



Informing Progress - Shaping the Future

FOIL UPDATE 5th September 2022



Child Abuse: A Local Authority's Duty of Care

HXA v Surrey County Council and YXA (Protected Party) v Wolverhampton City Council (2022) EWCA Civ 1196

This was a second appeal against the decision of a High Court Judge to dismiss appeals against decisions in two unconnected cases striking out claims in negligence brought against local authorities arising out of the exercise of their statutory functions under the Children Act 1989. The appeal involved consideration of the circumstances in which a local authority and/or the social workers for whom it was vicariously liable owed a duty of care to a child to whom the local authority was providing child protection services.

It was acknowledged on behalf of the respondent local authorities that the background to both cases was shocking and disturbing. There was no doubt that each claimant as a child was subjected to severe abuse and neglect. Both claimants were involved with social services for a number of years whilst they remained at home with their families and continued to suffer abuse. On this appeal, however, the court was not asked to rule on whether either of the local authorities was at fault. The issue was whether, at any stage in its contact with the children, the local authorities could be said to have assumed responsibility for their welfare so that they owed the children a duty of care at common law. A Deputy Master in the case of HXA and a Master in the case of YXA and Stacey J on the conjoined appeals against both decisions all decided that the local authorities could not be said to have assumed responsibility so as to owe a duty of care to the children. As a result, the claims were struck out.

IN BRIEF

The Court of Appeal indicated that the liability of local authorities for harm suffered by children under their protection was still an evolving area of the law, requiring careful and incremental development of principles through decisions reached after full trials on the evidence.

The Court of Appeal stressed that if it allowed either or both of these appeals, the consequence was that one or both would proceed to trial. At that stage, the judge would have to decide in each case whether the local authority did in fact owe a common law duty of care, and if so whether there was a breach of duty as a result of which the claimant suffered damage for which she or he was entitled under general legal principles to recover compensation. If the court allowed these appeals, it did not follow that either claim would ultimately succeed.

After considering the facts of these two cases, the Court of Appeal allowed both appeals.

Depending on the facts of the case, an assumption of responsibility might arise out of the local authority's conduct where it acquired parental responsibility for a child when granted a care order under S31 Children Act 1989, or an interim care order under S38. But the circumstances in which a duty of care might arise were not confined to such cases. It was correct that a local authority by whom a child was accommodated under S20 did not have parental responsibility for the child, unlike an authority who had been granted a care order for a child. But the circumstances in which a local authority might assume responsibility for a child so as to give rise to a duty of care under the law of negligence were not confined to cases where it acquired parental responsibility under the Children Act 1989.

First, a duty of care might arise in respect of looked-after children if circumstances arose which amounted to an assumption of responsibility by the local authority. Just as the conduct of a local authority pursuant to the statutory scheme relating to a child subject to a care order might, depending on the facts, amount to an assumption of responsibility so as to give rise to a duty of care at common law, so might the conduct of a local authority pursuant to the statutory scheme under S20.

Secondly, a duty of care might arise in circumstances where a local authority, acting in accordance with its duties under statute, regulation, or statutory guidance, had taken, or resolved to take, a specific step to safeguard or promote the welfare of a child which amounted to an assumption of responsibility for a child.

In each of these broad categories, the question whether a duty of care had arisen would depend on the specific facts of the case, which would include the specific requirements under statute, regulations or guidance in force at the time. It was important to emphasise that, in exercising their statutory powers and duties, local authority social workers have a wide discretion and are often required to make complex and difficult assessments of what should be done to safeguard and promote the welfare of the particular child.

A claimant asserting that there had been a breach of a duty of care in such cases so as to give rise to a claim in negligence was therefore likely to face a high hurdle. This had perhaps been lost sight of in the cases which had focused on the existence or otherwise of a duty of care.

The question for this court was whether the Master and Deputy Master at first instance, and the judge on appeal, were right to strike out these claims under CPR 3.4. As Lord Reed said in *Poole (2019)*, the existence of an assumption of responsibility can be highly dependent on the facts of a particular case" and "where there appears to be a real possibility that such a case might be made out, a court will not decide otherwise on a strike out application."

The extent of the responsibility assumed by a local authority when a child was accommodated under S20 would plainly vary from case to case. It was certainly arguable that an assumption of

responsibility might arise when a child was voluntarily accommodated in respite care as occurred in the case of YXA. He was accommodated with the same carers under a regular programme of short breaks or respite care because of concerns about his welfare in the care of his parents. He thus became a looked-after child whose welfare the local authority was under the statutory duty to safeguard and protect. This court did not agree with the interpretation preferred by the Master and the Judge that this was merely an assumption of responsibility leading to a duty of care in relation to the accommodation itself. Whether or not there was an assumption of responsibility so as to give rise to a common law duty of care and, if so, whether there was a breach of that duty which caused or contributed to the damage suffered by YXA could not be determined without a full investigation of the facts. A local authority accommodating a child under S20 was capable of amounting to "something more" so as to give rise to an assumption of responsibility by the local authority. Accordingly, this was not a claim which should have been struck out under CPR 3.4(2)(a).

In the case of HXA, the child was never accommodated under S20. But the local authority was involved with the family for a number of years, exercising its statutory powers and duties. The fact that the statutory powers and duties under consideration were substantially the same as were under consideration in *Poole* was, by itself, no answer to the claim. The factual circumstances were very different. In November 1994, there was a child protection investigation after the local authority received a complaint that the child had been assaulted by her mother. It was at least arguable that, in resolving to take those steps, the local authority was assuming responsibility for the children. In 1999, an allegation of sexually inappropriate behaviour by the mother's partner was reported to the school. In January 2000, another allegation of sexual abuse by the mother's partner was reported to a social worker employed by the same local authority. In the light of that allegation, the local authority decided to take specific action designed to protect HXA and her sister, namely arranging for "keeping safe" work to be carried out. It was at least arguable that, in deciding to carry out that work, the local authority was assuming responsibility for the children. In those circumstances, it seems to me that it would be wrong to strike out this claim.

This was still an evolving area of the law in which it would only be through careful and incremental development of principles through decisions reached after full trials on the evidence that it would become clear where precisely the line was to be drawn between those cases where there has been an assumption of responsibility and those where there has not. In due course, as a body of case law emerged, it would become easier at the outset of proceedings to identify the circumstances in which an assumption of responsibility could exist so as to give rise to a duty of care. At that point, there would be greater scope for striking out claims which on any view fell short of establishing a common law duty of care.

Kella Bowers, Head of the Social Care and Abuse Claims Team at **Forbes Solicitors** and a member of the Abuse Claims Practice Procedure SFT comments:

In an area of law where the case law has been lacking clarity for many years, the Supreme Court case of CN v Poole provided some much-needed clarity for both defendants and survivors on the underlying principles upon which claims could be brought. These two appeals were an attempt to further cement those principles and create a body of case law in which those principles were applied. However, the Court of Appeal have instead reverted to the position that the issue of assumption of responsibility is based on the facts of the case and that fully litigated, costly and emotive proceedings are needed to build a body of case law based on individual personal life stories rather than underlying principles. All parties stated aim in making these applications initially, and bringing the appeals subsequently, was to seek clarity. As the Court has declined to make any firm

conclusions on the issue of assumption of responsibility both defendants and survivors' representatives are now left without firm guidance as to the viability of such cases.

The full case report may be found at: [HXA v Surrey County Council \[2022\] EWCA Civ 1196 \(31 August 2022\) \(bailii.org\)](#)

This publication is intended to provide general guidance only. It is not intended to constitute a definitive or complete statement of the law on any subject and may not reflect recent legal developments. This publication does not constitute legal or professional advice (such as would be given by a solicitors' firm or barrister in private practice) and is not to be used in providing the same. Whilst efforts have been made to ensure that the information in this publication is accurate, all liability (including liability for negligence) for any loss and or damage howsoever arising from the use of this publication or the guidance contained therein, is excluded to the fullest extent permitted by law.