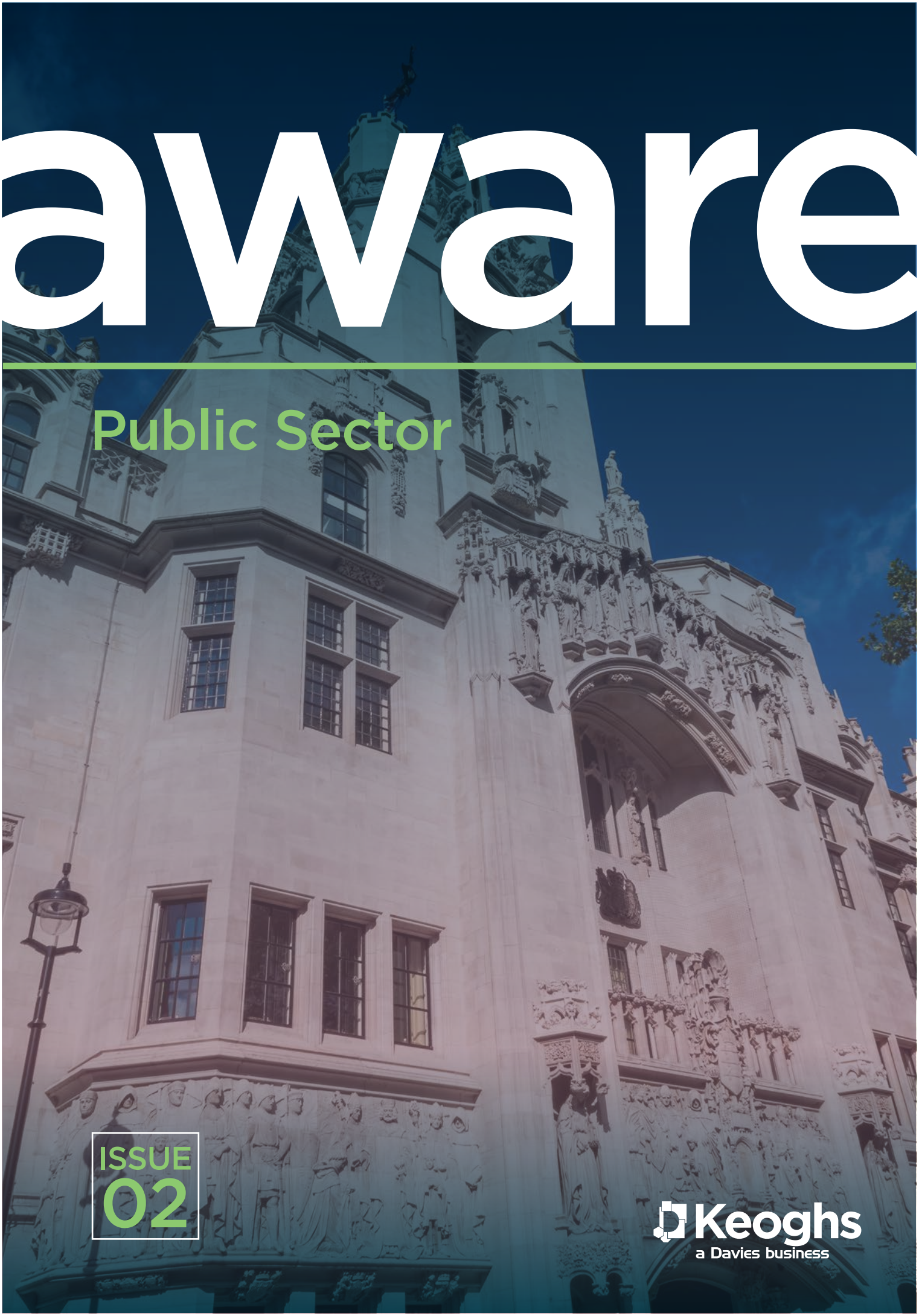
aware

Public Sector



ISSUE 02

Keoghs
a Davies business

Contributors

Lauranne Nolan
Associate
T: 0151 921 7399
E: lnolan@keoghs.co.uk

Paul Edwards
Director of Costs
T: 0151 921 7082
E: pedwards@keoghs.co.uk

Sarah Swan
Partner
T: 0151 921 7099
E: sswan@keoghs.co.uk

Nicola Markie
Solicitor
T: 01204 672390
E: nmarkie@keoghs.co.uk

Peter Kenworthy
Partner
T: 01204 678616
E: pkenworthy@keoghs.co.uk

Matthew Kirk
Associate
T: 01204 677353
E: mkirk@keoghs.co.uk

Michael Davies
Associate
T: 0117 218 0235
E: michaeldavies@keoghs.co.uk

Find out more about Keoghs or any of our services at

Keoghs.co.uk

Welcome

As we are quickly heading towards the end of 2022, we would like to welcome you to the second edition of Keoghs Public Sector Aware. We are pleased to include a number of articles on topics which affect the sector and which will hopefully provide some useful information and assistance to you and your colleagues:-

- Lauranne Nolan, an Associate in our Abuse team, considers and advises on Mandatory Reporting of abuse in England and Wales.
- Paul Edwards, a Director in our Costs team, provides interesting comment on Costs implications in Infant Settlement Hearings for non-co-operating claimants.
- The recent Court of Appeal decision of HXA v Surrey County Council and YXA v Wolverhampton City Council and its implications on public sector organisations is considered by Sarah Swan (Partner) and Nicola Markie (Senior Solicitor), giving a dual perspective of its conclusions.
- An interesting article on Covid-19 claims and their current inquiry status is provided by Peter Kenworthy, Head of Legacy & Disease.
- Matthew Kirk, Lead Lawyer in Keoghs subsidence and tree mitigation team, considers Climate Change, COP 26 and the impact on the environment.
- A Code of Practice in relation to historical allegations of abuse and best practice produced by the LGA for Councils in England is outlined and considered by Sarah Swan (Partner).
- Finally, we hope that you find the case law update relating to Highways provided by Michael Davies, Associate in our Public Sector Team informative.

With the current economic forecasts, funding issues and evolving case law, it is now more pertinent than ever for public sector organisations to keep up to date with evolving law and best practice. We hope that our updates have gone some way to assisting with this and have more articles in the pipeline ready for our next edition. If there are any particular areas which you would like us to cover, please let us know. Alternatively, if you would like to speak to any of the contributors about their article and/or specific practice area, they will be very pleased to hear from you.

Sarah Swan

Lauranne Nolan
Associate

Mandatory reporting of abuse in England and Wales: an update

Following the numerous revelations over the past few years of abuse having taken place in various sectors and organisations, there has been growing support to impose stronger reporting duties on professionals working with children to report suspected cases of abuse to the authorities in England and Wales. This is in the form of mandatory reporting of suspected incidents of abuse, with criminal sanctions for failing to do so. Mandatory reporting is not a new concept and already exists in other jurisdictions, such as Australia, with varying degrees of duties between states to report suspected abuse.

As a result, the Regulated and Other Activities (Mandatory Reporting of Child Sexual Abuse) Bill has now been presented to the House of Lords for its first reading with the aim that it will become law in England and Wales.

The Bill

The Bill proposes to mandate those providing and carrying out regulated or other activities with responsibility for the care of children to report known and suspected child sexual abuse. It is not intended to include other instances of suspected child abuse, such as physical abuse or neglect.

It will create a criminal offence for failing to report concerns of child sexual abuse but also aims to enact provisions to protect mandated reporters from detriment in any personal, social, economic and professional settings.

The Bill states that any providers of one or more of the activities set out in the Bill who have "reasonable grounds for knowing or suspecting sexual abuse of children when in their care" must, as soon as is practicable after it comes to their knowledge or attention, report it to:

- The Local Authority Designated Officer (LADO); or
- Local Authority Children's Services; or
- Such other single point of contact with the Local Authority as that authority may designate for that purpose

If the report is made orally then the maker of the report must confirm the report in writing within seven days. Importantly, the report needs to be made whether the alleged or suspected abuse has taken place in the setting of the activity or elsewhere. If a person fails to make such a report then they will have committed an offence and if found guilty they will be liable on summary conviction a fine of up to £5,000.

Crucially, a person who makes a report, as required to under the Bill or in good faith, may not be held liable in any civil, criminal or administrative proceeding and may not be held to have breached any code of professional etiquette or ethics, or to have departed from any acceptable form of professional conduct.

For the purposes of this Bill, some of the proposed regulated or other activities would include:

- Education, including schools, sixth form colleges, colleges of further education
- Healthcare, including hospitals, hospices, GP surgeries, walk-in clinics and outpatient clinics
- Private institutions contracted by public bodies to provide services to children
- Organisations providing activities to children, such as sports clubs, music, dance or drama groups and youth clubs

The first reading is simply a formality to signal the start of the Bill's journey. The Bill will now move on to its second reading in the House of Lords with a date yet to be scheduled. If the Bill successfully makes its way through both the House of Lords and House of Commons it is proposed that the Bill, once it receives Royal Assent, would become known as the Regulated and Other Activities (Mandatory Reporting of Child Sexual Abuse) Act 2022.

Comment

There is no doubt mandatory reporting will increase the awareness of professionals working with children when sexual abuse may be taking place. In support of this, some studies have indicated that where mandatory reporting systems are in place, it substantially increases the number of cases of child sexual abuse that are identified. However, if the Bill is enacted into law it will be important for organisations to provide all the necessary training, support and resources to those working with children to enable professionals to comply with their legal duties and report concerns of child sexual abuse promptly and appropriately.

Paul Edwards
Director of Costs

Claimants who don't co-operate in advance of infant approval hearing face cost sanctions

A hearing I recently attended serves to remind us that where there is an infant approval hearing (IAH), the parties are expected to have at least attempted to deal with costs. This was a public liability claim where damages were agreed and listed for an infant approval hearing in Southampton County Court. In advance of the hearing we repeatedly asked the claimant's solicitor for details of their costs so that we could try to agree them or so the judge could summarily assess them. The claimant refused, saying there was no point, because the approval might not be granted and because the claim was complex, having been ongoing for a number of years. I pointed out that because they had calculated the deduction from damages for their success fee they had clearly given costs some consideration and it was regular practice for parties to prepare schedules for hearings where costs might not be recovered.

At the hearing, following the damages figure being approved, I addressed the court on this issue, arguing that because costs weren't capable of being dealt with, my client was being prejudiced and subject to additional expense by way of costs of assessment. The claimant argued that rarely would such costs go to assessment so there was likely to be no harm done; however, the judge agreed with my analysis and said she had expected to see cost details. She accepted my submissions and in her final order provided that there be no order for costs on any provisional or detailed assessment. Accordingly, our client's position is protected and if the costs are not capable of agreement we can go to assessment at no risk.

There are a number of reasons why costs should be dealt with, or an attempt made, before an IAH so they can be summarily assessed, if not agreed:

- The Costs Practice Direction to CPR44.6 states at 9.2 that: "The general rule is that the court should make a summary assessment of the costs .... (b) at the conclusion of any other hearing, which has lasted not more than one day"
- The 2021 Guide To Summary Assessment confirms: "The court may carry out a summary assessment of the costs of a receiving party who is a child or protected party if the solicitor acting for the child or protected party has waived the right to further costs."
- Many directions orders listing IAH make provision for costs to be dealt with, because detailed assessments are disproportionate
- It has also become standard practice that the court prefers to tie up all the loose ends of such claims when making its final order on them.

The majority of claimant solicitors do try to present their cost details; however, where they don't, or behave unreasonably, we should not be afraid to make representations about future costs of assessment.

Nicola Markie
Solicitor

Sarah Swan
Partner

A Step Back in Time for Assumed Responsibility?

Keoghs considers the Court of Appeal decision of HXA v Surrey County Council and YXA v Wolverhampton City Council and its implications on public bodies

Since CN v Poole Borough Council [2020] AC 780 ("Poole") in 2019 there have been a number of cases that have further clarified the UKSC's judgment on what circumstances may give to rise to a duty for local authorities where there is no parental responsibility by way of a care order or interim care order in failure to remove claims.

A particularly helpful decision was the High Court Appeal of HXA v Surrey County Council and YXA v Wolverhampton City Council which analysed one of the most frequently pleaded exceptions from Poole – the principle of "assumed responsibility". In these cases both claimants had suffered abuse and neglect at the hands of family members. There was a long history of social services involvement with both families, which included:

- Investigating and monitoring a child's position
- Taking on a task
- Exercising its general duty under s17 of Children Act
- Placing a child on the child protection register
- Investigating under s47 of the Children Act.

The claimants argued that the defendants had assumed responsibility for the claimants by carrying out the above. The defendants sought to strike out the claims as they argued that they would not be able to show that the defendants had assumed a responsibility under Poole by the above actions alone.

In the first instance, the defendants were successful and the court found that there was no duty of care owed by the defendants. Both claimants appealed the decision to the High Court where the cases were heard together and the decision was upheld.

These cases have been discussed previously in our articles [Keoghs Insight | Keoghs] and [The High Court provides some stability to 'Failure to Remove' Claims in two appeals | Keoghs]. These articles contain the full facts of each case and further details on the judgments.

The claimants appealed the High Court decision and the Court of Appeal hand down its judgment on 31 August 2022.

Grounds of Appeal

The claimants raised seven grounds of appeal:

(1) On the facts as pleaded which were not disputed by the parties the claimants each had a strong case for showing there had been an assumption of responsibility.

(2) The court was wrong to strike out both cases by comparison with the facts of other first instance cases when the comparison was flawed and the cases were not binding or necessarily correctly decided.

(3) The court was wrong to accept that this is not a developing area of law, as the parameters set in Poole have not been applied in the range of cases that local authorities deal with and the circumstances in which there has been an assumption of responsibility have not been considered by the Court of Appeal since Poole.

(4) In the case of HXA, the failure to find that a decision to take care proceedings was not an assumption of responsibility was plainly wrong.

>

(5) In the case of HXA, the failure to find that the decision to carry out keeping safe work and thereby provide a service to the claimant was not an assumption of responsibility was plainly wrong.

(6) In the case of YXA, the finding that accommodating YXA pursuant to section 20 of the Children Act 1989 was distinguishable from the decision in Barrett v Enfield LBC was plainly wrong.

(7) In the case of YXA, the failure to find that the decision to accommodate YXA and the decision to place him back with his parents or allow his return to his parents and thereby provide a service to the claimant was an assumption of responsibility was plainly wrong.

LJ Baker stressed that if either or both appeals were allowed, the consequence was that one or both would proceed to trial. At that stage the trial judge would decide in each case whether the local authorities held a duty of care. If the appeals were allowed it did not follow that either claim would ultimately succeed.

LJ Baker allowed both appeals.

Discussion

In reaching his decision LJ Baker summarised and discussed the law, relevant case law and the two previous decisions.

He confirmed that in order to consider if there is an assumption of responsibility, each case would need to be considered on its own merits with reference to specific facts of the case. LJ Baker provided the following the observations:

- The circumstances in which an assumption of responsibility may arise where not confined to a local authority acquiring parental responsibility for a child when a care order is granted under section 31 under the Children Act 1989 as occurred in Barrett v Enfield LBC, or an interim care order under section 38.

Importantly, in his view there may be circumstances where a duty arises outside of these examples.

- A duty of care may arise in respect of looked-after children if circumstances arise which amount to an assumption of responsibility by the local authority. This category may include children who are provided with accommodation under section 20 or respite care.
- Further, a duty may arise in circumstances where a local authority's action under statute, regulation, or statutory guidance, has taken, or resolves to take, a specific step to safeguard or promote the welfare of a child which amounts to an assumption of responsibility for a child. An example of this is when a decision to undertake or commission a specific piece of work to assess the level of risk and/or protect a child from harm has been undertaken. In the case of DFX v others v Coventry City such a report was commissioned under s47 when child protection investigations took place, yet the court in that trial found no assumed responsibility. LJ Baker specifically stated that he was not looking for this decision to be appealed, but provided commentary as to why such an action by the local authority may surmount to an assumption of responsibility in his view.

Judgment

LJ Baker concluded that if the assumption of responsibility were to be confined to cases where a local authority had acquired parental responsibility under a care order, the line would be clear. However, in his view this was not the effect of Poole and the responsibly for a child can be assumed in wider circumstances. Whether that duty arises will depend on specific facts of the case. There are a wide range of circumstances in which the social services department of a local authority may become involved in the lives of children in its area who are or are at risk of being abused or neglected. In many such cases, it may not be possible without a full examination of the facts to establish whether or not a duty of care arose or, if it did, whether it was breached. In those circumstances, it is plainly wrong to strike out the claims.

LJ Baker stated that as a body of case law emerges, it will become easier at the outset of proceedings to identify the circumstances in which an assumption of responsibility can exist so as to give rise to a duty of care. At this juncture there will be more scope for striking out claims which fall short of establishing a common law duty. However, "at this relatively early stage in the development of the law after the Poole case, striking out these claims would in my view be a wrong use of the power under CPR 3.4".

Both defendants and claimants are in a similar position as they were in June 2019 awaiting further court guidance on what constitutes assumed responsibility and forms a duty in failure to remove claims.

The matter is being appealed to the Supreme Court by the defendants.

CSE claims involving police forces

So far as CSE claims involving two public sector organisations – police forces as well as local authorities – are concerned, the line is not completely clear and an appeal is pending, but it does appear that the YXA/HXA decision no longer provides local authorities with a blanket denial of a claim in a number of circumstances where claimants were known to an authority but not on a care order as it has done previously.

When considering potential liability by local authorities as well as police forces in CSE claims, consideration now has to be given to what statutory guidance and/or regulations were applicable at the relevant time of the alleged abuse; whether the claimant was in section 20 voluntary or respite care; and if local authorities took a specific step towards safeguarding or promoting the child's welfare as this could amount to an assumption of responsibility on their part, especially if they undertook 'keep safe' work and/or a child protection investigation under section 47. Local authorities may now have a contribution to make towards potential liability and resolution of such claims dependent on specific facts in each case.

Keoghs awaits the outcome of the appeal in due course.

Peter Kenworthy
Partner

Covid-19 inquiries Where are we now?

As at the 20 July the number of Covid-related deaths in the UK edges towards 200,000[1] and the total number of Covid cases recorded to date in the UK stood at 23.3 million. On the same date the number of patients in hospital with Covid-19 stood at 17,019 with 175 being in ventilation beds. This is against a background of 93.1% of the population aged 12 or over having received at least one dose of the vaccine[2].

While the pandemic has not ended, the impact has been very much reduced and the restrictions in place have in turn been similarly reduced. In fact Covid-19 is now a matter for public health guidance rather than statutory regulation and restriction in the overwhelming majority of cases. The Health & Safety Executive no longer expects every business to consider Covid-19 in their Risk Assessments or to have specific measures in place. Employers may still choose to continue to cover it in their Risk Assessments but there is no obligation.

There is however a requirement to protect those who will come into contact with the virus due to their work activity and this unsurprisingly includes health and social care workers caring for infectious patients and in those cases there must still be a Risk Assessment and controlled measures in place.

Just as Covid-19 has moved on to be a public health matter the inquiries that have been mooted for some time are due to get underway.

1. HMG Corona virus data as at 20th July - deaths within 28 days of positive test 177,977, deaths with Covid-19 on the death certificate 198.552.
2. Healthcare in the UK | Coronavirus in the UK (data.gov.uk)

>

United Kingdom

The UK Government has set up an inquiry to be chaired by Baroness Hallett[3] under the following terms of reference:

The inquiry will examine, consider and report on preparations and the response to the pandemic in England, Wales, Scotland and Northern Ireland, up to and including the inquiry's formal setting up date. In doing so it will consider reserved and evolved matters across the United Kingdom as necessary, but will seek to minimise duplication of investigation, evidence gathering and reporting with any other public enquiry established by the dissolved administrations.

The aims of the inquiry are to:

1. Examine the Covid-19 response and the impact of the pandemic in England, Wales, Scotland and Northern Ireland, producing a factual narrative account.
2. Identify the lessons to be learned, thereby to inform the UK's preparations for future pandemics.

The terms of reference were approved by the Prime Minister on 28 June at which point Baroness Hallett launched the inquiry and laid out a timetable with evidence hearing expected to begin in 2023.

Scotland[4]

Terms of reference for the inquiry in Scotland were published on 14 December 2021 and were subject to minor revision on 9 June 2022. The Chair is Lady Poole (a Court of Session Judge) with a public launch pencilled in for early summer 2022[5].

The aim of the inquiry is to:

Establish the facts and strategic response, along with the lessons learnt, from the Covid-19 pandemic in Scotland.

It is highly likely, despite the stated intentions at UK level, that there will be a significant overlap with Scotland regarding terms of reference. Despite the much earlier publication of terms of reference and intention to have an early summer public launch, further details and a timetable have yet to be released.

Wales

The First Minister Mr Mark Drakeford has not ruled out a Wales-only inquiry but to date has indicated he will be relying upon the Hallett inquiry to provide a proper Welsh dimension as promised by the Prime Minister. It must be noted however that Drakeford is under some significant pressure from the bereaved families and indeed the Conservatives in Wales for a Wales-only inquiry.

Northern Ireland

There have been similar calls for a separate inquiry in Northern Ireland. This has been pressed for by the Northern Ireland Human Rights Commission and Northern Ireland's Commissioner for Older People who called for a separate inquiry into how the pandemic was managed in care homes. This however is unlikely to be progressed while the Stormont assembly remains suspended.

Keoghs

Our taskforce combines industry leaders in handling all elements of disease claims with regulatory experts versed in a range of inquiries. We will provide regular updates as the inquiries progress and can assist in all jurisdictions should you have any involvement in, or concerns over, the inquiries.

3. UK Covid-19 Public Inquiry (public-inquiry.uk)
4. Scottish Covid-19 Inquiry (covid19inquiry.scot)
5. https://covid19.public-inquiry.uk/

Matthew Kirk
Associate

Climate Change:

Surge year for the insurance industry

Over the course of this record-breaking summer we have seen the highest ever temperatures in the United Kingdom, sparking large wildfires and even melting runways at airports. Climate change is well and truly baring its teeth for all to see and this is having a significant effect on the insurance market. Insurers are facing an increased number of extreme weather events in both the winter and the summer which will likely only continue in the years to come.

A big outcome of the increase of global temperatures is the increase in subsidence claims. By all accounts in the market, 2022 is likely to be a surge year where the insurance market faces a huge increase in subsidence claims. In 2018, the number of subsidence claims across the market were 400% higher than the previous year.

It is believed that the levels of dry soil in 2022 are in line with the previous surge years of 2003 and 2018, so the insurance industry is bracing itself for the subsequent increase in claims.

The annual increased numbers in claims are likely to endure as temperatures continue to rise. It is likely that the insurance industry will see more frequent surge years and thus become an increasing challenge for insurers.

In addition, at Keoghs, we are seeing an increased number of claims in different parts of the country. Traditionally a peril limited to London and the South East, we are seeing increasing numbers of claims moving further north in places such as Yorkshire and the North East. This trend is something to consider in the years to come, and one we will be watching with interest.

COP26 and the Environment Act 2021

In October - November 2021, the COP26 conference took place in Glasgow with much fanfare and media attention where attending nations agreed to the Glasgow Climate Pact.

Immediately following COP26, the Government passed the Environment Act 2021 to bring into law the principles towards addressing climate change. These included net zero by 2050, a cap of 1.5 degrees in increased temperatures, protecting public health relating to air pollution and targets on limiting biodiversity loss.

Trees are vital in their fight against climate change in that they remove CO2 from the atmosphere, they cool the air, reduce flooding and improving physical and mental health. This is particularly the case in respect of urban trees. However, as we know, tree roots are a major cause of subsidence damage and often removal is the only way in which to abate any damage.

This creates a massive area of conflict to insurers and practitioners in subsidence cases where trees need to be removed but there is a Government target to keep trees in situ. This is especially the case where trees are under the ownership of a local authority.

Under section 102 of the Environment Act, local authorities have a general duty to conserve and enhance biodiversity. Given the significant impact of trees on biodiversity, this will naturally create pressures in respect of the removal of trees even in cases where they are causing damage.

More specifically to the felling of trees, the Environment Act creates a new ‘duty to consult’ the public under section 115. For “street trees” on an urban road, the local highway authority must consult with the public before felling any trees. It is common for there to be a significant amount of public interest when urban trees are to be removed and therefore this will likely create significant pressure on local authorities to prevent the removal of trees.

An additional provision is that any approved planning permission application is on the condition that a biodiversity gain is met. This could significantly affect any applications to remove a tree preservation order as it will be difficult to meet a biodiversity gain. It may be that local authorities decide to place more tree preservation orders on trees in order to protect from felling.

With the advent of climate change there will be a large increase in subsidence claims, however there are going to be additional challenges in effecting the removal of vegetation relating to environmental legislation.

In the years to come there will be increasing challenges for all practitioners and the market needs to work together in order to negotiate the changes in the climate and in legislation.

For further information, please contact Matthew Kirk. He is the lead lawyer of Keoghs subsidence and tree mitigation team. The team was set up in January 2022 and, within it, has vast experience at dealing with claims involving subsidence.

Sarah Swan
Partner

Code of Practice for councils responding to civil claims of non-recent child sexual abuse

In response to recommendations from IICSA, feedback from councils and the ABI Code of Practice, a Code of Practice in relation to historical allegations of abuse has been produced by the LGA for councils in England. Whilst the Code is not prescriptive, it is aligned with the ABI Code of Practice and recommends best practice for councils to follow along with their own protocols when dealing with civil claims of this nature.

The overarching principles of the Code of Practice relate to sensitivity towards victims of abuse, being victim-focused, and offers recommended ways of working with and supporting them throughout the process of a civil claim and afterwards, having regard to the emotive and difficult issues involved.

Methods of offering apologies and assurances to victims in consideration of the ABI Code of Practice are suggested, noting that apologies are not an automatic admission of liability. It also provides guidance in respect of limitation and consent issues being considered on a case by case basis, again having regard to the ABI Code of Practice's recommendations which provide assurances that these points will be taken in civil claims only in exceptional circumstances.

The Code of Practice for Councils notes that councils may wish to consider and develop their own redress schemes whilst IICSA's views on a National Redress Scheme are awaited. It also recommends that councils consider and review their own processes and practices bearing in mind the guidance, having particular regard to ensuring that their internal processes and responses are transparent and efficient.

For more information about the Code of Practice for Councils and its recommendations, see this **link**. It should, of course, be read in conjunction with the ABI Code of Practice.

Michael Davies
Associate

Highway Cases Update

While there arguably have been no new principles arising from reported highway decisions in the last year or so, there have, however, been some useful illustrations of existing principles.

Louise O'Connor v Luton Borough Council (QBD – 22 June 2021)

Facts

Ms O'Connor owned an 800cc motorcycle. She was a relatively inexperienced rider, describing herself as a hobby motorcyclist. On the day of the accident, she was riding with a group of club riders. She had stopped to fill up with fuel. As she was leaving the petrol station forecourt and riding into the road, she lost control of the bike. She went across the carriageway and had managed to travel around 25m before crashing into an oncoming car. She suffered a serious head injury and had no recollection of the accident.

Ms O'Connor's case was that the accident was caused by a defect or defects in the highway surface, situated at the boundary between the forecourt exit ramp and the carriageway.

The tarmac in this position had broken up and was deteriorating, adjacent to a line of setts (cobbles) marking the edge of the forecourt. There were several potholes of varying sizes present. Unusually, and helpfully, the publicly available judgment of Mr Justice Spencer in this case has a photograph of the affected area incorporated into it, the photograph being from the trial bundle and taken a few weeks after the accident. The judgment can be obtained online from BAILII. This image shows one pothole in particular as being larger/deeper than the others. In our view most highway officers observing the area would probably assess it as untidy, but not dangerous to vehicles.

The claimant's case was that the rear wheel of her bike went into the area and caused her to lose control. Although she could not remember the incident, her case was supported by members of her riding club, one of whom was 20m further back on the main road as she exited the forecourt. He gave evidence that the claimant had started to lose control after her rear wheel dropped into the pothole or rut (as he called it). He then heard the throttle of the claimant's bike picking up, which according to the accident reconstruction experts in the case was common in the case of beginner motorcyclists who start to lose control, since they mistakenly increase their grip on the handlebars and throttle. It was the sudden increase in power which caused the claimant to accelerate down the road and into the other carriageway. The same witness gave evidence saying that he had been aware of the presence of the same defect for many years before the accident, and it was so problematic that did not himself use the petrol station.

A police car happened to be nearby at the time of the incident and two officers provided first aid. As it was immediately known that the injuries were serious, an officer from the Roads Policing Unit was summoned and took charge. As time went on it was thought that the injuries were more significant and even life-threatening, and so yet more specialist officers attended. The officers considered the circumstances and interviewed the witnesses, including the claimant's club members. In the event, the claimant's medical condition improved and the police investigation was wound down.

>

The incident was brought to the attention of Luton Borough Council as the highway authority, 13 days later by the claimant's family. They emailed the highway department to report the incident and attached photographs of the defective road surface (one of which is the image incorporated into the judgment). They suggested that the pothole was responsible for the accident.

The next day a highways inspector visited the area in response to the complaint and issued a repair order to "make safe potholes" with a priority time of one hour. Nothing in the judgment suggests that the inspector measured the depth or other dimensions. While the claimant's lawyers agreed that mere repair of a defect after an incident is not significant, they nevertheless submitted that the one-hour repair timescale should be taken by the court as an acceptance by the highway authority that the pothole was a serious danger.

The highway experts instructed in the case differed about the likely measurement of the depth of the pothole: one thought it was 40–50mm in depth and the other thought it was in the range of 30–50mm. These measurements were estimated using the adjacent line of cobbles for scale.

The highway authority's intervention criterion for defects was 50mm depth and 150mm minimum width. The area had been the subject of a walked inspection only 12 days before the inspector felt that the defect alleged to be responsible for the accident did not require repair.

Unfortunately for the claimant, none of the many police officers who were present on the evening gave the defective road surface any attention at all. There was no suggestion from witnesses at the time that defective road surface had contributed. The senior investigating officer said in evidence that he had observed the potholed area, but did consider it could have been a contributory factor.

Judgment

Unsurprisingly, Mr Justice Spencer did not find that the accident was contributed to by the defect that the claimant alleged was responsible. The witness evidence to the contrary from one of the claimant's colleagues was rejected as unreliable. Most important to the judge's reasoning was the complete absence of any suggestion being made by witnesses on the evening that the road surface had contributed.

While the judge did not make any definite findings about what did cause the accident, he speculated that there may be been something about the construction of the forecourt exit which contributed to a loss of control by a motorcyclist: the camber and the use of different materials at the boundary (the setts/tarmac) with different coefficients of friction. This would have been for the claimant to try to prove.

Given the finding about causation of the accident it was not necessary for the judge to make a finding about the dangerousness (or otherwise) of the defect, but he went on to do so. He found the authority was not in breach of its duty under section 41 as the defect was not a danger within the relevant legal tests.

He rejected the claimant's argument that the one-hour repair timescale allocated by the highway authority was an indication it was a serious danger. The highways maintenance manager had given witness evidence that it was the policy at the time to carry out repairs following a complaint of an accident (that is, regardless of actual danger), so as to be seen to be a "caring" authority.

Although the judge did not make explicit findings about whether the authority's repair policy would have required the pothole to be remedied, that would appear doubtful – since the very maximum depth estimated by the experts was 50mm and that was the intervention level.

The judge relied on the fact that, in his view, any motorcyclist approaching the area from the forecourt would be riding at slow speed and have ample opportunity to observe and avoid it. Motorcyclists have a greater choice of which part of the road to use. He contrasted this with a similar defect which would be found in the middle of the road on a sharp bend where a motorcyclist would have much less opportunity to avoid it.

The judge also relied on the inspections which had been carried out and the absence of complaints or accidents. Finally, the judge noted that none of the police officers involved at the scene felt there was anything significantly wrong with the road surface.

It was, therefore, not necessary to consider whether the highway authority would in the alternative have been able to rely on its section 58 defence.

Comment

The case is a useful reminder of several important principles of use to highway authorities in these cases.

Firstly, the highway authority should not be concerned about the consequences of repairing a defect after an accident or claim is reported. The court will be slow to infer dangerousness from the mere fact of a repair, even an urgent repair.

Secondly, the positioning of the defect on the highway surface is an important element of the court's assessment of dangerousness. The outcome in this case may have been different if the same defect had been situated in the middle of the road on a sharp bend, allowing motorcyclists less time to observe and avoid it. This sort of reasoning is consistent with the risk-based approach to highway maintenance advocated in the latest Code of Practice, 'Well-managed Highway Infrastructure'.

Finally, the absence of previous complaints or reported accidents is a highly relevant factor in assessment of dangerousness. Often claimants will adduce evidence that a particular defect had been present in the highway for many months or years before their own accidents took place. This can be done by interviewing local residents, those who use the road regularly, or by use of historical Google Street View imagery. Claimants often chose to do this as a way of attempting to undermine the highway authority's section 58 defence, since longevity of a defect might be evidence of highway inspections being inadequately performed. But in doing so they may ironically assist the highway authority's argument that the defect is not an unreasonable danger, at least where no other accidents or complains are reported.

Where a claim is intimated a long time after an accident takes place, say a year or more, and if the defect had remained unrepaired in the meantime and no other accidents were reported or complaints made about the area, that too can be good evidence that the defect is not an unreasonable danger to highway users.

>

Brown v (1) West Lakes (2) South West Water (3) Cornwall Council (Court of Appeal – 17 January 2022)

The case involved an appeal by the claimants against the successful striking out of their claims against three defendants in the High Court. Because the claims had been struck out on the basis that the Particulars of Claim disclosed no reasonable grounds to pursue the claims, there had been no trial and, therefore, no findings of fact made. Where such applications are made by defendants in those circumstances, the court generally must assume that the facts pleaded by the claimant in the Particulars of Claim are all true.

Facts (as alleged)

Mrs Brown was tragically killed in a road accident in May 2017. As she was driving on a road situated alongside a reservoir in Cornwall, she unfortunately lost control near a left-hand bend. Her car crossed the middle of road into the other carriageway, went down an embankment, though a wire fence, down a stone-faced bank and ended up in the reservoir. Her car was submerged and sadly she did not survive.

Mrs Brown's husband and children brought claims against three defendants. The first and second defendants were responsible respectively as licensee and owner of the reservoir. They were sued on the basis that they were negligent or in breach of duty under the Occupiers' Liability Acts 1984 and 1957. The third defendant was Cornwall Council as the highway authority.

The reservoir had been constructed around 1967 and the road was realigned around the same time. The second defendant had erected the wire fence at some point. It was not until after the accident that a vehicle restraint barrier was constructed by the highway authority.

The Particulars of Claim alleged at least two instances of previous accidents when cars had left the road near the bend (but not according to the defendants, ending up in the reservoir).

The Particulars of Claim also stated that the road construction (in the 1960s) did not comply with the relevant design guidance in force at the time, in that the bend was too acute.

The claims against all three defendants were struck out in the High Court. As against the first two defendants, the High Court had found that the Occupiers' Liability Act 1984 applied, since the deceased had been a trespasser on the stone bank and reservoir. There was no breach of the 1984 Act on the facts alleged by the claimants.

As against the third defendant highway authority, the High Court concluded that the claim should also be struck out, amongst other things on the basis it had not been alleged in the Particulars of Claim that the bend in the road was dangerous or that it had caused the accident. The highway authority is not "occupier" of the highway and neither is dangerous highway design/construction within the scope of the section 41 Highways Act duty. The Particulars also alleged that the highway authority was liable for failing to exercise powers to erect a crash barrier – an allegation which was bound to fail because of the important decision of the House of Lords in Stovin v Wise.

The claimants asked the Court of Appeal to reinstate the claims.

Judgment

The Court of Appeal found the lower court was correct to strike out the claims against the first and second defendants as occupiers of the reservoir. There was no danger "due to the state of the premises", which is a requirement for a claim under the 1984 Act. The danger arose because the deceased's car had lost control and left the road. It did not matter that the reason for the trespass was inadvertent rather than deliberate.

However, the claims against the third defendant highway authority were reinstated by the Court of Appeal and allowed to proceed. The High Court judge was incorrect to strike them out.

The Court of Appeal agreed there were some shortcomings in the way the case had been expressed in the Particulars of Claim, in that there was nothing specific pleaded about how the road construction did not comply with the prevailing standards at the time. Nevertheless, it was at least arguable that, assuming the road had been by constructed with a bend which was more acute than recommended by prevailing standards, and assuming the acuteness of the bend had contributed to the accident, then the claimants' claims might have a real prospect of success.

The allegedly deficient design/construction of the road was a positive act creating the danger, rather than an omission, therefore allowing potential liability under first principles of negligence.

Comment

Highway authorities might be surprised to learn that a road which was built in the 1960s and for which there is no significant accident history, is at risk of being found to have been constructed negligently. The accident history after construction might conceivably be evidence of whether or not the road was dangerous but it is not relevant to whether such danger could reasonably have been foreseen at the time of construction in the 1960s, which is the most crucial point

It is important to stress that the Court of Appeal did not decide the case in the claimants' favour – merely found that it ought to be allowed to proceed to be argued at trial and the facts found.

In practice it is often alleged that a newly built or altered highway has created a danger and caused an accident. Such cases can only be brought as claims in negligence, not for breach of section 41 of the Highways Act. Claims will generally need to be supported by expert evidence about design standards and how the construction departs from them.

The other part of the case – the occupiers' liability aspect – is not public sector specific, but is of general importance. It has been generally thought that an occupier of land next to the highway is under no duty to try to prevent vehicles driving off the highway onto his land, regardless of what dangers may be on it. The decision of the Court of Appeal tends to support that.

It was stated at the time of the decision that the claimants would be seeking permission to appeal from the Supreme Court, apparently not satisfied with pursuing the claim only against the highway authority. It would be beneficial for this important point to be considered at the highest judicial level. It is understood that a decision on permission is awaited from the Supreme Court.

Client Comments

We would like to share some of the fantastic feedback we have received from Legal 500.

Keoghs are at the cutting-edge of technology and have a number of market innovations including the use of AI and machine learning in dealing with significant cases. Nothing is too much trouble in terms of added value services including regular insight on market development and bespoke training. They are genuinely a pleasure to work with.

Paul Edwards from the costs team is the main individual I work with. Paul is highly knowledgeable and experienced in the area of costs. He commands his own against senior counsel on a regular basis and is highly regarded by all including opponents.

Keoghs costs team is, I think, the premier team for historic abuse claims in England and Wales. Their approach is not just limited to each case but they have a keen sense of strategy and are thought leaders in the field.

From receipt of the initial call the team ensures that the client is made to feel at ease and potential outcomes explained from the outset. The partner have an excellent relationship with the HSE in that they are always ready to assist with their investigation making the whole process run much smoother.

Head Office:

2 The Parklands
Bolton
BL6 4SE
T: 01204 677 000

E: info@keoghs.co.uk
@keoghslaw
W: keoghs.co.uk
F: 01204 677 111

Belfast | Bolton | Bristol | Coventry | Glasgow | Newcastle | Liverpool | London | Manchester | Southampton