

Responding to Allegations of Negligence by Former Children in Care: The experiences of an expert witness

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Abstract

This article discusses the system whereby people allege negligence on the part of agencies that were responsible for their care as children or young people. Although it is written from the personal viewpoint of an expert witness and former director of social services, the system is a sufficiently important (if small-scale) process in our legal and social services to merit scrutiny, especially as I have some concerns about what is happening and the fact that it has not been independently researched.

Introduction

Since 2002, when I commenced this work, I have been involved in over 70 cases, averaging about one a month, therefore, though the flow has not been consistent. The number of cases means, however, that I must have seen a broad cross-section of claims and that I am in a position to make generalised comments. I have also been asked to prepare reports in broadly equal numbers by claimants and defendants.

The Claimants

In describing the system, let me start with the claimants. When I first started my work as an expert witness the cases I dealt with were group actions involving large numbers of former children in residential care who were alleging that they had been abused by the staff. The late Barbara Kahan had been involved in these cases and when she died unexpectedly in 2000, I was asked to complete two of her unfinished reports.

The group actions sometimes related to a single establishment such as a large children's home or a community home with education, but some related to several homes in one authority. In the group actions the police had sometimes gone 'fishing' – approaching other children who had been in the homes to find out whether they also wished to make allegations. This process was criticised by some people on the grounds that it might encourage spurious claims, but my impression from the witness statements and particulars of claims is that almost all of them come over as completely genuine.

More recently I have been involved much less in group actions. My impression is that these actions were dealing with a backlog of claims dating back to the abuses of the 1970s, but some group actions are still being initiated.

The typical case which has been referred to me in recent years involves alleged negligence on the part of social workers, for example that the claimants should have been removed from their abusive parents at an earlier age, and that in consequence

they would have suffered less. These cases are usually brought by individuals, though quite often a number of siblings make common cause. In such cases much of the information is common to all of them, but the detailed allegations vary from one claimant to another.

In one or two cases the Official Solicitor has initiated the action on behalf of children still in care, when a guardian *ad litem* has reported to a court that the agency involved had been negligent.

In some of these cases the children are still in care. The earliest cases in which I have been involved date back as far as the 1950s, but typically they relate to children in care in the 1980s and 1990s. Although this is a long time ago and action should best be initiated within a few years of the alleged negligence, judges are usually very understanding about the reasons why former children in care failed to take action – for example through fear or having blocked out the memories – and are willing to waive the time limits.

Clearly, because it is fundamental to the system, the claimants are seeking damages. However, I believe that they are often also looking for an understanding of what happened to them as children, they may want an apology for shortcomings in their care, or they may want to hold someone, such as their social worker, personally accountable for what they suffered. In one case, the claimant did not want to seek damages but simply wanted to know whether the quality of services she had received had been acceptable. I will return to this point later.

The Defendants

The defendants are typically local authorities. Before 1971 there were the Children's Departments; from 1971 onwards there were the Social Services Departments. Although authorities were required to have Children's Departments and Social Services Departments statutorily, they sometimes used other titles. More recently we have moved back to Children's Services in quite a number of authorities, and the titles of services vary greatly.

The situation is complicated in quite a lot of cases by changes in local authorities – sometimes boundary changes, but more often changes in the type of authority, such as the introduction and removal of metropolitan counties, the creation of unitary authorities and so on. In a few cases, in the course of a person's childhood, their care has been the responsibility of three or four different authorities, even though they have been ordinarily resident in the same area.

These changes will usually have meant the appointment of new senior staff, possibly staffing changes at area team level, the introduction of new policies and systems and the need to create new sets of working relationships. The politicians and senior managers who think that major re-organisations are a good thing may be unaware of the damage that they can cause at client level, but that is another story. As far as this article is concerned, such re-organisations have offered a prime opportunity for confusion, with disruption in the management of the claimants' cases, case accountability being unclear and papers being mislaid, though I have also come

across one instance in which the process of handover was very well handled and well recorded.

In addition to local authorities some claimants sue voluntary organisations, mainly for the quality of their residential care. I have not come across any case to date where damages have been sought from an individual professional.

Of course, while it is the local authorities and voluntary bodies who are named as the defendants, the claimants' real adversaries are the insurance companies. Their primary aim is to pay out as little as possible, and they make hard-headed decisions about when to do deals in order to minimise lawyers' fees and court costs. For the claimants, then, taking action is highly personal in helping them understand their painful experiences, often having to relive them time and again as they are questioned by different professionals, while for the defendants it is generally an impersonal business matter, and it is relatively rare for anyone who was active in the care of the child to play a significant role in responding to the claim.

The Process

As an expert witness, I am not involved in the early stages of the process, but as I understand it, claimants typically decide at some point in their lives that they would like to understand what happened to them while they were in care – perhaps in their 20s or 30s, or even later – at a stage, perhaps, when the memories of their childhood are more distant and less painful, and they feel able to face up to them.

They may go straight to solicitors for advice, or, perhaps supported by their partners, may ask to see their social work case records. This can take a long while. Local authorities and voluntary bodies may have destroyed or lost some of the records, and even when they have found them, they may then spend a long time redacting them, blotting out the names of other individuals involved in their case. Since quite a lot of files relate to whole families, this can be an extensive exercise. When the files are ready, they are then able to read them, sometimes in the presence of a social worker who can explain their significance.

Whether they have seen their files or not, if they feel aggrieved about the quality of social work or social care services which they received, it is for solicitors to weigh up whether they have a case worth fighting. (There are now a number of firms who specialise in this work, and there is an association – the Association of Child Abuse Lawyers – set up to promote high standards of service in this specialist field.)

If the solicitor is persuaded that the claimant has a case, and if legal aid is required, then the Legal Services Commission has to be persuaded that the case has a 60% chance of success. There is a complicated formula to assess the likely damages and the likely cost of the case, and the LSC has to reassure itself that it will be getting value for money. The LSC budget has been reduced recently and they are tightening their criteria. On occasion this leads to a ceiling being placed on the fees paid to expert witnesses, and it could be argued that these limits load the case against claimants.

The impact of the alleged negligence is assessed by a separate expert witness – usually a psychiatrist, but sometimes a psychologist, and they have the difficult job of distinguishing between the impact of the negligence on the claimant on the one hand and on the other the effects of the child's earlier life and the factors which led to the need for care.

The purposes of the social work expert witness's report is to determine whether the quality of the services offered by the defendant was of an acceptable standard, taking account of the expectations during the period in question and of the various approaches to the work which different professionals might have taken at the time. It is not a question of best practice, but of the level of work which a competent professional would have been expected to offer. Making this judgement can be tricky, as there have been times when unacceptable standards have been widespread, for example during the dearth of qualified social workers in the early 1970s. At such times certain poor practices were typical, but that did not mean that they were acceptable.

The principles to be followed in this respect were laid down in two cases concerning claimants against the Health Service named Bolam and Bolitho, in which reasonable professional practice was defined for legal purposes.

I will come back to the reports in more detail, but to complete the description of the process, the expert witness's report is examined closely by counsel to determine the strength of their case. There may be meetings to consider critical points in detail, and there may be the need to revise or clarify the report. Counsel from both sides may put questions to the expert witnesses before the case comes to court.

If both sides have called for expert witness reports, the next stage is for the two experts to discuss their respective differences and prepare a joint report, explaining why they hold differing views, if they continue to do so.

Usually, the two sides settle, and it is my experience that by that stage they have a fairly clear idea of the scale of damages anticipated. In a small number of cases (only two out of more than 70 in which I have been involved) the case goes to court and is decided by a judge. In such cases, the claimants, the expert witnesses and other witnesses all give evidence and are cross-examined. The hearings are in public, and personal information that is otherwise confidential may be reported, being circulated around the legal profession in particular, especially when there is a point of principle involved.

The timescale of the whole exercise is strange to a non-lawyer. Some stages seem to last for ever and nothing may happen for years, and then suddenly reports are needed at short notice and judges' deadlines have to be met. Most cases seem to last for two or three years, and I have never been involved in a case which has been settled quickly.

As far as I am aware no one really knows the extent of these cases. The cases, which end up in court are well known, and they are few – my estimate is that there are no more than a dozen a year. However, the number settled before reaching court is much greater. Many of them involve expert witnesses. I only know of about half a

dozen people working in this field, and if they are working at the same pace as myself, this suggests that the number of such cases will be in the low hundreds per annum. There must be much larger numbers of cases where solicitors advise that nothing can be achieved or where the claimants do not pursue their claims. Figures for such cases are not available.

The nature of expert witness reports

The reports prepared by social work expert witnesses, although requested by the defendants' or the claimants' solicitors, are meant to be impartial, for the benefit of the court. There are guidelines which apply to all expert witness reports, but I know of no guidelines specific to social work or social care, and it is for each expert witness to shape their reports as they choose.

Some expert witnesses, for example, include a lot of information about the relevant law, while others do not. I choose to prepare lengthy chronologies, with every item referenced back to the documentation so that it can be cross-checked. I then use these chronologies as the basic quarry for material for the rest of the report. I attach the chronologies as appendices, and try to keep my basic reports short (say, 20-30 pages).

I have only met claimants on rare occasions, and have not interviewed them for information for my reports. The reports are based on the claimant's case files, and sometimes there are witness statements, but I find these less helpful as people's memories tend to be selective. The case files vary in length from a few hundred pages to thousands, and the longer cases typically have ten or more bulging case files to read.

The quality of the material is very varied. Sometimes it is badly copied; I had to use a lens for one file based on microfiches. Sometimes the records are in manuscript and take a long while to read. The most irritating problem is redaction, as one often has to work out whose names have been obliterated if one is to make sense of the case. Fortunately this job is usually done badly, and if there are multiple copies of a report one often finds that different sections have been redacted, so that one can read the whole document. I personally think that redaction is time-wasting, unhelpful and unnecessary.

My reason for mentioning this sort of detail is that the work can at times be relatively slow, not just because of the nature of the material but because one has to work out the implications of the data. It may, for example, be more important to note what is not there than what is – the records which have gone missing, the visits which were not made, or the statutory meetings which were not held. It is easy to quote from a report, but to state definitively that a social worker did not do something requires a thorough knowledge of the files.

To save money the Legal Service Commission sometimes requests preliminary reports. I do not mind producing as thorough a report as I can from a limited number of documents but I resist requests to skim the full documentation, as the critical issues often relate to detail.

An interesting feature in writing reports is that, in order to determine negligence and calculate damages, lawyers want to know exactly what was negligent and when it happened. Social work thinking and recording is a good deal more fuzzy. Social workers have to constantly make balanced judgements, often based on insufficient information, and they deal in shades of grey, not black and white. Trying to translate social work records into evidence which helps the lawyers is sometimes difficult.

If, for instance, the standards in a family home decline gradually over a period of years with no specific incidents to trigger action, at what point should a social worker have intervened more decisively, and at what point can failure to do so justifiably be termed negligent?

My concerns

As a life-long social worker, I have found the work fascinating. It has provided an opportunity to compare methods of social work and social care and case records from the 1950s through to this century, and since some families require social work intervention from one generation to the next, the claimants' case files may cover two or three decades and three or four generations. Indeed, it can be dispiriting to see families replicating problems.

I have, however, a number of concerns about the way in which this system works, in addition to the practical issues which I have mentioned.

Does the process help individuals?

The first is that I am unclear how much the system actually helps the claimants. Obviously, if negligence is identified, they obtain damages, and in our culture the money is a token to represent that the claimants have been wronged. Whether they spend the money on therapy and counselling or on holidays, I think it is appropriate that they have some recompense for their unnecessary suffering; they have the satisfaction that their concerns have been recognised.

As far as I am aware the amounts are usually modest. In a few cases where children have become severely disabled, the figures may be in the millions because of their need for lifetime care, but my impression is that the figures are usually in the low tens of thousands. Indeed, one of my concerns is that the claimants obtain only a modest percentage of the money spent on running the system.

While I do not begrudge the damages, there is the question whether the whole process meets the claimants' needs. Does it help them to relive their experiences, often at length and depth, several times over with solicitors, barristers, psychiatrists and maybe the court, where they may have to face searching questions? Does the amount of attention paid to them make them feel that their concerns have been properly listened to? Does the discussion help them to a fuller understanding of the way their case was handled? Does the in-depth discussion have a therapeutic effect?

I once raised this in a meeting with solicitors, and they felt that the process had helped perhaps half of their clients in this way, but as far as I am aware no one has researched the subject.

One of the problems is that reliving some of these childhood experiences can also be traumatic. One case was handled on the claimant's behalf, but the claimant did not want to be involved because the memories were too painful. In the group actions where the police have trawled for possible victims of abuse, the sudden confrontation with the past was said to have caused considerable stress for some people, for example when partners had not been told that the victim had spent some of their childhood in care and had been abused.

Furthermore, if the case comes to court the process becomes adversarial, and it is the role of the defendant's lawyers to minimise their liability. This may entail alleging that the damage was done within the family, rather than by the defendant's actions, or that the claimant's own conduct led to the problems.

It is also possible that, in the end, the claimant may not receive damages. Although judges are sympathetic towards claimants, the outcome depends upon the proof of negligence. It is always possible that a person has a miserable childhood and ends up as a damaged adult despite the provision of excellent services. There are occasional cases where I could not fault the practice, and in many instances the poor practice was only for brief periods. The damage suffered by the claimant affects the quantum, but the defendant's liability has to be proved first.

In short, while the process may help some people, it can be painful and even damaging for others, and there is always the chance that there will be no compensation.

How can social work learn from the alleged negligence?

My second main question is whether we can find a way for social work practice to be improved as a result of these cases. Serious Case Reviews, such as Baby Peter, may be published, even if anonymised, and the lessons can be learnt. Their findings can be made available to the social work profession and its managers. Serious Case Reviews are obviously different from the court cases I have been discussing, but the cases share the common factor that they address serious disquiet about the quality of practice.

It has been my experience that the detailed analysis involved in preparing expert witness reports indicates areas where practice could be improved.

For example, in many cases the problem was simply that good standard practice was not followed. This is in some ways re-assuring. At least the right systems were in place; no new policies or working methods were needed. One example is the failure of social workers, probably under pressure of work, to read the case files when taking over case accountability. In one case no one was aware that the claimant had been on the Child Protection Register previously. In another they had no indexing system and the filing system was in such chaos that they opened a new

file every time the case was re-opened, so that no one had an overview of the case as a whole.

In other cases, clients' needs were not adequately assessed. Either assessments were not thorough and comprehensive in scope or they were not undertaken at all, so that no one had a grasp of the extent of the family's problems.

Or again, in some cases social workers did not take neglect seriously enough and let household standards drop to an unacceptable level without taking action, perhaps becoming inured to the standards in the home.

Or they persisted with placing a child in successive foster homes when the child made it quite clear that this type of placement was unacceptable.

Some problems were managerial and systemic. In one authority social workers took turns to act as duty officers to deal with new referrals. The duty officers recommended any necessary action to the duty senior, who took the decision. It was clearly standard practice to open as few cases as possible, and in principle such a system is a good use of scarce resources. To be effective, though, some method is required to pick up repeat referrals in case they represent a pattern signifying a more serious problem. In the case in which I was involved, a total of 43 staff had been involved as duty officers or duty seniors before it was decided to open the case formally. At this point they found that the claimant's mother was 'hostile'.

In another case the family always rang the night duty team when they were at the point of crisis. The night duty social workers never visited but passed on messages to the area team the next day. Before the case was formally opened there had been eighteen such occasions. These two examples demonstrate the problem of dealing with each incident separately and failing to see the bigger picture.

In reading a large quantity of files covering several decades I have also formed other impressions which are harder to demonstrate. For example, case files in the 1960s were generally thin and contained practical information. In the 1970s and 1980s they usually contained full process recording. From the 1990s onwards the volume of paper has increased considerably, but the records do not seem to give as full a picture of the clients, or of the social worker's relationship with the claimant. There are more facts, and a lot more boxes to tick, but it feels as if the client's personal story is missing.

In my view, the lessons to be learnt from these cases could be of help to managers and trainers. But because the reports are subject to legal confidentiality the details cannot be disclosed, and the only ways in which the learning can be passed on is for individual expert witnesses to mention issues, or for the defendants to take account of the issues where they have been subject to censure. I have raised this issue in several quarters, but found no solution.

Conclusion

In summary, this is a relatively small and specialist part of the overall scene of social work and the law. It is broadly fulfilling its role satisfactorily within the current law, but

there may be better ways of helping claimants understand how their cases were handled during their childhood, and there must be some way in which the services and the social work profession can learn from the detailed analyses undertaken by expert witnesses.

References

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