

A duty of care?

Welcome to the February 2018 edition of Aon Inperspective

The Public Sector Bulletin

Staying in front of insurance related issues and trends affecting the public sector can be challenging. Aon Inperspective – the Public Sector Bulletin contains insight and news articles written exclusively by public sector experts and is designed to keep our clients and future clients ahead of the risk curve.



Bill Sulman
AC11 AIRM
Public Sector Client Director

With the Court of Appeal restoring the legal position set down in the 1995 case of *X v Bedfordshire*, Aon's public sector expert Bill Sulman explains how this will affect local authorities dealing with failure to remove cases.

A recent Court of Appeal judgement will have a significant impact on failure to remove cases. While this represents good news for local authorities, with further testing of this decision likely, it's important to take a considered approach to any outstanding offers.

The case, *CN & GN v Poole Borough Council*, involves two boys, both aged under 18 and living with their mother in a Poole Housing Partnership at the time of the incident.

Having suffering prolonged abuse, including anti-social and criminal behaviour from a neighbouring family, the boys alleged that Poole Borough Council was in breach of its common law duty of care for failure to safeguard them. Although the council did eventually rehouse them, the continual harassment had resulted in both sustaining physical and psychological harm with one of the claimants attempting suicide.

[Court of Appeal judgement](#)

The High Court ruled in 2016 that the local authority did have a duty of care to the boys under the Children's Act 1989 but this was overturned by the Court of Appeal judgement in December 2017.

The claimants' argument had centred on the case of *D v East Berkshire*, which took their human rights into account. However, the defendants successfully argued that decisions in the cases of *Mitchell v Glasgow City* and *Michael v Chief Constable of South Wales* were inconsistent with and overruled the *East Berkshire* case.

As a result, the Court of Appeal ruled that the decisions in the 1995 case of *X v Bedfordshire* should be restored as a governing authority. This rules that the council did not have a common law duty to take care of children who had suffered parental abuse or neglect.

This means that a local authority does not owe a child living at home a duty of care, even if the family are receiving support from social services. As a result, such cases are doomed to fail in negligence.

Implications for failure to remove cases

While it might be attractive to withdraw current offers in failure to remove cases, the ramifications of this decision mean that, even if this case doesn't go to the Supreme Court, it's highly likely that another case will be tested in the next few years.

Given this, Sarah Erwin-Jones of law firm Browne Jacobson recommends considering the following points when reviewing all outstanding offers in failure to remove cases:

- **Costs protection** – as some offers are likely to be old, if you withdraw an offer, and the position is reversed, you could lose all the commercial protection
- **Fact specific** – cases are very fact specific and it is likely that the current analysis which suggests no duty of care is owed will be subject to significant scrutiny and case law over next few years
- **Cluster cases** – where you have sibling cluster cases, where some have already settled, is it fair to repudiate the remaining claims as a result of the change in the law?
- **Approval hearing** – it may be tempting to withdraw offers in cases where all that's needed is an approval hearing
- **Complex cases** – offers are often made in cases where there are a number of facts to consider. These can be complicated and require careful review.

With the current position likely to be challenged at some point, reviewing each outstanding offer on its own merits and in line with the points above will ensure a fair and consistent approach can be demonstrated.

We will keep you up to date with any changes to this position and how they might affect your position.
For more information contact Bill Sulman at bill.sulman@aon.co.uk

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