Court of Appeal extends local authority liability for kinship foster carers

01 August 2024 James Arrowsmith

The decision

The Court of Appeal handed down its decision in the case of DJ v Barnsley Metropolitan Borough Council and SG this week. Following first instance and appeal decisions that a local authority was not vicariously liable for kinship carers, the Court of Appeal has allowed an appeal by the claimant on the particular circumstances of the case and thereby determined that local authorities may be vicariously liable for kinship carers.

The facts

The claimant went to live with his maternal aunt and uncle when his parents would no longer care for him. The local authority subsequently assessed, approved, and formalised the aunt and uncle as the claimant's foster carers. At this point the claimant was received into care of the local authority under S.1 of the Children Act 1948. The claimant alleges that the uncle had sexually abused him.

The established law

In Armes v Nottinghamshire County Council [2017] UKSC 60, the Supreme Court determined that local authorities could be vicariously liable for the acts of foster carers connected to the child they were fostering.

In a dissenting judgement, Lord Hughes expressed the view in relation to kinship foster care that the "reality is that any member of the extended family, or close friend, who undertakes the care of children in need, is doing so in the interests of the family, not as part of a local authority enterprise".

Lord Reed who gave the majority judgment said of this "*It would not be appropriate in this appeal to address the situation under the law and practice of the present day, on which the Court has not been addressed, and which would also require a detailed analysis. It is sufficient to say that, for the reasons explained by Lord Hughes, 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*."

Therefore, **Armes** left the position of kinship carers uncertain.

The judgment

The Court of Appeal concluded, on the specific facts of DJ, that vicarious liability was established as a result of the fostering arrangement with the aunt and uncle. The key reasoning was as follows:

60. At the local authority's suggestion, they had applied to be his foster carers, undergone a full assessment, and been approved as foster carers. We disagree with the judge's analysis that they were not recruited and selected as foster carers. It is true that they were not recruited and selected to be foster carers for any child placed with them but only for DJ. But they were recruited and selected as DJ's foster carers to enable the local authority to discharge its statutory duty towards a child received into its care. It was open to the local authority to conclude that the Gs were not suitable to be foster carers. The exercise undertaken by the local authority was one of assessment and selection as foster carers, rather than a ratification of the pre-existing arrangement.

62. In our view, after 1 August 1980, the preponderance of factors points clearly to the relationship between the local authority and the Gs being akin to employment. In those circumstances, we do not consider this to be one of those cases where it is necessary to check whether the justice of the outcome is consistent with underlying policy. But, standing back and assessing whether our proposed outcome is indeed consistent with that policy, we conclude that all five "incidents" identified by Lord Phillips in the Christian Brothers case are satisfied. Both the recorder and the judge found that all were satisfied save for the second (whether the tort was committed as a result of activity being taken by the employee on behalf of the employer). They concluded, for slightly different reasons, that there was, in the judge's words, "a sufficiently sharp line between what the Gs were doing and the activity and business of the defendant".

63. We disagree. The judge may have been right to conclude that the fact that DJ was their nephew was "integral" to what the Gs were doing and that they would not have considered fostering had he not been their nephew. It does not follow, however, that their care of DJ was distinct from the local authority's activities. On the contrary, once he was received into care and the Gs had been approved as his foster carers, their care of DJ was integral to the local authority's business of discharging its statutory duties towards him.

The Court was at pains to point out that the decision was fact-specific and related to circumstances arising before the Children Act 1989 and associated guidance came into force. The Judgment goes on to say "We are not laying down a general rule that a local authority will always be vicariously liable for torts committed by foster carers who are related to the child. Furthermore, in allowing this appeal, we do not intend to give any indication about the circumstances in which vicarious liability might arise under the present legislation and regulatory regime."

Comment

It is important when considering these judgments to note that where there is vicarious liability, there is no requirement to show fault on the part of a defendant. That means that these claims are not about local authorities being negligent in their assessment of foster carers, or in their supervision of the placement. They are about whether, even if the local authority had done all that they could to ensure the placement was safe, they should be liable for the acts of the foster carers, without fault of their own.

The Judgment does appear to be an expansion of vicarious liability beyond Armes, in which doubt was expressed as to whether vicarious liability should be imposed in relation to kinship carers. It is of limited assistance to defendants to know that the decision is 'fact-specific' as there is little appeal in the prospect of having to await further case law in order to establish the parameters of the decision.

In any event, the scenario is a common one, in which children are placed with family members, and the local authority uses the structures of foster care to implement this. The 2022 Independent Review of Children's Social Care commented:

"To seek support from the state, kinship carers are forced into an unenviable choice between having parental responsibility for their family member but receiving no support (as a special guardian or through a Child Arrangement Order), or becoming a foster carer to get financial support but handing parental responsibility to the local authority".

S 2 The report recommends changes to these support systems, but unless and until they happen, kinship carers and local authorities are left to work with the systems they have.

The benefits of kinship care are also highlighted in the report, which supports its expansion and highlights the improved outcomes that research shows can be delivered through its use. It is already given preferential treatment under S 22C of the Children Act 1989, with additional measures in place to support this. These include provision through regulations for temporary approval as a foster carer, some leniency around the time taken to meet the relevant standard, and flexibility on training and formal support. The emphasis throughout is on prioritising safeguarding, but here again we come back to the point that vicarious liability does not require a safeguarding failure, or any negligence, on the part of the local authority. vicarious liability applies whether risks are known, unknown or unknowable.

Vicarious liability is not limited to the most serious abuse. Any tortious act potentially creates a liability on the part of the local authority. For example, allegations of an incident of excessive restraint could give rise to a claim. This may be uncontroversial in a professional care service or with unconnected foster carers (who would be trained in techniques if a risk arose) but where a local authority is working with family members to try and keep a child within their family the position is more nuanced. And the problem is not simply whether a claim will succeed, but whether one will be brought, as much of the cost is tied up with the mere fact of a claim.

There is little evidence as to the extent to which liability law impacts on practice, but a report by Unison in 2023 found that 78% worried about being blamed publicly in connection with cases. Technically, vicarious liability does not involve 'blame' but there is no doubt social workers feel in the firing line when claims arise. Liability decisions such as this, and other claims which will follow, seem likely to contribute to potentially 'defensive' practices which may not always be in the best interests of children.

The law on use of kinship care by local authorities has not changed, and given the substantial benefits it presents, a risk of claims should not deter local authorities from its use where this is indicated by the legislation, regulations, guidance and relevant policies. The vast majority of kinship carers, like other foster carers, will be amazing people doing their best to support their relative. Unless and until other arrangements are introduced, it may often be appropriate to formalise arrangements through foster care. Liability risks should not undermine established good practice.

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