

**Social Service Claims after *Pierce -v- Doncaster MBC*,
Court of Appeal, December 2008**

Briefing Note

Introduction

Considerable publicity has been generated by this case, including a headline piece in The Times on Christmas Eve headed “300 victims of abuse to sue Councils for neglect”, after this allegedly landmark ruling “*established for the first time that local authorities are liable for abuse suffered by children if they fail to remove them from harm*”.

This is wholly incorrect and an example of media hype coming after the publicity surrounding the case of Baby P. *Pierce* makes no significant new law. It is unlikely to lead to a flood of claims. But it does contain useful pointers as to how these cases should be handled going forwards. The failure of unattractive, technical arguments by the Defendant should be carefully noted.

Law before *Pierce*

Local authority immunity from civil claims under *X -v- Beds* in respect of investigations of child abuse, has for all practical purposes ended. It is still theoretically possible to rely on *X* to argue that it would not be fair, just and reasonable to impose a duty of care in a particular case, but the facts would have to be exceptional.

It was the Human Rights Act 1988 and the change in the legal culture which it brought in which put an end to this immunity. The Court of Appeal in *JD -v- East Berkshire NHS Trust, 2003*, made it clear that a duty of care was owed not just in respect of the period after the Human Rights Act came into force in October but before as well.

The *Pierce* Decision

This case did not involve the more usual scenario of a child abused whilst in care but rather concerned a child looked after by its parents at home and whether he should have been taken permanently into care. The Defendant did not challenge the existence of a duty of care. The case was really concerned with the question of breach, not duty, and thus turned on its own facts.

It is worth getting a handle on the key chronology to understand where the Defendants went wrong in this case in order to try to learn from it:-

March 1976	Claimant born.
August 1976	Claimant put into foster care because he had lost significant weight and appeared ill cared for; over the coming months social worker noted highly unsatisfactory family home; file entry: -“Claimant should be kept in care to avoid serious health risk”

November 1977	Claimant was returned to the family. No evidence of any proper review or reasoned decision to reunite them. Social worker had left, different social worker dealing with case. Family was living in a rehabilitation unit (light supervision by wardens).
1978 onwards	Irregular contact by social services. Little action, despite area officer's view that mum would need support for many years until children grown up.
1979	Mum gives up Claimant to sister because she cannot cope with him; hospital notes historic scalding to buttocks/leg with no record of medical attention; social services put Claimant on "at risk" register. Claimant suffers "neglect/periodic violence".
1991	Claimant, by now 14 years old, truanting/stealing/prostitution. Runs away from family/thrown out by Dad.
March 1991	Social services take him into care.

Defence Case

- No social workers involved in the case were called - only a social work manager, not directly involved.
- Thrust of the case was:-
 - (a) Despite lack of records the Court must presume that social services were monitoring the Claimant's progress and reaching defensible conclusions and that everything was carried out properly.
 - (b) Attack on the Claimant's credibility: Claimant is devious, has borderline personality disorder and is apt to invention/exaggeration (Claimant's teacher called in support of this, plus medical expert).

Decision of Trial Judge

Wholesale rejection of defence case: Claimant may be prone to exaggeration/dramatisation but this is due to his disorientation and personality disorder. Defendant's case that the tale of neglect is of recent invention was found to be inconsistent with early social service records.

The key breach of duty was in November 1977: a proper review of the Claimant's welfare before the return to the family would have led to him being taken into care and would have avoided much of the damage until 1991.

Compensation was awarded for those years but not for the personality disorder because that has multiple causes.

Award: £25,000 general damages. Nothing for loss of earnings or therapy costs.

Court of Appeal Decision

The Council's appeal was dismissed (except that the case remitted to Trial Judge for hearing on limitation - whether to grant Claimant Section 33 discretion).

The Court of Appeal had little time for the Defendant's somewhat technical and legalistic arguments, in particular:-

- that the Claimant's expert had not in fact suggested at trial that it was *Bolam* negligent to return the Claimant to his family- when he clearly had;
- that the pre Children Act statutory duty to review the case could not be relied upon by the Claimant because the regulations related to conditions in a foster home not relevant here (The Court dismissed this on the basis that both experts agreed anyway that a thorough review of the Claimant's welfare was essential before he was returned to the family) ;
- that only damage by neglect not by violence was potentially compensatable because the alleged breach related only to neglect not violence, so the later violence after the breach point was not foreseeable. The Court held this defines the foreseeable damage too narrowly: what was foreseeable was injury through bad parenting.

But the Court did accept that the Council had a limitation defence. The Claimant had constructive knowledge under Section 14 Limitation Act, given that he had asked for his records as long ago as the mid 1990s, so the case was remitted to the Trial Judge to consider the Section 33 discretion issue.

What does all this suggest about the handling of social service cases?

There is unlikely to be any flood of claims because this case makes no new law. At most it contains guidance as to what constitutes a breach. But it does flag up a number of issues as to how these cases should be handled:-

- 1 Claims handlers need to spot those cases likely to be difficult to defend - look out especially for evidence of convictions and vicarious liability.
- 2 Make early offers to take the sting out of Claimant's costs: settlements are often in the region of £25,000 but can regularly attract Claimant's costs approaching six figures and beyond.
- 3 Look out also for cases with gaping holes in the records. Such holes cannot be plugged by asking the Court to make presumptions about what was done during the missing periods as was attempted in *Pierce*.
- 4 Frontload costs trying to locate social worker witnesses, for two reasons. Firstly to help with limitation arguments- defendants must show what efforts they have made to find witnesses in order to establish prejudice. Secondly, these cases can hardly ever be defended on breach of duty unless the social workers making the key decisions at the time are available and handlers need to know the position sooner rather than later.
- 5 Be wary of using unattractive technical/legalistic arguments on breach of duty trying to make up for an absence of solid liability evidence.
- 6 Attacking the Claimant's credibility only gets you so far: to use it to undermine an entire case is likely to backfire because the Court is likely to conclude that the Claimant is only unreliable because of the abuse itself. Defendants cannot wish away awkward contemporaneous records.
- 7 Limitation: potential Defendants and claims handlers must be assiduous in responding promptly to requests for records to assist in limitation arguments. In

Pierce, the Council offered full assistance and this was of considerable help in establishing a limitation defence.

JANUARY 2009

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