[2004] 1 FLR 749

A v ESSEX COUNTY COUNCIL

[2003] EWCA Civ 1848,

Court of Appeal PANEL: Ward, Hale, Scott Baker LJJ

HEADNOTE:
The local authority, as the relevant adoption agency, approved the prospective adoptive parents to adopt a child with mild medical conditions, not physically or mentally handicapped, with mild emotional or behavioural handicap, but not needing special education. The local authority decided to link the adoptive parents with a brother and sister whom, the adoption panel had decided, should be placed together for adoption. The local authority had information about the boy's serious behavioural difficulties, including violent behaviour, his need for constant adult supervision, and for child guidance and specialised respite care. The adoptive parents claimed that the local authority did not disclose this information to them and had they known about the severity of the boy's problems they would not have taken the children. During the 14-month placement, and subsequent adoption, the boy attacked both parents and their natural child and was diagnosed with attention deficit hyperactivity disorder and prescribed Ritalin. After a period in local authority accommodation, he returned to live with the adoptive parents. The parents claimed damages in respect of the local authority's negligence in not fully informing them of what was known about the boy before placing him with them. The claim included damages for psychiatric illness. The judge held the local authority liable to the parents in negligence for failing to provide them with 'all relevant information' about the two children they were preparing to adopt. The judge held that the local authority was only liable for injury, loss and damage sustained during the placement, but not after the adoption orders were made. The local authority appealed against that holding and the parents appealed against the limitation to their claim.

Held -- dismissing the local authority's appeal and the parents' cross-appeal --

(1) Whenever the question of a common law duty of care arises in the context of the statutory functions of a public authority, there are three potential areas of inquiry: first, whether the matter is justiciable or whether the statutory framework intended to leave such decisions to the authorities, subject to the public law supervision of the courts; secondly, whether even if justiciable, it involves the exercise of a statutory discretion which only gives rise to liability in tort if it is so unreasonable that it falls outside the ambit of that discretion; thirdly, in any event whether it is fair, just and reasonable in all the circumstances to impose such a duty of care (see para [33]).

(2) Adoption agencies are entitled to have policies, or standard practices, about what information will be disclosed to prospective adopters before children are placed with them. It was not for the court to dictate to the agency what the policy should be. An adoption agency has a duty to communicate to the prospective adopters that information which the agency has decided they should have. If an agency decides that the prospective adopters should have the child's Form E and medical report, together with any specific information the agency or adoption panel considers they should have and its staff fail to take reasonable steps to ensure that that information is in fact communicated, in circumstances where it is

foreseeable that actionable harm would be caused if it is not, then there should be liability (see paras [47], [50]).

(3) It may be appropriate for an agency to depart from its policy about what information should be passed on to prospective adopters in individual cases, either in withholding information which would otherwise be given, or in divulging information over and above that contained in the various forms and reports disclosed. There is no general duty of care owed by an adoption agency or its staff in relation to deciding what information is to be conveyed to the prospective adopters unless they take a decision which no reasonable agency could take, in which case there could be liability (see paras [58], [59]).

Per curiam: it is not fair, just and reasonable to impose upon the professionals involved in compiling reports for adoption agencies a duty of care towards the prospective adopters. A duty of care towards the child cannot be ruled out.

NOTES:
Statutory provisions considered

Local Authority Social Services Act 1970, s 7

Adoption Act 1976, Part IV, ss 1A, 6, 11(1), 12, 13, 23, 39, Sch 1

Adoption Agencies Regulations 1983 (SI 1983/1964), regs 5, 6, 7, 8(2), 10, 12, Sch 1, Part II

Adoption Rules 1984 (SI 1984/265), rr 18, 22(1), Sch 2

New Zealand Adoption Act 1955

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Arts 3, 8

CASES-REF-TO:

Anns and Others v Merton London Borough Council [1978] AC 728, [1977] 2 WLR 1024, sub nom Anns v London Borough of Merton [1977] 2 All ER 492, HL
Attorney-General v Prince and Gardner [1998] 1 NZLR 262
B and Others v Attorney-General of New Zealand and Others [2003] UKPC 61, [2003] 4 All ER 833, PC
Barrett v Enfield London Borough Council [2001] 2 AC 550, [1999] 3 WLR 79, [1999] 3 All ER 193, HL
Bolam v Friern Hospital Management Committee [1957] 1 WLR 582, [1957] 2 All ER 118, QBD
Caparo Industries plc v Dickman and Others [1990] 2 AC 605, [1990] 2 WLR 358, [1990] 1 All ER 568, HL
D v East Berkshire Community Health NHS Trust; K and Another v Dewsbury Healthcare NHS Trust and Another; K and Another v Oldham NHS Trust and Another [2003] EWCA Civ 1151, [2003] 4 All ER 796, [2003] 3 FCR 1, CA
Osman v United Kingdom (2000) 29 EHRR 245, sub nom Osman v UK [1999] 1 FLR 193, ECHR
Page v Smith [1996] AC 155, [1995] 2 WLR 644, [1995] 2 All ER 736, HL
Phelps v Hillingdon London Borough Council; Anderton v Clwyd County Council; G (A Minor) v Bromley London Borough Council; Jarvis v Hampshire County Council [2001] 2 AC 619, [2000] 3 WLR 776, [2000] ELR 499, [2000] 4 All ER 504, HL
Smith v Bush (Eric S); Harris v Wyre Forest District Council [1990] 1 AC 831, [1989] 2 WLR 790, [1989] 2 All ER 514, HL

South Australia Asset Management Corporation v York Montague Ltd; United Bank of Kuwait plc v Prudential Property Services Ltd; Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (Formerly Edward Erdman (An Unlimited Company)) [1997] AC 191, [1996] 3 WLR 87, HL
Stovin v Wise [1996] AC 923, [1996] 3 WLR 388, [1996] 3 All ER 801, HL
W and B, Re; Re W (Care Plan) [2001] EWCA Civ 757, [2001] 2 FLR 582, CA
W and Others v Essex County Council and Another [1999] Fam 90, [1998] WLR 534, [1998] 3 All ER 111, sub nom W v Essex County Council [1998] 2 FLR 278, CA; reversed in part [2000] 1 FLR 657, sub nom W and Others v Essex County Council and Another [2001] 2 AC 592, [2000] 2 WLR 601, [2000] 2 All ER 237, HL
X (Minors) v Bedfordshire County Council; M (A Minor) and Another v Newham London Borough Council and Others; E (A Minor) v Dorset County Council; Christmas v Hampshire County Council; Keating v Bromley London Borough Council [1995] 2 AC 633, [1994] 2 WLR 554, [1994] 4 All ER 602, CA

COUNSEL:
Edward Faulks QC and Andrew Warnock for the respondent; Gavin Millar QC and Carole Parry-Jones for the claimants.

JUDGMENT-READ:
Cur adv vult

JUDGMENTBY-1: HALE LJ

JUDGMENT-1:
HALE LJ: This is the judgment of the court.

[1] This appeal raises the novel and difficult issue of the nature and extent of any duty of care owed by an adoption agency towards prospective adopters with whom they place children with a view to adoption.

[2] On 18 December 2002, Buckley J held the defendant, a local authority adoption agency, liable to the claimant adoptive parents in negligence for failing to provide them with 'all relevant information' about the children they were to adopt. (Editor's note: see A and B v Essex County Council [2002] EWHC 2707 (QB), [2003] 1 FLR 615.) The local authority appeals against that holding. The judge also held, however, that the authority was only liable for injury, loss and damage sustained between the time when the children were placed with the claimants as prospective adopters and the date of the adoption orders. The claimants appeal against that limitation to their claim.

The facts

[3] At the centre of this case, but not a party to it, is a boy whom I shall call William (though that is not his name). He was born in July 1990. His sister Kate (though that is not her name) was born in March 1993. The family was known to social services because of concerns about domestic violence and possible drug and alcohol abuse by the father. Emergency protection orders followed by interim care orders were obtained in July 1993 because of the risk of emotional and physical harm to both children. Their father was becoming increasingly violent and their mother's ability to protect them was decreasing rapidly. The children were returned to their mother at a women's refuge for 3 weeks but removed to foster care when she rejected Kate and it was feared that the parents would run away together with William. The children moved foster homes three times after that, because of William's behaviour, before reaching their final foster placement

in October 1993. By that stage the parents had decided to surrender Kate but try to be reunited with William. A consultant child psychiatrist, appointed to advise the local authority for the purpose of the care proceedings, made a report on 18 November 1993. William showed behaviour to the foster mother which indicated that he had seen violence; he sometimes approached Kate with his hands in the position of squeezing her neck and on one occasion he picked up a knife indicating that he would cut someone's head off, although he did not say who this would be. He was showing signs of disturbance and disturbed behaviour and thinking. Whether he went home or not, it would be prudent to refer him to a child guidance clinic for more detailed examination. Nevertheless, to ordinary clinical examination the children did not appear to have suffered developmental delay or been harmed by any experience they might have had. So the psychiatrist did not think that there were grounds for making a full care order or removing the children with a view to adoption. [4] Nevertheless, full care orders were made in December 1993. The parents and William were referred to the Marigold Centre for assessment. This took place between February and July 1994. It was inconclusive about the prospects of reuniting them, but did not rule this out. In late July, however, William began to show reluctance to meet his parents and in August adamantly refused to visit them. The parents then applied for discharge of the care orders and for contact with the children. The local authority applied for permission to refuse contact.

[5] The children were informally referred for discussion by the agency's adoption panel in September. Their foster carer happened to be a member of the panel and she gave a 'lengthy and detailed' description of her experience as their foster carer; we can assume that this was in similar terms to the graphic description of William which she gave in the 'foster carer's profile', an annex to the medical reports required on each child, signed by her in June 1995. The panel advised the social services department to work towards placing the children together. The child psychiatrist saw William again in October 1994. Generally speaking he was better than when seen previously. The only aggression he had shown was when he attacked the foster mother's daughter after returning from his last meeting with his parents. The psychiatrist recommended that it would not be wise to return him to his parents, but that it would be premature to begin adoption proceedings. He recommended a child guidance inquiry to find out what William's ideas really were, how they had been formed and why it was that he had seemed to change his mind so quickly.

[6] This did not take place. Child guidance clinics are generally reluctant to undertake therapeutic work with children until they are settled into a placement, but this was not therapy as such. The children were formally referred to the adoption panel. On 17 November 1994, their social worker, Helen Nys, who had been working with the family since 1992, completed Form E for each child (although we have not seen the form for Kate): Part I gave formal particulars of the child; Part II gave an extended account of their family background, history and characteristics. Her view of William was more favourable than that taken by the foster carer, but she believed the form to be an accurate account of her view. In November 1994, the adoption panel unanimously recommended that adoption was in the best interests of both children and that they should be placed together. In December 1994, the court refused the parents' applications for discharge and contact and authorised the local authority to refuse contact.

[7] Meanwhile, the claimants had first been formally approved as prospective adopters in June 1991, after an assessment by their social worker, Alan Kearsley, who remained involved throughout. In 1993 they withdrew because of family problems but were reinstated in early 1994. Their Form F (which gives particulars and an extended description of prospective adopters) stated that they were not

prepared to consider a child with either a physical or a mental disability, or with special educational needs outside mainstream school, but would consider a child who had been physically or sexually abused. Originally they were only approved for one child up to the age of 4, but in February 1995 they were approved for one child or a sibling pair of the same sex in the age range 0-5.

[8] On 5 July 1995, Helen Nys and the adoption team leader, Jo Willoughby, visited the claimants to discuss the possibility of William and Kate being placed with them. The claimants asserted that around this time they received the first two pages of William's Form E, which gives the formal particulars but not a detailed description, and the Marigold Centre's report. The local authority's case was that at some stage before placement the children's Form Es were sent or given to the claimants, but neither social worker could be precise about when or how this had happened. The judge made no clear finding about this.

[9] It was planned that the link would be presented to the panel in July but this did not happen because the children had not had their pre-adoption medical examinations. But the panel did approve the claimants to adopt one child or siblings of either sex, aged 0-5 years, with mild medical conditions, not physically or mentally handicapped, with mild emotional or behavioural handicap, but not needing special education outside mainstream school. [10] The medical examinations took place on 18 September. That same day, the panel considered whether the children qualified for an adoption allowance. The minutes, based on the report of their medical adviser, Dr Lehner, say this about William:

'His concentration is very poor. Because of his behaviour he requires constant adult supervision, he will test his carers to the absolute limit, including running away. He needs constant strong discipline with lots of love and firm boundaries . . . His behaviour can be very difficult with frequent tantrums. He has been seen by a child psychiatrist who recommended ongoing child guidance therapy.'

He might therefore have special educational needs, require child guidance therapy, and specialised respite care. Hence the panel recommended an immediate adoption allowance for William and a deferred allowance for Kate.

[11] On 19 October 1995, the panel was asked to consider linking William and Kate with the claimants. Their foster carer again recounted William's problems when placed with them; he was still an aggressive, angry child but there had been much improvement; when told he was to have a new mummy and daddy his behaviour had immediately got worse; it would require a very special family for the placement of this child to be successful. The doctor was concerned that irreversible damage would be caused if William's placement failed. The panel deferred a decision for further inquiries about the prospective adopters. The panel reconvened in October and approved the link by a majority. It was unanimous that a support package must be ensured and it would be impracticable without an immediate adoption allowance.

[12] Dr Lehner wrote a letter addressed to the prospective adopters, dated 6 November 1995, which repeated what she had told the panel about William's behavioural problems, his possible special educational needs, the need for child guidance and specialised respite care. That letter was left with the panel administrator and there is no record that it was sent to the claimants. The judge found that they had not received it. Dr Lehner also went to see the claimants in early December. One reason for this was to explain why in her view it would not be appropriate for the children to have HIV tests, despite suspicions that their father was an intravenous drug abuser. She said that she would also have gone through the letter with them, whereas the claimants said that she had not. The

judge accepted the claimants' account.

[13] On 13 December, there was an informal meeting between the claimants, the foster carers, and the two social workers, Helen Nys for the children and Alan Kearsley for the prospective adopters. They had discussed the children's needs and how introductions might be arranged. As a result of this meeting, the foster carers now felt much more positive about the claimants. But the written information for the prospective adopters was still 'only in rough draft'.

[14] A formal placement-planning meeting was held on 16 January 1996. Although the minutes record that the claimants had received medical information from Dr Lehner, were fully aware of the birth parents' circumstances, and had received the Form E and assessment document, the judge held that they had not received the medical information and did not find that they had by then received the whole of Form E, which was still to be updated with developments since November 1994. A timetable for introductions was arranged at that meeting. Form E was updated later in January and in a handwritten letter agreed with Jo Willoughby over the phone in early February the claimants confirmed that, 'having now received [the children's] details', they would like the placement to go ahead. On 14 February Jo Willoughby wrote enclosing the children's birth certificates and also stating that she enclosed a copy of 'Information for Adopters' and the final pages of the medical forms. But these items were asterisked in the letter and the judge found that they had not in fact been enclosed, not least because Dr Lehner had only completed the forms in a different place that very day.

[15] The introductions took place according to the timetable and the children were placed with the claimants on 19 February 1996. In due course, they lodged their applications to adopt, including an application to dispense with the mother's agreement. Barnardo's were engaged by the local authority to do 'life story' work with the children. They were thus able to look at the files relating to the original care proceedings. The claimants' solicitors applied to the court for the contents of the care files to be disclosed to the claimants, on the basis that William suffered from behavioural problems and this would provide them with greater insight to help them deal with those problems. This was refused. The claimants were by then experiencing considerable difficulty with William's violent and destructive behaviour, but were not being wholly forthcoming with the social workers about this for fear of losing the children. They went ahead with the adoption application. The guardian ad litem, in his report dated 24 April 1997, reported that he 'took some special care to raise some child management issues with the applicants, and [I] have confidence that despite their awareness of the children's special emotional and educational needs, they have the knowledge, confidence and capacity to meet these needs adequately'. The mother's agreement to adoption was dispensed with by order of the court on 25 April 1997 and the adoption orders were made on 1 May 1997.

[16] Soon after the adoption, the adoptive mother became pregnant. In September, William was referred to the child and family consultation service, diagnosed with attention deficit hyperactivity disorder and prescribed Ritalin. He was violent towards his mother and she was twice hospitalised during her pregnancy as a precaution. In October they received some further information, including the Barnardo's worker's summary of the information available in the child care files which listed William's previous violent behaviour. The claimants described this as a bombshell.

[17] The claimants' natural child, E, was born in March 1998. William's behaviour got progressively worse until March 1999, when he lost control, caused injury to

both parents and threw an electric iron at his baby sister. The parents were unable to cope and he was accommodated by the local authority.

[18] The story has not yet ended but William's future now looks much brighter. The adoptive placement has not broken down. William is still part of the claimants' family and they remain committed to him. Although he has had to go to residential placements for a while, he is currently back living with them.

[19] They claim, however, that had they been told as much about him as they feel that they should have been told, they would not have taken the children on in the first place. Once they had taken the children on, they were emotionally committed and could not go back. But they suffered physical damage to their home, each has suffered psychiatric injury and been assaulted on many occasions, the mother required hospital admission and was for various periods unable to work because of her depression and consequent inability to cope with William. This, they claim, was the result of the local authority's negligence in not fully informing them of what was known about William before he was placed with them.

The judge's findings

[20] The local authority's case was that the claimants had received both the Form E giving detailed particulars about the children and the medical reports, which had been discussed with them when Dr Lehner visited in December 1995. The judge, however, accepted that they had not received the medical reports or discussed them in detail with Dr Lehner in December. He did not think that the adoptive father could be correct to say that he had not seen the whole of Form E until shortly before the trial because he had written a letter in April 1999 referring to a passage from Part II of the form. But he concluded that this did not matter because the Form E did not give a full or fair picture of William's serious behavioural problems. Had the adopters seen it, it would not have caused them to reject the children.

[21] He found that there was a duty 'to take reasonable steps to provide all relevant information about the children to the prospective adopters or to take such steps to ensure that it was provided'. The social workers failed to give the claimants relevant and important information about William or ensure that it was provided. They did not properly operate the agency's own procedure for ensuring and recording that such information was given. Hence breach of duty by the social workers was established and the local authority was vicariously liable for it. He went on to find that, had the claimants known the full extent of William's problems, they would not have proceeded with the placement. However, they had acquired sufficient relevant knowledge during the placement and before the adoption orders were made. It would be contrary to the statutory scheme, which allows each side to withdraw during the placement period, to allow a continuing claim for damage suffered after the adoption order. The judge had most difficulty with whether psychiatric injury was foreseeable, but concluded that it was. In any event, Mr Millar QC had argued that physical injury was foreseeable so that if psychiatric injury was sustained as well or instead damages were recoverable on the principle in Page v Smith [1996] AC 155.

The statutory framework

[22] The common law does not recognise adoption. The modern law of adoption is wholly the product of legislation, currently contained in the Adoption Act 1976, together with the Adoption Agencies Regulations 1983 and the Adoption Rules 1984. Adoption can only be achieved by court order, made on the application of

the prospective adopters (s 12(1) of the Adoption Act 1976). The effect of the order is not only to give the adoptive parents parental responsibility for the child and remove that of the birth parents (s 12(3)); it also removes the child for almost all legal purposes from his family of birth and makes him a permanent, life-long member of the adoptive family (Part IV, Status of Adopted Children). With very limited exceptions, adoption can only be arranged by an adoption agency (s 11(1)). Section 6 of the Adoption Act 1976 provides:

'In reaching any decision relating to the adoption of a child a court or adoption agency shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood . . .' (emphasis supplied)

[23] Adoption agencies are subject to the Adoption Agencies Regulations 1983. These make very detailed provision for how adoptions must be arranged. While the actual decisions are made by the agency, the key decisions must be referred to the multi-disciplinary adoption panel (established under reg 5): as seen above, the panel recommends whether adoption will be in the best interests of the children; the panel recommends whether prospective adopters should be approved and for what kinds of children; and the panel recommends whether particular children should be placed with particular prospective adopters (see reg 10). Agencies are required by reg 6, in consultation with the adoption panel and with their medical adviser, to have written arrangements governing the exercise of their and the panel's functions. These must include arrangements for maintaining and safeguarding the confidentiality of adoption information and case records.

[24] The agency is required (by reg 7(2)(a) and (b)) to set up a case record and obtain the information about the child and his parents prescribed in detail by Sch 1 and any other relevant information which may be requested by the panel. The regulations do not prescribe that Form E is to be used for this purpose, but it is standard practice to use these forms, which were prepared by the agencies' professional association, British Agencies for Adoption and Fostering (BAAF). The agency is also required (by reg 7(2)(c) and (d)) to arrange for a medical report covering the matters prescribed in detail in Part II of Sch 1 and to arrange such other examinations and screening procedures as are recommended by the medical adviser. Forms C and D are used for this purpose, depending on the age of the child.

[25] The agency is similarly required (by reg 8(2)) to set up a case record and obtain the prescribed information about prospective adopters, and to obtain a medical report, referees' reports and various other information about prospective adopters. Form F is used for this.

[26] Regulation 12(1) provides as follows:

'Where an adoption agency has decided in accordance with Regulation 11(1) that a prospective adopter would be a suitable adoptive parent for a particular child it shall provide the prospective adopter with written information about the child, his personal history and background, his health history and current state of health, together with the adoptive agency's written proposals in respect of the adoption, including proposals as to the date of placement for adoption with the prospective adopter.'

Regulation 12(2) begins '. . . if the prospective adopter accepts the adoption agency's proposals . . .' and then goes on to provide what must happen next.

[27] This regulation clearly contemplates that such information shall be given after the link has been approved but before the child is placed with the prospective adopters (although in some cases, such as step-parent or foster parent adoptions, he will already be living there). The expert evidence of Sarah Borthwick, a former trainer and consultant with BAAF with a wealth of experience in child care, adoption, fostering and child protection, as to practice in 1996 was this:

'Following agreement to the match, written information was then provided as required by reg 12. It is important to note that each agency developed its own procedures in conveying this information and therefore practice was (and still is) somewhat variable. Common practice included the provision of a copy of the child's Form E or equivalent, and any updates, the back page of the BAAF medical Form C or D and a report from the agency's medical adviser. The foster carer's report (annex to Form C or D) might have been made available. There might have been a copy of an educational statement and report, if applicable. Similarly a report from the child's therapist, if applicable, might have been available. Usually a letter was provided by the agency detailing the proposals for adoption, including the date of placement and the notifications to be sent.'

A meeting between the child's foster carer and the prospective adopters was usual practice, but a meeting with the medical adviser was only occasional practice. The provision of written information would have been checked at an introductory planning meeting when an introduction plan would be drawn up and agreed. As to present practice, she said this:

'Practice now largely remains the same although there is increased understanding of the need to provide the fullest information. A number of agencies now ensure that the adoption worker has read the child's file to pass on relevant information, if necessary. Other agencies now recognise that sometimes the Form E may not contain all the information that may be required. It may be out of date and lacking in detail. Sometimes Form E can give an overly optimistic view of the child, related to their recent progress in foster care. There is increased recognition of the importance of early information being made available and better understanding of the implications of poor [2004] 1 FLR 758 attachment patterns and the impact of abuse or neglect on children. In some agencies, practice is being developed for prospective adopters to see documents relating to care proceedings, with the leave of the court being obtained where necessary.'

[28] It should also be noted that local authority adoption agencies are subject to s 7 of the Local Authority Social Services Act 1970, which provides:

'(1) Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State.'

Their functions under the Adoption Act 1976 are 'social services functions' for this purpose: see now s 1A and Sch 1.

[29] After placement, there follows a trial period before an adoption order can be made. If the child has been placed by an adoption agency, as here, he must have had his home with the applicants for at least 13 weeks (Adoption Act 1976, s 13(1)). The court must be satisfied that the adoption agency has had sufficient opportunity to see the child with the applicants in the home environment (s 13(2)). The agency has to submit a report to the court on the suitability of the applicants and any other matters relevant to the operation of s 6 (s 23; Adoption Rules 1984, r 22(1)); the content of that report is prescribed in detail by Sch 2 to

the Adoption Rules 1984, and it is normally referred to as the 'Sch 2 report'. Up until the order is made, the prospective adopter may give notice to the agency that he does not intend to give the child a home or the agency may notify the prospective adopter that it does not intend to allow the child to remain in that home (s 39). The placement is therefore clearly provisional on both sides.

[30] The court must appoint a child's guardian (formerly known as a guardian ad litem) if the birth parent(s) are unwilling to agree to the adoption and may do so in other cases (Adoption Rules 1984, r 18(1) and (2)). The guardian's duties, 'with a view to safeguarding the interests of the child before the court', are laid down in the rules, and include investigating so far as he considers necessary the matters alleged in the originating process, any report supplied under r 22(1) and the statement of facts supplied by the applicants in support of their application to dispense with the agreement of a parent or guardian (r 18(6)). In this case, as the mother was withholding her agreement, a guardian was appointed and reported to the court.

[31] The court must then consider whether adoption will safeguard the welfare of the child throughout his childhood and whether the ground for dispensing with the parent's agreement is made out. The order, once made, is irrevocable.

The law of negligence

[32] It was common ground between the parties that no action for breach of statutory duty lies in respect of an alleged breach of reg 12(1). The debate was as to the existence of a common law duty to take reasonable care in the provision of information to prospective adopters before a child is placed with them. No one denies that the provision of such information is a good thing, not only for the prospective adopters but also and more importantly for the child. It will do him no good at all if the placement breaks down because his adopters were not properly forewarned about what they might expect. That is why, as Ms Borthwick said, there is increasing recognition of the need to provide much fuller information than was provided in the past. This is particularly so in the context of modern adoption. Adoption is increasingly seen as the best way of providing a secure and stable home for a child who has been separated from his birth family, often because of neglect or abuse. Such children present particular challenges, partly because they are often well past babyhood and partly because their early experiences may have damaged their abilities to be ordinary children in ordinary families, at least in the short term.

[33] Whenever the question of a common law duty of care arises in the context of the statutory functions of a public authority, there are three potential areas of inquiry: first, whether the matter is justiciable at all or whether the statutory framework is such that Parliament must have intended to leave such decisions to the authorities, subject of course to the public law supervision of the courts; secondly, whether even if justiciable, it involves the exercise of a statutory discretion which only gives rise to liability in tort if it is so unreasonable that it falls outside the ambit of the discretion; thirdly, in any event whether it is fair, just and reasonable in all the circumstances to impose such a duty of care. The considerations relevant to each of these issues overlap and it is not always possible to draw hard and fast lines between them.

[34] Discussion of these issues in the context of child care and education has hitherto largely taken place in the context of applications to strike out the claimant's case. In X (Minors) v Bedfordshire County Council; M (A Minor) and Another v Newham London Borough Council and Others; E (A Minor) v Dorset County Council; Christmas v Hampshire County Council; Keating v Bromley

London Borough Council [1995] 2 AC 633, claims brought by children alleging breach of statutory duty and negligence on the part of a local social services authority which had failed to take action to protect them from harm, and by a mother and child for breach of statutory duty and negligence in the conduct of a child protection investigation, which had resulted in the child being unjustifiably taken into care, were struck out. Claims brought by children alleging breach of statutory duty and negligence in the exercise of statutory discretions under the Education Acts were struck out, but claims alleging negligence by educational psychologists and teachers involved in the assessment of special educational needs were not. There followed the decision of the European Court of Human Rights in Osman v United Kingdom (2000) 29 EHRR 245, sub nom Osman v UK [1999] 1 FLR 193, which if nothing else engendered great caution in the use of striking out. Then came Barrett v Enfield London Borough Council [2001] 2 AC 550, in which the House of Lords declined to strike out a claim alleging negligence in the local authority's exercise of its parental responsibilities towards a child in its care. In all but the clearest cases it was important to see on the facts proved whether what was alleged was justiciable, and also whether on those facts it was fair, just and reasonable to impose a duty of care; some of the allegations made might give rise to a duty and some might not. Phelps v Hillingdon London Borough Council; Anderton v Clwyd County Council; G (A Minor) v Bromley London Borough Council; Jarvis v Hampshire County Council [2001] 2 AC 619, [2000] ELR 499 brought together four claims alleging negligence on the part of educational psychologists and teachers in the assessment of special educational needs, one of which had proceeded successfully to trial. The House of Lords held that the educational psychologists and teachers did owe a duty of care to the children whose needs they were assessing.

[35] The judge in this case referred only to the Phelps case, which he considered provided him with sufficient guidance: it decided that a person exercising a particular skill or profession might owe a duty of care in its performance, for which the local authority might be vicariously liable, notwithstanding that the professional was acting in furtherance of the authority's performance of a statutory duty, breach of which did not of itself sound in damages.

[36] That is, of course, a statement of the obvious. Teachers have a duty to take care of their pupils. Doctors, nurses and other healthcare professionals have a duty to take care of their patients. This is just as much so if they are employed by a local education authority or a NHS Trust as it is if they are employed by a private school or hospital. The fact that a public authority has a statutory duty to provide such services makes no difference. But that does not answer the difficult questions arising in this case. Some decisions taken by public authorities, and necessarily by the people employed by those authorities, are non-justiciable. In other cases it may not be fair, just and reasonable to impose a duty of care upon those charged with making or carrying out such decisions. How are those questions to be judged?

[37] The starting point must be, as Lord Nicholls of Birkenhead said in Stovin v Wise [1996] AC 923, at 935B, that the common law should not impose a concurrent duty which is inconsistent with the statutory framework:

'A common law duty must not be inconsistent with the performance by the authority of its statutory duties and powers in the manner intended by Parliament, or contrary in any other way to the presumed legislative intention.'

[38] The next step, however, is that there is no such inconsistency if what has been done falls outside the permissible limits of the exercise of such statutory powers, as Lord Browne-Wilkinson said in X (Minors) v Bedfordshire County

Council; M (A Minor) and Another v Newham London Borough Council and Others; E (A Minor) v Dorset County Council; Christmas v Hampshire County Council; Keating v Bromley London Borough Council [1995] 2 AC 633, at 736B:

'It is clear both in principle and from the decided cases that the local authority cannot be liable in damages for doing that which Parliament has authorised. Therefore if the decisions complained of fall within the ambit of such statutory discretion they cannot be actionable at common law. However if the decision is so unreasonable that it falls outside the ambit of the discretion conferred upon the local authority, there is no a priori reason for excluding all common law liability.'

Lord Browne-Wilkinson went on to discuss the distinction between policy and other decisions. He gave as examples of policy matters, 'social policy, the allocation of finite public resources, or . . . the balance between pursuing desirable social aims as against the risk to the public inherent in so doing'.

He quoted Lord Wilberforce's observations in Anns and Others v Merton London Borough Council [1978] AC 728, at 754:

'Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many "operational" powers or duties have in them some element of "discretion". It can safely be said that the more "operational" a power or duty may be the easier it is to superimpose upon it a common law duty of care.'

Lord Browne-Wilkinson concluded that:

'. . . if the factors relevant to the exercise of the discretion include matters of policy, the court cannot adjudicate upon such policy matters and therefore cannot reach the conclusion that the decision was outside the ambit of the statutory discretion. Therefore a common law duty of care in relation to the taking of decisions involving policy matters cannot exist.'

But even if the complaint is of carelessness:

'. . . not in the taking of a discretionary decision to do some act, but in the practical manner in which that act has been performed (eg the running of a school) the question whether or not there is a common law duty of care falls to be decided by applying the usual principles, ie those laid down in Caparo Industries plc v Dickman [1990] 2 AC 605, 617-618. Was the damage to the plaintiff reasonably foreseeable? Was the relationship between the plaintiff and the defendant sufficiently proximate? Is it just and reasonable to impose a duty of care?

However, the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done. . . a common law duty of care cannot be imposed upon a statutory duty if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties.'

[39] He declined to strike out the claims on the ground that they were non-justiciable, because some matters did not raise such policy issues. He also declined to strike them out on the ground that they involved statutory discretions, because it might be shown that they had been exercised in a way falling outside the ambit of that discretion. But he considered that it was nevertheless not fair, just and reasonable to impose a duty of care, for a variety

of reasons (see 749-751). It would cut across the whole statutory system set up for the protection of children at risk; the system is inter-disciplinary, involving many other than the local authority; it would be unfair to impose a duty on only one participant and impossible to disentangle their respective contributions; the task is extraordinarily delicate; imposing liability to damages might make local authorities more cautious and defensive; the high risk of conflict and litigation, which would deflect resources from the more important task of protecting children from harm; the remedy of maladministration; and the need for caution in developing the law into new areas.

[40] Lord Slynn of Hadley, in Barrett v Enfield London Borough Council [2001] 2 AC 550, at 568, did not consider that those factors, in particular the difficulty and delicacy of the task and the risk of defensive practice, carried so much weight once the child was being looked after by the local authority. Social workers looking after children were professionals and could owe their clients a duty of care in some respects just like other professionals: although like other professionals they could rely upon the principle laid down in Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 when it came to deciding whether or not it had been broken.

[41] The Court of Appeal has also recently held, in D v East Berkshire Community Health NHS Trust; K and Another v Dewsbury Healthcare NHS Trust and Another; K and Another v Oldham NHS Trust and Another [2003] EWCA Civ 1151, [2003] 4 All ER 796, that those policy considerations are less weighty now that a similar factual inquiry will have to take place if there are alleged breaches of Art 3 (in failing to take protective measures over a child) or Art 8 (in taking a child away from his family) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention). In those circumstances, the court thought that there was no justification for preserving a rule that no duty of care in negligence was owed towards the child. The position of the parents, however, was very different: while it may be in the interests of the child either to be removed or not to be removed from home, it will always be in the interests of the parents that the child is not removed. The child's interests are therefore in potential conflict with the parents': hence there are cogent policy reasons for holding that, where child care decisions are being taken, no common law duty of care should be owed to the parents.

[42] The Judicial Committee of the Privy Council drew the same distinction between the duties owed to children and those owed to parents in B and Others v Attorney-General of New Zealand and Others [2003] UKPC 61, [2003] 4 All ER 833. The Privy Council upheld the decision of the Court of Appeal of New Zealand to allow a claim brought by children in respect of the allegedly negligent way in which a social worker and clinical psychologist had investigated a complaint that a father had sexually abused one of his daughters. But no common law duty of care was owed to the father. His interests and those of the children were 'poles apart'. It would not be satisfactory to impose a duty of care in favour of alleged victims and at the same time a duty in favour of alleged perpetrators.

[43] The Privy Council in B and Others v Attorney-General of New Zealand and Others approved that part of the New Zealand Court of Appeal's decision in Attorney-General v Prince and Gardner [1998] 1 NZLR 262, which held that there could be a duty of care towards children in the investigation of complaints of child abuse and neglect. The other part of Attorney-General v Prince and Gardner concerned a complaint of negligence by a social worker in recommending that prospective adopters were suitable parents, as a result of which the order was made and the child suffered an appalling childhood. The Court of Appeal held that it would be inconsistent with the scheme and policy of the New Zealand Adoption

Act 1955 to allow individual claims in respect of particular acts and omissions. They pointed out, at 274, the contexts in which each of three people involved in the adoption triangle might wish to sue:

'The implications of imposing a duty of care are these. First, in relation to the child there is the risk of liability for influencing the adoption court to make an adoption order in favour of unsuitable applicants; for adverse consequences of being placed in an approved home (s 6); and for bad parenting by adoptive parents. Second, in relation to natural parents (or guardians) there is the risk of liability for adverse consequences of careless advice as to the suitability and particular qualities of adoptive applicants, and as to the effects of adoption; and for mental anguish and distress of discovering the child suffered from bad parenting by adoptive parents. Third, in relation to adoptive parents, there is the risk of liability for their adopting an unsuitable child.'

At 275, they pointed to the policy factors in favour:

'There are we think two major policy considerations which support the imposition of a duty of care on those responsible for carrying out functions under the Act. First, as it was put in the Bedfordshire case at p 633 per Lord Bingham MR and at p 758 per Lord Browne-Wilkinson, the proper consideration which has first claim on the loyalty of the law is that errors should be remedied and that very potent counter-considerations are required to override that policy. Second, as independent professional social workers are expected to exercise reasonable care and skill in carrying out their statutory functions and in the present situation the fulfilment of the duty to the child (or the mother) is consistent with the social worker's duty to the court. There is, too, an element of reliance: explicit reliance by the mother on the pleaded negligent misrepresentations and assurances; implicit reliance by the child on the exercise of reasonable care and skill by the social worker.'

However they found policy considerations against much stronger:

'First and particularly significant, it would be inconsistent with the policy and scheme of the Act to allow individual claims in negligence in respect of particular acts or omissions in the carrying out of the statutory functions.

The legislation establishes a process leading to judicial consideration and determination on the evidence then before the adoption court of whether an adoption order should be made. The social worker has an important role. So do others in exercising their rights and discharging their obligations under the statutory process. The applicants provide relevant information concerning their family situation, their health, their financial circumstances and their reasons for wanting to adopt the child. The social worker furnishes a report and is entitled to take part at the hearing of the application. Anything known to the police about the character of the applicants is also conveyed to the adoption court. The adoption court is required to consider any report which the social worker may furnish (s 10(1)). It is not obliged to accept the report or its recommendations. The court makes its own assessment of all the material including any oral evidence and cross-examination. It is the court which must be satisfied that the requirements of ss 4 and 11 are met and the necessary consents have been given or should be dispensed with (ss 7 and 8) . . .

There is nothing in the legislation to indicate a parliamentary purpose to create actionable obligations. On the contrary, to impose a common law duty of care on social workers involved in that process and on the department would cut across that statutory regime. The adoption court makes the ultimate decision. Social

workers see the parties and assess the prospects for successful adoption. The social worker contributes to the information before the court, but the report is not accorded any statutory primacy when the adoption court is deciding whether or not to make an interim order or adoption order.

Further, to allow a claim in negligence would undermine the intended finality of the adoption. The legislation does not contemplate any subsequent performance appraisal of the adoptive parents or of the well-being of the child. Any claim in negligence would constitute an indirect attack on the adequacy of the statutory process and the integrity of the adoption order. It would be extraordinary if a claimant could allow the adoption to stand unchallenged, including in the case of the mother the validity of her consent, but still seek damages on the footing that the adoption order should not have been made and her consent was induced by material misrepresentations. And it would be inconsistent with the deliberately narrow remedies and sanctions provided in the statute (s 12 for revocation of an interim order, s 20 for variation and discharge of an adoption order, and s 27(1)(f) for making a false statement for the purpose of obtaining or opposing an interim order or adoption order). The application for the discharge of an adoption order requires the prior approval of the Attorney-General and no adoption order or adoption can be discharged unless it was "made by mistake as to a material fact or in consequence of a material misrepresentation to the court or to any person concerned" . . . Finally, the secrecy provisions do not envisage the disclosure of what would be essential information in determining negligence suits. Section 23 provides a narrow exception to the general unavailability for production or inspection of adoption records . . . Statutory powers must be exercised in accordance with the policy and purpose of the legislation . . .

Further, the imposition of the duty of care contended for could not sensibly be confined to social workers and the department. Others involved in the adoption process (apart from the court which is the effective decision-maker) could scarcely be excluded. The consequences for the public interest would in our view be unacceptably expansive.

As well, there are fair trial considerations. Disentangling factors that contributed to the decision of the adoption court usually long after the event, and determining to what extent the adoption court was influenced by the alleged negligence of the social worker would be difficult, if not often impossible. Causation, including weighing the respective influences of nurture and nature in shaping the child and affecting his or her life prospects, and quantification of any loss are likely to be highly speculative, if indeed justiciable. Finally, there are other systems of accountability for performance by social workers of their professional responsibilities and for maladministration of the department. Standard public law remedies apply in respect of the exercise of statutory powers. Departments are subject to ministerial and parliamentary oversight. Social workers are subject to departmental disciplinary regimes. Complaints may be made to the Ombudsman.'

The law in England and Wales does not appear to be materially different from that in New Zealand.

[44] Finally, reference should be made to W and Others v Essex County Council and Another [2001] 2 AC 592, [2000] 1 FLR 657, reversing in part W and Others v Essex County Council and Another [1999] Fam 90, sub nom W v Essex County Council [1998] 2 FLR 278. A local authority had allegedly placed a 15-year-old boy who was a known sex abuser with foster parents, contrary to an express assurance that no sex abusers would be placed with them. The boy then abused their children. The children's claims in negligence were allowed to proceed. The Court of Appeal upheld the judge's decision to strike out the foster parents'

claims for psychiatric injury. The House of Lords allowed those claims to proceed. But the argument there centred mainly on whether there was a valid claim for psychiatric injury. Otherwise, it was not clear and obvious that the claim could not succeed. In the words of Lord Slynn of Hadley at 598H and 661 respectively:

'Whether the nature of the council's task is such that the court should not recognise an actionable duty of care, in other words that the claim is not justiciable, and whether there is a breach of the duty depend, in the first place, on an investigation of the full facts known to, and the factors influencing the decision of, the defendants.'

In this case we have the benefit of being able to consider these issues after the full facts had been found.

The parties' submissions on the law

[45] Mr Gavin Millar QC, for the claimants, relied on Barrett v Enfield London Borough Council [2001] 2 AC 550 and Phelps v Hillingdon London Borough Council; Anderton v Clwyd County Council; G (A Minor) v Bromley London Borough Council; Jarvis v Hampshire County Council [2001] 2 AC 619, [2000] ELR 499 to argue that this situation is no different. He referred to the concept of informed consent. Adoptive parents were entitled to be fully informed before welcoming a child into their home and family. Hence there was a duty to supply them with all the relevant information. Relevance could be judged by what the agency had put before the panel: 'what's good enough for the panel is good enough for the prospective adopters'.

[46] Mr Edward Faulks QC, for the adoption agency, relied on Attorney-General v Prince and Gardner [1998] 1 NZLR 262 and a variety of policy factors to argue that the whole process is non-justiciable or alternatively that it would not be fair, just and reasonable to impose a duty of care upon those involved in it: placing a child for adoption is a process of considerable delicacy which always carries an element of risk; the adoption process laid down by Parliament carries a number of safeguards to minimise that risk; many children like William are successfully placed but inevitably some placements break down; introducing duties of care will provide fertile ground for litigation brought by adoptive parents or birth parents when all concerned should be working together in the interests of the child; the individual professional judgments concerned are inevitably subjective; the collective decisions are in practice taken by a multi-disciplinary panel; it is important that everyone involved in the adoption process should be able to express frank and honest opinions without fear of later censure; but if such claims are allowed, disclosure of relevant confidential material is inevitable; there is the risk of defensive practice; and of a deleterious effect upon the adopted child; and picking apart who was to blame for the problems encountered is an almost impossible task.

Conclusions on the duty of care

[47] It is clear that adoption agencies are entitled to have policies, or standard practices, about what information will be disclosed to prospective adopters before children are placed with them. Indeed they are expected so to do by the Adoption Agencies Regulations 1983, reg 6. It is also clear that this agency did have such a policy, in line with that common at the time, of disclosing the children's Form E and medical reports. No doubt departures from this, either in withholding some information in the interests of confidentiality, or disclosing further information where thought appropriate, could be decided upon in individual cases. The claimants were provided with a copy of the Marigold Centre's assessment of the

prospects of reuniting William with his birth parents.

[48] That policy decision is classically an area of discretion which can only be challenged if it falls outside the realms of reasonableness. It is not for this court to tell adoption agencies how they should decide such questions, any more than it would be for this court to tell a professional body what its rules should be. Parliament has clearly entrusted this task to the adoption agency, which must act under any general guidance given by the Secretary of State, and this is for good reason. If this court were to accede to Mr Millar's argument and lay down a rule that what goes to the panel should go to prospective adopters, this would set in stone an area of practice which must be free to develop in the light of developing understanding of how best to select and prepare prospective adopters and how best to ensure that adoptive placements do not break down. That understanding and practice have moved on since 1996 is clear from Ms Borthwick's evidence.

[49] If that be so, one question is whether individual social workers and others can be held to account in their implementation of the agency's policy and practice. Here, there seem to be two questions. First, is there a duty of care in relation to the contents of the forms and reports which are made? Secondly, is there a duty of care in relation to the communication of the information which the agency has decided that the prospective adopters should have?

[50] The second question is much easier than the first. We see no difficulty in a duty of care to communicate to the prospective adopters that information which the agency has decided that they should have. If an agency has decided that the prospective adopters should have the child's Form E and medical report, together with any specific item of information which the agency or the panel considers that they should have, and its staff fail to take reasonable steps to ensure that that information is in fact communicated, in circumstances where it is foreseeable that actionable harm will be caused if it is not, then there should be liability.

[51] On the findings of fact made by the judge, that is what happened in this case. The local authority accepted that the prospective adopters should have had at least that information. Its case was that it had been given to them. That it was not was the result of ordinary administrative failures of the sort that commonly and regularly ground liability in negligence. There is no reason why they should not. In this particular case it matters not that on one view the contents of the Form E would not have been enough to forewarn the prospective adopters of the serious nature of William's problems, because on any view the doctor's report would have told them enough. Unless those findings can be overturned, therefore, in our view this appeal should fail, but the reason for the claimants' success would be very different from the reasons for which the judge allowed the claim.

[52] The more difficult questions are the intermediate ones: to what extent are the social workers and doctors responsible for compiling the reports and forms under a duty of care towards the various participants in the adoption triangle? Their primary duty must be towards the agency by which they are employed. Their reports are required by the agency so that it can fulfil its statutory obligations. Can they simultaneously owe duties towards the people who are the subject matter of those reports and towards the people who may read and rely upon them? There are cases where a person with a contractual duty of care towards one person may also owe a tortious duty of care towards another: see Smith v Bush (Eric S); Harris v Wyre Forest District Council [1990] 1 AC 831; but there are many other cases, of which Caparo Industries plc v Dickman and Others [1990] 2 AC 605 is the obvious example, where they do not.

[53] Two features tell particularly strongly against such a duty in adoption. The first is the statutory framework itself, which is very closely regulated with a view to ensuring best contemporary practice in this difficult and sensitive exercise in social engineering. A balance has to be struck between the interests of all three parties to the adoption triangle; the prospective adopters, the birth parents and the child. But the agency's first duty is towards the child. If, therefore, there is to be any duty of care in tort, it should be towards the child. The child is the most vulnerable person in the whole transaction; the one who is most likely to suffer lasting damage if things go wrong; who rarely has much choice in the matter; and is least able to protect his own interests. His interests may well conflict with those of any of the adult parties to the triangle. The Court of Appeal in D v East Berkshire Community Health NHS Trust; K and Another v Dewsbury Healthcare NHS Trust and Another; K and Another v Oldham NHS Trust and Another [2003] EWCA Civ 1151, [2003] 4 All ER 796 and the Privy Council in B and Others v Attorney-General of New Zealand and Others [2003] UKPC 61, [2003] 4 All ER 833 recognised the difficulty and declined to hold that there was any duty of care towards the birth parents.

[54] The potential conflict between the interests of birth parents and the interests of the child is more obvious than the potential conflict between [2004] 1 FLR 768 prospective adopters and the child. Generally speaking, openness about the problems is likely to be better for both. But the report may in due course be read by both. There is a delicate balance to be struck between pessimism and optimism. Too much pessimism may render some children effectively unadoptable: we would then go back to the days, before the great change in adoption practice which began in the 1970s, when only perfect white babies and toddlers were considered adoptable. This would be directly contrary to the present policy of encouraging the adoption of as many children being looked after by local authorities as possible; this policy aims to make good, so far as can be made good, the deficiencies in their early life experiences which have led to these children being separated from their birth families; as the Court of Appeal held in Re W and B; Re W (Care Plan) [2001] EWCA Civ 757, [2001] 2 FLR 582, if the state is to interfere in the child's right to respect for his family life, it has a duty to use its best endeavours to make good what it has taken away. On the other hand, too much optimism may put the placement at risk of breakdown, with consequences for the child which may be worse than if it had never been made. As this case shows, it is important to place the right child with the right prospective adopters, but part of the assessment is the resilience of the prospective adopters in meeting the challenges ahead. If there is to be a duty of care, the professionals should be addressing their minds to their first consideration, the welfare of the child throughout his childhood, rather than to anything else.

[55] These considerations are reinforced by two others. Prospective adopters are proposing to be parents. They are the child's new 'family for life'. They must be prepared to regard themselves as parents in every sense. While very few parents have to face the extraordinary problems which William's parents have had to face, all have to be prepared for downs as well as ups. And those downs can include physical damage to the home, physical harm to the parents, and psychiatric illness in the parents. Secondly, prospective adopters are not passive recipients of the agency's services. They are actors in the story. They have a trial period within which to get to know the child and adjust to the enormous upheaval of having a new person in their lives. It is all too understandable that prospective adopters, like the claimants in this case, who have been waiting for a long time to have a child offered to them, are eager to accept what looks like a suitable proposal when it is put to them. It is understandable that they should feel committed from a very early stage. But the system could not work as it is meant

to work if the prospective adopters did not keep a cool head and ask themselves seriously during that period whether they were willing and able to carry it through.

[56] For all those reasons, therefore, we would hold that it is not fair, just and reasonable to impose upon the professionals involved in compiling reports for adoption agencies a duty of care towards prospective adopters. We would certainly not rule out a duty of care towards the child, but that does not arise in this case.

[57] However, if we were wrong about that, one thing is crystal clear. The breach of that duty of care is to be judged in accordance with the principles laid down in Bolam v Friern Hospital Management Committee [1957] 1 WLR 582: if the professional judgment made is one which would be acceptable to a responsible body of opinion within that profession at that time, then there is no breach of duty. In this case, the judge did not ask himself that question. If he had done so, he might have had considerable difficulty in holding that Helen Nys was in breach of her duty in compiling Form E. She had been involved with these children for longer than anyone else. The view of William which she portrayed in Form E was a view which she genuinely held about him. At the time of first writing he was only 4 years old. The child psychiatrist's reports (the second one dated only a month before Form E was written) had described some problem behaviour; this appears to have been taken largely from what the foster mother had told him, so he was basing his view on the same information as the social worker, coupled with his own observations. He had not diagnosed psychological harm, let alone mental disorder, in this child. Child guidance had been proposed for specific purposes, not for general therapy. AIthough more senior personnel within the department later took the view that a reader would not gain an understanding of the full extent of William's problems, it is difficult to say that her view of him was one which no reasonable social worker could have held. As to Dr Lehner's report, no one has begun to suggest that it did not paint a full and accurate picture of this child's medical history and problems.

[58] The other intermediate question is whether the agency has a duty of care in respect of the decision about what information should be passed on. As already indicated, the agency is entitled and expected to have a policy about this. But clearly it may be appropriate to depart from that policy in individual cases, either in withholding information which would otherwise be given, or in divulging information over and above that contained in the various forms and reports disclosed. That decision might well be made on the advice of the adoption panel. All the same factors which tell against the imposition of a duty of care on the individual professionals apply with equal if not greater force to the agency's decisions.

[59] Hence we would hold that there is in general no duty of care owed by an adoption agency or the staff whom it employs in relation to deciding what information is to be conveyed to prospective adopters. Only if it takes a decision which no reasonable agency could take could there be liability. But once the agency has decided, either in general or in particular, what information should be given, then there is a duty to take reasonable care to ensure that that information is both given and received.

Breach of duty

[60] Was that duty broken in this case? On the judge's findings of fact, it was: the agency had decided that the prospective adopters should have both the Form E and the medical reports. The judge held that they had not received the written

medical reports before the placement, nor did they receive a full oral explanation when Dr Lehner visited them at home. He did not think it could be right that they had not received the whole of Form E until much later, because a letter to the social services department in 1999 referred to an incident mentioned in the descriptive Part II of William's Form E. But even if they had received the whole of Form E before the placement was made, this would not be enough to discharge the duty if they had not also received the medical report.

[61] Before us, Mr Faulks, for the local authority, mounted a spirited attack on the judge's findings of fact. The parents' case about Form E had shifted during the proceedings: from the pleadings, to their witness statements, to the witness box. It was inconsistent with the 1999 letter which revealed knowledge of the contents of Part II of the form. The judge should, therefore, have found that they had received the whole of that form during the placement process. If so, that meant that they were unreliable witnesses as to what they had received or been told from other sources. Their recollections of the meeting with Dr Lehner should not have been preferred to her account of what she would have done at such a meeting.

[62] It would not be surprising if prospective adopters, flushed with enthusiasm now that two children had at long last been offered to them, had forgotten the warnings they had been given before the children were placed. Equally, however, these adopters were hungry for information: they kept asking for it and complaining that they had still not received the updated Form E. The meeting with the doctor will have been a very important and memorable one for them. The judge saw and heard them both give evidence and he believed them.

[63] It is clear that the agency's administrative and record-keeping practices at the time were not perfect. No doubt it was not alone in that. But it did mean that it was not in a position to demonstrate that the information had been sent, let alone received. The social workers could not say when Form E and the Marigold Centre's report had been sent out. Dr Lehner had dictated her letter and left it with the panel administrator to be sent out; the panel administrator did not give evidence and there was no record that it had been sent out. The minutes of the pre-placement planning meeting did record that the claimants had received this information, but the form had been completed in advance and the signatures were appended on a different page. The hastily written letter in early February saying that 'having now received the children's details' the claimants wished to proceed did not set out what those details were and certainly did not refer to the medical report. In the letter of 14 February purporting to enclose the final pages of the medical reports, the reference to those reports was asterisked, possibly indicating that they were to follow later, which would not be surprising as Dr Lehner had only completed them that day. The claimants were complaining at an early stage that they had not yet received the information they had been promised. Added to this were the undoubted difficulties the agency was experiencing with getting the required documentation from Helen Nys. She had moved to another post but had retained responsibility for these children. She was also inexperienced in seeing the adoption process through from start to finish. There was a delay in completing the Sch 2 report required by the court. There was also a delay in completing an updated Form E and it was not clear when this had been sent to the claimants. It is by no means improbable that at the early stage of proposing the children to the claimants, only the barest details contained in the first two pages of Form E were passed on.

[64] In those circumstances, much depended upon the judge's view of the claimants' reliability. He was fully alive to the difficulties, and in particular to the possible unreliability of their recollection about Form E. Nonetheless he preferred

their version of the meeting with Dr Lehner and gave good reasons for doing so. Mr Faulks's forensic success in cross-examination on the Form E point is not a sufficient basis for us to hold that the judge was not entitled to accept the claimants' evidence about that visit.

[65] Hence on the judge's findings even the restricted duty which we have identified was broken.

Causation

[66] Did that breach cause the harm? Mr Faulks also attacks the judge's finding that, had the claimants had the information they should have had, they would not have taken the children. This couple had been waiting a long time. These children had also been waiting a long time, particularly Kate, who had been rejected by her parents at a very early age and whose future had been kept on hold while the uncertainties about William were resolved. These children had been identified for this couple. They had been prepared to modify their views about which children would be acceptable and the agency had modified its views about which children would be suitable for them. Optimism and enthusiasm are likely to be the predominant motivating factors in such circumstances. Above all, perhaps, rejecting William would also have meant rejecting Kate.

[67] Nonetheless, the judge accepted their evidence that had they had the information which they believed they should have had, they would not have accepted the children. They had already declined to proceed with another child on the basis that he was not for them. Their discussions with their own social worker, Alan Kearsley, indicated that, while they understood and were prepared for a certain level of difficulty, there were limits to what they felt they could take on. That is a finding which was open to the judge on the evidence. Even on the more restricted duty which we have identified, it is clear that Dr Lehner's report would have caused them to ask questions before meeting the children. These would have revealed the extent of the difficulties and thus taken them beyond the limits of what they were prepared to take on.

The cross-appeal

[68] Should the judge have restricted their claim to the period before the adoption order was made? Mr Millar argues that once the children were placed, they were emotionally committed to seeing things through. In principle, he argues, a person who has given wrong information (or failed to give enough information) is responsible for all the foreseeable consequences of that information being wrong (or inadequate): see South Australia Asset Management Corporation v York Montague Ltd; United Bank of Kuwait plc v Prudential Property Services Ltd; Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (Formerly Edward Erdman (An Unlimited Company)) [1997] AC 191, at 213C and 214D. It was entirely foreseeable that once this couple had accepted the children into their lives they would be thoroughly committed to seeing it through and not letting the children down. He also attacks the judge's finding that by the time of the adoption order, some 14 months after placement, they would have found out quite enough about the difficulties to have a fair idea of what they were letting themselves in for.

[69] However, the judge was entitled to find that by the time the adoption order was made quite enough had happened to enable the claimants to know enough about William to be able to make a decision for themselves. In those circumstances, it would be contrary to the statutory scheme for liability to continue beyond the date of the adoption order. The purpose of the probationary

period is for all concerned to test out the arrangement. Each side is free to withdraw at any time. It is just as important that prospective adopters are frank and forthcoming with the agency as it is that the agency is frank and forthcoming with them. The adoption order is made on the prospective adopters' application. The court has a duty to give first consideration to the welfare of the child throughout his childhood. It has reports from the agency which should include reports about how the probationary period has gone. In this case it also had a report from the independent child's guardian, which endorsed the agency's reports. The adoption order changes everything forever. From that point on the adopters became as much like birth parents as it is possible for them to be.

[70] In our view, therefore, the judge was right to treat this as the cut-off point.

Psychiatric injury

[71] In this case, the agency did know a good deal about the problems which bringing up William was likely to entail. Was that sufficient to make psychiatric illness a foreseeable result of placing him with these prospective adopters without disclosing the medical report to them? Even on the more expansive version of the duty of care which the judge adopted, he found this a difficult question. It is made even more difficult because the adoption panel was concerned about the claimants' resilience and adjourned the decision in order to make further inquiries, specifically about the prospective father's mental health. Those inquiries reassured them and led them to approve the link. Unless that decision was one which no reasonable adoption panel could reach, it is difficult to accept that psychiatric illness was a foreseeable result of placing this child with those adopters. But it was foreseeable that William might assault them and damage their property. In those circumstances, the principle in Page v Smith [1996] AC 155 indicates that there is liability for whatever harm ensues.

Conclusion

[72] Adoption is not a commercial transaction. It cannot be likened to the sale of goods or even the supply of services. Writing reports about a child is not like writing financial references and reports. The whole process is about doing the best one can for children who have not had the start in life which most of us take for granted. At times during the argument in this case it was easy to forget that William and Kate are real people, every bit as real as the adults in the case. They have been both extraordinarily unfortunate and extraordinarily fortunate in their lives. They were unfortunate in that Kate was rejected by her parents when only a baby while William had to suffer a chaotic and disrupted early life and experience the violence between his parents as if it were normal. They are fortunate to have been adopted into a loving and dedicated family who have remained thoroughly committed to them both. As their father acknowledged in his witness statement, 'ironically the panel got it right in placing [William] with us since we will never give up on [him]'. It is appalling to contemplate what both children's lives might have been like had this not been so. This is not to minimise the extraordinarily difficult, damaging and stressful experience this has been for the claimants. Nor is it to condone or excuse the agency failings which have contributed to this. But the long-term calculation of gains and losses involved in this delicate piece of social engineering cannot be done on the cold computer programme of the law.

[73] We would, therefore, dismiss both the appeal and the cross-appeal, but in the former case for very different reasons from those given by the judge. Careful and considerate though his judgment was, this is a case which would have benefited from being tried by a judge with experience of the work of the Family

Division and adoption in particular.

DISPOSITION:
Appeal dismissed with costs to be assessed if not agreed; cross-appeal dismissed and respondent to pay appellant's costs to be assessed if not agreed; Civil Aid funding assessment of respondent's costs.

SOLICITORS:
Barlow Lyde & Gilbert for the appellant; Fisher Jones Greenwood for the respondent.