



Corporate Manslaughter

What is the problem?

The naming last month of the last victim of the Kings Cross disaster is a grim reminder that no-one has been held accountable for the deaths of any of the 31 people who died in the fire in November 1987. Similarly, no-one has been successfully prosecuted for the deaths of 187 people who died when the Herald of Free Enterprise capsized off Zeebrugge, nor for the 167 fatalities in the Piper Alpha oil platform disaster, nor probably will there be prosecutions for the Morecombe Bay tragedy. Sadly, the list of instances where no-one has been brought to account for loss of life in major disasters is lengthy. The absence of criminal convictions is all the more shocking because many of the companies in question have been seriously criticised.

The main impediment to successful prosecutions seems to be the current law on corporate manslaughter, which stipulates that the offence is made out only where "a corporation, through the controlling mind of one of its agents, does an act which fulfils the prerequisite of the crime of manslaughter". It has proved problematic to identify a single individual who is the "controlling mind" of the corporation responsible for the deaths. In the tiny number of instances where someone has been convicted (by early 1996 there had been four prosecutions of companies and only one conviction) the companies were either very small or were "one-man" companies. By contrast, most major disasters have happened because of failings by companies employing many hundreds or thousands of people and which have diffuse structures so that culpability for health and safety failings can be attributed to more than one person. This makes the chances of a successful prosecution under the present law very slim indeed.

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WHAT IS PROPOSED?

The government has been prompted to consider a new legal framework to deal with loss of life caused by corporations. In March 1996, the Law Commission suggested that there be a new law of "Corporate Killing". Liability would be proved by showing that the corporation's conduct in causing the loss of life fell "far below what could reasonably be expected". While individuals could continue to be prosecuted for manslaughter, in cases where the cause of death is a "management failure", the corporation itself could be convicted of the proposed new offence, thereby obviating the need to find that one "controlling mind". The Law Commission's proposals were largely accepted by the government and it published a consultation paper in 2000 seeking comment from interested parties.

WHEN WILL THE PROPOSALS BECOME LAW?

It had been anticipated - wrongly - that the Queen's Speech in November 2003 would announce a timetable for the publishing of a draft bill. The Home Office now proposes to publish

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a summary of responses to the 2000 Consultation paper some time in the first half of this year, and is aiming to include details of a draft bill in the Queen's Speech in the autumn of 2004. It appears that the delay has been caused by various issues, as yet unresolved, thrown up during the consultation process.

POTENTIAL DEFENDANTS

The Law Commission's 1996 report recommended that only incorporated organisations (bodies that have a single legal identity) ought to be caught by the new plans. The rationale for excluding unincorporated organisations is that each member of an incorporated body would be criminally liable for the death of employees in any case. This limiting of personal liability has traditionally been one of the main advantages of incorporation.

The government, on the other hand, was concerned that the applicability of the law to one type of employing body and not to another may result in inconsistent application. It was, therefore, inclined to make the law apply to all "employing organisations", which it called "undertakings", except perhaps predictably, government bodies. The remedy in cases where death is caused by a Crown body would be a "declaration of non-compliance" which would compel immediate rectification of the problem. The reasoning given for the application of the proposed laws to non-governmental bodies is that they will be obliged to ensure that they have adequate health and safety procedures in place *before* death is caused. This seems to be an inadequate justification for the exclusion of governmental organisations from criminal liability.

The government is also concerned to ensure that culpable bodies do not evade criminal liability by

hiding behind company structure. For example, in the case of a wealthy holding company establishing a relatively impecunious subsidiary in order for the subsidiary to engage in risky practices which lead to people dying. It is proposed, therefore, that it will be possible for holding companies to be defendants.

Another matter being studied is whether directors, *simply by virtue of being directors* of a company responsible for loss of life, should be defendants. Unsurprisingly, this has been the subject of much comment in the consultation process.

Where, after a successful prosecution, a particular individual is found to have "had some influence on, or responsibility for, circumstances in which management failure fell far below what could reasonably be expected", it is proposed that the sentencing court be given the power to disqualify that person from acting in a management role.

Where death is caused by the conduct of a contractor employed by the corporation, it is proposed that the corporation should bear criminal liability.

Upon conviction, it is envisaged that the prosecuting authority, whoever it be, will be able to apply to the court to freeze the assets of the organisation.

WHO WILL PROSECUTE THE NEW OFFENCE?

At the moment, it is the police who investigate cases where death is caused and then pass the case to the Crown Prosecution Service for prosecution. However, the Government may in future take advantage of the expertise of the Health and Safety Executive (the HSE) for the conduct of future prosecutions.

EQUALITY OF ARMS

Whoever the investigating and prosecuting body is, the question of the adequacy of the representation of the defendant must be faced. Even a corporation accused of corporate killing remains innocent until proven guilty and care should be taken to ensure that it has the means to defend itself properly. The legal aid provisions at present do not allow for a person being questioned by the HSE to be represented free of charge. This is being looked at by the government. Further, we understand that there are currently no proposals to make provisions for an accused corporation to be entitled to legal aid. If it is obliged to pay for its own legal representation, it is possible that the situation will arise where all the company's resources will be depleted by legal fees. If it is then not found liable, the livelihoods of some of the very people in whose interests the prosecution was pursued, will needlessly have been endangered.

CONCLUSION

The most important consequence of these proposals, whenever they become law, is that companies will be anxious to avoid the particular stigma of being convicted of the avoidable killing of their employees and members of the public. To achieve this, they may actually implement the health and safety measures which they are already obliged to have in place. Few things focus the minds of those in charge of companies like the prospect of being publicly shamed.

... Andrew Baillie Q.C. and Busola Johnson



Costs Estimates

The New Battle Ground?

In *Leigh v Michelin Tyre PLC*, on 8th December 2003, the Court of Appeal have laid down guidelines concerning the significance of costs estimates to an assessment of costs. The case was listed before the Master of the Rolls and the Court of Appeal sat with the Senior Costs Judge. The result is likely to be that costs estimates will assume greater importance in future.

CPR 43 Practice Direction requires that a party must file an estimate of base costs and serve a copy on every other party when he files an allocation questionnaire and again when he files a listing questionnaire in a fast or multi track case. The estimate should be substantially in the form illustrated in Precedent H.

Paragraph 6.6 states:

"On an assessment of costs of a party the court may have regard to any estimate previously filed by that party, or by any other party in the same proceedings. Such an estimate may be taken into account as a factor among others, when assessing the reasonableness of any costs claimed".

It emerged during the passage of the case from the District Judge to the Court of Appeal that it has been a common practice at allocation questionnaire stage to provide an estimate of profit costs only, excluding disbursements and vat and not to provide any estimate at all at listing questionnaire stage. The Court of Appeal said, if that indeed is the practice, then that practice should cease. It is to be noted that the allocation questionnaire is in Form 150 which asks for a single figure for the overall costs, whereas the Practice Direction requires the more detailed information contained in Precedent H. It seems that solicitors will have to provide both to the court and to other parties.

In *Leigh*, it was argued on behalf of the paying party that the receiving party should be bound by his costs estimate, given at the allocation questionnaire stage, because it had never been revised and was very substantially ("hopelessly") inaccurate. The estimate had been that £3,000 had already been incurred and a further £3,000 would be incurred. The actual costs claimed were £21,741.28 of which the District Judge found that £20,488.83 were reasonably incurred and were reasonable in amount. Profit costs subsequent to the allocation questionnaire were £11,744.

The Court of Appeal expressly rejected the suggestion that the power conferred on the court by 43 PD paragraph 6.6 should be exercised to hold a party to his estimate simply in order to penalise him for providing an inadequate estimate. It emphasised, however, that the estimate had to be taken into account on the assessment in accordance with 43 PD 6.6, and gave guidance on the circumstances in which it should be taken into account in assessing reasonableness. Dyson L.J., who gave the judgment of the Court, identified three

circumstances in which the costs estimates may be taken into account in assessing the reasonableness of the costs claimed.

1. The costs estimate should usually provide a useful yardstick by which the reasonableness of the costs finally claimed may be measured. If there is a substantial difference between the estimated costs and those claimed, the difference calls for an explanation. In the absence of an explanation, the court may conclude that the costs claimed are unreasonable.
2. The estimated costs may be taken into account if the other party shows that he relied on the estimate. An example would be a party who relied on a low estimate given in deciding not to make an offer of settlement, but carried on with the litigation on the basis that his potential costs liability was likely to be of the order indicated in the estimate. The allegation that a paying party relied on the costs estimate is easy to make and may be difficult to refute by the receiving party. Fortunately, in *Leigh*, the paying party was not able (and did not try) to demonstrate that it relied on the estimate in its conduct of the action.
3. The court may take the estimate into account where it decides that it probably would have given different case management decisions if a realistic estimate had been given. An example might be that the number of experts would have been reduced or other steps taken to slim down the complexity of the litigation and control costs. At case management, the costs estimate can be taken into account in relation to proportionality, although at costs assessment stage it would seem from paragraph 6.6 that it is relevant only to reasonableness. Again, in *Leigh*, the paying party was unable to demonstrate that any different case management order would have been made, but one can well see that on a costs assessment where the costs claimed are much more than the estimated costs, there will be a temptation on the part of the paying party and possibly the costs Judge to use the benefit of hindsight.

In *Leigh*, the paying party's appeal failed because the receiving party was able to give an explanation for the increase and the appellants were not able

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to demonstrate reliance on the estimate, either in their conduct of the action or in the making of any case management directions. They were left only with the argument that the receiving party should be penalised which the court rejected, making the point that a costs estimate is different to a costs capping order.

Practitioners should be aware of another argument advanced by the paying party in this case which, in the event, failed on the facts. It was said that a solicitor has a duty to inform his own client of the likely costs and if these were substantially exceeded the solicitor would be unable to recover these from his own client. Therefore, on the indemnity principle, they were irrecoverable from the paying party. In Leigh, the client did not want to be informed of costs estimates and the solicitors were not in breach of Solicitors' Practice Rules, but the position could be different if costs were not recoverable from the client for this reason.

THE LESSONS

1. Costs estimates are likely to assume a greater importance than hitherto and it is important to get them as accurate as possible. The Court of Appeal recognised that there was a danger that their guidance in this case might foster satellite litigation on costs, but this will not occur if your estimate is reasonably accurate.
2. The courts are likely to be more vigilant in ensuring that costs estimates in the appropriate form are filed in accordance with 43 PD paragraph 6 i.e. in the form of Precedent H as well as N150.
3. In preparing an estimate it should be assumed that the case will go to trial and not settle.
4. An estimate can be revised at any time. If you realise that an estimate given is inaccurate, a revised estimate can be served and this is likely to avoid an adverse order on costs assessment.
5. Costs Judges will have Leigh in mind in all future assessments as the Court of Appeal made it clear they were setting out guidance for the future. It is therefore worth looking at ongoing cases to see what estimates have been given and whether they are still valid.

... John Foy Q.C. and Mark Whalan

Every Child Matters

A review of the Government's Green Paper

The Government's green paper, *Every Child Matters*, was finally released in September to almost universal acclaim from voluntary organisations, campaigning bodies and social work professionals alike. While the Government deserves credit for a carefully considered set of proposals, much of this acclaim must be attributed to concerns of what might have been. A barely concealed war has been fought within government in the months preceding the green paper's release between those who argued for the establishment of a national protection agency and those that were vehemently against it. In coming down against an NPA, the Government has roundly rejected the idea that a false demarcation can be made between children in need and children at risk. The sighs of relief from child protection professionals remain audible.

Every Child Matters sets out the Government's plans to reform child welfare and family support services. Its aim is to strengthen child protection services for the most vulnerable children and it comes in response to the public inquiry into the murder three years ago of eight-year-old Victoria Climbié. The Laming Report, published earlier this year, made 108 recommendations to overhaul the child protection system. The Government has distilled Laming's recommendations into four policy areas: early intervention to prevent vulnerable children reaching crisis point; improving support for parents and carers; a childcare workforce strategy; and improving the accountability for and co-ordination of children's services at a local and national level. The Government purports to accept each of Laming's 108 recommendations either wholeheartedly or 'in principle'. In fact, it would be more accurate to describe the Government's response as one of acceptance of the underlying message of Laming. It has, for example, been bold enough to jettison a great number of the structures of local and national accountability recommended, and outlined in detail, by the Climbié Inquiry. Laming has taken this well, applauding the green paper and professing himself "*not wedded to the structures [the Climbié report proposed] but to the principle of clear lines of accountability - of knowing where the buck stops...*"

Early intervention: Perhaps the most ambitious proposal contained in the document is intended to improve information sharing between agencies: there will be a "local information hub" in 150 local authorities recording details of all the children living in the area. Each child will be given a unique ID number attached to an electronic file of personal information about their lives, including their name, address, date of birth, GP and school (and whether they have been excluded from or refused access to any school). Where a child is known to local agencies such as social services, the police, educational welfare or youth offending teams, the file will be 'flagged' and will contain contact details of each professional dealing with the case. Most importantly, those children known to more than one agency will have a named lead professional with overall responsibility for their case.

The paper opens for consultation whether information should be included without the consent of the child or his/her carers and whether information should be stored that could denote warning signs of possible future problems, such as a carer's imprisonment, mental health difficulties or domestic violence within the home. The green paper clearly leans towards the registration of minor concerns that would not, alone, be enough to trigger intervention. It is only a stage further to suggest that *suspicions* of problems be included. The proposals do not address directly, for example, in what circumstances a broken bone should be entered into the 'hub'. Clearly, the overwhelming majority of broken bones are the result of ordinary childhood accidents but might they occasionally not be non-accidental injuries that, allied to other 'flags' could trigger an intervention?

Unsurprisingly, the proposal to include such a wealth of personal information - and the Government's admission that legal change will be needed to allow it - has alarmed privacy campaigners. Perhaps more surprisingly, some children's charities have expressed concern that knowing that everything will be recorded will deter referrals being made in the first place. Some thought will have to be given to this problem but recording and sharing the concerns of the various professional agencies seems infinitely preferable to simply hoping a child will tell each of them in turn.

A greater obstacle to the implementation of the information hub is perhaps the technical challenge it presents to the agencies. Those of us who work with local authorities will be familiar with the often-antiquated state of their technical equipment and, particularly, ICT systems. This is something the Government seems to have recognised and it will be providing up to £1 million to ten 'trailblazer' local authorities to establish, by the end of 2004, whether an ICT-based information sharing system is indeed feasible.

The proposals also include reforms of assessment procedures to include a common assessment framework across disciplines in order to ensure that each agency is able to conduct a preliminary assessment without having to involve social services and to eliminate multiple assessments that alienate children and families and waste resources.

The green paper also calls for multi-disciplinary teams in which teachers, social workers and other myriad childcare experts will work in schools and community-based children's centres in order that vulnerable children can be identified more easily. The understandable focus upon schools as the arena in which it is most easy to reach out to children raises the question of marginalisation for those who do not attend school - most obviously the under-fives.

Improving support for parents and carers: Since the crux of this policy initiative is early intervention in order - where possible - to keep children with their families, it should come as no surprise that the Government has accepted the need to offer greater support to parents and carers. The question of how best local authorities can develop specialist parenting support services is open to consultation but the Government suggests a national 24

hour helpline that could offer immediate advice and help and could also direct callers to local sources of support. Schools and other universal services, such as GP surgeries, will provide parents and families with more support and advice, including parenting classes. The green paper differentiates between support offered universally and specialist support targeted at parents having problems coping or with additional needs, such as assistance with a child with disabilities. The green paper also offers ideas on improving fostering and adoption services, recognising the crucial role these services play in the lives of the most vulnerable children.

Unsurprisingly, the proposals on supporting families and carers have been warmly welcomed by professionals. Since the intention is early intervention, the need for self-referral has been pointed out by the NSPCC. For this to be viable, the services need to be both non-stigmatising and familiar to all.

Workforce strategy: Admirably, the green paper devotes a large section - and proportionally more than did Laming - to the need to address recruitment and retention within the children's workforce. The challenge is a considerable one: the most recent Chief Inspector's report (pre-publication of the green paper) indicated a further 50,000 social workers are needed across all fields to reduce vacancies to 5%. To put this in perspective there are currently only 40,000 children and family social workers in the whole of England. The workforce strategy will improve the skills of childcare professionals and offer more financial rewards to help recruit and retain staff - and to keep them on the front line. This will



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include more flexible training routes into social work, such as work-based training for graduates. There will also be a comprehensive workload survey to see how best to free up time for face-to-face work. Common occupational standards and training will be introduced for *all* staff who work with children and families. The chief nursing officer is to assess what more health visitors, nurses and midwives can do to protect children at risk. Already some in the medical professions have said they will refuse to take a lead role in child protection but, in reality, if the focus is to switch to preventative work then in many cases the only professional in contact with the family is the health visitor.

Accountability for and co-ordination of children's services:

The Government is evidently calling for the swift amalgamation of local authority education and children's social services as the first step towards a truly integrated service for all children. Every council must set up a children's trust by 2006, bringing together education, social services, health and Connexions, the careers advice service. Thirty-five pilot trusts of varying specificity have already been announced and have been up and running for two months. Councils must appoint a children's director to lead the development of the new trusts, who will take over the statutory responsibilities of the chief education officer and the director of social services. A lead councillor must also be appointed to take political responsibility for children's services. These appointments will be vital for these *are* where the 'buck stops' in Laming's words; it is the holders of these posts that will hold the ultimate accountability for the welfare of the young people in the local area. This proposal could easily be seen as passing over responsibility by a Government that has rejected Laming's calls for a cabinet committee and now refuses to hand ultimate

responsibility for child welfare to the Minister for Children. In fact, it is supremely realistic: whilst the Government can prescribe policy, it is logistical decisions on the ground that determine the safety of individual children and it is at the lower echelons of decision making where true accountability must lie.

Area child protection committees - the quality of which varies hugely from area to area - will be replaced by new statutory bodies known as local safeguarding children's boards, which have the power to ensure that senior managers from each relevant agency are involved in child protection cases. Nationally, the schools watchdog Ofsted will take over the inspection of all children's services and an independent Children's Commissioner will also be appointed to protect the welfare of all children. The remit of the Commissioner is still somewhat imprecise though it is clear that the Government wishes them to undertake any further investigations into child protection, similar to the Climbié inquiry. Campaigning organisations will be pushing to ensure the role has real teeth, proper funding and the ability to investigate individual cases where necessary.

The integration of all children's services is the radical but obvious response to a series of inquiries that firmly lay the blame for child deaths at the door of ineffective inter-agency working. I cannot but help feel, however, that those social services professionals today welcoming this apparently progressive proposal may yet come to regret their enthusiasm. There is no doubt that those who drafted *Every Child Matters* want nothing more than effective multi-disciplinary work. In searching for it, however, they may have inadvertently turned the clock back. The 1948 Children Act was the then Government's response to the Curtis Committee that recommended that without a split between two services previously joined, child protection would never receive the funding it so urgently needed. The two services in question? Social services and education. The plain fact is that education investment wins votes and social services investment does not. No matter how well-meaning the amalgamation of education and social services, in the end the net effect will be a diversion of resources and political interest away from social services towards education. In a democracy, it is inevitable that the majority's concerns win out and while there are millions with a stake in the education system through their children or grandchildren there are far fewer with a stake in protecting the most vulnerable in our society.

SUMMARY

The green paper is a largely successful attempt to address the difficulties of multi-disciplinary working that have bedevilled child protection in recent years. Bold decisions have been taken and radical proposals made. My fear is that while seemingly moving us forward, the decision to integrate social services and education may result in a further marginalisation of child protection issues that will place ever greater funding pressures on services crucial to the most vulnerable children.

Indeed thus far, the most common criticism of the green paper relates to funding. The Government's avowed intention was for the proposals to be resource-neutral. The Minister for Children has begun to point with some desperation to proposals within the paper that will save money but everyone involved knows effective implementation will require massive funding. The Government has not yet publicly announced its' costing of *Every Child Matters*: a sign, if ever there was one, of a row between the Treasury and a minister in search of more money. Let us hope she succeeds.

... Alex Verdan

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Liability for damage arising following failure to warn of the risks of an Unavoidable Operation

The duty on a doctor to warn of the risks in a procedure is reasonably clear. He must provide the patient with appropriate information about the risks involved. When questioned by a patient of apparently sound mind about risks involved in a particular treatment proposed, the doctor's duty must be to answer both as truthfully and as fully as the questioner requires (**Sidaway v Board of Governors of Bethlem Royal Hospital and the Maudsley Hospital** [1985] AC871).

Assuming that the operation is then carried out non-negligently but the unintended adverse result - the risk of which should have been mentioned to the patient - occurs, then in terms of causation it is for the claimant to establish what difference that warning may have made to him/her and therefore what damage has been suffered by reason of the negligence. If it is proved that the claimant would never have undergone the operation if s/he had been properly warned, then damages for the adverse outcome are recoverable.

What however if the claimant establishes (on the balance of probabilities) that although s/he would have undergone the operation this would have been after a period of reflection or further inquiry (as to the risk or as to alternative procedures or alternative surgeons) and therefore would have been at another time?

In this situation the claimant can prove that (1) if warned s/he would not have undergone *that* operation and (2) the risk of injury at any subsequent operation would be extremely small - exactly the same as it was at the operation in fact performed - and therefore probably would not have arisen. What then is the damage sustained by the claimant by reason of the doctor's breach of duty? Is it-

- ◆ the exposure to risk - the risk of which s/he was not informed in breach of the doctor's duty of care - or
- ◆ the actual harm which in fact was suffered in the operation - the harm of which there was a risk which should have been revealed to the claimant?

The act of the surgeon causes the damage in that s/he carries out the operation, even if non-negligently. But did the surgeon's failure to warn of the risk of the damage which in fact was sustained cause the patient to suffer that damage or was that damage just the unintended but unfortunate outcome of the procedure?

Chester v Afshar [2002] 3 WLR 1195 concerned C, a journalist, who had severe and painful back problems. A rheumatologist advised her to consider back

surgery. C wished to avoid surgery if at all possible and made this known. Surgery was elective rather than necessary but recovery would 'take a long time' without it. A neurosurgeon advised the removal of 3 intervertebral discs. The judge accepted that C was not given any warning as to the risk of cauda equina nerve root disturbance. It was common ground that in accordance with good medical practice she should have been warned of the risk of damage involved in the surgery and its possible consequences including paralysis. The operation was performed non-negligently but there was both sensory and motor impairment, and she was left with substantial disability. The judge also accepted that if she had known of the actual risks of the surgery she would not have consented to the operation taking place on the day it did, and would have sought a second and possibly third opinion, but that she could not say that she would never in any circumstances have consented to the surgery.

It was held by the Court of Appeal that where the very risk of which the surgeon should have warned C had materialised and C could prove that had the risk been brought to her attention she would not have undergone the procedure, and therefore not have suffered injury when she did, *it was the surgeon's breach of duty rather than the random occurrence of the risk which had caused C's damage*. The issue of whether C would have undergone the procedure and suffered the same damage in the future went to quantum and did not effect causation.

Therefore in such a situation

- ◆ the surgeon causes the claimant to have the operation.
- ◆ without breach of duty on the part of the surgeon the claimant would not have had that operation and would not have suffered the injury at that time.
- ◆ whether or not the claimant would have suffered the injury later is relevant only to the value of the claim.

Permission to appeal **Chester** to the House of Lords has been granted.

Secure Accommodation:

A User's Guide to s25 Children Act

When faced with an application to place a child in secure accommodation the courts and practitioners are in reality dealing with an area of the law crying out for clarity. This is one of the most complex sections of the Children Act 1989. Unhappily it is also the section of the children act which allows children to be locked up on the balance of probabilities often on hearsay evidence. To say that section 25 of the Children Act represents a knife edge walked by practitioners between the interests of the child and possible human rights abuse is not an exaggeration.

The relevant test seems superficially clear. The law in this area is however crying out for codification. A creature of statute, the relevant law is set out in two statutes and no less than five statutory instruments¹. Particularly when dealing with children who are also the subject of criminal proceedings, a junior practitioner may find himself or herself at court without a textbook that covers both the criminal and civil aspects of an application for secure accommodation. Even if one were to photocopy the relevant sections I have set out below and carry them around as a security blanket there are still situations where the case law and the legislation draw blanks. What I hope to do in this short article is focus on those areas that arise time and time again as points of dispute and hope that this is of some use in smoothing the way through those preliminary points.

We all know the basics. The wording of section 25 is clear. Both limbs can apply, although they should be read disjunctively and satisfaction of one limb is enough for section 25 to bite. If the criteria are made out then the order is mandatory but permissive. The welfare of the child is remarkably not paramount. So far so good.

After this things get trickier. In my experience the points that cause the most confusion are firstly, time limits on keeping a child in secure accommodation, secondly the moments when there is an overlap with the criminal jurisdiction and finally the question of how to treat a child over 16.

TIME LIMITS

Having set this out as the first area that causes difficulties I would say from the outset that in my view the legislation when read carefully is clear as to time limits. Rather the difficulties are caused at court by practitioners interpreting them in favour of their client!

¹ The legislative framework can be found in s25 of the Children Act 1989, s60 of the CJA 1991, the Children (Secure Accommodation) Regulations 1991 (SI 1001 No. 1505), the Children (Secure Accommodation) (No.2) Regulations 1991 (SI 1991 No 2034), the Family Proceedings Courts (Children Act 1989) Rules 1991 (SI 1991 No 1395) and the Magistrates' Courts (Children and Young Persons) Rules 1992 (SI 1992 No 2071).

A child can be detained in secure accommodation for an initial period of 72 hours within any period of 28 days without the authority of the court. This is an aggregate period. Be warned that some local authorities require prior authority of their Director of Social Services before they will sanction this step.

With court authority a child in a remand case can be kept in secure accommodation for the period of remand save that no such order may be extended beyond 28 days.

In non-remand cases a child can be kept in secure accommodation for up to three months on the first application and then for up to six months on any further application. (Regs 11 and 12).²

The difficulty comes when cases are adjourned. There is clear authority that if a case is adjourned and a child kept in secure accommodation during that period then that time spent counts towards the final tally of months spent in secure accommodation.

In the same way, if an application is adjourned and the child is not in secure accommodation, say for example if the local authority has been unable to detain the child, then this does not count towards the total maximum time spent in secure accommodation. There is no helpful authority clarifying this point however, all that needs to be done is to look at the purpose of the legislation dealing with time limits. Quite clearly the key point in this area (although sometimes overlooked in practice) is to protect the interests of the child and to ensure that they are not locked up for any longer than necessary.

THE OVERLAP WITH THE CRIMINAL JURISDICTION

The important point when dealing with a child also facing criminal charges is to bear in mind the basics. Secure accommodation is not a form of remand. It is distinct from remand to a secure unit under CYPA 69 s23.

If a child is remanded by the youth court and the local authority wishes to make a s25 application this produces an odd situation:

² This is repeated more clearly in Re W (A Minor) (Secure Accommodation Order) [1993] 1 FLR, ³ CJA 1991 s60 (3), ⁴ Re G (secure accommodation order) [2001] 1 FLR 884 and Regulation 6

*"In the case of a child or young person who has been remanded or committed to local authority accommodation by a youth court or a magistrates court other than a youth court, any application under s25 of the Children Act 1989... shall notwithstanding anything in s92 of that Act or s65 of the 1980 Act be made to that court."*³

The authorities are clear.⁴ The application must be made to the magistrates' court dealing with the matter. In practice this produces a huge amount of confusion and the rule is more honoured in the breach. Generally young people are not remanded for any great length of time in any event, and often one way of removing this difficulty is by transferring up on the basis of complexity!

When children are bailed with a condition of residence this is no longer a remand situation. The child is then a child "looked after" and the application can be made to the FPC.⁵ Sometimes it can be a good idea for the local authority to make representations to the CPS.

If the child is remanded into secure accommodation beware that the power to hold in secure accommodation will fall away when the child is sentenced. If the Local Authority plans to hold the child in secure accommodation after that date, most likely the 72 hour power will have to be invoked to bridge the period where they have no order granted by a court. If prior authority by the Director of Social Services is required to invoke this power then the local authority will have to be ready with this on the day of sentencing.

CHILDREN OVER 16

In practice this throws up problems when a child is aged over 16 and in voluntary accommodation. If a child is accommodated under s20 (5) then the court does not have the power to make a secure accommodation order.⁶ In practice this is a matter of construction as frankly this point is seldom specified when the child is accommodated. One option open to any applicant local authority is simply to apply for an interim care order.

WHAT ABOUT HUMAN RIGHTS?

A secure accommodation order constitutes a "deprivation of liberty" within the meaning of Article 5 of the ECHR but is not incompatible with the convention where it is justified under one of the exceptions in Article 5(1) of the ECHR⁷. In practice secure accommodation is nearly always justifiable for the purposes of educational supervision. Other exceptions under article 5(1) might be argued to apply. By the same token locking up a child under the 72 hour provision is not incompatible with the convention. In short, the deprivation of liberty by an administrative decision must come within the article 5(1) exception. This follows *Koniarska v UK*⁸.

This brief article can only provide some pointers to help negotiate the secure accommodation maze. It cannot begin to grapple with the various questions asked by practitioners time and time again about the benefits of secure accommodation. Even if it only grazes the surface of this area of law one thing at least is clear: this area of law needs to be codified, and the sooner the better.

... Cleo Perry

³ Re C (a minor) (secure accommodation order: bail) [1994] 2 FCR 1153. Re W (secure Accommodation Order: Jurisdiction) (October 4 1994) unreported, supports this. Where a child has been bailed with a condition of residence at the discretion of the Local Authority the court with jurisdiction is the FPC, not the court that bailed the child, ⁴ Re G (Secure Accommodation) [2000] 2 FLR 259, ⁵ Re K (Secure Accommodation Order: Right to Liberty) [2001] 1 FLR 526, CA, ⁶ (2000) 12 October unreported

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House of Lords compounds error on Damages for the Unwanted Child

A seven man House of Lords in **Rees -v- Darlington Memorial Hospital NHS Trust**¹ has affirmed the 1999 House of Lords decision in **McFarlane -v- Tayside Health Board**², that the parents of an unwanted, but healthy and accepted baby could not recover the cost of bringing up that child from a doctor whose negligent conduct of a vasectomy led to the birth of the child. In doing so, however, they have added what they described as a "gloss" in the form of a conventional sum of £15,000, in addition to the cost of the pregnancy and birth itself, to mark the legal wrong suffered in being deprived of the freedom to control whether they have children, and if so how many. This article considers the original decision in **McFarlane**, the attempts of the lower Courts to deal with the House of Lords reasoning, and the House of Lords' latest attempt to set out the law in **Rees**.

McFARLANE

The decision of the House of Lords in **McFarlane**, was a significant change in the law and a serious limitation on recoverable damages when compared with previous cases. The Courts had grappled with such morally contentious claims in cases such as **Emeh -v- Kensington & Chelsea HA**, **Thake -v- Maurice** and **Allen -v- Bloomsbury HA**, but the result until **McFarlane** had been that substantial damages had been awarded.

When the matter came before the House of Lords in **McFarlane** they overturned the accepted practice of awarding such damages. Although they permitted damages for the pregnancy and the birth itself, the cost of bringing up the child was disallowed.

The five Law Lords in **McFarlane** gave separate judgments with different reasons. As a result it was difficult to discern any one basis for the decision, though it was possible to find a majority who were prepared to accept the proposition that it was not fair, just or reasonable (per **Caparo Industries -v- Dickman**) to impose liability for the cost of the child's upbringing. The issue that troubled all their Lordships was how a balance was to be struck between the

unwanted cost of bringing up an additional child and the benefit and blessing that was nevertheless enjoyed as a result. As Lord Millett put it, it was morally offensive to regard a normal, healthy and accepted baby as more trouble than it was worth.

Whilst the other Law Lords put forward a number of legal policy explanations for their decisions, Lord Steyn said that to explain decisions denying a remedy for the cost of bringing up an unwanted child by saying that there was no loss, no foreseeable loss, no causative link or no grounds for reasonable restitution was to resort to unrealistic and formalistic propositions that masked the real reason for the decision. In his view, it was a matter of distributive justice; whether ordinary people would regard it as fair for the parents of a healthy and accepted child to be paid the cost of its upbringing. Whilst admitting that he had not asked any travellers on the London Underground, he posed the question of what they would say and decided that the answer would be an emphatic "No". Lord Steyn disclaimed any idea that his notion of distributive justice arose from the "quicksands" of public policy. It was, as he re-emphasised later in **Rees**, a matter of legal policy.

POST-MCFARLANE

Following the decision in **McFarlane**, the lower Courts had the task of trying to make sense of it. What became clear was that if the Underground carriage approached by Lord Steyn had been full of Judges from the lower courts, then it is likely that their answer would have been "Yes", rather than "No". This raised the issue of whether a group of senior, exclusively male, lawyers was the appropriate group to be making such decisions at all.

Soon after **McFarlane**, Newman J. gave judgment in **Rand -v- East Dorset HA**, where the Claimants were not informed about the result of a scan which disclosed the likelihood that Mrs. Rand would give birth to a Down's Syndrome baby. As a result, Mrs. Rand was deprived of the chance, which she would have taken, to have an abortion. The child was born with Down's Syndrome. Newman, J. held that **McFarlane** did not prevent an award of damages for the birth of a disabled child and that the Claimants could recover

¹[2003] 4 All ER 987

²[1999] 3 WLR 1301

damages arising from the disability rather than the fact of birth, and only to the extent that such losses had in fact been sustained, or would be sustained in future. Thus, their own means were determinative and the wealthy would recover larger losses than the poor.

The Court of Appeal considered **McFarlane** in **Parkinson -v- St. James and Seacroft University Hospital NHS Trust** in April 2001. The Court was presided over by Brooke, L.J., who had been the trial judge in **Allen -v- Bloomsbury HA** in December 1991. Brooke, L.J. considered that the law of negligence had been made "much more complicated" by **McFarlane** and there was no longer a single test for recovery of damages. Where a healthy baby is born, the issue was whether the facts disclosed a state of affairs where the law should recognise a legally enforceable duty of care owed by a doctor to parents to relieve them of the financial consequences of bringing up an unwanted healthy child. The answer, following **McFarlane**, he said would generally be "No".

Where the child had a disability, however, then under the principles of distributive justice "ordinary people" would consider that it would be "fair" for the law to make an award where the child suffered serious disability so long as the award went no further than the extra expenses of bringing up a child with a significant disability. Hale, L.J. giving judgment in **Parkinson** referred to the reasoning in **McFarlane** as being a deemed equilibrium between the benefit and the cost of a normal healthy child, to which I shall return below.

In deciding that the costs of bringing up a healthy child are irrecoverable, the House has aligned itself with many Courts in the United States and other jurisdictions. The **McFarlane** reasoning was considered, but not followed, in Australia in the case of **Cattanach -v- Melchior**³. In **Rees**, Lord Bingham was to suggest that Kirby, J. in Australia was surely right to suggest that :-

*"Concern to protect the viability of the National Health Service at a time of multiple demands upon it might indeed help to explain the invocation in the House of Lords in **McFarlane** of the notion of distributive justice."*

REES

The first issue that had to be grappled with in **Rees** was whether they should reconsider or amend the decision made so recently in **McFarlane**. Unanimously, they decided that it would be wrong to do so, but promptly did just that. Lord Millett, in the course of giving judgment in **McFarlane**, had proposed a conventional award of damages of £5,000 to reflect the legal wrong done to parents, but the idea had not been taken up. In **Rees**, he suggested a figure of £15,000 and that figure was adopted by a majority as "a gloss" on the reasoning in **McFarlane**. In truth, it was no such thing. As Lords Hope and Steyn pointed out, the creation of a conventional award was contrary to principle and inconsistent with the decision in **McFarlane**. If it was wrong to depart from **McFarlane** where the issues had been fully debated in the Court below and before their Lordships, how could it be right to depart from **McFarlane** by creating a conventional award where that issue had neither been developed in the Courts below nor in argument before the House.

In **Rees** the House of Lords was dealing with the case of a healthy child born to a severely visually disabled mother. She feared that her eyesight would prevent her from looking after children properly and sought a sterilisation. She was bringing up the child as a single mother with care and support from family and friends. The House of Lords decided that that position was no different to the position in **McFarlane**. Their Lordships did not deal with the issue in **Parkinson**, namely whether the additional cost of bringing up a disabled child should be recoverable, despite their clear reservations about it. Whether **Parkinson** remains good law remains to be decided.

Their Lordships in **Rees** were at pains to emphasise that Hale, L.J. had been wrong to assert that the basis of their reasoning in **McFarlane** had been a notion of deemed equilibrium. They emphasised that they were not saying that the cost should be deemed to be equal to the benefit of a healthy child. Rather, whilst the cost of a child may be calculable (although with some difficulty, in their view), the benefit of a child was not. In those circumstances, they concluded that it was not possible to value the balance, and if the Courts could not value the balance then they should not award damages to reflect it, save by way of a conventional award.

By shying away from the task of valuing something because it is difficult to value, the House of Lords have demonstrated a level of timidity unfamiliar to the common law. Common lawyers have long been used to dealing with balancing values that are incommensurate and incapable of precise quantification. They have faced up to the task in many ways. They have done so recently with the introduction of the Human Rights Act. The European Convention on Human Rights gives rise to a number of rights, which sometimes find themselves in conflict. The Court then has the task of balancing right against right rather than right against wrong. It is the task of the Court in a civilised society to achieve a balance between incommensurate values, and in doing so often plugging gaps left by the legislature, not to shy away from doing so. Similarly, the Courts constantly value things that are difficult to value, whether it is by assessing the

³[2003] HCA 38

...Continued from page 11

value of a lost chance, or by placing a value on a broken leg or a broken mind. The fact that something may have a benefit that is difficult to assess is no good reason to refuse to award any element of the cost involved.

The family of a person whose life has been saved by the NHS, but who has been rendered paraplegic by a doctor's negligence in the process, could not be said to have wanted a paraplegic relative. That does not mean that the relative is not loved and cared for, or that the family do not receive enjoyment, satisfaction, love and affection from caring for their injured loved one. No-one suggests, however, that that should result in a discount from the cost of care, far less that it should remove the claim for the cost of care completely on the basis that the benefit is an incommensurate one and hard to assess.

For the present, however, the law is affirmed as being that the parents of an unwanted but healthy and accepted baby cannot recover the cost of bringing up that child from a doctor whose negligent conduct led to the birth of the child, save as to a small conventional figure. What then of the claimant whose case could and should have been brought to assessment before **McFarlane** but where, due to solicitors' delay, was not assessed until after **McFarlane**? The damages recovered will have been significantly reduced. The family will have lost the opportunity to have their claim assessed in accordance with the law as it was understood pre-**McFarlane**, but will have the joy and benefit of knowing that their claim has been assessed in accordance with the true law of the United Kingdom as decided upon by the House of Lords. That will not stop the Courts from allowing damages for the lost opportunity.

... Grahame Aldous

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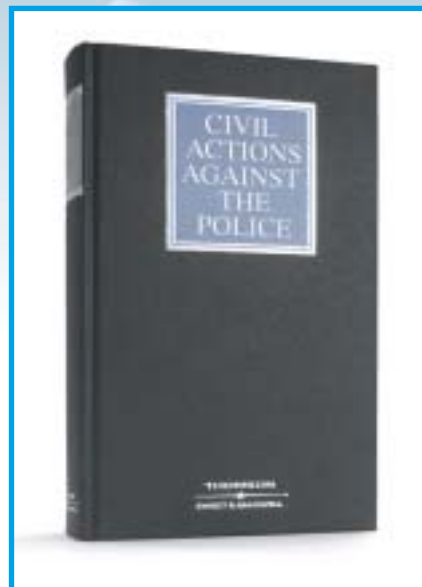
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