

The latest take on vicarious liability for kinship / connected person foster care

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It has long been accepted that the best people to care for children whose parents are unable to look after them are other relatives or adults who have a close connection to the child.

Research shows this type of care provides more stability, reduces the need for legal separation from birth parents, increases the chances of a firm psychological foundation for permanent relationships in adulthood and maintains a link with the extended family network. This care is described a number of ways. Recently it's most often referred to as kinship or connected person care.

Often this 'kinship care' happens without any local authority involvement, through informal arrangements made by the birth parents themselves. Sometimes arrangements are a little more formal, when it's known as private fostering; an arrangement made between a parent and a responsible adult for the care of a child. These private arrangements are ones that a local authority should be notified of but may not be involved in setting up.

A local authority is much more likely to be involved in kinship care for children who are looked after by a local authority and in those situations, the local authority has to go through an approval process with the relative coming forward to care for a child. Similarly, when the court is invited to make a Child Arrangement Order or a Special Guardianship Order, local authorities may be involved for the purposes of providing reports to the court.

An informal arrangement may become a formalised arrangement with local authority oversight. Short term arrangements may become long term arrangements when an expected recovery or change in parental circumstance does not happen. The upshot is that estimating accurately how many people are providing kinship care, however it is defined, is very difficult.

As an example, [research commissioned by Kinship](#) suggests that an estimated 160,000 children in England are being brought up by family members or friends and that the great majority are outside the child welfare system. By contrast, Government statistics show that at the end of March 2023, there were [8,400 kinship fostering households](#), many of which provided homes for multiple foster children.

Whatever the true picture, it's clear that whether children are fostered with some sort of [local government](#) oversight, or are in totally informal arrangements, the numbers are increasing. The Government statistics suggest that the sector has grown substantially over the last few years. There is been a 21% net increase since 2019 and a much higher turnover in the friends and family sector.

Fostering standards can be lower for kinship carers

The standards to which kinship foster carers are held, when local authorities are involved, are lower than "ordinary" foster carers. The [Fostering Services Regulations Regulation 26\(8\)](#) specifically relaxes the normal qualifications for foster carer approval. That means connected person foster carers might be approved for particular children notwithstanding specified cautions or convictions either themselves or within their families. If they were applying to become ordinary foster carers, their application would be barred, but because it's recognised that family connections are so important, this provision permits their approval if they're a relative of the child. Similarly, fostering services' minimum standards allow for different standards of training and development for kinship carers.

These, amongst other reasons, were why Lord Hughes gave a dissenting judgment in the [Armes v Nottinghamshire County Council \[2017\] UKSC 60](#) decision fixing local authorities with vicarious liability for deliberate actions of foster carers who they had approved, providing care to a child in the local authority's care. Lord Hughes' concerns were dealt with very briefly by the majority, recording "*The court would*

not be likely to be readily persuaded that the imposition on a local authority of vicarious liability for torts committed by parents, or perhaps other family members, was justified.”.

Seven years later, the Court of Appeal was persuaded exactly of that. In [DJ v Barnsley](#) once an aunt and uncle accepted their nephew into their care and had been approved as foster carers, the court found their care of their nephew was integral to the local authority's business of discharging its statutory duties towards the nephew.

Accordingly, the Court of Appeal found that it was possible a child's uncle might render the local authority vicariously liable for his alleged sexual assaults of the child.

The risks for local authorities

This judgment appears to be an extension of the principle of vicarious liability beyond *Armes* to include at last some if not all kinship carers. Whilst the way in which the judgment was delivered suggested that it was fact-specific, the sequence of events was not unusual.

A child was originally placed with his uncle and aunt; an arrangement brokered by the local authority. Several months after this placement was made, arrangements were formalised, with his relatives being approved as carers by the local authority and the local authority securing parental responsibility. The advantage of becoming a foster carer in this case was that impecunious relatives were able to request financial support from the Council.

Running parallel to this, the [law on limitation is being considered by the Government](#) with the possibility of changing to allow individuals who have sexual abuse claims to proceed with their claims, no matter how long ago they were, unless a defendant (usually a local authority, but also foster carers) can demonstrate that it's not possible to have a fair trial.

What does the future hold?

If this position stands, we can expect:

- Local authorities to see an increased number of claims (including historical claims) brought by individuals alleging they were harmed in kinship foster care.
- Once the principle is established, we may see an increased number of claims brought not simply about serious sexual abuse, but any alleged tortious act by the kinship foster carer.
- If these claims increase, then it's going to be increasingly likely that kinship foster carers will need to be parties to proceedings, since these are likely to be the alleged principal tortfeasors.

There are powerful social and economic arguments for the increased use of kinship care, [DfE launches first national kinship strategy](#). Nevertheless, this decision means that the increased liability risks of a substantial change in policy in this area should not be underestimated.

Next actions

I will be very happy to discuss any questions or queries you may have, so please don't hesitate to contact me on my contact details below.

Alternatively, please email kinshipfostering@brownejacobson.com to receive further information direct to your inbox.

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