Neutral Citation Number: [2021] EWHC 1444 (QB)

Case No: QB-2018-005153

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 May 2021

**Before** :

**MASTER DAGNALL**

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**Between :**

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| **YXA (a protected party by his Litigation Friend, The Official Solicitor to the Senior Courts)** | **Claimant** |
| **- and -** | |
| **WOLVERHAMPTON CITY COUNCIL** | **Defendant** |

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**Justin Levinson** (instructed by **Bolton Burdon Kemp**) for the **Claimant**
**Paul Stagg** (instructed by **Browne Jacobson LLP**) for the **Defendant**

Hearing dates: **26 January 2021**

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# APPROVED JUDGMENT

**MASTER DAGNALL :**

Introduction

1. This is my judgement in relation to an application by the defendant made by application notice dated 30 July 2020 to strike out one of the two bases upon which the Claim is brought ("the Application"). The application to strike out is made under Civil Procedure Rule ("CPR") 3.4(2)(a) on the basis that the particulars of claim do not disclose any reasonable grounds for bringing hey claim in common law negligence, although it is accepted that a parallel claim under the Human Rights Act 1998 ("the 1998 Act") is brought on disclosed reasonable grounds and should proceed.

2. The underlying issue of law in relation to the application is as to what point or points (if any) in a factual history a local authority comes under a positive duty of care to intervene by way of instituting care proceedings under the provisions of the Children Act 1989 ("the 1989 Act") to protect a child who the local authority knows, or ought to know, may be at risk of abuse or neglect i.e. whether what is alleged is sufficient to impose such a duty of care at the stage or stages at which it is alleged that it was negligent for the local authority not to have then or thereafter intervened.

3. The Claim is one of a number which have been or are before the courts relating to the situation where a child (or former child) brings a claim against a relevant local authority alleging in effect that that local authority should have protected them from abuse or neglect by commencing care proceedings during their childhood at an earlier stage than they did (if indeed such proceedings were commenced at all). While it is accepted that a claim under the 1998 Act might

exist in the pleaded circumstances, the defendants who appear before me by Mr Paul Stagg of counsel, by whom in other cases other defendants have similarly appeared, contend that no common law duty of care exists in the relevant pleaded circumstances sufficient to found an action in common law negligence.

4. However, the claimant, who is known in this litigation by the initials YXA under an anonymity order granted previously, and including because YXA was a child at the relevant time and is now a protected party (a matter to which I shall return below), and who appears by Mr Justin Levinson of counsel, and who has appeared for other claimants in similar cases, contends that the pleaded facts do disclose reasonable grounds for the existence of a duty of care at common-law.

5. This issue of law is asserted by the Claimant in two different ways, both disputed by the Defendant, being:

   i) A general assertion that a local authority that knew of sufficient to give rise to a knowledge of, or of a potential possibility of, harm or risk of significant harm to a child in its area, then owed a duty of care to the relevant child to consider (or enter into an investigation regarding the potential for) care proceedings ("the General Duty"); and if not

   ii) A specific assertion that where the local authority has become involved with that child to the extent of providing the child with accommodation under section 20 of the 1989 Act then that will (or at least may), with other circumstances which would not be sufficient to give rise to a duty of care of themselves, give rise to a general duty of care to consider care proceedings (as opposed to merely a duty of care regarding such provision of accommodation and ancillary matters) (I call this for

convenience "the Respite Care Duty" although it does seem to me that the expression "Respite Care" is merely a convenient label where the facts and the associated statutory provisions are what is important).

6. The oral hearing of this application took place on 26 January 2021 by way of remote hearing during the COVID pandemic. After the oral hearing, and as had been anticipated by counsel, judgement was delivered by Deputy Master Bagot QC in the case of HXA and Another v Surrey County Council [2021] EWHC 250 (QB). That was a claim brought by claimants against a local authority for alleged failure to institute care proceedings when they were children. The Deputy Master accepted Mr Stagg's submissions in that case for that defendant and rejected those of Mr Levinson in that case for those claimants, and held that no common law duty of care existed in the circumstances before him, and struck the common-law claim out.

7. I directed that the parties provide written submissions as to the HXA decision and its relevance to the matters before me, and they have done so. It is common ground that the HXA decision directly concerns the first way in which the Claimant's case is put in this case, although the Defendant says that its reasoning also applies to the second way. However, Mr Levinson contends firstly that I should not follow the HXA decision, alternatively that in this case there are facts alleged in relation to the provision of accommodation under section 20 of the 1989 Act which should enable me to distinguish this case from the HXA decision and afford reasonable grounds upon which to base the imposition of a duty of care,

The Relevant Civil Procedure Rules

8. The Application is brought under CPR3.4(2)(a), where the material parts of CPR3.4 provide that:

"3.4

(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.

(2) The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim…"

9. It is common-ground and trite law that:

i) A strike-out application of this nature involves the Court assuming that the facts stated would be proved at trial and asking whether they could rise to a claim in law (see e.g. King v Stiefel [2021] EWHC 1045 (Comm) at paragraph 27)

ii) The rule is, strictly speaking, discretionary (being introduced by the word "may"), although at first sight there would need to be real reason to allow matters which did not disclose reasonable grounds for a claim in law to proceed to a trial with consequent potential waste in time, cost and court resource (all contrary to the CPR 1.1 overriding objective).

## The Alleged Facts

10. The alleged facts are set out (i.e. "stated" although I will also use the older expression "pleaded" for convenience) in the Particulars of Claim. They state in summary that:

    i) the claimant was born in 2001 and moved to the defendant local authority's area in 2007 (this move was from the area of a different local authority which was the First Defendant to this Claim but against whom the proceedings have been discontinued)

    ii) the claimant's mother and father ("the Parents") were throughout engaged in known substance abuse

    iii) the Parents throughout engaged in such parenting conduct as to put the claimant at the risk of suffering, and so that the claimant actually suffered, significant harm, including by permitting a paedophile to babysit the claimant

    iv) the defendant should have known of risks to the claimant from the time of the initial move in 2007, both from its own knowledge and from various referrals and reports made to it by others, and including the previous local authority, and, in fact, held various reviews and child care conferences with respect to the claimant

    v) the defendant at various times in 2007 and following provided accommodation to the claimant away from the Parents under section 20 of the 1989 Act (termed by Mr Stagg as being "the Respite Care") but each time returned the claimant to the Parents

vi) the defendant only took positive steps after a considerable lapse of time, when it eventually instituted a care proceedings process with the results that: at the end of 2009 the Parents signed an agreement for the claimant to be accommodated under a long term placement pursuant section 20 of the 1989 Act; in early 2010 the claimant was placed with foster carers; and eventually later in 2010 an interim care order and then a final care order was made.

11. The allegations of negligence are to the effect that at and from the time of the 2007 move, the defendant should have investigated and/or appreciated the risk to the claimant, and have instituted protective steps by way of care proceedings. It is common ground that these allegations are reasonably arguable as a matter of law if, but only if, the pleaded facts are sufficient to impose a duty of care in law upon the defendant.

12. However, it is also common grounds that the facts alleged, if proved, would give rise to reasonable grounds for a claim under section 7 of the 1998 Act. Counsel were not clear before me as to how, if at all, the legal approach, remedies and quantum of damages applicable and available in such circumstances might differ (at least in practice) with those of a common-law claim (assuming that a duty of care existed) made in these circumstances, although there appeared to be some common ground that there might well be differences.

The Claimant

13. The claimant was, of course, a child at the relevant time. The claimant is now said to be a protected party and so brings this claim by their litigation friend, the Official Solicitor. In view of certain of the material before me at the hearing, I queried whether there was sufficient evidence to justify the contention that the claimant was a protected party by reason of not having the mental capacity to conduct litigation. Following the hearing I was provided with a psychiatric report from Professor Bashir and a Certificate from the Official Solicitor which has satisfied me that the claimant does lack the relevant capacity (within the meaning of the Mental Capacity Act 2005 in terms of mental impairments which result in the claimant being unable to understand, retain, process or evaluate the information or express the instructions which would be required for the litigation process).

The Children Act 1989

14. The 1989 Act is structured in a number of Parts.

15. Part I is headed "Introductory". In section 2(1) it is provided that the birth parents (at least if the father's name appears on the birth certificate), and thus the Parents, each have parental responsibility for the child. In section 3(1) it is provided that "parental responsibility" means "all the rights, duties, powers responsibilities and authorities which by law a parent of a child has in relation to the child".

16. Part II relates to various orders which the Court may make in certain children proceedings (generally, but not exclusively, proceedings brought by parents i.e. "private law" proceedings).

17. Part III is headed "Support for children and families provided by local authorities in England." This includes the following sections.

18. Section 17 which provides that:

> "17 Provision of services for children in need, their families and others.
>
> (1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to those children's needs.
>
> (2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.
>
> (3) Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a

particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.

(4) The Secretary of State may by order amend any provision of Part I of Schedule 2 or add any further duty or power to those for the time being mentioned there.

(4A) Before determining what (if any) services to provide for a particular child in need in the exercise of functions conferred on them by this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare—

(a ) ascertain the child's wishes and feelings regarding the provision of those services; and

(b) give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as they have been able to ascertain.

(5) Every local authority—

(a)shall facilitate the provision by others (including in particular voluntary organisations) of services which it is a function of the authority to provide by virtue of this section, or section 18, 20, 22A to 22C, 23B to 23D, 24A or 24B; and

(b)may make such arrangements as they see fit for any person to act on their behalf in the provision of any such service.

(6) The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation…

(7) Assistance may be unconditional or subject to conditions as to the repayment of the assistance or of its value (in whole or in part).

(8) Before giving any assistance or imposing any conditions, a local authority shall have regard to the means of the child concerned and of each of his parents…"

(10) For the purposes of this Part a child shall be taken to be in need if—

(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;

(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled,

and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.

(11) For the purposes of this Part, a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed; and in this Part—

"development" means physical, intellectual, emotional, social or behavioural development; and

"health" means physical or mental health…"

19. Section 20 provides that:

"20 Provision of accommodation for children: general.

(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—

(a) there being no person who has parental responsibility for him;

(b) his being lost or having been abandoned; or

(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

(2) Where a local authority provide accommodation under subsection (1) for a child who is ordinarily resident in the area of another local authority, that

other local authority may take over the provision of accommodation for the child within—

(a)three months of being notified in writing that the child is being provided with accommodation; or

(b)such other longer period as may be prescribed in regulations made by the Secretary of State...

(3) Every local authority shall provide accommodation for any child in need within their area who has reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation.

(4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare.

(5) A local authority may provide accommodation for any person who has reached the age of sixteen but is under twenty-one in any community home which takes children who have reached the age of sixteen if they consider that to do so would safeguard or promote his welfare.

(6) Before providing accommodation under this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare—

(a)ascertain the child's wishes and feelings regarding the provision of accommodation; and

(b)give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as they have been able to ascertain.

(7) A local authority may not provide accommodation under this section for any child if any person who—

(a)has parental responsibility for him; and

(b)is willing and able to—

(i)provide accommodation for him; or

(ii)arrange for accommodation to be provided for him,

objects.

(8) Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section.

(9) Subsections (7) and (8) do not apply while any person—

(a) who is named in a child arrangements order as a person with whom the child is to live;

(aa)who is a special guardian of the child; or

(b)who has care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children,

agrees to the child being looked after in accommodation provided by or on behalf of the local authority.

(10) Where there is more than one such person as is mentioned in subsection (9), all of them must agree.

(11) Subsections (7) and (8) do not apply where a child who has reached the age of sixteen agrees to being provided with accommodation under this section…."

20. Section 22 provides that:

"(1) In this section, any reference to a child who is looked after by a local authority is a reference to a child who is—

(a) in their care; or

(b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which are social services functions within the meaning of the Local Authority Social Services Act 1970, apart from functions under sections 23B and 24B

(2) In subsection (1) "accommodation" means accommodation which is provided for a continuous period of more than 24 hours.

(3) It shall be the duty of a local authority looking after any child—

> (a)to safeguard and promote his welfare; and (b)to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case…"

21. Part IV of the 1989 Act provides in section 31 onwards for the (family) court to have power on the application of "any local authority" to make a care or supervision order but only (section 31(2)) where:

> "… the court "is satisfied (a) that the child concerned is suffering, or is likely to suffer, significant harm; and (b) that the harm, or likelihood of harm, is attributable to—
>
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
>
> (ii) the child's being beyond parental control."

22. Part V of the 1989 Act provides for the (family) court to make certain other protective orders (including what are called "emergency protection orders") in relation to a child but (again) in effect only where (section 43(3)) "the applicant has reasonable cause to suspect that the child is suffering, or is likely to suffer, significant harm" or (section 44(1)(a)) "there is reasonable cause to believe that the child is likely to suffer significant harm if [he is not removed from or if he remains where he is accommodated; and even if that is not with their parents]"

23. Thus:

i) section 17 confers a general duty ("the Section 17 Duty") upon local authorities to safeguard children in their area and consequential powers to provide various services

ii) section 20(1)(c) requires a local authority to provide accommodation where the child's carer (even though there is a person(s) with parental responsibility for the child) is prevented, permanently or temporarily, from providing the child with suitable accommodation or care; and section 20(4) permits the local authority to provide accommodation or care where it considers that to do so would safeguard or promote the child's welfare. However, both provisions are: subject to sub-section (7) which provides that they cannot be invoked (absent the existence of at least some form of court order) if any person with parental responsibility can provide accommodation (as the Parents could always have done in this case) and objects; and to sub-section (8) which enables any person with personal responsibility to remove the child from the local authority provided accommodation. I term this "Respite Care" (as Mr Stagg did, although Mr Levinson was keen for me just to treat this and the word "respite" as a convenient label rather than as having any special meaning and which approach I have adopted (his point being, which I accept, that it is simply a provision of accommodation under and in accordance with and for the purposes of the statutory sections). Section 22 requires the local authority accommodating a child to safeguard and promote their welfare

iii) Parts IV and V enable a local authority to take care and other intervention proceedings (to which I refer below generally as "care etc. proceedings") where they and/or is there is reasonable cause to believe that the child has suffered or is likely to suffer significant harm.

The Allegations in this Case

24. What is alleged in this case as a matter of fact, and which I therefore must accept for the purposes of this hearing and judgment, is that:

i) At all times circumstances existed known to the defendant which would have led any reasonable local authority (and the family court if the matter had been brought before it) to consider that the claimant had suffered and/or would be likely to suffer significant harm if the claimant remained with the Parents at their home, and so that care proceedings would (or at least been likely to) have resulted (or at least been likely to in protective orders being made ("the General Duty Matters")

ii) The defendant did at times provide accommodation for the claimant with the consent of the Parents for various agreed fixed periods of time at the end of each of which the defendant returned the claimant to the Parents (and without making any application to the family court) ("the Respite Care Matters").

25. The claimant would also put the case as a matter of fact in the alternative at a lower level, in case the claimant did not succeed at trial in establishing facts to the extent of the high level set out above. However, as this is a striking-out case, it seems to me that I should proceed on the basis that the highest level facts

would be established at any trial (although the defendant is, of course, not making admissions that any of such would be proven to have been the case should a trial take place).

26. As stated above, the claimant contends that the General Duty Matters in conjunction with the provisions of the 1989 Act give rise in themselves to a common-law duty of care to commence proceedings; but in the alternative contends that they with the Respite Care Matters gave rise to such a duty of care (possibly extended to also be a duty not to return the claimant to the Parents without having first taken care etc. proceedings).

The Case-Law

27. I was taken to a considerable volume of case-law, much of which was reviewed in the HXA decision, and from which I cite various paragraphs for reasons of convenience and so as to put in context and explain the analysis in HXA, but also because they are important in relation to the second way in which Mr Levinson puts the claim based on the Respite Care aspect.

28. Hedley Byrne v Heller [1964] AC 465 is a seminal case with regard to duties of care. At pages 495-6 it was explained that duties of care could arise including in circumstances where the claimant had not appreciated that a defendant was assuming a responsibility to them or where there was no direct dealing between them:

"My Lords, it seems to me that if A assumes a responsibility to B to tender him deliberate advice, there could be a liability if the advice is negligently given. I say "could be" because the ordinary courtesies and exchanges of life would

become impossible if it were sought to attach legal obligation to every kindly and friendly act. But the principle of the matter would not appear to be in doubt. If A employs B (who might. for example, be a professional man such as an accountant or a solicitor or a doctor) for reward to give advice and if the advice is negligently given there could be a liability in B to pay damages. The fact that the advice is given in words would not, in my view, prevent liability from arising. Quite apart, however, from employment or contract there may be circumstances in which a duty to exercise care will arise if a service is voluntarily undertaken. A medical man may unexpectedly come across an unconscious man, who is a complete stranger to him, and who is in urgent need of skilled attention: if the medical man, following the fine traditions of his profession, proceeds to treat the unconscious man he must exercise reasonable skill and care in doing so. In his speech in *Banbury v. Bank of Montreal* [183] Lord Atkinson said: "It is well established that if a doctor proceeded to treat a patient gratuitously, even in a case where the patient was insensible at the time and incapable of employing him, the doctor would be bound to exercise all the professional skill and knowledge he possessed, or professed to possess, and would be guilty of gross negligence if he omitted to do so." To a similar effect were the words of Lord Loughborough in the much earlier case of *Shiells v. Blackburne* [184] when he said: "... if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence." Compare also *Wilkinson v. Coverdale.* [185] I can see no difference of principle in the case of a banker. If someone who was not a customer of a bank made a formal approach to the bank with a definite request that the bank would give him deliberate

advice as to certain financial matters of a nature with which the bank ordinarily dealt the bank would be under no obligation to accede to the request: if, however, they undertook, though gratuitously, to give deliberate advice (I exclude what I might call casual and perfunctory conversations) they would be under a duty to exercise reasonable care in giving it. They would be liable if they were negligent although, there being no consideration, no enforceable contractual relationship was created.

In the absence of any direct dealings between one person and another, there are many and varied situations in which a duty is owed by one person to another. A road user owes a duty of care towards other road users. They are his "neighbours." A duty was owed by the dock owner in *Heaven v. Pender.* [186] Under a contract with a shipowner he had put up a staging outside a ship in his dock. The plaintiff used the staging because he was employed by a ship painter who had contracted with the shipowner to paint the outside of the ship. The presence of the plaintiff was for business in which the dock owner was interested and the plaintiff was to be considered as having been invited by the dock owner to use the staging. The dock owner was therefore under an obligation to take reasonable care that at the time when the staging was provided by him for immediate use it was in a fit state to be used. For an injury which the plaintiff suffered because the staging had been carelessly put up he was entitled to succeed in a claim against the defendant. The chemist in *George v. Skivington* sold the bottle of hair wash to the husband knowing that it was to be used by the wife. It was held on demurrer that the chemist owed a duty towards the wife to use ordinary care in compounding the hair wash. In *Donoghue v. Stevenson* it was held that the manufacturer of an article of food, medicine, or the like, is

under a duty to the ultimate consumer to take reasonable care that the article is free from defect likely to cause injury to health.

My Lords, these are but familiar and well known illustrations, which could be multiplied, which show that irrespective of any contractual or fiduciary relationship and irrespective of any direct dealing, a duty may be owed by one person to another."

29. In X v Bedfordshire [1995] 2 AC 633 a claim was made that a local authority had failed to take care proceedings as early as it should have done. The recital of the facts at p742C-D indicates that there had been some periods of Respite Care. At pp748G-749G Lord Browne-Wilkinson rejected various defences but then went on to consider whether a duty of care should exist at all under ordinary common-law principles, and held that under the modern "incremental approach" with regard to new categories of duties of care that one should not:

"I turn then to consider whether, in accordance with the ordinary principles laid down in the *Caparo* case [1990] 2 A.C. 605, the local authority in the *Bedfordshire* case owed a direct duty of care to the plaintiffs. The local authority accepts that they could foresee damage to the plaintiffs if they carried out their statutory duties negligently and that the relationship between the authority and the plaintiffs is sufficiently proximate. The third requirement laid down in *Caparo* is that it must be just and reasonable to impose a common law duty of care in all the circumstances. It was submitted that this third requirement is only applicable in cases where the plaintiffs' claim is for pure economic loss and that it does not apply where, as in the child abuse cases, the claim is for physical damage. I reject this submission: although *Caparo* and many other of the more

recent cases were decisions where only pure economic loss was claimed, the same basic principles apply to claims for physical damage and were applied in, for example, *Hill* v. *Chief Constable of West Yorkshire* [1989] A.C. 53.

Is it, then, just and reasonable to superimpose a common law duty of care on the local authority in relation to the performance of its statutory duties to protect children? In my judgment it is not. Sir Thomas Bingham M.R. took the view, with which I agree, that the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter considerations are required to override that policy ante, p. 663C-D. However, in my judgment there are such considerations in this case.

First, in my judgment a common law duty of care would cut across the whole statutory system set up for the protection of children at risk. As a result of the ministerial directions contained in "Working Together" the protection of such children is not the exclusive territory of the local authority's social services. The system is inter-disciplinary, involving the participation of the police, educational bodies, doctors and others. At all stages the system involves joint discussions, joint recommendations and A joint decisions. The key organisation is the Child Protection Conference, a multi-disciplinary body which decides whether to place the child on the Child Protection Register. This procedure by way of joint action takes place, not merely because it is good practice, but because it is required by guidance having statutory force binding on the local authority. The guidance is extremely detailed and extensive: the current edition of "Working Together" runs to 126 pages. To introduce into such a system a common law duty of care enforceable against only one of the participant bodies

would be manifestly unfair. To impose such liability on all the participant bodies would lead to almost impossible problems of disentangling as between the respective bodies the liability, both primary and by way of contribution, of each for reaching a decision found to be negligent.

Second, the task of the local authority and its servants in dealing with children at risk is extraordinarily delicate. Legislation requires the local authority to have regard not only to the physical wellbeing of the child but also to the advantages of not disrupting the child's family environment: see, for example, section 17 of the Act of 1989. In one of the child abuse cases, the local authority is blamed for removing the child precipitately: in J-J the other, for failing to remove the children from their mother. As the Report of the Inquiry into Child Abuse in Cleveland 1987 (Cm. 412) said, at p. 244:

"It is a delicate and difficult line to tread between taking action too soon and not taking it soon enough. Social services whilst putting the needs of the child first must respect the rights of the parents; they also must work if possible, with the parents for the benefit of the children. These parents themselves are often in need of help. Inevitably a degree of conflict develops between those objectives."

Next, if a liability in damages were to be imposed, it might well be that local authorities would adopt a more cautious and defensive approach to their duties. For example, as the Cleveland Report makes clear, on occasions the speedy decision to remove the child is sometimes vital. If the authority is to be made liable in damages for a negligent decision to remove a child (such negligence lying in the failure properly first to investigate the allegations) there would be a substantial temptation to postpone making such a decision until further inquiries

have been made in the hope of getting more concrete facts. Not only would the child in fact being abused be prejudiced by such delay: the increased workload inherent in making such investigations would reduce the time available to deal with other cases and other children.

The relationship between the social worker and the child's parents is frequently one of conflict, the parent wishing to retain care of the child, the social worker having to consider whether to remove it. This is fertile ground in which to breed ill feeling and litigation, often hopeless, the cost "of which both in terms of money and human resources will be diverted from the performance of the social service for which they were provided. The spectre of vexatious and costly litigation is often urged as a reason for not imposing a legal duty. But the circumstances surrounding cases of child abuse make the risk a very high one which cannot be ignored.

If there were no other remedy for maladministration of the statutory system for the protection of children, it would provide substantial argument for imposing a duty of care. But the statutory complaints procedures contained in section 76 of the Act of 1980 and the much fuller procedures now available under the Act of 1989 provide a means to have

"grievances investigated, though not to recover compensation. Further, it was submitted (and not controverted) that the local authorities Ombudsman would have power to investigate cases such as these.

Finally, your Lordships' decision in the *Caparo* case [1990] 2 A.C. 60 lays down that, in deciding whether to develop novel categories of negligence the court should proceed incrementally and by analogy with decided categories. We were

not referred to any category of case in which a duty of care has been held to exist which is in any way analogous to the present cases. Here, for the first time, the plaintiffs are seeking to erect a common law duty of care in relation to the administration of a statutory social welfare scheme. Such a scheme is designed to protect weaker members of society (children) from harm done to them by others. The scheme involves the administrators in exercising discretions and powers which could not exist in the private sector and which in many cases bring them into conflict with those who, under the general law, are responsible for the child's welfare. To my mind, the nearest analogies are the cases where a common law duty of care has been sought to be imposed upon the police (in seeking to protect vulnerable members of society from wrongs done to them by others) or statutory regulators of financial dealings who are seeking to protect investors from dishonesty. In neither of those cases has it been thought appropriate to superimpose on the statutory regime a common law duty of care giving rise to a claim in damages for failure to protect the weak against the wrongdoer: see *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53 and *Yuen Kun Yeu* v. *Attorney-General of Hong Kong* [1988] A.C. 175. In the latter case, the Privy Council whilst not deciding the point said, at p. 198, that there was much force in the argument that if the regulators had been held liable in that case the principles leading to such liability "would surely be equally applicable to a wide range of regulatory agencies, not only in the financial field, but also, for example, to the factory inspectorate and social workers, to name only a few." In my judgment, the courts should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrongdoings of others."

30. However, in other conjoined cases with which Lord Browne-Wilkinson went on to deal, it was held that a duty of care might exist where the local authority, by itself or its servants, had involved itself so in some way take over an aspect of the child's life e.g. their education. No specific mention was made of the fact that Respite Care had been provided on a temporary basis, although Lord Browne-Wilkinson would have been likely to have had it in mind, he having referred to it earlier in his judgment.

31. In Capital & Counties v Hampshire [1997] QB 1004, an attempt to claim against a fire brigade for failing to respond to an emergency call expeditiously was dismissed on the basis of their being no duty of care, but a claim for damage caused by negligence in the course of the eventual fighting of the fire was allowed. The decision is helpful in that it points up that in terms of the possible existence of duties of care there is a difference between allegations of failure to provide a benefit (there coming and then engaging in fire-fighting) and causing damage during the course of actually attempting to provide a benefit; but otherwise it seems to me that the matters of principle are more relevantly dealt with in the subsequent case-law.

32. In Barratt v Enfield [2001] 2 AC 550, a claimant sued the local authority where they had been taken into care and were then abused. X v Bedfordshire was distinguished on the basis that Enfield had taken over the care of the child,

(p569B-C) "The question in the present case is different, since the child was taken into care; it is therefore necessary to consider whether any acts or omissions and if so what kind of acts or omissions can ground a claim in negligence. The fact that no completely analogous claim has been accepted by

the courts previously points to the need for caution and the need to proceed "incrementally" and "by analogy with decided cases".”

and so that it was then possible that a duty of care might be imposed upon it in relation to the service which it had actually provided.

33. In W v Essex [2001] 2 AC 592 (a case about whether a duty of care was owed to an alleged secondary victim), caution was expressed as to whether it was appropriate to strike-out, at pages 598B and 600C-D:

“For the application to strike out to succeed it must be shown that the statement of claim discloses no cause of action or constitutes an abuse of process of the court and for that inquiry the factual averments must be taken as true though many of them are denied by the defendants.

Although the power to strike out a claim which really has no chance of succeeding in law is a very valuable one to protect defendants and to prevent the court's time being used (to the detriment of other cases waiting to be heard) in the investigation of the allegations, it has to be exercised cautiously as has so often been said. In X *(Minors) v Bedfordshire County Council* [1995] 2 AC 633 where the question was whether a duty of care arose in child abuse cases and in special educational needs cases Lord Browne-Wilkinson said, at pp 740-741: "Where the law is not settled but is in a state of development (as in the present cases) it is normally inappropriate to decide novel questions on hypothetical facts." He added that it could be different where the question depended only on the construction of relevant statutory provisions. At p 741 he agreed with Sir Thomas Bingham MR that:

"if, on the facts alleged in the statement of claim, it is not possible to give a certain answer whether in law the claim is maintainable then it is not appropriate to strike out the claim at a preliminary stage but the matter must go to trial when the relevant facts will be discovered."

The complex range of facts in those cases shows how difficult the exercise is.

In *Barrett v Enfield London Borough Council* [2001] 2 AC 550 Lord Browne-Wilkinson repeated what he had said in the X *(Minors)* case and, at p 557, added that the development of the law should be on the basis of actual facts found at trial "not on hypothetical facts assumed (possibly wrongly) to be true for the purposes of the strike out". I took the view, at p 574, that "the question whether it is just and reasonable to impose a liability of negligence is not to be decided in the abstract for all acts or omissions of a statutory authority, but is to be decided on the basis of what is proved". Causation is largely a question of fact to be proved and the facts needed to be investigated. Lord Hutton, at p 587, agreed that the claim should not be struck out "on the ground that it gives rise to issues which are non-justiciable".

It seems to me that it cannot be said here that the claim that there was a duty of care owed to the parents and a breach of that duty by the defendants is unarguable, that it is clear and obvious that it cannot succeed….

On a strike out application it is not necessary to decide whether the parents' claim must or should succeed if the facts they allege are proved. On the contrary, it would be wrong to express any view on that matter. The question is whether if the facts are proved they must fail. It is not enough to recognise, as I do

recognise at this stage, that the parents may have difficulties in establishing their claim."

34. In D v East Berkshire Community NHS Trust 2004 QB 558 a claim was made based on an erroneous diagnosis of abuse which was said to have caused damage as a result of care proceedings then being taken. At paragraphs 82-85 the Court of Appeal considered that X v Bedfordshire in the context of already having decided that it was not a bar to a claim under the 1998 Act, and held that:

"81 Thus litigation involving factual enquiries of the nature considered above is now a potential consequence of the conduct of those involved in taking decisions in child abuse cases. In these circumstances the reasons of policy that led the House of Lords to hold that no duty of care towards a child arises, in so far as those reasons have not already been discredited by the subsequent decisions of the House of Lords, will largely cease to apply. Substantial damages will be available on proof of individual shortcomings, which will be relevant alike to a claim based on breach of section 6 of the Human Rights Act and a claim based on breach of a common law duty of care.

82 Can there, in these circumstances, be any justification for preserving a rule that no duty of care is owed in negligence because it is not fair, just and reasonable to impose such a duty? It is true that a claim under the Human Rights Act will only lie against public authorities and not against the individuals employed by them. But the reality is that claims in negligence are brought primarily to establish liability on the part of the local authorities and individuals are unlikely to be personally at risk. In so far as the risk of legal proceedings will inhibit individuals from boldly taking what they believe to be the right

course of action in the delicate situation of a case where child abuse is suspected, we think that this factor will henceforth be present, whether the anticipated litigation is founded on the Human Rights Act or on the common law duty of care.

83 In so far as the position of a child is concerned, we have reached the firm conclusion that the decision in *Bedfordshire* cannot survive the Human Rights Act. Where child abuse is suspected the interests of the child are paramount - see S.1 Children Act 1989. Given the obligation of the local authority to respect a child's Convention rights, the recognition of a duty of care to the child on the part of those involved should not have a significantly adverse effect on the manner in which they perform their duties. In the context of suspected child abuse, breach of a duty of care in negligence will frequently also amount to a violation of Article 3 or Article 8. The difference, of course, is that those asserting that wrongful acts or omissions occurred before October 2000 will have no claim under the Human Rights Act. This cannot, however, constitute a valid reason of policy for preserving a limitation of the common law duty of care which is not otherwise justified. On the contrary, the absence of an alternative remedy for children who were victims of abuse before October 2000 militates in favour of the recognition of a common law duty of care once the public policy reasons against this have lost their force.

84 It follows that it will no longer be legitimate to rule that, as a matter of law, no common law duty of care is owed to a child in relation to the investigation of suspected child abuse and the initiation and pursuit of care proceedings. It is possible that there will be factual situations where it is not fair, just or reasonable

to impose a duty of care, but each case will fall to be determined on its individual facts.

85 In reaching this decision we do not suggest that the common law duty of care will replicate the duty not to violate Articles 3 and 8. Liability for breach of the latter duty and entitlement to compensation can arise in circumstances where the tort of negligence is not made out. The area of factual enquiry where breaches of the two duties are alleged are, however likely to be the same."

35. There was a dispute between counsel before me as to whether paragraph 84 of the judgment was directed to the General Duty Matters state of affairs as in X v Bedfordshire where care proceedings had not been taken, or to the situation where the child had been taken into care by the local authority. The paragraph is, in context, ambiguous as D v East Berkshire was not a General Duty Matters case on the facts, but rather a situation of where a specific intervention had taken place, and so what was said in relation to a non-removal case (as this one is) was, at most, obiter.

36. D v East Berkshire was considered by the Supreme Court in N v Poole [2019] UKSC 25 (which I deal with and cite in below).

37. At paragraphs 52-58 the Supreme Court cited paragraph 84 of D v East Berkshire (and considered the judgments in the House of Lords to the limited extent that one of those conjoined cases had been appealed from the Court of Appeal) but in paragraph 55 stated "The court did not need to consider whether there had been an assumption of responsibility towards the child, since the doctors and social workers were alleged to have harmed her, rather than to have failed to protect her from harm." And then went on in paragraph 56 to say:

"56 The Court of Appeal's reasoning effectively knocked away the public policy objection to liability. It did not, however, undermine some other aspects of the reasoning in *X (Minors) v Bedfordshire*. It remained the position that, where a decision under challenge was taken in the exercise of a statutory discretion, it was necessary to establish that the decision fell outside the ambit of the discretion and was not, therefore, authorised by Parliament. It also remained necessary, in circumstances where a duty of care depended on an assumption of responsibility, to establish that there had been such an assumption of responsibility, and that the duty contended for fell within its scope."

38. In paragraph 58 it was made clear that "a duty of care could be owned to a child" in the context of a local authority's child protection duties.

39. It seems to me that the words "it also remained necessary" at least suggest that while the Supreme Court regarded D v East Berkshire as removing public policy objections to the existence of a duty of care, it still required something more (an "assumption of responsibility" although that did not exclude something else sufficient) to be required to give rise to a duty of care.

40. In X and Y v Hounslow [2009] EWCA Civ 286, the question of a liability of a social worker to a vulnerable adult was considered where a particular intervention had not taken place. Mr Levinson relied in his Skeleton (but not in oral argument) upon a passage where it was recorded as accepted by the parties and held that the social worker had behaved perfectly reasonably. I find that the decision proceeded simply on the basis that even if there was a duty, but without deciding that there was any such duty, it would not have been breached.

41. In Michael v Chief Constable of South Wales Police [2015] AC 1732 there had been a failure to respond to a 999 call resulting in the harm to a victim from a perpetrator. At paragraphs 97 onwards it was held that a duty of care is not ordinarily owed by one person to protect another from harm from a third party but that there were exceptions where (1) the person was in control of the third party (paragraph 99) and (2) where the person had assumed a responsibility to safeguard the victim (paragraph 100) it being said that "There has sometimes been a tendency for courts to use the expression "assumption of responsibility" when in truth the responsibility has been imposed by the court rather than assumed by D. It should not be expanded artificially."

42. In paragraph 102 the "incremental approach" was affirmed:

"102 It is true that the categories of negligence are never closed (*Heaven v Pender* (1883) 11 QBD 503), and it would be open to the court to create a new exception to the general rule about omissions. The development of the law of negligence has been by an incremental process rather than giant steps. The established method of the court involves examining the decided cases to see how far the law has gone and where it has refrained from going. From that analysis it looks to see whether there is an argument by analogy for extending liability to a new situation, or whether an earlier limitation is no longer logically or socially justifiable. In doing so it pays regard to the need for overall coherence. Often there will be a mixture of policy considerations to take into account."

43. In paragraph 114 reference was made to it not following that the existence of a public system of protection should give rise to duties of care:

"114 It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law."

44. In consequence it was held that no common-law duty of care could exist but that a 1998 Act claim was allowed to proceed.

45. In Robinson v Chief Constable of West Yorkshire Police [2018] AC 736, a case of harm caused by positive action (a police officer colliding with a pedestrian), the incremental approach was again affirmed, it being said at paragraphs 26-29 that:

"26. Applying the approach adopted in *Caparo*, there are many situations in which it has been clearly established that a duty of care is or is not owed: for example, by motorists to other road users, by manufacturers to consumers, by employers to their employees, and by doctors to their patients. As Lord Browne-Wilkinson explained in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 560, "Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company ... that decision will apply to all future cases of the same kind". Where the existence or non-existence of a duty of care has been established, a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles. It is therefore unnecessary and inappropriate to reconsider whether the existence of the duty

is fair, just and reasonable (subject to the possibility that this court may be invited to depart from an established line of authority). Nor, a fortiori, can justice and reasonableness constitute a basis for discarding established principles and deciding each case according to what the court may regard as its broader merits. Such an approach would be a recipe for inconsistency and uncertainty, as Hobhouse LJ recognised in *Perrett v Collins* [1999] PNLR 77, 90-91:

"It is a truism to say that any case must be decided taking into account the circumstances of the case, but where those circumstances comply with established categories of liability, a defendant should not be allowed to seek to escape from liability by appealing to some vaguer concept of justice or fairness; the law cannot be re-made for every case. Indeed, the previous authorities have by necessary implication held that it is fair, just and reasonable that the plaintiff should recover in the situations falling within the principles they have applied."

27. It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Following *Caparo,* the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is "fair, just and

reasonable". As Lord Millett observed in *McFarlane v Tayside Health Board* [2000] 2 AC 59, 108, the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases. But it is also "engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper".

28. In the present case, Hallett LJ cited the decision of this court in *Smith v Ministry of Defence (JUSTICE intervening)* [2013] UKSC 41; [2014] AC 52 as an example of a decision in which there was a focus on the three ingredients mentioned by Lord Bridge. That was however a case raising a novel legal issue, relating to the provision of protective equipment to soldiers on active duty, and the scope of combat immunity: it did not concern an established category of liability. Hallett LJ also relied on a passage in the speech of Lord Steyn in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211, 235, in which he remarked that "the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases". That was a case concerned with the loss of a ship and its cargo as a result of negligent advice, in which the reasoning was essentially directed to considerations relevant to economic loss. As Hobhouse LJ observed in *Perrett v Collins* at p 92:

"*Marc Rich* should not be regarded as an authority which has a relevance to cases of personal injury or as adding any requirements that an injured plaintiff do more than bring his case within established principles. If a plaintiff is

attempting to establish some novel principle of liability, then the situation would be different."

It was in any event made clear in *Michael* that the idea that *Caparo* established a tripartite test is mistaken.

29. Properly understood, *Caparo* thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable. In the present case, however, the court is not required to consider an extension of the law of negligence. All that is required is the application to particular circumstances of established principles governing liability for personal injuries.*"*

46. These decisions were then further reviewed by the Supreme Court in N v Poole [2019] UKSC 25. This concerned a claim pleaded against the local authority by a family which had been placed by the local authority in accommodation with abusive neighbours about whom the family complained but where nothing sufficient was (allegedly) done. The case was put on the basis of there having been a duty (and negligent failure) to (properly) investigate and take protective steps. However, that case (and also a possible argument based on the local

authority having created the danger by way of the placement itself) was rejected with the Supreme Court holding that no relevant duty existed on those pleaded facts (although it was also to consider that nothing which could amount to a breach of such a duty, had it existed, was pleaded either).

47. At paragraph 28 it was again stated that "public bodies did not generally owe a duty of care to confer benefits on individuals, for example by protecting them from harm…" but that "…as in the case of private individuals, however, a duty to protect from harm or to confer some other benefit might arise in particular circumstances, as for example where the public body had created the source of danger or had assumed responsibility to protect the claimant from harm…"

48. At paragraphs 66-73, the concept of "assumption of responsibility" was considered both in general and by of application to the facts of such cases as X v Bedfordshire and Barrett v Enfield, as follows:

"Assumption of responsibility

66. It is apparent from the cases so far discussed that the nature of an assumption of responsibility is of importance in the present context. That topic should be considered before turning to the circumstances of the present case.

67. Although the concept of an assumption of responsibility first came to prominence in *Hedley Byrne* in the context of liability for negligent misstatements causing pure economic loss, the principle which underlay that decision was older and of wider significance (see, for example, *Wilkinson v Coverdale* (1793) 1 Esp 75). Some indication of its width is provided by the

speech of Lord Morris of Borth-y-Gest in *Hedley Byrne*, with which Lord Hodson agreed, at pp 502-503:

"My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

It is also apparent from well-known passages in the speech of Lord Devlin, at pp 528-529 and 530:

"I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Norton v Lord Ashburton* [1914] AC 932, 972 are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. ... I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. … Where, as in the present case, what is relied on is a particular

relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility."

68. Since *Hedley Byrne,* the principle has been applied in a variety of situations in which the defendant provided information or advice to the claimant with an undertaking that reasonable care would be taken as to its reliability (either express or implied, usually from the reasonable foreseeability of the claimant's reliance upon the exercise of such care), as for example in *Smith v Eric S Bush,* or undertook the performance of some other task or service for the claimant with an undertaking (express or implied) that reasonable care would be taken, as in *Henderson v Merrett Syndicates Ltd* and *Spring v Guardian Assurance plc* [1995] 2 AC 296. In the latter case, Lord Goff observed at p 318:

"All the members of the Appellate Committee in [*Hedley Byrne*] spoke in terms of the principle resting upon an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill. Lord Devlin, in particular, stressed that the principle rested upon an assumption of responsibility when he said, at p 531, that 'the essence of the matter in the present case and in others of the same type is the acceptance of responsibility'. … Furthermore, although *Hedley Byrne* itself was concerned with the provision of information and advice, it is clear that the principle in the case is not so limited and extends to include the performance of other services, as for example the professional services rendered by a solicitor to his client: see, in particular, Lord Devlin, at pp 529-530. Accordingly where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have

assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct."

69. That approach is reflected in the cases previously discussed. In *X (Minors) v Bedfordshire,* the social workers were held not to have assumed any responsibility towards the claimants in the child abuse cases on the basis that they were not providing their professional services to the claimants, and it was not reasonably foreseeable that the claimants would rely on the reports which they provided to their employers. In the education cases, on the other hand, the local authority assumed responsibility for the advisory service which it was understood to provide to the public, since the public could reasonably be expected to place reliance on the advice; a school assumed responsibility for meeting the educational needs of the pupils to whom it provided an education; the headmaster came under a duty of care by virtue of his responsibility for the school; and an advisory teacher assumed responsibility for advice which he knew would be communicated to a child's parents and on which they would foreseeably rely. In *Barrett v Enfield,* the local authority assumed responsibility for the welfare of a child when it took him into its care. In *Phelps v Hillingdon,* the educational psychologist assumed responsibility for the professional advice which he provided about a child in circumstances where it was reasonably foreseeable that the child's parents would rely on that advice.

70. It is convenient at this point to consider a submission advanced on behalf of the council in the present case, said to be supported by some recent decisions of the Court of Appeal, that a public authority cannot assume responsibility merely by operating a statutory scheme. The submission was

based primarily on the judgment of Dyson LJ in *Rowley v Secretary of State for Work and Pensions* [2007] EWCA Civ 598; [2007] 1 WLR 2861, paras 51-55, where it was held that the Secretary of State, in carrying out his statutory duty to make an assessment of child support maintenance, did not assume a responsibility towards the parent with care of the children in question. Dyson LJ focused on the requirement that responsibility must be "voluntarily accepted or undertaken", as Lord Devlin put it in *Hedley Byrne* at p 529: a requirement which, he held, was not met merely by the Secretary of State's performance of his statutory duty under the legislation.

71. That decision was followed in *X v Hounslow London Borough Council* [2009] EWCA Civ 286; [2009] 2 FLR 262, a case with similarities to the present case, where it was held that a local authority's social services and housing departments had not assumed a responsibility to protect vulnerable council tenants and their children from harm inflicted by third parties. Sir Anthony Clarke MR, giving the judgment of the Court of Appeal, observed at para 60 that the case was not one of assumption of responsibility unless the assumption of responsibility could properly be held to be voluntary. That was because "a public authority will not be held to have assumed a common law duty merely by doing what the statute requires or what it has power to do under a statute, at any rate unless the duty arises out of the relationship created as a result, such as in Lord Hoffmann's example [in *Gorringe*, para 38] of the doctor patient relationship." Since the claimants' case amounted to no more than that the council had failed to move them into temporary accommodation in breach of its statutory duty or in the exercise of its statutory powers, it failed because

none of the statutory provisions relied on gave rise to a private law cause of action.

72. The correctness of these decisions is not in question, but the dicta should not be understood as meaning that an assumption of responsibility can never arise out of the performance of statutory functions. Dyson LJ based his reasoning in *Rowley* on the decision of the House of Lords in *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28; [2007] 1 AC 181, where the question was whether the bank had assumed responsibility to the Commissioners to prevent payments out of an account, by virtue of having been served with freezing orders. Dyson LJ cited Lord Bingham's statement at para 14 that there was no assumption of responsibility by the bank: they had no choice. Lord Hoffmann considered the question more fully. He observed at para 38 that a duty of care is ordinarily generated by something which the defendant has decided to do: giving a reference, supplying a report, managing a syndicate, making ginger beer:

"It does not much matter why he decided to do it; it may be that he thought it would be profitable or it may be that he was providing a service pursuant to some statutory duty, as in *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 and *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223."

He added at para 39:

"The question of whether the order can have generated a duty of care is comparable with the question of whether a statutory duty can generate a common law duty of care. The answer is that it cannot: see *Gorringe v*

*Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057. The statute either creates a statutory duty or it does not. (That is not to say, as I have already mentioned, that conduct undertaken pursuant to a statutory duty cannot generate a duty of care in the same way as the same conduct undertaken voluntarily.) But you cannot derive a common law duty of care directly from a statutory duty. Likewise, as it seems to me, you cannot derive one from an order of court."

73. There are indeed several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme. An example mentioned by Lord Hoffmann is *Phelps v Hillingdon*, where the teachers' and educational psychologists' assumption of responsibility arose as a consequence of their conduct in the performance of the contractual duties which they owed to their employers. Another example is *Barrett v Enfield*, where the assumption of responsibility arose out of the local authority's performance of its functions under child care legislation. The point is also illustrated by the assumption of responsibility arising from the provision of medical or educational services, or the custody of prisoners, under statutory schemes. Clearly the operation of a statutory scheme does not automatically generate an assumption of responsibility, but it may have that effect if the defendant's conduct pursuant to the scheme meets the criteria set out in such cases as *Hedley Byrne* and *Spring v Guardian Assurance plc*."

49. There then followed paragraph 74 in which it was held that the Robinson approach was now the correct one for the court to take:

"The present case

74. In the light of the cases which I have discussed, the decision in *X (Minors) v Bedfordshire* can no longer be regarded as good law in so far as it ruled out on grounds of public policy the possibility that a duty of care might be owed by local authorities or their staff towards children with whom they came into contact in the performance of their functions under the 1989 Act, or in so far as liability for inflicting harm on a child was considered, in the *Newham* case, to depend upon an assumption of responsibility. Whether a local authority or its employees owe a duty of care to a child in particular circumstances depends on the application in that setting of the general principles most recently clarified in the case of *Robinson*. Following that approach, it is helpful to consider in the first place whether the case is one in which the defendant is alleged to have harmed the claimant, or one in which the defendant is alleged to have failed to provide a benefit to the claimant, for example by protecting him from harm. The present case falls into the latter category."

50. I note that this case before me is also one of failure to provide a benefit.

51. In paragraph 75, it was stated that:

"75. Understandably, the reasoning of Irwin LJ in the Court of Appeal in the present case did not follow the approach set out in *Robinson*, which was decided after the Court of Appeal had given its decision. The first consideration on which Irwin LJ placed particular emphasis, namely the concern expressed in *X (Minors) v Bedfordshire* and *Hill v Chief Constable of West Yorkshire* that liability in negligence would complicate decision-making in a difficult and sensitive field, and potentially divert the social worker or police officer into defensive decision-making, has not been treated as sufficient reason for denying

liability in subsequent cases such as *Barrett v Enfield, Phelps v Hillingdon* and *D v East Berkshire*. His view that the decision of the Court of Appeal in *D v East Berkshire* had been implicitly overruled by *Michael* was mistaken: the decision in *D v East Berkshire* has not been overruled by any subsequent decision. In *Michael*, as explained earlier, this court rejected an argument which was said to be supported by *D v East Berkshire*, but it did not disapprove of the true ratio of that decision. More fundamentally, in cases such as *Gorringe, Michael* and *Robinson* both the House of Lords and this court adopted a different approach (or rather, reverted to an earlier approach) to the question whether a public authority is under a duty of care. That approach is based on the premise that public authorities are prima facie subject to the same general principles of the common law of negligence as private individuals and organisations, and may therefore be liable for negligently causing individuals to suffer actionable harm but not, in the absence of some particular reason justifying such liability, for negligently failing to protect individuals from harm caused by others. Rather than justifying decisions that public authorities owe no duty of care by relying on public policy, it has been held that even if a duty of care would ordinarily arise on the application of common law principles, it may nevertheless be excluded or restricted by statute where it would be inconsistent with the scheme of the legislation under which the public authority is operating. In that way, the courts can continue to take into account, for example, the difficult choices which may be involved in the exercise of discretionary powers."

52. Mr Levinson submitted that this (and paragraph 83 which I cite below) amounted to a general approbation of a contention that D v East Berkshire had

held that duties of care would exist in relation to the carrying out of child protection functions. I do not read the paragraph, or D v East Berkshire, in that way. Rather, it seems to me that it is (including in the context of the preceding paragraphs) (only) holding that:

i) There is no general restriction of public policy which prevents duties of care arising upon local authorities in the area of the exercise of their child protection functions, although it is possible that the scheme of particular legislation could lead to such a conclusion either as a matter of direct law (so no duty of care arose) or by affecting the appropriate standard of care

ii) However, a duty of care will still only arise where such would do so under ordinary common-law principles (and which the judgment then goes on to consider).

53. In paragraphs 76 and 77 the judgment starts to consider those ordinary common-law principles (and following Robinson) in the context of the facts of N v Poole:

"76. The second consideration on which Irwin LJ based his decision, namely the principle that in general there is no liability for the wrongdoing of a third party even where that wrongdoing is reasonably foreseeable, is plainly important but, as he recognised, not conclusive in itself. In *Robinson*, this court cited at para 34 a helpful summary by Tofaris and Steel, "Negligence Liability for Omissions and the Police" (2016) 75 CLJ 128, of the situations in which a justification commonly exists for holding that the common law imposes such a liability:

"In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger."

77. The present case is not brought on the basis that the council was in the second, third or fourth of these situations. It was suggested in argument that a duty of care might have arisen on the basis that the council had created the source of danger by placing Amy and her family in housing adjacent to the neighbouring family. The difficulty of sustaining such an argument is however apparent from *Mitchell*, paras 41, 61-63, 76-77 and 81-82. As Lord Brown pointed out in the last of these passages, there is a consistent line of authority holding that landlords (including local authorities) do not owe a duty of care to those affected by their tenants' anti-social behaviour. It is also necessary to remember that there is no claim against the council based on its exercise of its functions under housing legislation."

54. The judgment then considered how the N v Poole claim was actually brought being on the basis of "assumption of responsibility" and rejected it:

"78. The claim against the council is based instead on an assumption of responsibility or "special relationship". The particulars of claim state:

"In purporting to investigate the risk that the claimants' neighbours posed to the claimants and subsequently in attempting to monitor the claimants' plight as set out in the sequence of events above, the defendant had accepted a responsibility

for the claimants' particular difficulties and/or there was a special nexus or special relationship between the claimants and the defendant. The defendant purported to protect the claimants by such investigation and in as far as such investigation is shown to have been carried out negligently and/or negligently acted on the defendant is liable for breach of duty."

The "sequence of events" referred to is a chronology of events. In relation to investigation and monitoring by the council's social services department, it refers to the assignment of social workers to the claimants, to the various assessments of their needs, and to meetings at which the appropriate response to Graham's behaviour was discussed.

79. Irwin LJ rejected the contention that there was an assumption of responsibility by the council on the ground that there was an insufficient basis to satisfy the approach of the Court of Appeal in *X v Hounslow London Borough Council* and *Darby v Richmond-upon-Thames London Borough Council* [2017] EWCA Civ 252. I have also come to the conclusion that the particulars of claim do not provide a basis on which an assumption of responsibility might be established, for the following reasons.

80. As Lord Browne-Wilkinson explained in relation to the educational cases in *X (Minors) v Bedfordshire* (particularly the *Dorset* case), a public body which offers a service to the public often assumes a responsibility to those using the service. The assumption of responsibility is an undertaking that reasonable care will be taken, either express or more commonly implied, usually from the reasonable foreseeability of reliance on the exercise of such care. Thus, whether operated privately or under statutory powers, a hospital undertakes to exercise

reasonable care in the medical treatment of its patients. The same is true, mutatis mutandis, of an education authority accepting pupils into its schools.

81. In the present case, on the other hand, the council's investigating and monitoring the claimants' position did not involve the provision of a service to them on which they or their mother could be expected to rely. It may have been reasonably foreseeable that their mother would be anxious that the council should act so as to protect the family from their neighbours, in particular by re-housing them, but anxiety does not amount to reliance. Nor could it be said that the claimants and their mother had entrusted their safety to the council, or that the council had accepted that responsibility. Nor had the council taken the claimants into its care, and thereby assumed responsibility for their welfare. The position is not, therefore, the same as in *Barrett v Enfield*. In short, the nature of the statutory functions relied on in the particulars of claim did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care.

82. It is of course possible, even where no such assumption can be inferred from the nature of the function itself, that it can nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Since such an inference depends on the facts of the individual case, there may well be cases in which the existence or absence of an assumption of responsibility cannot be determined on a strike out application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred. In the present case, however, the particulars of claim do not provide a

basis for leading evidence about any particular behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred. Reference is made to an email written in June 2009 in which the council's anti-social behaviour co-ordinator wrote to Amy that "we do as much as it is in our power to fulfil our duty of care towards you and your family, and yet we can't seem to get it right as far as you are concerned", but the email does not appear to have been concerned with the council's functions under the 1989 Act, and in any event a duty of care cannot be brought into being solely by a statement that it exists: *O'Rourke v Camden London Borough Council* [1998] AC 188, 196.

83. I would therefore conclude, like the Court of Appeal but for different reasons, that the particulars of claim do not set out an arguable claim that the council owed the claimants a duty of care. Although *X (Minors) v Bedfordshire* cannot now be understood as laying down a rule that local authorities do not under any circumstances owe a duty of care to children in relation to the performance of their social services functions, as the Court of Appeal rightly held in *D v East Berkshire*, the particulars of claim in this case do not lay a foundation for establishing circumstances in which such a duty might exist."

55. The judgment then went on to consider a claim based on vicarious liability based on failures by the relevant council's employees. However, even if those employees had been in breach of their contracts of employment with the council, it was held that they had owed no duties of care to the claimants:

"85. The particulars of claim state:

"Each of the social workers and/or social work managers and other staff employed by the defendant who was allocated as the social worker or manager for the claimants or tasked with investigating the plight of the claimants owed to the claimants a duty of care."

It appears from the particulars of claim that social workers carried out assessments of the claimants' needs on the council's instructions, and provided the council (and others who may have been involved in decision-making) with information and professional advice about the children for the purpose of enabling the council to perform its statutory functions.

86. There is no doubt that, in carrying out those functions, the social workers were under a contractual duty to the council to exercise proper professional skill and care. The question is whether, in addition, they also owed a similar duty to the claimants under the law of tort. That depends on whether the social workers assumed a responsibility towards the claimants to perform their functions with reasonable care. In considering that question, it may be helpful to compare the position of the social workers with the positions of the educational psychologists and the advisory teacher in *X (Minors) v Bedfordshire*, and the educational psychologists in *Phelps v Hillingdon*.

87. In the former case, Lord Browne-Wilkinson accepted in relation to the *Dorset* proceedings that the local authority could be vicariously liable for negligence on the part of its educational psychologists because they were providing professional advice to parents on which the parents had foreseeably relied. In the *Hampshire* proceedings, he accepted that an advisory teacher, brought in to advise on a pupil's educational needs, owed a duty to the child to

exercise reasonable skill and care provided he knew that his advice would be communicated to the pupil's parents, and could therefore reasonably foresee that they would rely on such advice. In *Phelps v Hillingdon*, the duty of care of the educational psychologist towards the child was again based on the fact that it was reasonably foreseeable that the child's parents would rely on the advice provided. Those were all cases where the duty of care arose on the basis of the *Hedley Byrne* principle. In the present case, on the other hand, there is no suggestion that the social workers provided advice on which the claimants' mother would foreseeably rely.

88. As has been explained, however, the concept of an assumption of responsibility is not confined to the provision of information or advice. It can also apply where, as Lord Goff put it in *Spring v Guardian Assurance plc*, the claimant entrusts the defendant with the conduct of his affairs, in general or in particular. Such situations can arise where the defendant undertakes the performance of some task or the provision of some service for the claimant with an undertaking that reasonable care will be taken. Such an undertaking may be express, but is more commonly implied, usually by reason of the foreseeability of reliance by the claimant on the exercise of such care. In the present case, however, there is nothing in the particulars of claim to suggest that a situation of that kind came into being.

89. 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. In the circumstances which I have described,

however, the particulars of claim do not in my opinion set out any basis on which an assumption of responsibility might be established at trial."

56. At paragraph 90, it was also held that the claim failed on the facts as a matter of causation as the council could only have acted differently if there had been a "risk of significant harm… attributable to… a lack of parental care" justifying care proceedings and there was no evidence that such was the case as it was the neighbours, and not the relevant parents, who were the cause of the alleged problems.

57. In the conclusion at paragraph 91, the need for an assumption of responsibility was stressed and that in the absence of facts being pleaded from which such could arise, "… it is to the advantage of all concerned that the claim should not proceed to what would be a costly but inevitably fruitless trial." and so that the claim should remain struck-out.

58. In Transport Arendonk v Chief Constable of Essex Police [2020] EWHC 212, a claim was not struck out where police had allegedly failed to secure a vehicle (and thus its contents, which were then thereafter stolen) when arresting its driver. At paragraphs 83-86 caution was expressed as to striking-out in circumstances where the incremental approach could apply:

" 83 The issue on this appeal is whether the respondent has reasonable prospects of establishing its case that the appellant owed it a duty of care. The circumstances are that the appellant arrested Mr Luca, took him into custody, stopped him from using two of his mobile phones, took the keys of the lorry, left it in a remote layby, and did not speedily fulfil a promise made by officers

to get the operator's contact details from the lorry when it was known to the respondent that there was a risk of thefts from unattended lorries in the area.

84 I do not consider that I have been referred to any case which decides that issue. This case shares some general features with the decisions to which I have been referred, but it is not the same as, or similar to, any of them. As Lord Reed pointed out in *Robinson*, the common law proceeds incrementally, by analogy. A court which proceeds by analogy has to understand the underlying basis of the principles which are stated by the courts when they apply the law of negligence to different facts. However, previous decisions of the courts are not statutes, and the principles enunciated in the cases and the language which is used are not to be read as if they were a statute.

85 Unless it is very clear that the existence of a duty of care is precluded by authority or by the certain applications of the principles which can be deduced from authority, the possibility that as court may by that incremental process decide that the appellant did owe the respondent a duty of care cannot be excluded. But there is a more basic point, which is Mr Barraclough's submission that this case involves nothing more than the application of the normal principles of negligence.

86 I do not consider that this is a case in which it is clear beyond argument, as Ms Johnson submits, that a duty of care is excluded by the certain application of the principles stated in the decided cases to the facts. Leaving aside Mr Barraclough's fundamental submission that the case simply involves the application of the general principles of negligence to the facts of this case, the first ambiguity, which I consider can only be resolved after a trial on the basis

of findings of fact, is whether this case fits into the analytic structure on which Ms Johnson relies or not."

59. The judge then went on to stress the importance of the difference between what she called acts and omissions cases (meaning the difference between causing harm and failing to confer a benefit):

"87 Is it an act or omission case (or, in Lord Reed's words in *Poole*, at para.28) a case in which the appellant caused harm (made things worse) or one in which the appellant failed to confer a benefit (did not make things better)? I note that the relevant decisions recognise that it can be difficult on the facts to decide whether or not a case is an act or omissions case. See, for example, para.81 of the decision in *Poole*. See also the fact that one of the issues in *Robinson,* which went to the Supreme Court, was whether or not that case was to be classified as an act or omissions case, and see the statement by Lord Reed in para.69.4 of *Robinson* that, while the distinction between acts and omissions is fundamental, it can be difficult to draw in borderline cases.

88 In my judgment, this is not clearly a case in which the respondent relies solely on an omission by the appellant or completely, on the other hand, a case in which the respondent relies on a positive act by the appellant. This case shares features with both types of case. If it is not purely an omission case, I do not consider it is unarguable that the police in the circumstances of this case might owe the respondent a duty of care."

89 Moreover, like the Recorder, I consider there is a wider public interest in a decision after evidence and argument about whether the police owe any duty of care to a property owner in respect of property which they encounter in the

course of an arrest and which, in consequence of the arrest, is separated from its custodian. I do not consider that such a duty is clearly precluded by the reasoning in the cases about the victims of violent crime."

90 It follows, in my judgment, that this is not clearly a case which can be analysed as a case in which the appellant failed to act or to provide a service. The appellant did fail to keep the lorry safe, but it is arguable that it also took steps which prevented others from keeping the lorry safe."

60. The judge then went on to consider "assumption of responsibility" and other exceptions to the general rule that no duty exists to confer a benefit on another: "91 In any event, if that is wrong and, in accordance with Ms Johnson's submissions, this case does fit fairly and squarely into her analytical framework as an omission case, the next question is whether it is unarguably clear that the respondent cannot bring itself within one of the exceptions to the principle that a person is not generally liable for the acts of third parties.

92 Much time was spent in submissions about the concept of assumption of responsibility. There is, I recognise, some force in Ms Johnson's submissions on this aspect of the case. I accept that this is not clearly a case in which the appellant assumed responsibility for keeping the lorry safe in accordance with the principles enunciated in the cases precisely because the respondent did not know until it was too late what the appellant had done or failed to do. The respondent arguably did not rely on what the appellant did because the respondent did not know what the appellant had done. The respondent had no choice about any part of the transaction between the appellant and its driver, Mr Luca. Nevertheless, it seems from the cases to which I was referred that the

concept of assumption of responsibility is somewhat elastic and has, in the words of Lord Toulson in para.101 of *Michael*, been "imposed by the court rather than assumed by the defendant."

93 I note that, in para.82 of the *Poole* case (albeit in a different context) Lord Reed cautioned that inferences of an assumption of responsibility depend on the facts of a particular case, and that there may well be cases in which it cannot be decided on a strike-out application that there was no assumption of responsibility. I do not consider that, if this is the right area of the analytical framework, it would be right to strike out this claim without findings of fact. Moreover, I do not consider that it is unarguable that this case might be found to fit into one of the other exceptions listed in para.34 of Lord Reed's judgment in *Robinson*.

94 Finally, as Lord Toulson made clear in para.102 of his judgment in *Michael*, the list of exceptions to this rule is not closed. I consider that the Recorder was right to hold that the issues of causation were for trial, and that it was not appropriate to decide them on an application to strike out the claim. I consider that the same reasoning applies to the question, if it arises, of whether any duty, if owed, was discharged on the facts."

61. In this context of claims against local authorities in relation to child care and protection functions, there have been a number of further cases in relation to allegations that a local authority had failed to intervene by way of care proceedings at an appropriate stage.

62. In A v Attorney-General of St Helena [2019] SHSC 1, where the local authority had not investigated or acted on complaints and disclosure of sexual abuse, the Chief Justice of St Helena struck out the claim holding that:

"28. This is a case which it seems to me in essence falls squarely on all fours with Poole. I do not consider the distinctions which the Plaintiff sought to draw to be persuasive; and thus when I consider the allegations of breach of duty, I am satisfied that they fall within the second category of case identified by Lord Reed, namely that the true nature of the case advanced is that the Defendant has failed to provide a benefit to the Plaintiff, by failing to protect the Plaintiff. I can identify no area or circumstance in which it could conceivably be inferred that the Defendant has assumed a responsibility for the Plaintiff; and in this respect I adopt the Defendant's analysis set out at para 3.5 of Mr Bershadski's revised skeleton argument. Furthermore, I see nothing in the matters pleaded from which the apparent manner in which the Plaintiff was treated gave rise to an assumption of responsibility; and I am also satisfied that there is nothing in St Helena's circumstance which alone or in conjunction with any of the matters pleaded permits an inference to be drawn that St Helena's Social Services in some way thus assumed a responsibility. Additionally, and patently, it was not the Defendant who created the danger which indubitably caused the Plaintiff harm. I am satisfied therefore, that this is indeed one of those cases, rare as they may be, where it is appropriate to strike out the Plaintiff's claim as disclosing no cause of action given the absence of any prospect on the Plaintiff's behalf that the Defendant owed her a common law duty of care. If this action were permitted to proceed it would involve all parties in considerable cost with no prospect at the end of the day that the Plaintiff's case could succeed."

63. However, in the Central London County Court (although this is apparently subject to an appeal) in Champion v Surrey (Judgment 26/6/2020), His Honour Judge Roberts refused to strike-out a claim, holding that:

"30. A claim should only be struck out as disclosing no reasonable cause of action under CPR 3.4(2)(a) in a clear and obvious case. As the Court of Appeal said in *Hughes v Colin Richards & Co* [2004] EWCA Civ 266, an application should not be granted unless the court is certain that the claim is bound to fail.

31. The short point is that in my judgment, the case is not bound to fail. I say that for the following reasons:

i) The case must be looked at in the context that the law of tort in relation to the assumption of responsibility is still developing and emerging.

ii) The Supreme Court was at pains to point out in *Poole Borough Council* that each case turns on its own facts.

iii) An assumption of responsibility can arise where a claimant entrusts a defendant with the conduct of his affairs in general or particular. Such situations can arise where the defendant undertakes the performance of some task, or the provision of some service for the claimant, with an undertaking that reasonable care will be taken. Such an undertaking is commonly implied by reason of the foreseeability of reliance by the claimant on the exercise of such care.

iv) 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 (para. 89 of *Poole*).

v) The Claimant has set out in detail numerous positive acts, which the Defendant undertook for the assistance of the Claimant. The Claimant was reliant upon the Defendant's Social Services Department and the positive acts taken by the Defendant are sufficient to give rise to an arguable assumption of responsibility. For the purposes of this case, it is common ground that it must be accepted that the Defendant was negligent and the Claimant has suffered sexual, physical and psychological injuries.

vi) I was taken by both parties to a number of first instance decisions, some of which had been upheld on appeal. In my judgment they provide very limited assistance because in some of them the facts are obscure and in others the facts are distinguishable or very different."

HXA v Surrey

64. In HXA [2021] EWHC 250 (QB) Deputy Master Bagot QC considered what was an allegation of a General Duty after being cited (most of) the decisions above and hearing from Mr Levinson and Mr Stagg for the claimant and the defendant respectively.

65. At paragraphs 29-34, the Deputy Master rejected the existence of any General Duty holding, in effect, that the case was indistinguishable, as a matter of principle, from N v Poole on the basis that for liability in a "non-intervention" case something amounting to or justifying the imposition of an "assumption of responsibility" was required, but that nothing sufficient was alleged. At paragraphs 32 to 33 he said:

"32 Although there are (as there always would be, even between closely analogous cases) some factual elements present in the history which differ from *Poole*, it does not involve a factual undertaking of responsibility being taken to be relied upon by the Claimants. I agree with the submission that save for the general plea of reliance in para.17 of the Particulars of Claim, there is no allegation here of reliance on any specific act or undertaking of the local authority and nor realistically could there be.

33 A duty of care is recognised to arise when a care order is made, because the local authority has parental responsibility. But up until that point, parental responsibility remains unequivocally with the parent(s). A duty of care cannot, in my view, effectively be reverse engineered from the point at which a duty arises on the making of a care order, in the way that the First Claimant would wish. This involves saying that because the duty arises on the making of the

order, so there is a duty to conduct any care proceedings brought competently; and so, there is a duty to decide whether to institute care proceedings competently; therefore, there is a duty to investigate competently to decide whether to bring care proceedings. That attempt to trace back a duty at an earlier and earlier stage does not provide a viable route to an arguable case here, in my judgment."

66. At paragraph 35 the Deputy Master stressed that there had been asserted only briefly in oral submissions (although in support of points which had been raised in the Particulars of Claim before him) that the local authority had added to the danger, or had had any power which it had failed to exercise to control wrongdoers or prevented others from intervening, and went on to say:

"35 But in case it becomes relevant, I will deal with those points, albeit more briefly as I do not consider that they assist the First Claimant:

i) *Adding to the danger* (paras.20-21 of the Particulars of Claim): it is said that the Defendant did this by "*endorsing the parenting provided to the Claimants…[and]…allowing [Mr D] and [Mr A] who were both known Schedule One offenders to live in the Claimants' home…[and]…did not remove [Mr D or Mr A] of the Claimant's from the home"*. I do not follow how that was *adding* to the danger. The Defendant had no statutory power to remove partners of their mother from the home. The children could not be removed without a Court Order. The danger is created by those individuals coming into the home and that does not amount to the *Defendant* adding to the danger. The harm is something the Claimants are already being exposed to. The flaw in this proposition can also be confirmed by applying such a proposition to the *Poole*

case. If correct, this proposition would have been a complete answer to the charge that there was no duty of care in *Poole*, if it could be said that the Defendant there added to the danger by not bringing the harassment to an end.

ii) *Failing to control wrongdoers* (paras.22 to 23 of the Particulars of Claim): again, this is a reference to Mr D and Mr A, *"...the only way of controlling their access to the Claimants was to remove the Claimants [from the home]"*. It is also a reference to the Claimants' mother and the same allegation is made that this probably could only have been achieved by removing the Claimants. Again, the difficulty here is that there was no right to control the behaviour of those third parties of a type which would be required to lead to an arguable duty. An example is the control which the Home Office had over the actions of the Borstal boys, who escaped whilst under supervision on an island visit and caused property damage in, *Home Office v Dorset Yacht Co Ltd* [1970] QB 1004. But here there was no such control over or right to control the wrongdoers. Furthermore, this would be tantamount, in my view, to the exception extinguishing entirely the effect of the rule of non-liability for omissions, by creating a liability for all omissions which the case law indicates is incorrect as a proposition.

iii) *Preventing Others from Protecting the Claimant[s]* (paras. 24 to 25 of the Particulars of Claim]: the allegation here is effectively that other referrers, agencies and participants in child protection conferences would likely have taken further steps by making further referrals or taken action themselves which would have led to protective measures being put in place, had the Defendant not held out that it would investigate competently. Again, I do not think that this

allegation raises any reasonable grounds for an arguable duty of care. There are no facts pleaded to the effect that another agency wanted to put in place protective measures but was dissuaded from doing so by the local authority. This exception to the rule does not appear to have any relevance to the facts as pleaded. The only effective measure would have been to remove the Claimants from the home. No other agency could or would practically have achieved that here. The Police have a limited power to take a child to a place of safety (see section 46 of the Children Act 1989) but are not meant to do so if an emergency protection order is in place or in contemplation. There is a reference in the history to the NSPCC, but Mr Levinson did not contradict Mr Stagg's explanation in his skeleton argument and oral submissions that the NSPCC has not exercised its notional power to bring care proceedings since 1993; it now liaises with local authorities to protect children. There is no realistic basis for saying that the Defendant prevented any other agency from providing protection."

67. At paragraphs 38 to 44, the Deputy Master considered that he should strike-out notwithstanding the caution expressed in Transport v Essex, and the refusal of HHJ Roberts in Champion v Surrey, and that he should adopt the same course as in A v A-G of St Helena. He repeated (e.g. at paragraph 40) that he found the case to be indistinguishable in terms of "*material* fact" from N v Poole and at paragraph 44 said:

"44 Whilst I have borne closely in mind the cautionary words in the authorities, including *Poole*, in my judgment this is a case where the allegations of an assumption of responsibility can and should be determined on a strike-out

application. There is no real possibility that such a case might be made out so as to mean it should be permitted to proceed to trial. Notwithstanding it is a significant hurdle for a Defendant to overcome, especially in an application which turns on the absence of an arguable duty of care, in my view the application has been made out."

68. In his Conclusions the Deputy Master repeated this at paragraphs 46 and 47:

"46 My task has been to determine whether there are viable claims against the Defendant local authority arising out of their child protection activities in relation to the First Claimant. In the circumstances and for the reasons discussed above the relevant claims are, in my judgment, bound to fail as there is no arguable duty of care. Where there is a recent Supreme Court judgment which is on point or at least closely analogous, I do not accept that this can be described as a developing area of law (or a developing point within that area). Such a conclusion is not inconsistent with other aspects of abuse claim jurisprudence still developing. I reiterate the learning from *Robinson* about the importance of precedent, of maintaining the coherence of the law and avoiding inappropriate distinctions. Were I to accede to the First Claimant's response to the application here, I consider that I would be making inappropriate distinctions to avoid applying a clear precedent from the highest court, thereby allowing legally flawed claims to continue past the interim stage. To do so would be no kindness to the First Claimant only for the relevant claims to fail at trial, as I consider inevitable; better to focus on an arguable allegation (upon which it will be for others to rule on another occasion). It would also be contrary to the overriding objective to permit the relevant claims to proceed as it would result in significant

further costs and court resources being expended on the wider issues, beyond the much narrower point of the disclosure to the school.

47 In reality, whilst there are naturally some factual differences, there is much overlap in the process of monitoring, investigation and assessment carried out by the local authority in *Poole* and the present case. *Poole* cannot sensibly be distinguished from this case in terms of the appropriate legal analysis to be applied to the respective factual matrices when considering the question of duty of care."

69. The Deputy Master refused permission to appeal on the basis that an appeal would have no real prospects of success. He ordered costs to be paid by the claimant (albeit subject to the QOCS provisions of section II of CPR Part 44, and so not to be enforced).

The Parties' Submissions

70. Mr Levinson submitted first that I should accept what was said and follow the course adopted by HHJ Roberts in Champion v Surrey, and refuse to strike-out simply on the basis that the General Duty was arguable, and that Deputy Master Bagot QC was wrong to reject this in HXA v Surrey.

71. However, Mr Levinson concentrated his submissions more on the Respite Care Duty aspect submitting that the provision of the Respite Care in any event made a sufficient difference between this case and (mere) General Duty Matters cases such as A v A-G of St Helena and HXA v Surrey, and as:

(1) What was required was an "assumption of responsibility" but that there was little real guidance as to what that meant and it was very fact specific to the individual case

(2) An "assumption of responsibility" was not confined to circumstances of provision of information or advice or even be entrusting of any affairs to another. It would be sufficient if somebody in the position of the council performed a service or task for the benefit of another. There was no need for actual reliance by that other person it could simply be dependence as in the Hedley Byrne example of a doctor treating an unconscious stranger. Mr Levinson went further so as to submit that if the doctor did decide to treat the stranger then the doctor would owe a duty to treat all of the stranger's injuries rather than simply engaging in a partial treatment (I will call this and similar scenarios "the Good Samaritan Examples", see further below)

(3) There must be a duty of care in certain circumstances even where there was no duty to provide any other service, or at least where such duties flowed from a service which had been already undertaken. For example, if a child had been taken by their parents to a birthday party and the birthday child's parents were returning that child to their home then they should owe a duty of care, not only in relation to their driving while the conveyed child was in their vehicle, but also, if it turned out that the conveyed child's parents' house was on fire, not simply to just allow the child to exit their car there in circumstances where the child might then run into the burning building (I will call this and similar scenarios "the Burning Building Examples")

(4) The essential distinction between this case and one of simple non-intervention was the provision of the Respite Care and the return of the claimant to the Parents at the end of each period of it. He submits that:

a. To provide the Respite Care, the defendant had had to actively conclude under section 20(4) (or section 20(1)(c)) of the 1989 Act that the claimant considered that it "would promote or safeguard the child's [the claimant's] welfare"

b. By providing the Respite Care, the defendant was effectively providing a service to and engaging in an "assumption of responsibility" for the claimant. This would give rise to duties of care and not only with regard to the Respite Care accommodation itself but also including (i) to consider care proceedings where circumstances existed for such and, in any event (ii) not to release the claimant back to what should have been known to be an unsafe place (the home of the Parents) just as with the Burning Building Example

c. During the provision of the Respite Care, the claimant was in the "care of the local authority" for the purposes of section 22 of the 1989 Act and:

i. The defendant was therefore subject to section 22(3)(a) "It shall be the duty of a local authority looking after any child… (a) … to safeguard and promote his welfare…". In combination with section 20, that made this a case equivalent to Barrett v Enfield

ii. This should altogether result in a situation analogous to the Good Samaritan Examples, and the defendant could not simply "stop" at the end of the agreed fixed period and cease to owe any duty of care

iii. However, in any event, this would encompass a duty not to return to an unsafe place, and in particular the Parents' home; and just as with the Burning Building Examples

d. Alternatively, the returning of the claimant to the Parents from a place of safety (being the Respite Care accommodation) was effectively a circumstance of the creation of a source of danger

e. In any event, this was a novel situation, with new facts which were much further from N v Poole than those in HXA v Surrey, and a classic case for not striking-out until the full facts had been determined, and as in the Transport v Essex case

f. The existence of the continuing 1998 Act claim reinforced the undesirability of striking-out at this stage, and especially as all the relevant facts would have to be gone into in any event.

72. Mr Stagg submitted that:

i) This was a non-intervention case where facts, usually being positive acts on the part of the local authority, sufficient to justify an "assumption of responsibility" were required for a duty of care but no sufficient such facts were alleged

ii) While an "assumption of responsibility" could sometimes arise from appropriate reliance upon the local authority:

a) Mere "dependence" was not sufficient to amount to reliance. If it was then N v Poole would have been decided differently

b) The only reliance here was by the Parents and who were the alleged abusers, and so whose reliance would be irrelevant

iii) The HXA v Surrey decision was correct and in point and disposed of the General Duty claim. Further, it applied to the Respite Care claim as well as there was nothing sufficient to distinguish that from N v Poole either

iv) The Respite Care claim and the reliance upon section 22 of the 1989 Act ignores the facts that, as a result of the wording of section 20:

a) The defendant had a statutory duty to return the claimant to the Parents, and

b) The Parents, and not the local authority, had parental responsibility and the associated rights

v) The Good Samaritan Examples depend upon doctor-patient or similar relationships and which this was not

vi) The Burning House Examples are distorted analogies involving and relying on a peculiar factual situations of emergency

vii) The defendant had neither created nor enhanced any danger; and if this was such a situation then it would apply in all non-intervention cases.

Discussion and Analysis.

73. In the light of the case-law cited above there was a considerable measure of agreement between counsel as to the law as to the following aspects, but in any event I hold it to be as follows (drawing in particular from the paragraphs cited above of N v Poole):

i) There is (at least) no conclusive reason of public policy or legislative provision against a local authority owing a duty of care in relation to its child care functions. It is clear that the rulings in X v Bedfordshire to that effect are no longer the case (see e.g. N v Poole at paragraph 74)

ii) Thus it is possible for a local authority to owe a duty of care, but that must be established by the application of ordinary common-law principles

iii) Those common-law principles provide that:

a) No duty will usually arise to simply confer a benefit including by way of protection from harm. This is notwithstanding that the relevant public body may have a statutory role and rights which are designed to enable it to protect the claimant from harm (whether a fire brigade from fire, police from criminal activity, or children from abusers)

b) However, a duty of care can arise in four categories of case, being where (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of

control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger

c) An "assumption of responsibility" can arise from the performance of statutory functions and/or the provision of services and to a person (e.g. the unconscious stranger) who does not realise that those services are being provided or that they are in any relationship with the defendant. Thus, if services are provided, including the provision of care or accommodation, then generally a duty of care will arise in relation to the provision of those services (as in Barratt v Enfield where a child had been taken into care and where care was thus being provided, and in X v Bedfordshire itself in relation to various provisions of services under statutory schemes) on the basis that that is an incident of their provision.

74. There were, however, various general disagreements between counsel which I resolve as follows.

75. First, as to whether D v East Berkshire held that a duty of care would arise generally once a local authority had taken active steps, and if so then whether that holding had been approved in N v Poole. As stated above, I disagree with both of Mr Levinson's propositions to such effect. It seems to me that a duty of care may well arise in relation to the particular steps which were taken, but that D v East Berkshire is not authority for the proposition that the local authority thus undertakes a General Duty simply because it has taken some active steps. That seems to me to be going beyond what D v East Berkshire was either

concerned with or decided, and is also inconsistent with N v Poole at paragraph 84 where it was held that taking some steps did not carry with it a duty to take more.

76. Second, as to what Barratt v Enfield had decided (and which was said by the Supreme Court still to be good law). Again, I do not agree with Mr Levinson that it went any further than deciding that where the local authority had assumed responsibility by taking a child into care, the local authority owed a duty of care to the child in relation to all matters relating to the provision of that care. That duty would be extensive as by taking the child into care, the local authority had effectively taken (over) parental responsibility for that child, and with it the duties equivalent to those of parents (but sounding more in enforceable law). However, that is not this situation where the Parents retained parental responsibility during the periods with which I am concerned.

77. Third, as to whether the provision of a service of assistance results in a general duty to assist or to complete the assistance. This is necessarily fact-sensitive, but I think that Mr Levinson puts the resultant duties far too widely as a matter of general principle; as:

i) In the situation of the doctor treating the unconscious stranger; there is clearly a duty to take reasonable care in the treatment which is provided. However, if, for example, the stranger has multiple injuries, the mere fact that the doctor decides to treat one injury but then to stop and not to treat another injury does not mean of itself, in my view, that the doctor is liable for what they have not done. They may be liable by reason of other additional matters, for example if (i) the treatment which they did

carry out is itself incomplete so that the treated injury has been worsened or (ii) the two injuries, or the treatment of the first injury and the second injury itself, are in some way connected so that the position in relation to the second has been worsened by what has been done regarding the first or (iii) by intervening they have put off others who might have intervened more extensively or, just possibly, (iv) if it can be inferred that consent is only being given to any treatment on the basis that the treatment will be of all injuries (all of which may involve questions of medical ethics). However, that would require the presence of those additional matters or factors

ii) This can be tested by way of the example of the Good Samaritan as told in the parable in the Christian Bible (and which has given rise to the "Good Samaritan" expression as used in counsels' submisisons, and in past case-law and including by Lord Atkin in his derivation of the "neighbour" principle in the foundational case of Donoghue v Stevenson, and which is why I have used the term "the Good Samaritan Examples") where one person "the Good Samaritan" comes across a victim of robbers and first treats their wounds and then takes them to an inn and pays for their accommodation and convalescence (Luke 11 vv25-37). While, once the Good Samaritan had started to treat the wounds sustained by the victim of the robbers, they would (in modern English law) have been under some duty of care with regard to the treatment (see above); I do not see why the Good Samaritan would then have been under such duty to (as the Good Samaritan then did gratuitously in the parable) transport the victim to a place of rest (and

pay for their stay and convalescence) even if they would have been under a duty of care in relation to the transportation itself once, but only once, they had decided to provide and engage in it. The decision to proceed on to the second stage, while it was what the victim clearly needed (in one sense) to occur, would not have been a matter of duty (at least in modern English law) without more.

78. Fourth, as to whether "reliance" in terms of "dependence" of the claimant upon the local authority is sufficient to found an "assumption of responsibility". Again, I think Mr Levinson puts this too highly. It is correct that an assumption of responsibility may arise in circumstances where one person is clearly relying upon another, at least where that other accepts (whether consciously or not) that reliance. However, "dependence", at least in the context of this case is a different matter. The fact that one person (here the claimant) "depends" upon, in the sense of "needs" (because they have no other recourse), another (the defendant) to assist (or save) them does not mean of itself that that other has any duty to do so even if the assistance (or salvation) is within their power to effect. To hold that that was the case would, it seems to me, to be directly contradictory to N v Poole and the case-law which holds that there must be more to give rise to a duty to protect another from harm.

79. The Burning Building Example (and other similar scenarios) are, it seems to me, more complex. It seems to me that it is possible to analyse them in three main limited ways in terms of the conceivable (see below) extent of any duty which might exist, being:

i) by way of an implied term or provision of the original consigning of the conveyed child by their Parents into the care of the conveying person that they would not convey and then release/deliver them into a place of imminent danger and/or

ii) by way of an incident of the duty of care arising from the conveyance itself to complete the conveyance of the conveyed child in a safe manner which would include with regard to the circumstances of their eventual release/delivery. That is to say with a very limited extension of the period of the duty of care to the actual circumstances of the eventual release/delivery and what would be perceived to be its very immediate aftermath and/or

iii) by way of the assumption of responsibility, but only being an assumption of responsibility as to the conveyance and release/delivery itself.

80. Those analyses, which it seems to me to overlap and support each other, seem to me to be potentially appropriate and not to infringe the principles that (i) there is no duty simply to protect from harm and (ii) the relevant assumption of responsibility (a) has to be kept within bounds and (b) be determined by the relevant relationship, and (iii) it is the conveyed child's parents (here, in relation to the claimant, the Parents) who have the parental responsibility for and thus the control of the child and what should happen to them. I should make clear that I am in no way deciding whether in these factual situations (which are not before me) I would hold that the conveying parents would owe any such duty, I am merely seeking to analyse the limits of any duty that might exist (and the question of whether, for example, there could be any duty not to deliver back to

a parent who appeared, on the doorstep, to be under the influence of drugs, perhaps holding a knife, is a difficult matter).

81. I also note Mr Levinson's submission that N v Poole is simply distinguishable because it was held that there was nothing pleaded which could have amounted to a breach of any duty of care. It is correct that the claim would have failed on that basis in any event (paragraph 90) but it seems to me to be clear from both paragraphs 89 and 91 and the rest of the judgment that the Supreme Court also proceeded on the basis that nothing had been pleaded which was sufficient to have given rise to any duty of care in the first place (and so that the question of breach had there been an existing duty strictly did not arise).

82. I therefore turn to the question of whether there are reasonable grounds pleaded for a General Duty to investigate and take care proceedings (or similar) absent the Respite Care Matters. With regard to this:

i) It seems to me that there is nothing materially different between this case and N v Poole. On the pleaded case, the defendant had (or should have had) the knowledge of significant harm (or the risk of it) and the power to intervene. The same existed in N v Poole but that was held as insufficient to amount to any assumption of responsibility; and paragraph 81 made clear that even a decision to investigate and monitor was not sufficient to create any duty. This, like N v Poole, is a pure non-intervention case where the ability to intervene existed; but where it was held that no duty existed to take steps to confer a benefit by way of protecting from harm from others

ii) In A-G v St Helena, where the facts were at least as strong as in this case, in fact stronger as there the child had made their own disclosures and pleas to the public authority, it was held that no duty could exist on the basis of N v Poole. That decision is not binding on me but is persuasive

iii) Transport v Chief Constable is binding upon me but is a very different set of facts. There the police were said to have created the very danger (taking the driver and thus leaving the vehicle unattended) and so that it was (at least in part) a "positive act" case and that feature, which is not present in this case, is what it seems to me was held to be determinative as giving reasonable grounds for a duty of care and prohibiting strike-out; although there was also an additional important feature (it was held) of public interest in a trial as to the potential liability of arresting police regarding the arrestee's property and which is also not present here where there is ample authority regarding liabilities of local authorities to possibly vulnerable children

iv) While Champion v Surrey is also not binding but potentially persuasive, it seems to me that the reasoning is unsatisfactory. It seems to hold that because there are a great variety of factual situations, the matter should simply go to trial. That might be right in the absence of authority laying down the principles and confirming that striking-out should take place unless sufficient facts to amount to an exception to the general rule of no duty of care are pleaded, but such authority exists (see N v Poole itself) and at the highest level, and it seems to me that the matter has to be determined on (but only on) the basis of the pleaded facts

v) HXA v Surrey is technically not binding upon me but is all the more persuasive as being also at High Court Master level and having considered the preceding authorities. Although the rule in Colchester v Carlton [1986] Ch 80 that a judgment which reviews and departs from a co-ordinate authority should generally be followed unless it is thought to be clearly wrong does not strictly apply here, its policy of encouraging judicial comity in terms of following a second decision which has fully reviewed a first is material.

83. I note that, in three paragraphs of the Particulars of Claim, three particular arguments are put as to why a General Duty should have arisen, but each of which was specifically rejected by the Deputy Master in paragraph 35 of his judgment in HXA v Surrey. I agree with such rejections for the reasons given in HXA v Surrey but also specifically as follows.

84. First, in Paragraph 7.1 of the Particulars of Claim it is pleaded that by carrying out some investigations but then doing nothing, the defendant encouraged the mother to continue to abuse the claimant in the sense that it left her believing that the defendant would stand by and not intervene, and thus created a danger. I do not see how this could be said to be "encouragement" in any real sense, and it would mean that in almost every case a local authority would come under a duty of care by simply carrying out an investigation. It seems to me that this argument is wholly inconsistent with N v Poole itself (e.g. at paragraph 81). If the local authority has no duty to intervene, and has refused (by deciding not to take any steps) rather than assumed responsibility, I do not see why a duty should be imposed by reason of the fact that it has decided not to intervene.

85. I add that I do not consider that the Defendant in any way truly "enabled" the Parents to cause harm to the Claimant. The ability of the Parents to cause harm did, in one sense, result from the absence of intervention (or exercise of its powers to investigate and then take care etc. proceedings) by the Defendant but that is the situation in all of these cases, and insufficient to give rise to a duty of care or liability of itself (see above).

86. Second, in Paragraph 8.1 of the Particulars of Claim it is pleaded that the local authority failed to control the Parents, being alleged wrongdoers, and therefore that a duty of care should exist, and the authority of Dorset Yacht v Home Office is relied upon in aid of this contention. However, the case is fully distinguishable as there the Home Office defendant had control over the relevant wrongdoers, and here the local authority defendant had no control over the Parents, only an ability to seek to have the court control them. I can see no difference in this regard between the case before me and N v Poole where the situation was the same, and where it was made clear that something more was required.

87. Third, in Paragraph 9.1 of the Particulars of Claim it is pleaded that the various doctors and others had referred the claimant's situation to the defendant and where the defendant had purported to investigate the situation. It is pleaded that the defendant prevented those referrers taking further steps to protect the claimant and that if the defendant had not held out that they would investigate "and been trusted to investigate competently" then those referrers would have made further referrals and so that protective steps would have been taken. It seems to me that this pleading is not enough, as:

i) I consider, but without deciding at this point, that it might be possible to create some sort of an assumption of responsibility if the local authority had in some way sufficiently promised a referrer that it would carry out an investigation and stated that the referrer should (or perhaps need) not do anything more as a result. However, there is no pleading of either any such promise to or any dissuasion of any referrer (and in HXA v Surrey the Deputy Master regarded the absence of any pleaded dissuasion as destructive of this argument). At most there was an indication that the local authority would look into i.e. investigate, the subject of the reference. That is no more than a statement that there was going to be an investigation. That, and even the taking place of an investigation and monitoring process, was not enough in N v Poole (see paragraphs 81 and 82), or A v A-G of St Helena or HXA v Surrey, to give rise to a duty of care

ii) Even if referrers "trusted" the defendant "to act competently" that was a matter for them. There is no indication that the defendant made any promise to that effect. It does not seem to me that a third party's own expectation could result in the imposition of a duty of care to the defendant owed to the claimant

iii) The alleged causation is that further referrals would have been made had the defendant not indicated that it would investigate. However, since no amount of referrals could have caused a duty of care to arise without more, I do not see why a duty of care should be imposed simply because the defendant caused (on the claimant's case) only some referrals to be

made. Further, since further referrals were made and which resulted in the defendant, ultimately, intervening, it is difficult to understand how this allegation could succeed on the facts. I note that, as in HXA v Surrey, there is no suggestion that any other entity might (or was able to) have intervened had a reference been made to such an entity.

88. I therefore find myself both bound by the Supreme Court and encouraged by what I regard as being the more persuasive authorities to hold, as I do, that there are not reasonable grounds pleaded for the existence of a General Duty (absent the Respite Care Matters). I also consider that I should not follow Champion v Surrey but should follow HXA v Surrey as to the desirability of finality and so that the resultant discretion to strike-out should in principle be exercised.

89. However, the question is more complex as to whether a duty of care might exist where the Defendant had provided the Respite Care (and as a result become subject to the duty "to safeguard and promote his [the Claimant's] welfare" imposed by section 22(3) of the 1989 Act).

90. With regard to this, it seems to me to have been common-ground and rightly so that during the period that the Claimant was being provided with the Respite Care, the Defendant owed some duty of care, and that this would extend to the mechanics of the return (e.g. the driving of the Claimant back to the Parents' house) of the Claimant to the Parents. It seems to me that that period or periods are clearly times when the Defendant had assumed a responsibility by positively receiving the Claimant into their control, and that the D v East Berkshire analysis would apply in principle during those times. I do not have to, and therefore do not, make any decision regarding the extent of the duty of care (for

example if or how it might apply in terms of taking care to ensure that the Claimant was accommodated properly and with those who would take good, and not bad care, of the Claimant) or even as to whether the Defendant could or could not delegate it (e.g. by employing an independent contractor taxi to deliver the Claimant back to the Parent's house rather than by using its own staff for whom it would be vicariously responsible). Such matters are not before me.

91. However, the question before me is as to whether the provision of the Respite Care goes beyond merely providing the Respite Care accommodation for the agreed (with the Parents under section 20 of the 1989 Act) period to a duty of care to consider (where appropriate) and potentially bring (where appropriate) care etc. proceedings etc. Mr Levinson seems to be correct that this argument has not been considered in any decided authority as there is no further reference to Respite Care (beyond the mere recital that it had been provided) in X v Bedfordshire (or thereafter).

92. The argument seems to me to divide into two sub-questions, being (1) whether the provision of the Respite Care accommodation gave rise to a more general duty of care including to consider taking care proceedings generally and (2) whether it could give rise to a specific duty of care regarding whether the Claimant should actually be returned to the Parents at the end of the agreed Respite Care Period, at least without care proceedings having been considered and if appropriate taken. These sub-questions heavily overlap, but are useful to consider in order especially as the second can be argued to be akin to the Burning Building Examples i.e. it can be argued that the Claimant is being

returned to what is, or should be, known to be an unsafe or dangerous place (and where the first seems to be to be more akin to the Good Samaritan Examples).

93. With regard to the first sub-question, I do not consider that any general duty of care arises to consider care etc. proceedings simply because the Claimant has had temporary accommodation provided for the Claimant by the Defendant under section 20 of the 1989 Act (i.e. Respite Care).

94. This is notwithstanding that (1) if the accommodation is provided under section 20(1)(c) then it will have been a case where it has appeared to the local authority that the child requires case because their carer is prevented from providing them with suitable accommodation or care (2) if the accommodation is provided under section 20(4) then it will have been a case where the local authority will have considered that the provision would safeguard or promote the child's welfare, and (3) under section 22(3) the local authority "looking after [the] child" will have been under a duty to safeguard and promote their welfare.

95. My reasons are as follows:

i) As stated above, no General Duty of Care arises at common-law simply because a child is, or ought to be known, to the local authority to be at significant risk of harm, and that there is a general statutory scheme under which Parliament has empowered the local authority to seek to intervene through care proceedings etc in such circumstances

ii) A common-law duty of care will not arise directly (at least in this area) from the existence of a statutory duty (see paragraph 72 of N v Poole; and although there might, I suppose, be some question of judicial review

in theory, and it is accepted that liabilities might arise under the Human Rights Act). It is, however, possible for a duty of care to arise from the actual performance of statutory functions (paragraphs 72-74 of N v Poole)

iii) This remains a case where the defendant is alleged to have failed to provide a benefit to the Claimant, by protecting them from harm, and where there has to be some particular reason to justify such a liability (and where such will not arise in any event where it would be inconsistent with the scheme of the legislation under which the public authority is acting) being imposed upon the defendant (paragraph 75 of N v Poole)

iv) While, as I say above, there is reason to impose some duty of care on the defendant in relation to its performance of the functions of providing accommodation for the Claimant and ancillary matters (including transportation, education whilst accommodated etc.), the Claimant is seeking here to impose a duty of care to do something outside the performance of those functions both in nature and temporally. I do not regard the taking of care etc. proceedings as being part of or related to the provision of accommodation, itself for only a temporary period. Further, to hold that the section 22(3) duty (which is statutory and not at common-law) extends to promoting the safety and welfare of the claimant generally for the future, in ways which were not connected with doing so at the particular point of time, seems to be to be going too far (e.g. while providing education now may be with a view to a child's

future, it also is something which is happening and has value at the present; but that does not carry with it a duty to arrange a particular course for years in the future)

v) There is a useful analogy (although no more than an analogy) with the Good Samaritan Example and "doctor treating unconscious victim" scenarios which I have analysed above, and which make essentially the same point as in the previous sub-paragraph. The mere fact that a person (here the defendant) has aided another (here the Claimant) may well mean that a duty of care exists in relation to the provision of that aid, but does not mean that the person providing that benefit has a duty to provide further and other benefits even if they are desirable. As a proposition that is fact-sensitive, as I have given examples above as to how a failure to provide such a further benefit might result in the previous provision leading to harm, but that is not the case here. For the reasons given above and below, I do not think that there is sufficient pleaded to the effect that by providing the Respite Care the defendant prevented or hindered some other (than the defendant) body from bringing care etc. proceedings or taking other protective steps, or in some way sufficiently encouraged the Parents to cause harm.

vi) Looking at the matter in terms of "assumption of responsibility", the "responsibility" which was "assumed" was in relation to the provision of accommodation, and matters linked to or flowing from that, not in relation either to considering and taking care etc. proceedings or the

position or the future once the provision of the accommodation had come to an end

vii) Further, the scheme of section 20 is that it requires and is controlled by the consent of the Parents. This is the case both in terms of the initial provision (section 20(7)) and throughout the provision (section 20(8)). At first sight, the concept of the defendant's undertaking a duty of care which would extend to taking care etc. proceedings against the Parents (or at least so as to seek to deny them their rights which flow from their having parental responsibility) by virtue of the Parents having allowed the local authority to have provided, and to have continued to provide, the accommodation appears incongruous. Further, while the provision of the accommodation and these matters would not prevent the local authority from deciding to institute care proceedings while the accommodation was being provided, it would again be incongruous that the Parents by consenting to a provision of accommodation a term of which was that they could always remove the child from the accommodation (section 20(8)) were allowing to come into existence a duty (which would otherwise not exist) of the local authority to (at least) consider whether to launch care etc. proceedings so as to prevent that removal. The duty which is sought to be imposed seems to me to be at least somewhat inconsistent with the statutory scheme.

96. Counsel drew my attention to individual ways in which the Particulars of Claim plead that a duty of care arose due to the Respite Care Matters but I do not think that any (or all) of them are sufficient. In particular, in Paragraph 6.10, it is

pleaded that the defendant assumed responsibility for the Claimant when taking and providing accommodation for the Claimant. However, as stated above, I do not see that as creating any duty beyond the provision of the accommodation and ancillary matters during the Respite Care (provision of accommodation) period.

97. I have considered the particular statutory provisions within sections 20(1)(c) and 20(4) and 22(3) to which I refer above in coming to this conclusion; both above and specially as follows; and:

i) It is not pleaded by the Claimant as to whether the accommodation was provided under section 20(1)(c) rather than section 20(4) (which seems more likely) but I do not think that matters

ii) As far as the fact that section 20(4) requires the defendant to have considered that the provision of the accommodation "would safeguard or promote [the child's] welfare" is concerned; first, that does not go beyond the mere fact that providing the accommodation would do so; and, second, it is subject to the (continuing) consents of the Parents

iii) As far as the fact that section 20(1)(c) requires the local authority to have had it "appear" that the Parents were prevented from providing the Claimant with suitable accommodation or, more importantly perhaps, "care": first, there is no pleading of such facts; second, the sub-section makes clear that this may not be permanent; third, the general principle is that the statutory duty does not give rise to a common-law duty without more (see above); and, fourth, this is all subject to the (continuing) consents of the Parents

iv) Although section 22(3)(a) imposes a statutory duty to safeguard and promote welfare: first, the general principle is that the statutory duty does not give rise to a common-law duty without more (see above); second, I regard it as limited and controlled by matters and timing regarding the provision of the accommodation; and, third, this is all subject to the (continuing) consents of the Parents

v) I therefore do not regard them as being sufficient to take me away from my conclusion that there is no general duty of care at common-law to consider etc. care etc. proceedings during the provision of the Respite Care accommodation.

98. However, it does seem to me that I should also be giving specific consideration to the second question as to whether a duty of care could exist not to return the Claimant to what was (or should have been) known to be a place of danger without considering and (if appropriate) taking care etc. proceedings. Here the Claimant can rely more specifically upon the Burning Building Examples as saying that once the Defendant had assumed at least some responsibility to the Claimant (by providing accommodation and thus "looking after" (section 22 of the 1989 Act) the Claimant) there should be some duty of care regarding the return having to be to a safe (or rather not a dangerous place).

99. Nevertheless, and notwithstanding Mr Levinson's able arguments, I still do not find that reasonable grounds for the existence of a duty of care have been pleaded, and in particular as:

i) The starting-point remains (see above) that the Defendant was not under such a duty of care simply from its having provided the accommodation but was rather under a positive duty to return the Claimant to the Parents

ii) Each of my three ways of analysing the Burning Building Example itself (see above – implied term of permission; incidence of duty to take care during the stay; assumption of responsibility regarding the conveyance itself) so as to (possibly) give rise to a duty of care not to return required the presence of an clear and imminent danger on return and which would have been a clear change from the original "norm" when the Parents handed the Claimant over to the Defendant. However:

a) Here there is no pleading of any specific clear or imminent danger i.e. this is not a "Burning Building" or equivalent case (even if my suggested scenario of the drug abusing parent holding a knife would or could be such)

b) Rather this appears (on the pleading) to be simply a return of the Claimant back into the original situation (being one which I have to assume as being of general, but not immediate specific, risk of harm).

iii) It is thus difficult to see any reason why a duty of care would arise in relation to this return if, as I have held above, such has not arisen already

iv) The imposition of a duty of care would also seem to be inconsistent with the statutory scheme of the Defendant being bound to return the Claimant to the Parents and the Parents being entitled to remove the

Claimant from the Defendant. In the Burning Building Example scenarios that might be overridden by one of my three different analyses set out above, but none of them can apply here

v) I do not see this as a situation in which the local authority has in any way created the danger. The danger was from the Parents (to whom the defendant was bound to return the claimant as a matter of law and where no General Duty or other specific duty existed to take care etc. proceedings) and the situation is no different, in that respect, from that considered, and where an argument for a duty of care was rejected, in N v Poole at paragraph 74.

100. It is pleaded in Paragraph 6.10, combined with Paragraph 7.1, of the Particulars of Claim that by returning the claimant to the Parents, the defendant encouraged them to believe that no action would be taken. It seems to me that this argument should be rejected for the same reasons as when I considered it above in relation to the contention that it assisted on the General Duty point. I do not see how the returning could in any way amount to an encouragement (either directly of abuse or indirectly of an expectation that the local authority would take no steps) where the local authority was bound under statute to effect the return. I do not see how the local authority by complying with its obligations to return the claimant to the Parents can come under a duty of care which would not otherwise have existed. The defendant did not say that it would not continue to investigate, and, in any event, a failure to investigate or a decision to cease to investigate does not give rise to a duty of care where none existed already (see

N v Poole at paragraph 81 etc.) and it is the Parents who are the (alleged) abusers.

101. I add that I do not consider that the Defendant in any way truly "enabled" the Parents to cause harm to the Claimant. The ability of the Parents to cause harm did, in one sense, result from the return (in that if there had been no return, the Parents could not have thereafter caused the harm), but the Defendant had to return the Claimant to the Parents as a result of the operation of the provisions of the 1989 Act, and the fact that the Parents thereafter (on the pleaded facts which I have to assume are correct) caused the harm is, in my view, a legally separate and unconnected matter. This is effectively the same point as I have considered above in relation to the General Duty arguments and which it seems to be is simply contrary to the reasoning and approach of N v Poole that no duty of care arises simply from the existence of the local authority's powers to investigate and to institute care etc. Proceedings without something specific and sufficient to justify it. Whether one looks at this in terms of the existence or of the scope of a duty of care, I think that this argument fails.

102. I therefore hold that reasonable grounds have not been pleaded to give rise to a duty of care at common-law. This is notwithstanding my having sought to take the cautious approach required by the authorities in what has been in the past a developing area of law. It seems to me that the principles have been settled by N v Poole, following a sequence of cases at the highest levels, and that (as also held by Deputy Master Bagot QC in HXA v Surrey) their application is clear with regard to both the pleaded General Duty Matters and the pleaded Respite Care Matters.

103. There remains a principled discretion as to whether I should not strike-out notwithstanding that I have resultant discretion to do so under CPR3.4(2)(b). I have been concerned as to three particular matters:

i) That the Human Rights Act claim will go forward in any event and will involve consideration of all the evidence which would be relevant to the common-law claim (liability and, very probably, quantum even if the measure of quantum might be different). Mr Levinson can therefore say that there is limited point in striking-out the common-law claim. However, that is not a reason to allow it to go forward. It will still take time, the arguments (including as to quantum which have not yet been developed) may be different from those under the Human Rights Act (and if they are the same then the common-law claim may simply be unnecessary), and the overriding objective favours achieving finality and saving resultant waste of time, costs and court and parties' resource

ii) That a resultant costs order against the Claimant may result in a deserving claimant suffering substantial financial disadvantage where they have (perhaps) a good claim for a different (Human Rights) remedy on the same facts. However, costs are simply a separate matter from strike-out, and are yet to be determined

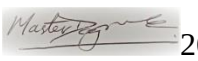
iii) That there is a general public interest in determining the responsibilities and liabilities of local authorities to children known (or who should be known) to be suffering (or be at risk of suffering) substantial harm and where such a child has come into the control of the local authority even if only for a limited period. However, that is not a reason for a trial

where no sufficient matters have been pleaded, and the Claimant will be able to continue to ventilate and run their claim under the Human Rights Act.

104. For and in all those reasons and circumstances, I therefore conclude that I both have jurisdiction to and will strike-out the claims advanced at common-law (but not those under the Human Rights Act). However, and including in view of the decision in Libyan v King 2020 EWCA Civ 1690, I will only do so as part of my eventual order consequential upon this judgment.

Handing-Down and Consequential Matters

105. As stated in my draft judgment, I am handing down this Final Judgment at 2 pm on Wednesday 26 May 2021 without attendance from the parties but with an adjournment of the hearing and of (with general extensions of time until further order) all questions of permission to appeal and time to appeal, form of orders (which are not presently being made and will only be made at) and costs to a further date; with the parties to liaise and having until 4.30pm on 18 June 2021 to submit their proposed orders and any applications (including for permission to appeal and time to appeal) and a statement of whether they seek an oral hearing (and if so with dates to avoid until 6 August 2021).


26 May 2021