

Taking 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.



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The Supreme Court ruling in the case of *Armes v Nottinghamshire County Council* will have implications for local authorities arranging foster care. Aon's public sector expert Bill Sulman explains.

More than 65,000 children live with foster families in the UK according to figures from [The Fostering Network](#). But, while this can give these children the love and stability they need, a recent Supreme Court ruling will have implications for local authorities arranging foster care.

The case, *Armes v Nottinghamshire County Council*, was brought by an individual who was in care from age seven to 18. During that time, she was fostered by Mr and Mrs A between March 1985 and March 1986, where she suffered physical and emotional abuse, and by Mr and Mrs B between October 1987 and February 1988, where she was sexually abused.

As the local authority had not been negligent in the selection or supervision of the foster parents, the case focused on whether it was liable, either on the basis that it was in breach of a non-delegable duty or that it was vicariously liable for the wrongdoing of the foster parents.

The claim was dismissed by the High Court in 2014 and the Court of Appeal the following year, but a Supreme Court ruling in 2017 overturned their decisions.

Supreme Court decision

Although it rejected the argument that the local authority was liable on the basis of a non-delegable duty, it found that it was vicariously liable for the abuse committed by the foster parents, detailing a number of reasons for its decisions.

It stated that it was too demanding a responsibility for a local authority to be under a non-delegable duty for the safety of children while they are with foster parents. Under the Child Care Act 1980, local authorities can arrange for children in care to spend time with parents and other relatives or friends. Imposing a strict liability on the local authority would risk a conflict of interest between promoting the welfare of the child and avoiding exposure to this liability.

The Act also requires the local authority to discharge the duty to provide accommodation and maintenance for a child. This implies that their duty is not to provide this care but to arrange for and monitor the care provided by the foster parents.

Vicarious liability

However, by applying the principles set out in *Cox v Ministry of Justice* (2016) on the imposition of vicarious liability, the court ruled that the local authority was vicariously liable for the acts of the foster parents for the following reasons:

- **Integration and business activity** – the local authority carried out the recruitment, selection and training of foster parents, paid their expenses and supervised the fostering. As such it is not possible to draw a sharp distinction between the activity of the local authority and that of the foster parents. The abuse was committed by the foster parents in the course of an activity carried out for the benefit of the local authority
- **Creation of risk** – the placement of children with foster parents creates a relationship of authority and trust between the foster parents and children in circumstances where close control cannot be exercised by the local authority. This leaves the children vulnerable to abuse
- **Control** – the local authority exercises a significant degree of control over the foster parents with approvals, inspections and supervision. A high degree of control isn't necessary for the imposition of vicarious liability

- **Ability to pay damages** – local authorities can compensate victims of abuse more easily than foster parents.

It also stated that by imposing vicarious liability it would not discourage local authorities from placing children in care with foster parents, rather than in residential homes at a much greater cost.

Insurance implications

The Supreme Court ruling has implications for insurance cover and claims and the following should be borne in mind:

- The extension to policies to indemnify foster carers is a long-standing extension to public liability cover offered by public sector insurers. Some policies specifically name foster carers, others merely refer to 'indemnity to other parties'
- This indemnity was originally requested to enable local authorities to attract people to the profession of being a foster carer. It's very helpful to be able to say that the foster parent would be indemnified by the council, with this indemnity supported by insurance
- It's important to distinguish between the liability of the council and the liability of the foster parent. A claim could arise resulting from a negligent act of the foster parent and none on the part of the council – as in this case – and subject to the council so wishing and insurers agreeing, the foster parent would be indemnified by the policy
- As a result of this decision, the negligent acts of the foster parent will now automatically mean the council is vicariously liable for the act, and any damages flowing from it. This will trigger the policy, subject to its usual terms, conditions and exceptions
- The change therefore is that the local authority would not need to request indemnity under the policy – this is now automatic
- It is quite likely that there will be an increase in such claims, as until this decision, local authorities have not been brought into an action where there is no evidence of negligence on their part
- Foster parent associations provide cover but, as there is a possibility that this would be involved in a claim, it is important to check whether it includes cover for abuse.

Conclusion

Most public liability policies will respond to claims in this area subject to the policy terms, conditions and exclusions. Policyholders should check with their insurance advisors to ensure foster parents are included within the construction or intention of the policy wording if they wish for indemnity to be provided by their policy.

Aon will of course keep a watching brief on the reaction of insurers to this development. To discuss this matter further, please contact Bill Sulman at bill.sulman@aon.co.uk

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