7BR
SEVEN BEDFORD ROW

Poole BC-v-GN and another [2019] UKSC 25

The purpose of this note is to provide practical guidance on the impact of the Supreme Court's decision in GN to local authority lawyers and solicitors acting for local authority defendants in "failure to remove" claims.

By "failure to remove" claims we mean claims brought on behalf of children, or by adults in respect of their own childhood, alleging that a local authority negligently failed to protect them from harm caused by their parents or other carers. The issue is whether a local authority owes the child a common law duty of care to protect them from that harm when exercising social services functions. Because the Supreme Court endorsed the House of Lords' decision in **Barrett-v-Enfield LBC**[1] that a local authority owes a common law duty to a child who is the subject of a care order, the practical question is whether such a duty can be owed prior to the making of a care order, and if so in what circumstances.

The decision

The claimants were two children who lived with their mother in accommodation provided by the defendant council from May 2006. They claimed damages for personal injury resulting from anti-social behaviour by a neighbouring family. The council knew that the claimants were subjected to harassment, intimidation and abuse by the family and that each claimant was vulnerable (the older claimant was severely disabled). The claimants were not taken into care but the council provided a range of services to the family: a social worker was allocated, the family was assessed and referred to services (child health and disability team, mental health services), and the older claimant had a care package. A child protection strategy meeting was held when the younger child expressed suicidal ideas (the ensuing assessment was admittedly flawed) and following a revised assessment the council conducted a s.47 investigation, resulting in a child protection conference and plan for the younger claimant. The family was found alternative accommodation in December 2011. It was alleged that the harassment suffered by the claimants between 2006 and 2011 caused physical and psychological damage.

The Supreme Court set out the principles applicable to the imposition of a common law duty of care on a public authority:

1. The same general principles apply to a public authority as would apply to a private individual or body [26].

2. Performance of a statutory function will not without more give rise to a common law duty of care, even if by exercising statutory functions they could prevent a person from suffering harm [65]. It

[1] [2001] 2 AC 550

needs to be shown that the authority has "actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care"[2] [33].

3. A distinction must be drawn between causing harm (making things worse) and failing to confer a benefit (not making things better). The general rule is that neither a public body nor a private individual owes a duty to confer benefit on others e.g. by protecting them from harm by a third party [28].

4. A duty to protect others from harm will only arise if an exception to the general rule applies. In the context of the type of case under consideration here, the relevant exception[3] will usually be that the public authority has assumed a responsibility to protect the claimant from harm[4] [65].

5. A voluntary assumption of responsibility is an undertaking to the claimant that reasonable care will be taken. The undertaking[5] can be express or implied. It can be inferred from the nature of the statutory function in question or from the manner in which the authority has behaved towards the claimant in the particular case [82]. It can be implied from foreseeability of reliance by the claimant on the exercise of reasonable care by the defendant [88].

6. Where the allegation is one of vicarious rather than direct liability the same principles apply. The question is: has the social worker assumed a responsibility towards the child to perform their functions with reasonable care? [86]

The appeal was dismissed because

1. The case concerned a duty to confer a benefit: to protect the claimants from harm caused by the neighbours [74].

2. A duty would only arise if the defendant had assumed a responsibility to protect the claimants from that harm [77].

3. The defendant had not assumed such a responsibility because

- Investigating and monitoring the claimants' position did not involve the provision of a service to them on which they or their mother could be expected to rely.

[2] Citing **Gorringe-v-Calderdale MBC [2004] UKHL 15**
[3] The other principle exception is where the defendant has created or has control over the source of the danger
[4] Note there will be no duty if the imposition of that duty would be inconsistent with the legislative framework
[5] The argument that a local authority cannot assume responsibilities voluntarily if it is required by statute to act in a particular way was rejected: see [70] to [73]

- It could not be said that the claimants and their mother had entrusted their safety to the council, or that the council had accepted that responsibility.

- The defendant had not taken the claimants into care and thereby assumed responsibility for their welfare.

- The nature of the statutory functions relied on did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care [81].

- The particulars of claim did not provide a basis for leading evidence about any particular behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred [82].

4. The vicarious liability claim failed because

- There was no suggestion that the social workers provided advice on which the claimants' mother would foreseeably rely [87].

- There was nothing to suggest D had undertaken the performance of some task or the provision of some service for the claimant with an undertaking that reasonable care will be taken by reason of the foreseeability of reliance by the claimant on the exercise of such care [88].

<u>What the decision means in practice</u>

Taking a child into care involves an assumption of responsibility for the welfare of the child. It seems unlikely that any different approach would be taken if the child was under an interim care order. What would be the position if the child was in voluntary care under s.20 of the Children Act 1989? Claimants will argue that any circumstances in which a local authority provides accommodation for a child involves an assumption of responsibility for the child's welfare.

Whether that is right will inevitably depend on the facts of the particular case. There is force in the argument that if the local authority is making a decision about where and with whom the child should live then the child's safety is entrusted to the council and the council, knowing that reliance will be placed upon the careful performance of the task, has accepted responsibility for the child's safety, at least of the duration of the period that the child is accommodated. Does the duty continue once the child ceases to be accommodated or the care order is discharged? The defendant should argue that it does not. The duty is dependent on the authority's ability to make arrangements for the child's welfare, including directing with whom they should live, and it should end when that responsibility is relinquished.

Are there circumstances short of accommodating a child that might give rise to a duty of care? The mere exercise of the statutory functions, which must include the working through of the measures required under the Working Together guidelines, will not be sufficient to impose a duty. Investigation and assessment, as the facts of GN demonstrate, will not be enough. But the judgment does not rule out the possibility that such circumstances might arise: [81] and [82].

In our view, this will be the battleground in the immediate future. Each case will turn on its facts, but claimants might argue (for example) that requiring a neglectful mother to attend parenting classes, or entering into an agree with an allegedly abusive father that he will not live in the family home, or engaging in self-protection work with the child is behaviour towards the child that demonstrates an assumption of responsibility for the child's welfare on which reliance will foreseeably be placed. The issue we think will always be whether the behaviour amounts solely to the operation of the statutory and regulatory scheme or whether it goes beyond that and demonstrates the acceptance of an obligation to act carefully in the protection of the child on the facts of the particular case. What can be said with confidence is that it will now be insufficient to argue that merely because the authority knew or ought to have known that the child was at risk a duty of care was owed, albeit that claimants may also seek to plug the gap in such cases by reliance of the Human Rights Act.

When facing these claims defendants should be alive to the possibility of an application to strike out the particulars of claim. Such applications are likely to succeed where

- as in GN, the particulars of claim do not properly identify the factual basis for the assumption of responsibility;

- the pleaded assumption of responsibility in reality amounts to no more than the exercise of the statutory powers;

- the existence of the duty of care alleged is inconsistent with the statutory scheme;

- on the facts identified, the breach of duty is not within the scope of the responsibility alleged to have been assumed.