

A Plea Against Tort Liability for Child Protection Agencies in England and Wales

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I. INTRODUCTION

Each field of law tends to operate within its own sphere, with little reference to the legal changes taking place around it. When I was invited to take part in an advanced tort seminar at Washburn University in Fall 2000, I was given an opportunity to look out from my own field of child protection law at the storm clouds approaching from decisions made in the law of tort in England and Wales. I was able to consider the newly-formed judicial view that local government should not be accorded blanket immunity for all decisions made in child protection cases on policy grounds. With the help of the seminar participants, I was able to explore the possible effects that liability would have on the development of the law and practice of child protection in England and Wales.

In this article, I describe the factors that have hitherto affected the development of child protection law in England and Wales. I describe the recent tort decisions that have paved the way for the imposition of liability for negligent acts by officials working in child protection. I then go on to question the assumption that the presence of tort liability will ameliorate the child protection system in the future.

In the background to this article is a current debate concerning the most suitable type of law to use when a case of child abuse comes to light. Initially this debate concerned the efficacy of the use of criminal law in inter-familial child abuse cases. Numerous commentators have argued that the criminal prosecution of an abusive family member can aggravate the problems created by the abuse. A failed prosecution could send a message to an abused child that she had not been believed, while a successful prosecution could lead to the polarisation of the family — something that the child may blame herself for. The scope of this debate was expanded in all common law jurisdictions when it became clear that the child protection system is beleaguered and that, far from alleviating the damage that some families inflict on children, it may compound it. The question has been reformulated in this context. It has become: what is the most suitable type of law to

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use to tackle the problems of the child protection system?¹ This article argues that family law rather than tort law is most useful in this context.

II. THE DEVELOPMENT OF CHILD PROTECTION LAW IN ENGLAND AND WALES

Before briefly discussing the background to the current law and practice in child protection in England and Wales, it is necessary to present a small glossary of terms. In England and Wales, the term “local authority” refers to the governing body of a region. Whilst the majority of functions of government are controlled centrally, a local authority has responsibility for provision of some of the domestic comfort of the people living within the region. This includes environmental, educational and social services. Local authorities employ social workers in order to fulfil their social service duties. Social work departments are known as “social services.”

Children who are cared for by the local authority, whether by consent of their parents or as a result of a court order, are known as children who are “looked after.”² Looked-after children may be accommodated by the local authority with one or both of their parents, with relatives or family friends, by foster parents or in residential children’s homes. At the height of their popularity in the 1960s, residential children’s homes were home to as many as several hundred children.³

“Parental responsibility” means all the rights and duties attached to being a parent. In English law, all biological mothers have the rights and duties of a parent as of right, as do all biological fathers who are married to the child’s mother.⁴ It may also be given directly by court order or by the consent of the child’s mother to the unmarried father.⁵ A local authority may acquire parental responsibility when a court order is granted for the care of children and in this instance parental responsibility lasts for the duration of the order.⁶

1. *See generally* LAW COMM’N OF CAN., RESTORING DIGNITY: RESPONDING TO CHILD ABUSE IN CANADIAN INSTITUTIONS (2000).

2. Children Act 1989, ch. 41, § 23 (Eng.).

3. *See generally* DEP’T OF HEALTH, CARING FOR CHILDREN AWAY FROM HOME: MESSAGES FROM RESEARCH (1998).

4. Children Act 1989 § 2.

5. *Id.* § 4. The law will change following the implementation of § 111 of the Adoption and Children Act 2002. After this a father can acquire parental responsibility if he is registered as the child’s father at the time of his birth.

6. Children Act 1989 § 33.

A. *Background to the Current Law*

As Lorraine Fox Harding has written, “[i]t is impossible to overlook the impact of individual cases which achieve ‘scandal’ status . . . and difficult to over-estimate their importance in English [child protection] policy in the 1970s and 1980s in particular.”⁷ Since the “rediscovery” of child abuse as a social problem in the mid-1960s,⁸ there has been a series of public scandals about the official response to it. These scandals generated enormous media, political and public concern, and have frequently been followed by a public inquiry. Scandals in relation to individual cases of child abuse may be divided into three types:

- the deaths of children at the hands of their parents whom the local authority had undertaken some duty to protect and had not protected them after its staff had received information that the child was at risk;
- investigations into suspected cases of child sexual abuse; and
- the abuse of children, whom the local authority were supposedly looking after.

The concern engendered by the death of Maria Colwell in 1973 was typical of the very grave misgivings about the child protection system which each new child death has created. Maria was returned to live with her mother and step-father after five years of living in the foster care of her aunt. She was battered to death by her step-father a year later. The ensuing public inquiry found that over thirty complaints expressing concern for her welfare had been made before her death. The inquiry concluded that the system had failed Maria. It recommended the creation of a system of interdisciplinary management of child abuse that involved all those working with children.⁹ This would be geared to the early identification of cases of child abuse and to a swift response when necessary.

In contrast, the scandals surrounding the investigation of child sexual abuse have engendered rather different concerns. The first of the scandals concerned investigations into the sexual abuse of children in Cleveland, in the North East of England. In this case, sexual abuse was diagnosed by two paediatricians in 121 children from fifty-seven families between January and July 1987. This was an unprecedented number of diagnoses of child sexual abuse for the area. The diagnoses were primarily made using physical signs upon the children’s bodies, most notably anal dilation. Once sexual abuse was diagnosed, social workers acted quickly to remove the children from allegedly abusive environments. The majority of these children were kept away from

7. LORRAINE FOX HARDING, *PERSPECTIVES IN CHILD CARE POLICY* 172 (2d ed. 1997).

8. NIGEL PARTON, *THE POLITICS OF CHILD ABUSE* 54-68 (1985).

9. REPORT OF THE COMMITTEE OF INQUIRY INTO THE CARE AND SUPERVISION PROVIDED IN RELATION TO MARIA COLWELL, at 86 (1974).

home for the duration of the investigation, with limited, if any, contact with their parents. As the furor surrounding the events in Cleveland developed, the press exposed the draconian nature of social workers' powers to intervene in families.¹⁰ This was underlined in the House of Commons, when the Member of Parliament Tim Devlin "asked the Minister if he was aware that children 'are being collected from their beds at two o'clock in the morning by social workers? Does not my Honourable Friend see a clear parallel with the activities of another body which carried the initials SS?'"¹¹

What the *Report of the Inquiry Into Child Abuse in Cleveland (Report)*¹² found was that social workers had reacted to the allegations of sexual abuse with a level of urgency, which the report concluded should have been reserved for cases when a child's "life or safety" was threatened.¹³ The *Report* echoed the sentiments of the family court and of the parliamentary select committees that had been considering reform of child law. They concluded that children could be harmed by precipitant intervention to protect them from abuse. In his judgment in *Re H*, Lord Justice Balcombe concluded:

[although] society is rightly astute to protect children from sexual abuse, society may cause other, and possibly greater harm to the children it seeks to protect. To take children away from the only home they may have known, from parents however inadequate, to whom they are attached, and to put them into the care of foster parents (however loving and skilled) or into a residential home, clearly carries a risk of harming those children.¹⁴

The *Report* also criticized the conduct of interviews with children, which were felt to place a great deal of pressure on children to state that they had been sexually assaulted and which failed to acknowledge any contraindications.¹⁵ The *Report* found that child protection work remained uncoordinated and demonstrated vast differences in approach both between professions and within them.¹⁶ It acknowledged a real fear that child subjects of investigations could become the victims of "system abuse."

The crises surrounding allegations of systematic abuse and mismanagement of children's homes picked up on many of the concerns that had already been raised in relation to child deaths and the investigation of child sexual abuse. Complaints made by adults who had pre-

10. See generally BEATRICE CAMPBELL, UNOFFICIAL SECRETS (1988).

11. Hansard, House of Commons Debates, June 29, 1987, col. 257, cited in NIGEL PARTON, GOVERNING THE FAMILY: CHILD CARE, CHILD PROTECTION, AND THE STATE 81 (1991).

12. REPORT OF THE INQUIRY INTO CHILD ABUSE IN CLEVELAND 1987, 1988, Cm. 412 [hereinafter CLEVELAND REPORT].

13. *Id.* at 228, ¶ 16.14.

14. *Re H*, [1991] F.C.R. 736, 745C (C.A. 1991).

15. See CLEVELAND REPORT, *supra* note 12, at 208-09, ¶ 12.42.

16. See CLEVELAND REPORT, *supra* note 12, at 81.

viously lived or worked in the homes¹⁷ had sometimes been ignored, overlooked or dismissed for years before they were taken seriously.¹⁸ In some cases this was because the person whom they complained to was also involved in abuse and indeed in some cases went on to abuse the complainant. In many cases the problems were identified as stemming from poor management. At a local government level, managers have been found by a number of inquiries at best to be uninterested in the workings of children's homes and at worst to be incompetent.¹⁹ Many of those working in children's homes, particularly those below management level, were inadequately trained. Children's homes were concluded to be isolated places with little opportunity for children to complain about their care or for staff to raise concerns about their colleagues.²⁰

Whilst the inquiry into each scandal identified the contribution of system failures, and the legislation itself, to the crisis, social workers were publicly blamed by the press for each tragedy.²¹ The media appeared almost to attribute the deaths of children, killed by their parents or carers, to social workers. For example, Lorraine Fox Harding cites several headlines published in national newspapers following the public inquiry into the death of Jasmine Beckford in 1986. These included *They Killed the Child I Adored*, a headline accompanied by a picture of a social worker, *Social Worker Lemmings Let Jasmine Die* and *Guilty Ones Who Let Jasmine Die*.²² In contrast, the majority of the media coverage of child sexual abuse investigations implied that the parents had not sexually assaulted their children, but had been the victims of overzealous child protection work.²³ The press coverage of the investigations into the satanic abuse of children²⁴ suggested that investigations had been commenced on very little, and in some cases fantastic, evidence of sexual assault, and that the reaction was disproportionate to the evidence of threat. Typical headlines of this period

17. See generally ANDREW KIRKWOOD, *THE LEICESTERSHIRE INQUIRY 1992* (1993).

18. LOST IN CARE: REPORT OF THE TRIBUNAL OF INQUIRY INTO THE ABUSE OF CHILDREN IN CARE IN THE FORMER COUNTY COUNCIL AREAS OF GWYNEDD AND CLWYD SINCE 1974 ¶ 34.17 (2000) [hereinafter LOST IN CARE].

19. See G. WILLIAMS & J. MCCREADIE, *TY MAUR COMMUNITY HOME INQUIRY 13* (1992).

20. See LOST IN CARE, *supra* note 18, ¶¶ 33.120-122, ¶¶ 41.31-54, ¶¶ 45.14-16, ¶¶ 45.17-19, ¶¶ 45.20-23.

21. See Bob Franklin, *Wimps and Bullies: Press Reporting of Child Abuse*, in *SOCIAL WORK AND SOCIAL WELFARE YEARBOOK 1*, 1, 7 (P. Carter et al. eds., 1989).

22. HARDING, *supra* note 7, at 219.

23. See, e.g., *A Fear of Loving - News on Sunday Special Report: "They Came for My Kids at Bedtime"*, NEWS ON SUNDAY, May 3, 1987; M. Pithers & J. O'Sullivan, *Rochdale Action Attacked: As Some Children in Abuse Cases Are Returned to Their Parents Social Workers and Police Are Criticised*, INDEP., Mar. 8, 1991; A. Sage, *Orkney Uproar After "Child Sex Abuse Raids"*, INDEP. ON SUNDAY, Mar. 3, 1991; M. Toner, *Should a Father Be Afraid to Kiss His Daughter Good-night?*, SUNDAY EXPRESS, June 28, 1987.

24. These took place in Rochdale (in the North of England) during 1990, on the island of Orkney (situated off the Scottish coast) in 1991 and in Nottinghamshire (in the middle of England) in 1994.

included *The Professionals Who Fear We Could Manage Without Them: Why Do Social Workers Believe Claims That Defy Common Sense?*²⁵ However, arguably the worst was yet to come, with revelations that children had been abused by social workers in children's homes. The perception grew that social workers not only caused damage by foolish behaviour and lack of professionalism, but were potential abusers themselves.

B. Refocusing Child Protection

The early scandals were part of the background to an overhaul of child law in the mid-1980s. These reforms were long overdue and very necessary. The law was fragmented and incomprehensible to non-lawyers. A new law, the Children Act 1989, was a root and branch reform of the existing law relating to children both between private individuals and between parents, guardians and the State. The law relating to children was now contained in one act, with shared common principles.

The Children Act 1989 is the basis for all current child protection work, but it is far from the only guidance. Investigations into suspected cases of child abuse have resulted in a number of high profile crises, surrounded by a great deal of media and public attention. As a result, much effort has been expended in producing guidelines to prescribe the actions of those investigating cases for the future. However, as the creation of guidance has generally been issue or crisis led, rules have been dotted about in a number of different places. Guidance is contained in statutes, national procedures and regulations, government circulars, inquire reports, and case law.

Guidance has been issued to enable those responding to an allegation of child abuse to determine whether the child is in need of services or whether an investigation should be launched to gather evidence of abuse.²⁶ Procedures have been created in an attempt to prevent those investigating a case from violating the rights and interests of the child involved; an aim that has been described as "the protection of children, not from abuse, but from investigation."²⁷ To this end, guidelines have been put in place to try and ensure that all those involved in a child protection case share information and to some extent share decision-making. The guidance document, known as *Working Together*, also attempts to avoid the replication of work by

25. P. Wilby, INDEP. ON SUNDAY, Apr. 14, 1991; see also A. Massie, *Believing in Witches - Officials in Orkney Accepted Children's Stories of Satanic Abuse*, SUNDAY TELEGRAPH, Nov. 1, 1991.

26. See generally DEP'T OF HEALTH, FRAMEWORK FOR THE ASSESSMENT OF CHILDREN IN NEED AND THEIR FAMILIES (2000).

27. Beatrix Campbell, *Screening out Stories of Abuse*, INDEP., Oct. 20, 1993.

stipulating that the majority of child abuse cases should be investigated jointly by social workers and the police.²⁸ This document also contains guidance on how to interview children in a way that does not damage them and ensures that the best evidence is gathered.²⁹

In addition, a raft of legislation procedures and guidance has been created to control the behaviour of those looking after children in local authority care and ensure that those children are protected from further damage by the system and from abuse. The Protection of Children Act 1999 placed the Department of Health's secret Consultancy Service Index — a list of individuals considered unsuitable to work with children — on a statutory footing.³⁰ The Care Standards Act 2000 created an independent national body to inspect all children's homes and other homes in which children are living away from their families and to monitor fostering and adoption agencies.³¹ Detailed policy and practice guidance on the treatment of children in residential and foster care was issued under the Children Act 1989.³² *Quality Standards for Residential Care*³³ has been issued as part of efforts to enhance the inclusion of residential childcare in social work training. *Guidance on Permissible Forms of Control in Children's Residential Care* has also been published.³⁴ A consultation paper has also been issued on improving Social Services complaints procedures.³⁵

Residential care has also been the subject of a number of initiatives. The Residential Care Initiative was launched in 1992 with the aim of increasing the number of senior staff in children's homes who are professionally qualified.³⁶ The National Children's Bureau National Initiative was initiated in 1993 to identify, develop and disseminate good practice in residential childcare.³⁷ The Quality Protects Programme was started in 1998. This is a government initiative to improve children's services through the creation of a ministerial task force, designation of local councillors as guardians of "looked after children's interests," exchange of good practice information and in-

28. See generally DEP'T OF HEALTH, WORKING TOGETHER TO SAFEGUARD CHILDREN (1999).

29. See generally DEP'T OF HEALTH, MEMORANDUM OF GOOD PRACTICE (2001); DEP'T OF HEALTH, MEMORANDUM OF GOOD PRACTICE (1992).

30. Protection of Children Act 1999 §§ 1-4.

31. Care Standards Act §§ 6-10 (2000).

32. DEP'T OF HEALTH, CHILDREN ACT 1989 GUIDANCE AND REGULATIONS: VOLUME 4 RESIDENTIAL CARE (1991).

33. CENT. COUNCIL FOR EDUC. & TRAINING IN SOC. WORK & DEP'T OF HEALTH, EXPERT GROUP QUALITY STANDARDS FOR RESIDENTIAL CARE (1992).

34. DEP'T OF HEALTH, GUIDANCE ON PERMISSIBLE FORMS OF CONTROL IN CHILDREN'S RESIDENTIAL CARE (1993).

35. DEP'T OF HEALTH, LISTENING TO PEOPLE: A CONSULTATION ON IMPROVING SOCIAL SERVICES COMPLAINTS PROCEDURES (2000).

36. See David Betridge & Isabelle Brodie, *Residential Child Care in England and Wales: The Inquiries and After*, in CHILD WELFARE SERVICES: DEVELOPMENTS IN LAW, POLICY, PRACTICE AND RESEARCH 180, 188-89 (Malcolm Hill & Jane Aldgate eds., 1996).

37. See *id.*

crease of funding for children's services.³⁸ A system of annual evaluations of local responses to the Quality Protects Programme has now been introduced.³⁹

In the face of all these initiatives, does child protection need the watchful eye of the courts and the imposition of tort liability to improve? I would argue strongly that it does not.

II. SHOULD A PUBLIC AUTHORITY OWE A CHILD A DUTY OF CARE IN CHILD PROTECTION CASES?

From the mid-1990s, a steady number of claimants have stepped forward to claim damages for injury they claimed to have suffered as a result of the child protection system in England and Wales. The claimants have allegedly suffered injury at each of the following stages of the child protection process.

A. *The Decision to Take Proceedings to Place the Children in the Care of the Local Authority*

In *X v. Bedfordshire County Council*,⁴⁰ five children from one family sued the local authority claiming that the authority had been negligent in omitting to apply for care orders, which could have removed them from the care of their parents and given the local authority "parental responsibility" for them. In this case, the local authority tried to keep the children with their birth parents, despite requests from the birth parents themselves that the children either be taken into the care of the local authority or adopted. The local authority instead offered the parents limited support to care for their children, including accommodating the children for short periods of time to facilitate this. The children were only taken into the care of the local authority when their mother threatened to injure them if no action was taken. During the four and a half years in which the local authority attempted to keep the family together, the children suffered horrific neglect and abuse. Their suffering has been the subject of a recent decision in the European Court of Human Rights. The court concluded that the children had not been protected from inhuman and degrading treatment in contravention of Article 3 of the European Convention of Human Rights.⁴¹

38. See generally DEP'T OF HEALTH, QUALITY PROTECTS: TRANSFORMING CHILDREN'S SERVICES, 1998 Local Authority Circular No. 28 (1999).

39. See generally DIANA ROBBINS, DEP'T OF HEALTH, TRACKING PROGRESS IN CHILDREN'S SERVICES (2000); DIANA ROBBINS, DEP'T OF HEALTH, MAPPING QUALITY IN CHILDREN'S SERVICES (1999).

40. [1995] 2 A.C. 633 (H.L. 1994-95).

41. *Z v. United Kingdom*, [2002] 34 Eur. H.R. Rep. 3 (2001).

Conversely in *M v. Newham London Borough Council*,⁴² the claimants claimed that the local authority had been too precipitant in their action to apply for a court order removing the child from home. This case concerned the suspected sexual abuse of M who was, at that time, nearly five years old. M was interviewed. She said that she had been abused and gave the first name of her abuser. The interviewers assumed that her abuser was the mother's boyfriend, as the child had given his first name. The interviewers failed to take a history of the mother's domestic circumstances. If they had done so they would have found out that the child was not referring to the mother's boyfriend, but to a cousin of the same name who had previously lived at the mother's address. By the time the mistake was rectified, the mother and daughter had been living separately for almost a year as a result of a court order.

B. *A Child's Treatment Once in the Care of the Local Authority*

In *Barrett v. Enfield London Borough Council*,⁴³ the claimant was taken into the care of the local authority when he was ten months old. He remained in their care until he was seventeen. The local authority did not arrange for him to be adopted. During this period he was placed in six residential children's homes and two foster homes; furthermore, he was separated from his half sister. He had a number of different social workers and for some periods no social worker at all. He developed a psychiatric illness for which the local authority did not arrange treatment.⁴⁴

C. *The Placement of Children in Foster Care*

In *W v. Essex County Council*,⁴⁵ the claimants were a family with three children. The parents became foster parents for the local authority. At the time that they started to become foster parents, they stipulated that they did not want to foster children who were suspected sexual abusers because of the threat to their own children. Nevertheless, the child that they were asked to foster was a sexual abuser, but the family was never informed of this. The foster child went on to abuse all three children.⁴⁶

In *H v. Norfolk County Council*,⁴⁷ and in *S v. Gloucestershire County Council*,⁴⁸ children were placed with foster parents who subse-

42. This was heard on appeal in the House of Lords with *X v. Bedfordshire County Council*, [1995] 2 A.C. 633 (H.L. 1994-95).

43. [2001] 2 A.C. 550 (H.L. 1998-99).

44. *Id.* at 561.

45. [1998] 2 F.L.R. 278 (C.A. 1999), remanded by [2001] 2 A.C. 592 (H.L. 2000).

46. *Essex County Council*, [2001] 2 A.C. at 596.

47. [1997] 1 F.L.R. 384 (C.A. 1996).

48. [2001] 1 F.L.R. 825 (C.A. 2000).

quently abused them. The monitoring of these foster placements had been erratic for the duration of the placements.

III. DENYING LIABILITY IN ORDER TO PROTECT THE CHILD PROTECTION SYSTEM

As Lord Browne-Wilkinson explained in *X v. Bedfordshire County Council*,⁴⁹ private claims for damages can be classified under British law into four different categories:

- Actions for breach of a statutory duty (irrespective of carelessness);
- Actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action;
- Actions based on a common law duty of care arising either from the imposition of a statutory duty or from the performance of it; or
- Misfeasance in public office, i.e., the failure to exercise, or the exercise of, statutory powers, either with the intention to injure the claimant or with the knowledge that the conduct is unlawful.⁵⁰

A person, or class of persons, founds an action for breach of a statutory duty on an express, or implied, intention of Parliament that such a breach should be actionable. The Children Act 1989 has not been found to display such an intention. In *X v. Bedfordshire County Council*, Lord Browne-Wilkinson concluded that:

[T]he Acts in question are all concerned to establish an administrative system designed to promote the social welfare of the community. The welfare sector involved is one of peculiar sensitivity, involving very difficult decisions how to strike the balance between protecting the child from immediate feared harm and disrupting the relationship between the child and his parents. Decisions often have to be taken on the basis of inadequate and disputed facts. In my judgment in such a context it would require exceptionally clear statutory language to show a parliamentary intention that those responsible for carrying out these difficult functions should be liable in damages if on subsequent investigation with the benefit of hindsight it was shown that they had reached an erroneous conclusion and therefore failed to discharge their statutory duties.⁵¹

Lord Browne-Wilkinson did not find this exceptionally clear statutory language in the Children Act 1989. Instead he found that the statutory language allowed for considerable subjective judgment by the local authority in fulfilling their responsibilities.⁵²

The second type of action, careless performance of a statutory duty, is not actionable by a private citizen, and is therefore irrelevant

49. [1995] 3 All E.R. 353 (H.L. 1995).

50. *Id.* at 363 J-364 B.

51. *Id.* at 378 G-H.

52. *Id.* at 378 J-379 A-B.

in this context. Similarly it is very unlikely that there will be evidence of the misfeasance of officials engaged in child protection. As it was stated in the later case of *W v. Essex County Council*, in the absence of evidence that an official has acted with the object of injuring the claimants, a claimant must demonstrate that the official did an act that he had no power to perform.⁵³ Performing that act carelessly, or even giving misleading information while performing his duties, as in the case of *W v. Essex County Council*, has not been found to be sufficient to justify a finding of misfeasance.⁵⁴

The most potentially successful route for those claiming damages is by an action based on a common law duty of care arising either from the imposition of a statutory duty or from the performance of it. Under English law, a tort of negligence is established on a finding that the defendant owes the claimant a duty of care, that duty of care has been breached and the claimant has suffered damage as a result. In determining whether the defendant owed the claimant a duty of care, the courts must ask whether the damage to the claimants was foreseeable, whether the relationship between the claimant and the defendant was sufficiently proximate and whether it is just and reasonable to impose a duty of care.⁵⁵

It has been accepted that the damage to the claimant is foreseeable by the local authority and that their relationship is sufficiently proximate. The point of resistance by the courts initially was whether it was “just and reasonable” to impose liability in child protection cases. Initially the House of Lords in *X v. Bedfordshire* found that it was not “just and reasonable” to impose liability on a local authority for an act or omission in investigations or in the decision to look after a child.⁵⁶ By placing a bar at this point, the facts were not considered by the court and the case did not proceed to trial to determine whether there had indeed been a breach of the duty of care and whether the claimant had suffered harm in each specific case.

How was this blanket bar on action justified? Lord Browne-Wilkinson argued that to open the way to action in this area would be inconsistent with the local authority’s statutory functions and would have a detrimental effect on practice. He attempted to look across to the child protection system and consider what the impact might be of imposing liability. He argued that a bar should exist to protect the operation of the child protection system for five reasons:

- Decisions in child protection cases were not simply the responsibility of the local authority but were made on an inter-agency

53. *See generally* [1998] 2 F.L.R. 278 (C.A. 1998).

54. *Id.*

55. *See generally* *Caparo Indus. v. Dickman*, [1990] 2 A.C. 605 (H.L. 1989-90).

56. [1995] 3 All ER 353, 380 J (1995).

basis. The system involved “the participation of the police, educational bodies, doctors and others. At all stages the system involves joint discussions, joint recommendations and joint decisions. The key organisation is the Child Protection Conference, a multi-disciplinary body which decides whether to place the child on the Child Protection Register.”⁵⁷ He argued that it would be unfair to impose liability on one of the participants of this process, the local authority, and practically difficult to unravel the decision-making process in order to determine which body was liable for what decision.⁵⁸

- The decision whether to remove a child from home was “extraordinarily delicate.”⁵⁹ The local authority had to weigh up the potential damage that the child could suffer if she remained where she was with the harm she could endure if removed from everything that she knew. It was very difficult for the court to second-guess this decision.
- If liability was imposed, the local authority could adopt a “more cautious and defensive approach” to their statutory duties. The local authority could postpone decision-making in cases that required speedy action until further inquiries were made, in the hope of gathering more concrete information. This could lead to unnecessary delay in a child’s case and could reduce the time that could be spent on other cases and children.⁶⁰
- As this is an area in which parental feeling against social workers is bound to ride high, it is an area in which there is the possibility of vexatious litigation.⁶¹
- Other remedies are available that would allow complaints to be investigated. In England and Wales, these consist primarily of the statutory complaints procedure under the Children Act 1989 and the local authority ombudsman⁶².

None of the reasons given, with the exception of the third concern about defensive work, touched upon the heart of the problems with imposing liability. This is why, although they were initially accepted by the Court of Appeal in *Barrett* and in *Norfolk* and at first instance in *W v. Essex County Council* and *S v. Gloucestershire County Council* as sufficient to justify a denial of liability, they were later rejected as insufficient on appeal.

The House of Lords in *Barrett* and the Court of Appeal in *W v. Essex County Council* and *S v. Gloucestershire County Council* dismissed Lord Browne-Wilkinson’s argument about the multi-disciplinary nature of child protection as irrelevant in cases of a looked after child. The courts stated that the local authority is primarily responsible for the child and that other disciplines are either not involved at all

57. *Id.* at 381 A.

58. *Id.* at 381 C.

59. *Id.* at 381 D.

60. *Id.* at 381 G.

61. *Id.* at 381 J.

62. *Id.* at 382 A.

or not closely involved.⁶³ The perceived difficulty of unravelling liability in multi-disciplinary work has been exposed as a stalling tactic. As Lord Nichols in *Phelps v. London Borough of Hillingdon* stated, “[it] is a practical problem which cannot constitute a legal bar on a claim. Even where such a situation exists it should be possible to disentangle the relevant parts played by particular individuals and identify where the alleged negligence occurred.”⁶⁴ Certainly the European Commission has taken the view that the multi-disciplinary aspect of child protection work “may provide a factual complexity to cases but cannot by itself provide a justification for excluding liability from a body found to have acted negligently.”⁶⁵

The potential threat of defensive practice was also dismissed as unreal. Evans L.J. argued in his judgment in the Court of Appeal in *Barrett* that “little, if any, weight” should be given to the concern that the removal of blanket immunity would lead to defensive conduct. Evans L.J. concluded that “[i]f the conduct can be measured against the standards of a reasonable man, placed as the defendant was, then I do not see why the law in the public interest should not require those standards to be observed.”⁶⁶ Lord Slynn in his opinion in *Barrett* also supported the view of Sir Thomas Bingham in his dissenting judgment in the Court of Appeal in *X v. Bedfordshire*, which was that the imposition of tort liability contributed to some extent to the maintenance of high standards.⁶⁷ This is an argument that has also found favour in the United States.⁶⁸

The threat of vexatious litigation has been dismissed as a ground for founding a claim of liability. In *Phelps*, Lord Slynn argued that “the fact that some claims may be without foundation or exaggerated does not mean that valid claims should necessarily be excluded.”⁶⁹

The argument was also accepted that whilst remedies did exist which could be used by the complainant, the remedies available were not as useful to a complainant as a tort remedy.⁷⁰ The decisions of both the complaints procedure and the local authority ombudsman are recommendations only and do not need to be followed. Few people know about the ombudsman and the service which he provides is

63. *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550, 553 (H.L. 1998-99).

64. *Phelps v. Hillingdon London Borough Council*, [2001] 2 A.C. 619, 674 (H.L. 2000). This was a case about the liability of education authorities. *See generally id.*

65. *Z v. United Kingdom*, [2002] 34 Eur. H.R. Rep. 3 (2001).

66. *Barrett v. Enfield London Borough Council*, [1998] Q.B. 367, 380 (C.A. 1997).

67. *X v. Bedfordshire County Council*, [1995] 2 A.C. 633, 662 (H.L. 1994-95).

68. *See generally Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000).

69. *Phelps*, [2001] 2 A.C. at 655.

70. *See generally Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550, 568 (H.L. 1998).

not understood.⁷¹ Limited financial compensation may be awarded by the complaints procedure and by the ombudsman, but it will never match the amount given in damages by a court.

IV. SHOULD TORT LIABILITY BE ACCEPTED FOR POLICY REASONS IN CHILD PROTECTION CASES?

At present, the policy reasons given in *X v. Bedfordshire County Council* remain a bar against action in negligence for acts or omissions made by the local authority in investigations and in the decision whether to remove a child from the care of a local authority.⁷² However, as they have been comprehensively dismissed in subsequent cases, it seems unlikely that it will survive for long. This is a pity. The arguments against the imposition of liability in child protection cases, raised in *X v. Bedfordshire*, are not the only arguments that may be raised. There are other good policy reasons to dampen the desire to use tort law in response to the problems of the child protection system.

There are two general policy reasons for the imposition of tort liability in child abuse cases recognised by the courts, both in England and Wales, and in the United States. These were encapsulated in the American case of *Sabia v. State*⁷³ by Justice Johnson. He concluded that “social policy considerations warrant the imposition of liability on the party charged with the duty to protect those who depend on that protection, not only to provide compensation to the abused children but to encourage the protective agency to perform its duty diligently in the future.”⁷⁴ I would argue that neither of these goals are in fact satisfied by the imposition of tort liability. Whilst a claimant may be financially compensated for the injuries which he has sustained as a result of the child protection system, it is very unlikely that increased liability will lead to an improved system of child protection.

A. Compensation

A demand for compensation by a survivor in this type of case is not merely a demand for monetary reparation. Survivors wish local authorities to make amends by means of a public acknowledgement of culpability. Whilst tortious liability may be the best mechanism to achieve the first type of compensation, it certainly is not the best way to achieve the second.

71. See Kate Standley, *No Duty of Care to Children in Care - H v Norfolk County Council, and Barrett v Enfield London Borough Council*, 9 CHILD & FAM. L.Q. 409, 416 (1997).

72. See Nuala Mole, *Local Authorities and the European Court*, [2001] FAM. L. 667, 671.

73. 669 A.2d 1187 (Vt. 1995).

74. *Id.* at 1196.

B. *Financial Compensation*

As one adult survivor of child abuse within a children's home told an English newspaper, *The Guardian*, "I want the rhetoric to stop and action to be taken. Every victim should be compensated for lack of education, for lack of trust, the whole lot. Let's have a clean sweep of the care system."⁷⁵ Survivors need to be financially compensated for injury by a local authority under English law. There is limited compensation available under the Criminal Injuries Compensation Scheme. The scheme was created to compensate victims of crime, without the necessity of court action. It has the power to make single payments to victims who make a written application under the scheme. Under its tariff, it may pay out awards for damage caused by sexual and physical abuse. However the limitation of this scheme is that injuries may only be compensated if they arise from "a crime of violence."⁷⁶ This means that if the child was considered to have consented to the assault the claim may be denied.⁷⁷ For example, in the case of *Regina v. Criminal Injuries Compensation Appeals Panel, ex parte Brown*,⁷⁸ Brown was buggered on four occasions by older boys at the approved school which he attended. It was accepted by the Court of Appeal that an applicant's consent to events was a real and important factor to be taken into account in a determination of whether those events amounted to a crime of violence. Furthermore compensation is excluded if the child suffers neglect or emotional abuse. Thus the children who were the subjects of the case *X v. Bedfordshire* received limited compensation from the scheme because the majority of their suffering had been caused by parental neglect, rather than violence.⁷⁹ In a letter to the Official Solicitor, the Criminal Injuries Compensation Board explained the limited scope for compensation in a case such as *X v. Bedfordshire*:

The Board Member who assessed these cases recognised that the children were exposed to appalling neglect over an extended period but explained to their advisers that the Board could not make an award unless it was satisfied on the whole available evidence that an applicant had suffered an injury - physical or psychological - directly attributable to a crime of violence He was nevertheless satisfied, that setting aside "neglect" the children had some physical and

75. David Ward & Helen Carter, 'I Just Hope This Will Protect Future Generations in Care': *Reaction Abuse Victims Give Cautious Welcome to Report*, *GUARDIAN*, Feb. 16, 2000.

76. HOME OFFICE, *THE CRIMINAL INJURIES COMPENSATION SCHEME*, ¶ 8 (2001).

77. See generally *Regina v. Criminal Injuries Comp. Bd., ex parte Piercy* (Apr. 14, 1997) (unreported).

78. [2001] Q.B. 774 (C.A. 2000).

79. "In February 1997, the Criminal Injuries Compensation Board awarded £1,000 [approximately \$1,400] to Z, £3,000 to A [approximately \$4,200] and £3,000 to B for injuries suffered between 1987 and 1992 [approximately \$4,200]; it awarded £2,000 to C for injuries suffered between 1988 and 1992 [approximately \$2,800]." *Z v. United Kingdom*, [2002] 34 Eur. H.R. Rep. 3, ¶ 49 (2001).

psychological injury inflicted upon them as enabled him to make an award to each child⁸⁰

The problem is how to compensate a person adequately for the damage which they have suffered as a result of abuse. Nothing is absolute reparation for survivors of child abuse for the damage which has been inflicted upon them. Child abuse may disadvantage a child in multiple ways. An abused child may grow up into an adult with psychiatric illness, drug or alcohol addiction and an inability to form relationships, gain and keep employment or access education. However, damages awarded by the court following a finding of negligence may more properly reflect the level of injury which a victim of child abuse has suffered. For example, a victim of Frank Beck, a social worker who abused children in his care in a children's home, received 80,000 pounds sterling.⁸¹ This may be compared with the top award under the Criminal Injuries Compensation Scheme of 33,000 pounds sterling, for this type of injury.⁸²

Nevertheless, some questions remain. It is difficult to assess whether even this level of compensation is adequate. We do not know how long the claimant will live and what he would have been like had the abuse not occurred.⁸³ Furthermore, a single lump sum payment may not be the best way to compensate them. The vast majority of claimants will never have had a large amount of money to manage, and there is a danger that they will not administer the money in the most advantageous way, and in some cases that they will dissipate it altogether. Any payment is only really an attempt at monetary compensation unless advice and assistance accompany it.⁸⁴

C. *An Acknowledgement of Wrong-Doing*

Compensation is not just about money. Many survivors search for recognition of wrong-doing and an apology. As one lawyer, handling claims against one local authority for abuse, which occurred in five children's homes run by them, stated, "[t]hat's all the kids want, really [is for someone to say sorry]. The tragedy is that while we are trying to get them money, money does not really help."⁸⁵ Increased liability of local authorities has up to this point hindered, rather than promoted, an acceptance of blame by local authorities. Local authorities have been warned by their insurers not to apologise lest it may be considered to be an admission of responsibility. Insurance companies

80. *Id.* (quoting the Criminal Injuries Compensation Board letter).

81. Christian Wolmar, *Sorry State*, *GUARDIAN*, Mar. 10, 1999.

82. HOME OFFICE, *THE CRIMINAL INJURIES COMPENSATION SCHEME* 31 (2001) (TSI Issue No. 1, Apr. 2001).

83. *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550 (H.L. 1998).

84. *LAW COMM'N OF CAN.*, *supra* note 1, at 170.

85. Wolmar, *supra* note 81.

have warned local authorities that any admissions will invalidate their policies. As one representative for a local authority has explained, “[w]e would love to put our hands up and say sorry, but we are just not allowed to do so.”⁸⁶

A finding of negligence may give the survivor the public acknowledgement of wrongdoing that local authorities are not at present allowed to give. As the Law Commission of Canada concluded, “this public determination and pronouncement of the defendant’s . . . responsibility for wrongful conduct . . . constitutes official recognition of the liability of defendants, even if they refuse to acknowledge that responsibility.”⁸⁷ For survivors whose abuse has been denied or minimized for many years, this public finding of the existence of their suffering may be more important than fiscal damages. However, the Commission goes on to add “a drawback to civil litigation is its tendency to discourage defendants from acknowledging their wrongdoing, apologising and reconciling with their victims. This shortcoming is inherent in the adversarial process. The mere possibility of litigation is enough to inhibit defendants (especially legally astute institutional defendants) from taking any step that might later be construed as an admission of liability.”⁸⁸

V. IMPROVING THE SYSTEM IN THE FUTURE

The hope acknowledged by survivors and policy makers is not simply that the authority will be publicly shamed, but that this shaming will lead to better behaviour in the future, as the local authority rushes to avoid a repetition of the situation.

One strength of the civil litigation process, acknowledged by the Law Commission of Canada, “is its fact-finding capacity. The requirement of proof in an adversarial setting promotes [although it does not guarantee] the emergence of all the facts relating to the particular wrongs alleged.”⁸⁹ The European Court of Human Rights has found that this remedy has advantages over internal complaints systems or even governmental ombudsmen because of its independence and enforceability of awards. It is therefore most likely to comply with the requirements of Article 13 of the European Convention of Human Rights.⁹⁰ It is questionable, however, whether the adversarial nature

86. *Id.*

87. LAW COMM’N OF CAN., *supra* note 1, at 166.

88. *Id.* at 168.

89. *Id.* at 161.

90. *See Z v. United Kingdom*, [2002] 34 Eur. H.R. Rep. 3 (2001). Article 13 states that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” *Klass v. Germany*, [1979-80] 2 Eur. H.R. Rep. 214, ¶ 61 (1978).

of the fact-finding is most suitable when dealing with victims of child abuse. Those who have spent their lives being disbelieved may find it very difficult to give the court their best evidence when they feel that they are being doubted.

Even if all the evidence about what went wrong in a particular case is gathered, there are several difficulties with the use of tortious liability as a means of achieving an improved system.

One often repeated argument is that findings of liability drain an over-stretched system of much needed resources. Local authorities provided services to 330,000 children last year.⁹¹ The insurance premiums for local authorities had already increased by 150 percent by 1987 in response to the threat of increased liability.⁹² It is clear that any money taken from the local authority's budget for insurance premiums cannot be spent on children's services. However, it is impossible to deny liability on these grounds when a similar argument could be made in respect of any other public authority and yet they have not evaded liability.⁹³ An argument with more weight is that well publicized findings of negligence may deprive local authorities of much needed skilled professionals to carry out child protection work. It is an increasingly unattractive job to take. With the prospect of public vilification for wrong-doing, it is one that many are choosing not to do. There is currently a forty percent shortfall in the required level of skilled staff to work in child-care.⁹⁴

Secondly, it is questionable whether guidance issued in tort cases is very useful. It is of course vitally important to appreciate that things go wrong in social work. A finding of negligence can forcefully remind a social worker that leaving a case to drift simply stores up problems for the future. However, it is less clear that action undertaken in response to a specific case will lead to a better system. A tort case examines the failings in a particular case. Its purpose is not to examine the system. On the evidence of the cases that have been considered, at least in part, in England it is fair to conclude that judgments about the operation of the child protection system have been made without evidence, but on instinct.⁹⁵ The child protection system is a multi-disciplinary system. Any national guidance issued involves a complicated balancing of priorities. Guidance is written by multi-disciplinary teams and open to consultation, which is followed by further

91. This is out of a population of 10.8 million children. See DEP'T OF HEALTH, QUALITY PROTECTS: ANNUAL REPORT (2000) [hereinafter ANNUAL REPORT].

92. Tony Weir, *Governmental Liability*, PUB. L. 40, 60-61 (1989).

93. See generally *Capital & Counties, Plc. v. Hampshire County Council*, [1997] Q.B. 1004 (C.A. 1997) (fire service); *Hall & Co. v. Simons*, [2002] 1 A.C. 615 (H.L. 2000) (solicitors); *Darker v. Chief Constable*, [2001] 1 A.C. 435 (H.L. 2000) (the police).

94. See generally ANNUAL REPORT, *supra* note 91.

95. See generally *id.*

revisions. The guidance issued in a tort case is simply the views of a few lawyers and cannot reflect the complexities of the questions as national guidance can.

Thirdly, the guidance issued in a tort case will usually be badly out of date. By the time that the case comes to court, any findings by the court about the failings of the system have been largely overtaken by events. For example, we can take the facts of the case of *Barrett v. London Borough of Enfield*. As described above, Mr. Barrett was a child who was “lost” in the care system. There was a consistent failure to monitor his case. He was separated from his sister. He was moved to nine different homes, including five different residential homes. The possibility of adoption was not explored fully, nor was re-unification with his mother. Residential child-care has changed to some extent since Mr. Barrett’s experiences. For example the popularity of residential children’s homes has already waned. The number of children’s homes has declined by eighty-two percent from 1971 - 1996 in the last ten years.⁹⁶ Policy makers and the family division of the high court are also now very alive to the problem of ensuring that children looked after by the local authority are monitored. A care order is now only granted once a detailed plan has been devised for the child.⁹⁷ The Children Act 1989 has created a system of periodic reviews of the cases of all looked after children. Neither of these procedural safeguards were in place when Mr. Barrett was a child. However, it has been clear for some time that these checks may not be enough in some cases to ensure that the care plan is brought into effect. The problem of “losing” children within the system has been the subject of a number of research reports⁹⁸ and conferences.⁹⁹ Most recently case law has changed to allow the courts much greater powers to monitor certain cases, even when the decision has been made that the local authority should have parental responsibility for the child.¹⁰⁰ There have also been initiatives to ensure that adoption is considered for children in long term care who wish to be adopted.¹⁰¹ It is difficult to know how a finding of negligence in a specific case several years before could guide those operating the system to make improvements that had not been considered.

Fourthly, there is much force in the argument that in fact no more guidance is needed to aid social workers in fulfilling their job. Much of the guidance resulting from inquiries into cases that have gone

96. See generally CARING FOR CHILDREN AWAY FROM HOME, *supra* note 3.

97. See generally *Re J (Minors)*, [1994] 1 FLR 253 (1993).

98. See, e.g., SOC. SERVS. INSPECTORATE, CARE PLANNING & COURT ORDERS (1998).

99. See, e.g., DIVIDED DUTIES: CARE PLANNING FOR CHILDREN WITHIN THE FAMILY JUSTICE SYSTEM (Lord Justice Thorpe & Elizabeth Clarke eds., 1998).

100. See generally *Re W & B (Children)*, [2001] 2 F.L.R. 582 (C.A. 2001).

101. See generally DEP’T OF HEALTH, ADOPTION: A NEW APPROACH (2000), Cm. 5017.

wrong in the past have very similar findings to those of previous inquiries.¹⁰² They tell social workers nothing new but are simply something else to read. Social workers do not need more guidance. No social worker now could fail to do their job because there was no guidance on a specific issue for them to follow. Each scandal has resulted in the creation of further reports and yet more guidance and procedures. As Sir William Utting found in his review of the safeguards in place for children in care, “the total corpus of regulations, statutory guidance, departmental circulars and letters, Inspectorate and other reports [about the care of children living away from home] is now so large that that responsible managers have difficulty in comprehending it all and it is less a tool for practitioners than a subject for their research.”¹⁰³ The creation of yet more guidance from tort cases is simply not needed. It will not tell social workers anything new. Furthermore it may prevent them from reading more fundamental and far-reaching guidance which has been written from evidence and with an understanding of the many different priorities of the system.

In addition, it is probable that the only thing that those working on the ground will understand about the findings of the court is that they were again found to be wanting. It is much less likely that social workers will understand exactly what the courts are asking them to do.¹⁰⁴ Social workers are not lawyers. More importantly they do not read cases. They rely on information given to them by their managers and by other staff to inform them of the implications of a decision for them. Guidance often becomes “folk-law.” Folk-law is the rules that those on the ground work to, rather than the rules that are actually written down. They are created by a slight misinterpretation by each person who hears the rules who then goes on to explain the guidance to the next person. Thus, the working rules may be slightly but crucially different from the original guidance.¹⁰⁵ For example, the Cleveland Report suggested that, in cases of suspected sexual abuse, children should only be physically examined if the sexual abuse alleged could have left physical signs. Thus, in a case of alleged indecent touching a child would not be examined.¹⁰⁶ However, in one area of the country this rule became that the Cleveland Report stated that

102. See generally LOST IN CARE, *supra* note 18.

103. SIR WILLIAM UTTING, PEOPLE LIKE US: THE REPORT OF THE REVIEW OF THE SAFEGUARDS FOR CHILDREN LIVING AWAY FROM HOME ¶ 17.1 (1997).

104. See also John Hartshorne et al., ‘Caparo Under Fire’: A Study Into the Effects Upon the Fire Service of Liability in Negligence, 63 MOD. L. REV. 502, 515 (2000). In this article they describe the lack of comprehension by firefighters of the decision in *Capital & Counties Plc. v. Hampshire County Council*, [1997] Q.B. 1004 (1997), which imposed tort liability on firefighters.

105. See generally GWYNN DAVIES ET AL., AN ASSESSMENT OF THE ADMISSIBILITY AND SUFFICIENCY OF THE EVIDENCE IN CHILD ABUSE PROSECUTIONS: A RESEARCH REPORT FOR THE HOME OFFICE (1999).

106. CLEVELAND REPORT, *supra* note 12, ¶ 11.45.

any child who was admitted to a hospital because of suspected physical abuse had to be examined for sexual abuse.¹⁰⁷ The fact that the guidance has come from a case rather than from a routine government circular will have an effect on the social work response to it. It is more likely to be open to misinterpretation. The possible reaction of social workers cannot be divorced from its historical context. As explained above, child protection work has been dogged by scandal for the last thirty years. Even when the courts and public inquiries have not blamed social work for the tragedy which occurred, the media have. Guidance issued in a case in which the local authority “lost” and was forced to pay damages will be subsumed by the feelings that the case itself has engendered. The most likely reaction is that social workers will feel yet more beleaguered and will feel more watched, and this may prohibit real attempts to understand what the guidance is saying.

The courts have rejected the argument that liability will lead to defensive practice. Defensive practice in this context means that social workers choose to go against their beliefs of what would be appropriate action, if they felt that to do so would make their work consistent with guidance set down in law. In the leading case on liability of public authorities, *Home Office v. Dorset Yacht Co.*,¹⁰⁸ Lord Reid dismissed the possibility that liability could cause public servants to act defensively. He stated that “Her Majesty’s servants are made of sterner stuff.”¹⁰⁹ However, past evidence regarding the child protection system demonstrates that this is simply untrue now for social workers. It is recognized by research that social workers work to avoid scandal. As one social worker describing his decision making process explained, he now asks himself and his colleagues “[w]hat would Louis Blom Cooper¹¹⁰ think if we tried explaining our decision to him at a public inquiry?”¹¹¹

Defensive practice is not problematic if it galvanises social workers to follow the rules in order to avoid scandal. The potential problem stemming from this situation is that the guidance from tort cases is not particularly useful guidance to follow, and that it is likely that

107. CAROLINE KEENAN, *THE DEVELOPMENT OF THE LAW AND ITS IMPLEMENTATION IN THE INVESTIGATION OF CHILD SEXUAL ABUSE* 145 (1994).

108. [1970] A.C. 1004 (H.L. 1970).

109. *Id.* at 1033.

110. Cooper was a barrister who chaired two very high profile inquiries into the deaths of children that had been monitored by the local authority. For information on these inquiries, see *A CHILD IN TRUST: THE REPORT OF THE PANEL OF INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF JASMINE BECKFORD* (1985), and *A CHILD IN MIND: PROTECTION OF CHILDREN IN A RESPONSIBLE SOCIETY* (1987).

111. Jeremy Oppenheim, *Welfare v. Protection in Social Services*, in *NAT’L COUNCIL FOR FAM. PROC. (CONF. PROC.), CLEVELAND TEN YEARS ON: CHILD PROTECTION, WHAT REALLY MATTERS?* 14 (1997).

the method by which the guidance is issued, within a tort case, will hinder social worker's comprehension of it.

VI. CONCLUSION

The need for proper financial compensation may be justification for the imposition of tort liability in child protection cases in England and Wales. Certainly the other mechanisms in place simply cannot match the level of award made in tort cases. However, liability in child protection cases cannot be additionally justified on the grounds that it will improve the behaviour of the local authority. Guidance from tort cases only amounts to criticism and suggestion by those who are not working in the area, do not have a whole view of the process, and have been given little information about the system as a whole. The reasons given by the judiciary about the imposition of liability are not rooted in research. In the words of Ken Oliphant, "no evidence [has been] cited to support the view of either side, which seem to rest upon nothing more than gut instinct."¹¹² The child protection system is now so weighed down with good advice, it must be seriously considered whether it will improve the lot of the next generation of looked after children to add more.

112. Ken Oliphant, *W v. Essex County Council: Local Authority Liability for Acts of Children in Foster Care*, 10 *CHILD & FAM. L.Q.* 303, 308 (1998).