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# 'Failure to Remove' Claims – the Decision in HXA v Surrey County Council, and an Update

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It is over nineteen months since the Supreme Court handed down its landmark decision in *N v Poole BC* [2019] UKSC 25, [2020] AC 780 considering whether social services authorities and their social workers owed duties of care in the exercise of their child protection functions. Interpretations of the judgment of Lord Reed in that case, with which all his colleagues agreed, have differed widely between practitioners in the field. It was inevitable that further litigation would ensue in order to determine the proper understanding of Lord Reed's reasoning and its precise reach. It has taken a while for cases to come to court, but first instance decisions are beginning to appear with increasing rapidity.

On February 15th 2021, an important judgment was handed down by Deputy Master Bagot QC. This article considers that decision and also summarises the other case law to date, before looking at pending cases and the likely way forward to the higher courts.

This article assumes that the reader is familiar with the Supreme Court decision in the *Poole* case. The Briefing Note which was published by myself and colleagues following the decision is available on our website [link].

## *The Case Law to Late 2020*

The first decision was given just over a month after *Poole* was handed down, and it came from an unusual source; the Chief Justice of the tiny British Overseas Territory of St Helena. In *A v Attorney-General of St Helena* [2019] SHSC 1, available on BAILII [link], the claimant had been sexually abused by two older men when she was a teenager. She complained of a failure to protect her despite disclosures made to the authorities. The precise factual history, and the exact way in which the claimant's case was put, are not entirely clear from the judgment, but it is clear that the Chief Justice rejected all the attempts to distinguish *Poole* and held the case "falls squarely on all fours with *Poole*" and that it should be struck out: para 28.

The first English judgment was that of HHJ Backhouse in the Mayor's and City Court on July 19th 2019 in *Spence v Calderdale MBC*, in which I appeared for the defendant. It was an unusual case in which the claimant and his siblings had been promptly removed from their parents' care under what was then, in 1971, called a place of safety order, following allegations of abuse. Interim care orders were later made. The claimant's stepfather was tried and acquitted for an indecent assault. There was rather equivocal evidence in the papers which suggested that the local authority tried to keep the claimant in its care, but the Magistrates' Court refused a further interim care order and the claimant was returned to his parents' care. The judge thought that the case was arguably distinguishable from *Poole* on the basis that the claimant had been taken into care and declined to strike the claim out. The case was subsequently settled for a modest sum. No transcript of the judgment is available.

The next judgment was given nearly a year later, by HHJ Roberts in the County Court at Central London on June 26th 2020. *Champion v Surrey CC* was a case in which there was a lengthy history of involvement of social workers with the claimant's family, but he had never been taken into care either under any form of care order or pursuant to any of the powers and duties in Part III of the Children Act 1989. Again, I represented the defendant. The judge's judgment is available on Westlaw [link-subscription needed]. He noted that a number of elements of the history were pleaded as representing positive acts, and he took the view that those allegations "are sufficient to give rise to an arguable assumption of responsibility": para 31(v). He refused permission to appeal, but Stewart J has subsequently granted permission to appeal on paper.

On September 15th 2020, District Judge Jackson, sitting in the County Court at Bradford, struck out a claim against Bradford MBC in which the claimant had been left in her mother's care and had been raped by her mother's partner. Although assumption of responsibility was alleged, it appears that no factual allegations in support of that suggestion were pleaded. The District Judge is reported to have decided that the pleaded case was "wholly inadequate in identifying the act or task or service relied on". No transcript is available, but counsel for the defendant, Steven Ford QC, has prepared a detailed note [link]. The case is a good illustration of the necessity for claimants to specify clearly in the Particulars of Claim the factual basis on which it is said that an assumption of responsibility arises.

In *AA v CC*, HHJ Godsmark QC, sitting in the County Court at Nottingham, declined to strike out a claim brought on behalf of the second claimant, a child, BB. Her father, AA, was the first claimant. He alleged that the council

had become involved in private law proceedings between him and BB's mother concerning her care, by providing information to CAFCASS and possibly also by providing information to the court itself. It was alleged that the council had given a wholly misleading impression of the ability of BB's mother to care for her and she had suffered neglect and abuse as a result. In his judgment given on September 22nd 2020, which is again available on Westlaw [link-subscription needed], the judge concluded that it was arguable that the council's involvement in the private law proceedings had caused harm to BB rather than merely amounting to a failure to protect her: paras 95-98. He also thought that if that analysis was incorrect, the council's entanglement in the case between the parents arguably gave rise to an assumption of responsibility: paras 99-103.

## *HXA v Surrey County Council*

This judgment, handed down by Deputy Master Bagot QC, will be provided along with this article. I represented the defendant, and Justin Levinson appeared for the first claimant (the second claimant's case is stayed by agreement pending the resolution of her older sister's claim). It was a case in which the claimants were left in the care of their mother and a succession of male partners, despite regular expressions of concern and involvement by the council's social services department. They suffered physical abuse and neglect at the hands of their mother and, latterly, sexual abuse from one of the mother's partners. The factual allegations were reproduced in para 9 of the judgment. The Particulars of Claim, which were based on a formulation of the duty of care issue which I have seen in a number of cases, sought to argue that a duty of care arose on six different bases:

(1) A duty of care existed by the mere exercise of child protection functions, because the effect of *Poole* was to resurrect the decision of the Court of Appeal in *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558.

(2) By its involvement with the claimants' family, the defendant assumed responsibility for their safety and welfare.

(3) The council had added to the danger which the claimants faced by "endorsing" their parenting and "allowing" the unsuitable male partners to move in with the mother.

(4) The council had failed to control the wrongdoers, namely the mother and her partners.

(5) The council's inaction had prevented others from protecting the claimants.

(6) The first claimant had complained to a lunch assistant at school about being frightened when her stepfather came into her bathroom when she was bathing, and the matter had been reported to the school office.

The defendant accepted that the last set of allegations might arguably fall within the scope of the well-recognised duty of care owed by teachers and school staff to pupils, and did not suggest that those particular factual allegations should be struck out. However, all the bases on which it was said that its social services department and social workers owed duties of care were attacked. It was expressly accepted in the submissions for the claimants that the case was one of failing to confer a benefit rather than causing them harm. It was suggested that *Poole* was distinguishable on the basis that it had

been concluded that a care order could not have been obtained in that case. The Deputy Master rejected that submission at para 26 of his judgment:

26. The difficulties I have with the Claimants' submissions on *Poole* are fourfold:

i) Firstly, the inability to seek a care order in the circumstances of *Poole* was central to difficulties in establishing breach and causation (had they arisen for determination) and not to the existence of a duty at all;

ii) Secondly, I consider it apparent that the lack of an ability to remove the children was an additional and stand-alone reason why the claim was struck out rather than the sole reason. ...

iii) Thirdly, if lack of an ability to remove the children had been a critical feature of the decision to strike-out on duty of care grounds, and hence the precedent value of *Poole* in a case such as the present, one would have expected this to have been a point highlighted by Lord Reed much earlier in the 92-paragraph judgment than paragraph 90, the final paragraph before the conclusion.

iv) Fourthly, understood in that way as a point going to breach and causation, this is fatal to the valiant attempt by Mr Levinson to distinguish away *Poole* and its effect by contrasting the non-availability of a care order there with the position here. That was not a point which went to the absence of a duty of care in *Poole* and nor was it the reasoning for that finding. When one strips away that, incorrect in my view, basis to distinguish *Poole* this only goes to enhance the (binding on me) precedent value of Poole and the close analogy it provides.

He also rejected as inappropriate, at paras 29-30, attempts to distinguish *Poole* on the basis of differences on the facts. Mere assertion of reliance on the council by the claimants would not suffice:

I agree with the Defendant's response which is to say that this is an attempt to make inappropriate distinctions of the kind deprecated in *Robinson.* The bald assertion of reliance in para 17 of the Particulars of Claim, that the Defendant was made aware that Schedule One offenders were living in the home so that the risks could be assessed; the Claimants relied on the Defendants to investigate; and the Defendant assumed responsibility for doing so, but its investigations and consequential steps taken were inadequate, cannot be made good as there is no foundation of factual averments as to how that reliance arose.

He also made this important observation at para 33, distinguishing the cases where a care order had been made and a duty of care was recognised, such as *Barrett v Enfield LBC* [2001] 2 AC 550:

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 Claimants 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.

He then went on to deal with the other exceptions to the general rule of non-liability which were relied on at paras 34-35:

i) Adding to the danger .... 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 .... 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] ....: 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 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.

Finally, he rejected the argument that the striking out should be refused, because the case would have to go to trial on the issue of the alleged disclosure at school, at para 37:

.... even if I accepted the proposition that only minimal savings would be made, that could not, alone, trump the need to make a decision under CPR 3.4(2)(a) or permit a large proportion of a claim to proceed to trial where a party had established the threshold for striking out those parts of the opposing party's claim. But, here, the Defendant is correct to observe that there will in all probability be significant savings of time, costs and court resources if the case is shorn of the relevant claims. Looking at what action would have been taken by the local authority as a consequence of a report by the school is wholly different from examining the myriad other allegations on the question of liability, rather than merely as matters of background. It will be less time consuming and costly to investigate and determine the school allegation alone: resulting in fewer documents, fewer witnesses, fewer experts and a significantly shorter trial. ....

As to the previous decisions, at paras 40-43, the Deputy Master indicated that he declined to follow the decision in *Champion* and regarded the approach in the *St Helena* case as representing the right approach. He closed the main part of his judgment by emphasising the importance of not distinguishing cases from *Poole* on inadequate grounds: paras 46-47. He went on to deal with costs and refused permission to appeal.

## *Pending Cases*

There are at least two cases in which judgments are pending. The most important will be the decision of Lambert J in *DXF v Coventry CC*, a case which was subject to a full trial in late 2020. This may be expected to be the first consideration at High Court level of duty of care issues following the decision in *Poole*.

An argument which has not yet been addressed in any of the decided cases is whether, if the claimant is accommodated by the local authority under s20 of the Children Act 1989, that gives a basis to distinguish *Poole*. The case of *YXA v Wolverhampton CC*, which was argued before Master Dagnall on January 26th 2021 by Mr Levinson and myself, concerns a claimant with severe learning and physical disabilities whose parents were neglecting and over-medicating him. He was provided with respite care, and it was suggested that by analogy with *Barrett*, that amounted to assumption of responsibility. A claim is also made under the Human Rights Act 1998 which is not attacked by way of strike-out, and judgment is reserved.

Two further cases are listed for hearing shortly. *DEF v Kirklees MBC* is currently listed for hearing on March 5th 2021 before Master McCloud. That case concerns child sexual exploitation by groups of men outside the claimant's family. The claimant was not provided with s20 accommodation during the history. A claim is also made under the 1998 Act, which again is not the subject of the application to strike out.

Finally, *AGR v Hertfordshire CC* was recently adjourned and relisted for hearing on April 12th 2021 before HHJ Hellman in the County Court at Central London. This is a further case with extensive social services involvement with the claimant's family, although he was not accommodated until he was over 16 years old.

It is understood that an application may be made in the *Champion* and *DEF* cases for the cases to proceed directly to the Court of Appeal for determination. Whether or not that happens, few would disagree with the view expressed by Master Dagnall during the hearing in *YXA* that it would be

appropriate for a group of cases to be heard together on appeal so that as many different factual scenarios as possible and the fullest range of arguments can be canvassed.

## *Conclusion*

It can be seen that first instance judges are reaching widely diverse conclusions on the various way in which duty of care issues are argued before them. While the Deputy Master's judgment in *HXA* is a carefully-crafted and closely-reasoned rejection of many of the arguments advanced on behalf of claimants, it will not be the last word in the ongoing debate.