Abusing parents and children

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ABUSING PARENTS AND CHILDREN.

JD v East Berkshire Community Health NHS Trust and others

[2005] UKHL 23; [2005] 2 WLR 993; [2005] 2 All ER 443

House of Lords

21 April 2005

Negligence - Human rights - Child abuse - No duty to wrongly suspected parent

Introduction

Three conjoined appeals were brought before the House by parents falsely suspected by child welfare professionals (principally doctors) of abusing their children. The parents claimed to have suffered psychiatric or other harm in consequence. In each case an action for damages for common law negligence was dismissed by a judge on the preliminary ground that no duty of care could arise in such circumstances. The Court of Appeal affirmed the judges' rulings. The House of Lords dismissed these further appeals holding that it was not 'fair, just and reasonable' to impose a duty of care (*per* Lords Nicholls, Steyn, Rodger, and Brown: Lord Bingham dissenting).

Decision of the Court of Appeal [2003] EWCA Civ 1151; [2004] QB 558 affirmed.

Facts

In the first appeal, JD, the mother of a five-year old boy with what turned out to be severe multiple allergies, was wrongly suspected of fabricating his condition and of harming him herself. She was misdiagnosed as suffering from Munchhausen's Syndrome by Proxy, an error that took almost three years to rectify. In the second, RK, a nine-year old girl with patches of discoloured skin in the genital region caused

by the rare Schamberg's Disease was initially believed have been sexually abused. Her father was prevented from seeing her for the twelve days it took hospital staff to correctly diagnose her condition. In the third case, MK's parents were separated from her for some eight months after a consultant wrongly diagnosed a femoral fracture as an 'inflicted injury'. The child was put into the care of an aunt where she sustained further fractures: only then was the cause of her injuries reviewed and correctly identified as osteogenesis imperfecta or brittle bone disease. In each case, the respondent authorities conceded that the parents were now free of all suspicion and guilt but denied that there had been any want of care in fact or in law.

Commentary

Across the post-war period a series of high profile inquiries has documented the dire consequences of child welfare agencies failing to deal promptly and effectively with suspected instances of abuse and neglect (see, for example, Victoria Climbié Inquiry, Cm 5730, 2003). In X (Minors) v Bedfordshire CC [1995] 2 AC 633 abused children badly let down by the authorities were told they had no remedy (except against their abusers) because child protection decisions are too delicate and complex to be justiciable The European Court of Human Rights (ECtHR) in Z v UK [2001] 2 FLR 612 disagreed. Whilst recognising the frequently difficult nature of the task, the ECtHR nonetheless considered that the protracted failure to safeguard the 'Bedfordshire' children, who were known to be at risk of parental abuse, violated their Article 3 right not to be subjected to inhuman or degrading treatment.

Influenced by such human rights considerations, it began to appear as if domestic courts would adopt a more nuanced (perhaps more sceptical) approach to policy-based

'no duty' arguments or, at least, that striking out claims in developing areas of law was coming to be regarded as undesirable. However, the East Berkshire decision reasserts the central importance of duty as a control device (at least in this context) while declining a further opportunity to better align common law negligence and human rights law. Doctors and social workers owe no duty to parents who suffer foreseeable psychiatric or other harm caused by the careless manner in which suspected abuse is investigated. Their only duty is to act in good faith. English law's continuing failure to respect the right of parents to family life under Article 8 of the European Convention means that this insular decision is vulnerable to vicarious challenge in Strasbourg. Whether each individual claim will ultimately succeed on the facts is rather less certain. As well as demonstrating a sufficient causal connection to the alleged loss, it would need to be shown that a public authority had unfairly disregarded the interests of the parent in question, lacked any proper basis for suspecting them, acted wholly prematurely or otherwise failed properly to pursue a legitimate objective.

The new duty to children

There was no appeal against the Court of Appeal's unanimous decision to allow the claim by RK (the child in the second appeal) going to trial (see Kevin Williams, 'Revising liability for child abuse in Britain' (2004) Tort L Rev 63). Ironically, that decision was based on the bold proposition that the earlier 'no duty to children' rule deriving from X (Minors) v Bedfordshire CC had not 'survived' the introduction of the Human Rights Act 1998 (see [2003] EWCA Civ 1151 at [83]). While some commentators doubted the propriety of the Court of Appeal departing from precedent in this way (see Jane Wright, 'Immunity no more: Child abuse cases and public

authority liability in negligence' (2004) 20 PN 58), in the House it seems to have been accepted obiter (and without much discussion) that children suspected of being the victims of abuse are owed a duty (see Lord Nicholls at [82], Lord Brown at [124] and Lord Bingham at [30]). In effect, the authorities may be (vicariously) liable for failing to rescue children they know or ought to know are at risk.

No duty to wrongly suspected (parental) abusers

Before the House it was agreed on all sides that identifying and protecting children from abuse should have the highest priority. Like the Court of Appeal, a majority of their Lordships concluded that the only safe way of ensuring this was to adopt a 'no duty to parents' analysis. Where abuse is suspected, parents' interests in contesting allegations, maintaining custody and resisting what they believe to be unwarranted interferences must inevitably conflict with that primary objective. Necessary enquiries and decisions might be compromised if their likely impact on parents had also to be considered, particularly in those not uncommon cases where the immediately available evidence of abuse is inconclusive. For the majority, this policy consideration meant that it would not be 'fair, just and reasonable' to impose simultaneous duties of care in favour of both children *and* suspected parents. Moreover, if parents' interests were entitled to careful consideration why not the position of less proximate parties? Anticipating this difficulty, counsel for the appellants had urged that the duty should be confined to a child's 'primary carers'. The majority was not persuaded that this would be a workable limitation, in which event every suspect (whether a stranger, babysitter or teacher) would also be entitled to protection, so further threatening children's interests (see Lord Nicholls at [85-91], Lord Brown at [128-133], and Lord Rodger at [110-117]). Additionally, Lord Nicholls pointed out that persons suspected

of crime could generally expect no more of police and prosecuting authorities than that they act in good faith (at [77]). The fact that the appellants happened to be parents who 'took the unexceptional step' of bringing their child's condition to the attention of doctors should make no difference (at [91]). The possibility that their family life might be wrongfully interfered with did not give them any greater protection nor put them in a special category separate from other suspected abusers.

Tied in with the 'conflicting duties' argument was the majority's belief that a liability rule might encourage 'defensive' practices and thus sub-optimal child protection decisions. Witness statements from a distinguished paediatrician and the NSPCC had testified to the difficulties of diagnosis and the undesirability of electing in the face of evidential uncertainty for the 'easy option' of doing nothing. In light of this, Lord Brown advanced two 'fundamental considerations' telling against wrongly suspected parents being allowed the option of arguing breach of duty (at [137]). First, the 'insidious effect' duty would have 'on the mind and conduct of the doctor (subtly tending to the suppression of doubts and instincts which in the child's interests ought rather to be encouraged)'. Secondly, the need to protect doctors from the 'very real risk' that disgruntled parents would bring 'costly and vexing litigation' in order to vindicate their reputation. While Lord Nicholls doubted that professionals would be 'consciously swayed' (being made of 'sterner stuff'), he nevertheless concluded that their decisions 'should not be clouded by imposing a conflicting duty in favour of parents or others suspected of abuse' (at [86]).

The Privy Council had come to similar conclusions in B v Attorney General of New Zealand [2003] UKPC 61; [2003] 4 All ER 833 where it was said that ‘the interests of

the alleged perpetrator and of the children as alleged victims are poles apart' (at [30]). It would not be 'satisfactory' if welfare professionals and their employers were to find themselves facing both ways, as it were. The decision of the High Court of Australia in Sullivan v Moody (2001) 207 CLR 562 is to much the same effect (albeit that it rejected the Caparo test for duty). An impressive array of authority, but are the reasons and the result sound? Seemingly, a wrongly suspected parent has no common law remedy, however egregious the error or Draconian the consequence. According to Lord Brown, this is the price the common law extracts from individual parents 'in the interests of children generally' (at [138]).

The dissent in favour of duty

Lord Bingham delivered a strong dissenting speech. Barrett v Enfield LBC [2001] 2 AC 550 and Phelps v Hillingdon LBC [2001] 2 AC 619 having written down fears of excessive caution by local authorities when exercising statutory powers, his Lordship found it hard to see how a duty towards parents 'could encourage healthcare professionals either to overlook signs of abuse which they should recognise or draw inferences of abuse which the evidence did not justify'. And to assert, as Lord Brown had, that awareness of legal duty would have an 'insidious effect' on their conduct was 'to undermine the foundation of the law of professional negligence' (at [33]). Nor was he persuaded that the appellants *were* contending for two irreconcilably conflicting duties: the duty was essentially the same, namely, to pay careful regard when making a diagnosis of child abuse, a duty already owed to the child (at [37]). The interest abusive parents have in concealment was not an interest that the law would recognise as legitimate.

Rather than striking out, Lord Bingham's preferred solution was to leave matters to be resolved at trial via the mechanism of breach, bearing in mind that defendants are not required to be right but only careful (at [32]) and that claimants should be expected to show 'a very clear departure from ordinary standards of skill and care' (at [49]). His Lordship added that parental claims would not be summarily dismissed in France or Germany and that in neither country have the courts been 'flooded with claims' (at [49]). Of course, abandoning the ‘bright line’ exclusionary rule may well result in evidentially difficult and costly trials and claimant-friendly settlements which drain limited budgets. Moreover, the earlier successes of (English) parents in Strasbourg have not continued to pass unnoticed by lawyers in Germany and elsewhere.

For his part, Lord Nicholls could see that leaving breach to act as the gatekeeper had attractions. It was more 'flexible' and 'analogous' to the approach adopted when considering violations of human rights, yet to ‘jettison’ the duty concept would lead to 'a protracted period of uncertainty'. This was undesirable as well as unnecessary since nowadays claims can be brought directly against public authorities for breaches of the European Convention (at [92-94]).

Absence of duty and human rights

Contrary to the hopes of the majority, providing doctors and social workers with a tortious immunity from parental claims is unlikely to reassure them or to influence their professional conduct. They are already exposed to the risk of being sued - by children for negligence or under the Human Rights Act (see East Berkshire in the Court of Appeal and Z v UK), and by parents claiming infringement of their Article 8 right to family life. In M (A Minor) v Newham LBC [1995] AC 633, the mother’s

cohabitee was suspected of sexually abusing her daughter, wrongly as it transpired later. The House of Lords' denial that a duty of care arose was effectively overturned by the ECtHR in TP and KM v UK [2001] 2 FLR 549. The Strasbourg court refused to say that the original decision to seek a place of safety order had been wrong. There were good reasons to suspect that the child had been abused, as well as doubts about the ability of the mother to protect the daughter, so that her removal had been 'in accordance with the law' and done in pursuit of a 'legitimate aim', as Article 8(2) requires. The authorities were properly entitled to a wide margin of appreciation when deciding whether a child needs protecting. In the language of negligence, there had been no breach, initially. However, as regards later decisions restricting a parent's right of access, the ECtHR considered that 'stricter scrutiny' was justified. The subsequent serious delays and other shortcomings had deprived the mother of the opportunity to challenge the conclusion that it was unsafe to return her daughter, which prevented the process being regarded as 'necessary in a democratic society'. Having unfairly infringed both mother and daughter's Article 8 rights, they were entitled to an effective remedy. While this is not the same as saying that social services or doctors owe parents a duty of care, the areas of factual enquiry and the effect are much the same. Requiring parents to be 'involved in the decision-making process to a degree sufficient to provide them with the requisite protection of their interests' (at [72]) reads a procedural requirement into Article 8. This ought not to be problematic for child protection agencies since, even at the earliest stage when consideration is being given to the question whether the child is at risk, good practice and ministerial guidance means that it is expected (as well as usual) for parental views to be considered.

Accordingly, since no common law rule can free the authorities from respecting parents' human rights it is impossible to insulate them from the alleged chilling effects of parental litigation. It seems to follow that the behaviour of child care professionals is unlikely to be influenced one way or the other were the common law also to recognise a duty to parents. As the Court of Appeal in East Berkshire noted when justifying its unchallenged finding of a duty in favour of children, the risk that potential liability might inhibit such professionals from taking what they believe to be the right course of action will 'henceforth be present, whether the anticipated litigation is founded on the Human Rights Act or on the common law duty of care' (at [82]). Though the Court of Appeal did not say so, its conclusion is indirectly supported by the findings of the numerous inquiries which show that the common causes of child protection failures are over-stretched resources, poor information-sharing, and inadequate training, supervision and co-ordination, rather than litigation-induced staff timidity (see Every child matters, Cm 5860, 2003).

The House of Lords 'no duty' analysis is not the only (much less the best) way to protect children's safety or avoid placing the authorities in a quandary. The claimed 'conflict', so influential in East Berkshire, could have been accommodated by drawing a distinction between decisions to provide immediate protection to children believed to be at risk and the conduct of subsequent (and less urgent) procedures. At the earlier stage, the authorities should be entitled to act on the precautionary principle and to err on the side of caution in cases of doubt. By sanctioning a 'safe rather than sorry' strategy, the courts could thereby treat them as having simultaneously discharged their initial (low-level) duty to the parent. Accordingly, early intervention may be justified whenever there appears to be an immediate and sufficiently serious risk, even if the

supporting evidence is presently less than certain. At this point, the standard of care may amount to little more than requiring that decisions are taken in good faith. Employing Bolam in this way would not only maintain a strong breach barrier against weak (parental) claims but would minimise the asserted (but untested) danger that inadequate protection will otherwise be provided to children. TP and KM v UK shows that the ECtHR is prepared to concede considerable discretion to domestic authorities where tricky decisions are taken in what appears to be an emergency, while Yousef v Netherlands [2003] 1 FLR 210 emphasises that children's interests must prevail over parents' in the event of conflict. Had a similar approach been adopted in the negligence claims under review the doctors and social workers would not have been caught up in the impossible 'Catch 22' fearfully envisaged by the majority of their Lordships.

Conclusions

The reluctance to allow overly enthusiastic (albeit well-meaning) interventions to be challenged by falsely suspected parents, while disappointing, may not be too surprising in light of the mournful history of timid and dilatory official responses to the troubling problem of child abuse, and the deference traditionally shown by courts to medical decision-making. The significance of the East Berkshire decision will depend on whether it signals a general willingness to return to 'no duty' strike-outs. If not, its net effect will be very limited, having barred only those parental claims arising before the implementation of the Human Rights Act 1998 in October 2000, thereby forcing these appellants (but not their wronged children) to travel to Strasbourg for a remedy. Rather than leaving matters to be 'swept up by the Convention', as Lord Bingham put it (at [50]), it would have been preferable to have relied on s. 6 to justify

developing domestic negligence law compatibly with European human rights jurisprudence.

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