and take appropriate action. It was struck out as having failed to disclose a cause of action by the House of Lords who did not want to impose a duty of care on social workers and local authorities.

⁹⁴ *Re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806, 820 and *J v C* [2005] EWHC 1016 (Fam).

⁹⁵ J Herring, 'The Human Rights Act and the welfare principle in family law – conflicting or complementary?' [1999] CFLQ 223.

⁹⁶ See, for example, *Re H (Contact Order) (No 2)* [2002] 1 FLR 22 and *Re B (A Child) (Adoption by one Natural Parent)* [2001] UKHL 70, [2002] 1 WLR 258.

⁹⁷ This derives from attachment theory. See J Bowlby, *Maternal care and mental health* (Monograph, World Health Organization, 1951); J Bowlby, *Child Care and the Growth of Love* (Penguin Books, 1953); J Bowlby, *Attachment. Attachment and Loss: Vol 1. Loss* (Basic Books, 1969); J Bowlby, *Loss: Sadness and Depression. Attachment and Loss (Vol 3)* (International psycho-analytical library no 109) (Hogarth Press, 1980). For an introduction to a critique of Bowlby's work, see M Rutter, 'Maternal deprivation, 1972–1978: New findings, new concepts, new approaches' (1979) 50(2) *Child Development* 283.

⁹⁸ Once children are considered to have 'settled' in a placement the courts are likely to treat the newly established relationship(s) as paramount for the child's best interests. See *London Borough of Greenwich v EH and AA and A (Children)* [2010] EWCC 61 (Fam). For a typical review of the issues by the media where the courts are perceived to 'go horribly wrong', see P Sawyer, 'Ombudsman could investigate child "snatching" by courts', 6 March 2011, *The Telegraph*, available at: www.telegraph.co.uk/news/uknews/law-and-order/8363499/Ombudsman-could-investigate-child-snatching-by-courts.html.

⁹⁹ [1995] 2 AC 663.

The negligence case was brought by five sibling claimants aged between three and one on the grounds that the local authority had failed to investigate concerns. Various professionals had reported the children to the local authority and had made recommendations but no action was taken other than a case conference, despite both parents requesting removal of the children. Following the mother's threat that she would 'batter them' if they were not removed the children were placed with foster carers and were eventually placed on the child protection register in relation to neglect and emotional abuse. However, no application was made in respect of a care order at that time despite the fact that the local authority accepted the children should not return to the care of their parents. Some months later the local authority did apply for care orders which were successfully granted. The children's case was that the local authority should have acted more quickly and effectively.

Four of the five siblings pursued the action as *Z and Others v United Kingdom* in the European Court.¹⁰⁰ This decision laid the groundwork establishing a duty of care in relation to social work decisions and children. The originating action had been brought prior to the Human Rights Act 1998 so the case was taken to Strasbourg which held that there should be a right to a remedy, and that there had been breaches of private family life. Following this decision, it is now established that a duty of care exists in relation to the duty of a local authority towards children, but not in relation to their parents and other adults. It was held there were breaches under Articles 3 and 13 of the Convention but no breach of Article 6. In relation to Article 3 there was a positive obligation on the government to protect children from inhuman or degrading treatment. The authorities had been aware of the abuse over a period of years, and had failed to bring this to an end. In relation to Article 13 there should be a mechanism available to the victim or the victim's family for establishing liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention, including compensation for non-pecuniary damage.

*M (A Minor) v Newham London Borough Council*¹⁰¹ was heard together with *X (Minors) v Bedfordshire County Council* in 1994 and concerned the opposite problem, that of over-interference. The legal issue, however, was the same: that of establishing whether a duty of care exists between a local authority, children and/or parents. The claimants were mother and daughter. The daughter was separated from her mother by social services because of allegations that she had been abused by the mother's boyfriend, which turned out to be incorrect. The claim was also struck out on the grounds that no duty of care should be held to exist between social workers and children or parents.

*M (A Minor) v Newham London Borough Council*¹⁰² progressed to Strasbourg as *TP and KM v United Kingdom*.¹⁰³ The applicants contended that there had been a breach of their rights under Articles 6, 8 and 13. The claim under Article 6 was dismissed but it was found there had been a breach of Article 8. It was further found that the applicants had been denied an effective remedy, contrary to Article 13, as the possibility of applying to the ombudsman and to the Secretary of State did not provide the applicants with any enforceable right to compensation. The European Court awarded damages on the basis that the applicants suffered distress and anxiety, and in the case of the first applicant, feelings of frustration and injustice.

Following these judgments further cases were brought in the UK in 2003 claiming negligence in respect of social work acts and omissions which prompted the judiciary to reconsider the issues

100 [2001] 2 FLR 612.

101 [1995] 2 AC 663.

102 Ibid.

103 [2001] 2 FLR 549.

and the considerable academic commentary.¹⁰⁴ The facts in *D v East Berkshire Community NHS Trust*; *K v Dewsbury Healthcare NHS Trust*; *K v Oldham NHS Trust*¹⁰⁵ pre-dated October 2000, so no claim could be brought under the Human Rights Act 1998, although in the judgment Lord Phillips said that it was necessary to consider whether the introduction of the 1998 Act had affected the common law principles of the law of negligence. All three cases concerned instances of over-interference. Each case involved accusations of child abuse made against a parent and in each case the accusations proved to be unfounded. All three cases were turned down at first instance on the grounds that no duty of care was owed.

The claimants appealed to the Court of Appeal where Lord Phillips identified a number of issues including: whether the position in *X (Minors) v Bedfordshire County Council*,¹⁰⁶ and *M (A Minor) v Newham London Borough Council* and *E (A Minor) v Dorset County Council*¹⁰⁷ had developed, and whether more recent authority had varied those principles; whether *X (Minors) v Bedfordshire* could be distinguished on the facts; and whether a duty of care was owed to both the children and the parents in each case. Lord Phillips concluded that the effect of other decisions was to significantly restrict the effect of *X (Minors) v Bedfordshire* to the core proposition that decisions by a local authority whether or not to take a child into care were not reviewable by way of a claim in negligence, leaving the possibility for a different outcome.¹⁰⁸

As far as the position of the child was concerned, Lord Phillips considered that the decision in *X (Minors) v Bedfordshire* could not survive the Human Rights Act 1998, although those asserting that wrongful acts or omissions occurred before October 2000 would have no claim under it. It would therefore 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. It was possible that there would be situations where it was not fair, just or reasonable to impose a duty of care, but each case would fall to be determined on its own facts.

Having established the position in relation to children, the judgment turned to the position of the parents. Although the position of the child in a common law negligence action had developed under the Human Rights Act 1998, the position in relation to parents was very different as it was held there were cogent reasons of public policy for concluding that where child welfare decisions were being taken no common law duty of care should be owed to the parents. Although decisions in relation to Article 13 established that parents and other adults must have a remedy, it was held that it did not follow that they would establish the same rights as children in relation to common law negligence: the fact that parents could establish a breach of Article 8, and there were other remedies available to them in relation to specific situations, for example defamation, meant they were not left without remedy. The rationale for the decision was that the duty owed to children was in potential conflict with the interests of

104 The issues these cases raised have been considered extensively in academic literature. For example: M Johnson, 'Public authority liability in child abuse compensation claims – the *X v Bedfordshire CC* case undergoes a re-examination by the Court of Appeal' (2004) 1 *Journal of Personal Injury Law* 28; M Mildred, 'Personal injury – psychiatric harm – parents – children' (2004) 1 *Journal of Personal Injury Law* 9; K Williams, 'Abusing parents and children: negligence remedy not afforded to parents' (2005) 21 *Journal of Professional Negligence* 196; P Case, 'The accused strikes back: the negligence claim and erroneous allegations of child abuse' (2005) 21(4) *Professional Negligence* 214; E Gumbel, R Scorer and M Johnson, 'Recent developments in child abuse compensation claims' (2006) 1 *Journal of Personal Injury Law* 21; A Inglis, 'Personal injury claims for child protection failures' (2009) 29 *Scots Law Times* 173.

105 [2003] EWCA Civ 1151, [2004] QB 558.

106 [1995] 2 AC 663.

107 Ibid.

108 Lord Phillips also considered two New Zealand cases, *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 and *B v Attorney-General* [2003] UKPC 61. In the latter case a claim by a child was allowed, but rejected in relation to the father on the grounds that no duty of care was owed because he was the alleged perpetrator: the statutory duty on social services was not imposed for the benefit of alleged perpetrators.

parents. It was considered essential that the professionals should not be inhibited in acting in the child's best interests by concerns that they might be in breach of a duty owed to parents. It would always be in the parents' interests that the child should not be removed and thus the child's interests were in potential conflict with the interests of the parents.

In these cases counsel for the claimants attempted to distinguish the cases from *X (Minors) v Bedfordshire* by arguing that there was a duty of care owed by the doctor to the child and also to the parents. This argument was rejected and was held to be unrealistic because the initial diagnosis of the doctor simply set in train the multi-disciplinary approach. The moment the doctor suspected that the child had been abused, his duty to the child was in potential conflict with the parents.

The decisions established that children who suffer harm as a consequence of negligent medical diagnosis and social work interference do have a duty of care owed to them, representing a significant shift in judicial policy. Although the position in relation to negligence has developed in favour of children, who now have a remedy in common law negligence, their parents and other adults do not.

The difficult balancing act that the courts were faced with has left the position for parents unsatisfactory, despite their right to an effective remedy. The courts' decisions have attempted to resolve some of the difficulties surrounding whether, and in what circumstances, a claim could succeed. They have also considered whether a failure to act on the part of a local authority is actionable by children harmed as a result of the failure. However, the courts have stopped short of providing parents with the same rights as children, the argument being that they have other remedies they could use. The question of whether these remedies are effective and adequate is open to debate given the scale of referred families and evidence of trauma and harm potentially suffered by non-abusing parents.

Conclusions

The available remedies are drawn from a number of common law and statutory provisions. Local authority complaints procedures and judicial review will not provide a remedy in relation to local authority decisions unless there is a procedural irregularity in the manner of the decision making. This may trigger a re-determination. Defamation is of limited help but only in situations where malice can be shown. The circumstances where this is possible to demonstrate on the balance of probabilities are likely to be rare.

In the case of common law negligence damages are restricted to children as parents have no *locus standi* as a matter of public policy. The Human Rights Act 1998 offers some remedy where processes have been breached, but the case-law has not addressed the apparent incompatibility of the Children Act 1989 paramountcy principle. Damages are limited to small amounts of monetary compensation which is of little assistance to families who have been separated via processes later shown to have breached the rights of the parents or the child. The rationale is the welfare principle, which has been interpreted to mean that once a child is removed from their parents, a return of the child would be a further disruption and is not, therefore, in their best interests.

These provisions offer limited remedies that do not adequately reconcile the level of reported harm. Given the annually increasing number of referred families this is a growing and immediate problem. The issues are particularly acute in relation to the dilemmas of parents and claimants in cases such as *Re S (Sexual Abuse Allegations: Local Authority Response)*¹⁰⁹ who

109 [2001] EWHC Admin 334, [2001] 2 FLR 776.

could not bring an end to the suspicion surrounding him. The decisions also do not help situations such as that which occurred in *M (A Minor) v Newham London Borough Council*.¹¹⁰

This leaves claimants, particularly parents, in an unequal position. Argument that establishing a duty of care would create a conflict of interest for social workers, causing them to act defensively are weak; a social worker acting in accordance with their statutory duty in a reasonable and proportionate way has no reason to fear the consequences of a negligence action. It is notable that in *X (Minors) v Bedfordshire* Lord Browne Wilkinson observed that if a remedy in negligence were imposed on local authorities it would have a chilling effect on their work and generally render them more cautious and defensive in their approach.¹¹¹ This approach, however, is directly at odds with the government's view that public inquiries and serious case reviews should occur in cases of under-interference which also render local authority social workers more cautious and defensive. This is an unsatisfactory position leaving a disincentive for under-interference and encouragement for over interference.

Simply denying the right to a remedy at common law does not address the serious question of the harm caused and the impact on parents, children and society. It is not reasonable to deny a remedy to a class of citizens harmed by negligent state interference, particularly where citizens are powerless to stop such interference. This entrenched position is enabling a power imbalance between state and family at odds with principles of reasonableness and proportionality.

The fundamental problem is that there is no process in the legislation or the statutory guidance to assist parents who are caught in assessments and are harmed by them. These parents are left in a 'twilight' situation where suspicion remains but there is no process of exoneration or redress. The problem is therefore not adequately prioritised and considered in conjunction with the processes of child protection investigations themselves. When the Children Act 1989 was drafted the scale of referred families, now annually approximately five percent of families, was not envisaged. Child protection processes have expanded into safeguarding with the introduction of the Children Act 2004. Successive versions of *Working Together to Safeguard Children*¹¹² have become more intrusive in relation to how families are assessed. More is now known about the harm caused by referral and assessment, placing a responsibility on policy makers interpreting how local authorities will carry out their statutory duties to ensure that if harm is an inevitable consequence, then adequate remedy is available. The need for the increasing number of families in this situation to obtain redress is consequently growing. It may be that policy should address the plight of parents where allegations are unsubstantiated, including providing specific remedies and ensuring sensitive treatment of such parents and management of their data. If Government intent is to continue to adopt the child rights model as opposed to the family support model whilst policy continues to lean towards the early intervention model, discussion is indicated concerning specific remedy to address the piecemeal development of remedies. This discussion should focus on the need to ameliorate some of the tensions and distress for parents that are left following unsubstantiated suspicions of child abuse, and the adverse impact on their children and family life.

110 [1995] 2 AC 663.

111 Ibid.

112 For the latest version see note 12 above.