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'Failure to Remove' Claims in the High Court: the Appeals in HXA v Surrey County Council and YXA v Wolverhampton City Council

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The trickle of court decisions seeking to apply the decision of the Supreme Court in *N v Poole BC* [2019] UKSC 25, [2020] AC 780 continues. On November 8th 2021, Stacey J handed down her long-awaited decision [2021] EWHC 2974 (QB) on the appeals from the decisions of Deputy Master Bagot QC in *HXA v Surrey CC* [2021] EWHC 250 (QB) and Master Dagnall in *YXA v Wolverhampton CC* [2021] EWHC 1444 (QB). She dismissed the claimants' appeals, upholding the striking out of the claims in negligence brought by them against social services authorities.

I have analysed in previous articles the first instance decisions in *HXA* [link] and *YXA* [link]. The decision in *YXA* was handed down in the same week as the decision in Lambert J in *DFX v Coventry CC* [2021] EWHC 1382 (QB), [2021] PIQR P18 which is discussed in a further article written by Katie Ayres [link]. Together, the decisions of Lambert J and Stacey J address and reject a

number of the arguments which have been advanced by claimants in favour of the imposition of duties of care in 'failure to remove' cases.

The Judgment

It will be recalled that both cases arose from neglect and abuse sustained by the claimants within the family home. In the case of HXA, she suffered from physical abuse and neglect from her mother, and sexual abuse chiefly perpetrated by her mother's partner, Mr A. YXA suffered from physical and learning disabilities and was over-medicated and neglected by his parents.

After summarising the allegations made in the two cases at paras 6-12 of her judgment, Stacey J summarised the bases on which it was argued on appeal that duties of care arguably arose at para 13. In essence, the arguments for the claimants repeated those advanced below. The issues were accurately summarised as follows:

i) On the assumed facts in each case did the defendant local authority assume a responsibility towards the claimant so that a duty of care arguably arose as a result of the following particular behaviour by the defendants?
    a) In HXA's case when:
        i) the defendant placed her name on the child protection register on 28 July 1994, or
        ii) in November 1994 when the defendant decided to undertake a full assessment with a view to initiating care proceedings but failed to do so, or
        iii) on 27 January 2000 when the defendant resolved to undertake keeping safe work with HXA, but failed to do so?
    b) In YXA's case when he was given intermittent accommodation provided by the local authority away from the family home under s.20 of the Act?
ii) Was it wrong to strike out the negligence claims on the basis that the law in this area is a developing area of law?
iii) Was it wrong to strike out the negligence claims on the basis that certain aspects of each claim would remain even if the negligence claims were struck out?

Stacey J then carried out an extensive review of the provisions of the Children Act 1989 relevant to the claim at paras 14-23 and then an analysis of the case law at paras 24-36, focusing mainly on Lambert J's decision in *DFX*. She then summarised the judgments below at paras 40-53 and the parties' submissions before her at paras 54-62.

At the outset of her conclusions, Stacey J adopted at para 63 the approach of the Court of Appeal in *Kalma v African Minerals Ltd* [2020] EWCA Civ 144 to determine whether the essence of the allegations made was one of act or omission. She said that it was "abundantly clear" that they fell into the latter category as "the harm was being done by the claimants' families and Mr A". She concluded:

> The attempt to carve out positive acts from a case which is principally about a failure to confer a benefit is to fail to identify correctly the underlying complaint. as per the Court of Appeal in *Kalma*:
>
> "merely because something can be presented as an act does not mean that what are, on a proper analysis, omissions can be, as the judge put it, "brought wholesale within the parameters of a duty of care"" [121]
>
> Or to put it colloquially, to fail to see the wood for the trees.

She set out at para 65 a list of tasks which, it was clear from previous decisions, did not amount to the provision of services to a child which they could be expected to rely upon in a way which might create an assumption of responsibility:

> "investigating and monitoring" a child's position .... "taking on a task" .... exercising its general duty [under] s17 [of the Children Act] .... placing a child on the child protection register .... investigating under s47 [of the Children Act]

She said, importantly, that "something more" was required. So the placing of HXA on the child protection register did not amount to "something more": para 66. Neither did a decision to undertake a full assessment and seek legal

advice about care proceedings: para 67. As for the "keeping safe" work, as with the similar allegation in *DFX*, there was no suggestion in the Particulars of Claim that the claimant would have kept herself safe if that work had been carried out, and in any event the allegation was one of omission to carry out the work, rather than it being carried out incompetently: para 68. The scope of any duty relating to the keeping safe work could therefore only extend to doing the work competently.

As for YXA, the judge noted at para 69 that his position as a child who was receiving temporary and intermittent care under s20 of the 1989 Act was "entirely different" to that of a child in care for whom the local authority had parental responsibility. There was no criticism of the care that YXA received during those periods; instead, the complaint was of a failure to take care proceedings to remove him from the care of his parents. There was no "logical reason" why the provision of s20 accommodation made any difference: para 70. The decision in *Barrett v Enfield LBC* [2001] 2 AC 550 was readily distinguishable, because the claim there was based on alleged failings after the child entered the local authority's care. 'Wrongful removal' cases such as *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558 were also readily distinguishable: paras 70-71.

Having decided that none of the formulations advanced in the two cases arguably gave rise to an assumption of responsibility, Stacey J went on to consider whether she should refrain from striking out the cases on the ground that the area of law was "developing". She rejected that submission at para 72, stating that the cases were "so closely analogous to the recent Supreme Court judgments and now *DFX*" that it could not be described as a "developing" area of the law. She went on, however, to consider some of the

cases discussed in my previous articles in which claimants had succeeded in showing that their claims should go forward. She rejected the decision of the St Helena Court of Appeal in *A v Attorney-General of St Helena* [2020] unreported, January 20th as wrong: para 73. She noted that *Champion v Surrey CC* [2020] unreported, June 26th was under appeal, and that it had been agreed at *AA v CC* [2020] unreported, September 22nd was distinguishable. Overall, she said at para 74:

.... the question of assumption of responsibility by a local authority so as to give rise to a duty of care to remove children from their families in child protection proceedings is not a developing, but a settled, area of law.

Stacey J summarised the position as follows at paras 75-76:

75. The Deputy Master and Master in both cases were correct to conclude that the claims were bound to fail for the reasons given in their careful judgments. The allegations were of an omission/failure to confer a benefit/not making things better and in neither case had the claimant asserted facts that could establish that the defendant local authority had assumed responsibility so as to give rise to a duty of care to take care proceedings. Since no duty of care had arisen, the claims in common law negligence were unwinnable. There was no arguable assumption of responsibility that could be found or inferred from either the nature of the statutory function or the manner of behaviour by the defendant in either claim to amount to an arguable case.

76. Even pre *DFX*, both judges were also correct in their analysis that neither case raised issues in a developing area of law so as to tend towards the exercise of the Court's discretion not to strike out notwithstanding the inherent difficulties in the claims. Post *DFX* the position has become clearer still. The facts alleged fall within the established parameters established by precedent. The application of the principles established by *Poole, Robinson and Michael* as applied to temporary intermittent accommodation provided with the parents' consent under s.20 does not amount to "something else" so as to amount to an assumption of responsibility to take care proceedings.

Finally, she stated that the decisions of the Deputy Master and Master to strike the negligence claims out notwithstanding that some parts of each claim were not attacked and would go forward were case management decisions and could not be impugned: para 77. The appeals were therefore dismissed.

The Implications

Combined with the decision in *DFX*, Stacey J's decision creates a body of authority binding up to the level of the High Court which has three main effects. First, it cuts off any argument that action taken by local authorities by way of investigating a family's position, providing services to try to relieve the family's position or invoking child protection powers short of obtaining a care order, can be seen as positive acts rather than omissions for the purposes of the law of negligence. This is plainly correct; these cases are at root about the local authority's failure to secure the removal of a child from a situation in which he or she is enduring abuse or neglect. They are cases of omission, or failing to make things better as it was put in *Poole***.**

Secondly, the decisions make it clear that the decisions in *Barrett* and *East Berkshire*, frequently relied upon as analogous, are nothing of the kind. *Barrett* is, following *Poole*, to be seen as an example of a case in which an assumption of responsibility arises purely as a result of the nature of the service being provided to the claimant. As made clear by Stacey J, child protection functions are not such a service. The *East Berkshire* appeals concerned three cases not of omission, but of causing harm by removing children from the care of their parents with no basis in fact.

The third point is the rejection by Stacey J of the assertions that cases of this kind should nevertheless be allowed to go forward to trial on the ground that the law was developing. As she says, *Poole*, *DFX* and her judgment between them spell out clearly that an assumption of responsibility can only arise from some facts which fulfil the criteria for an assumption of responsibility on a factual basis. The law is, in that sense, settled.

It is suggested that the search for the "something more" which might justify imputing an assumption of responsibility on the facts in a 'failure to remove' case is likely to remain elusive. This should not be particularly surprising, since the concept was developed in the very different context of references being voluntarily given by a company's bank to another company's bank. To construct an arguable case of assumption of responsibility in this context will, it is suggested, require some unusual facts. For example, if a child was given an express promise by a social worker that action will be taken to remove them from an abusive situation in order to dissuade the child from running away from home, and then action was not taken, that would arguably give rise to a duty of care. But as the law stands, nothing short of that sort of promise or representation which is then acted upon, surplus to the mere involvement of social workers in a family, will suffice.

There remain, however, some arguments being advanced by claimants which have not yet been the subject of pronouncement at High Court level. In particular, it remains to be seen whether the courts will be able to find an arguable duty of care on the basis of the other exceptions identified in the *Poole* case: namely preventing others from protecting the claimant, failing to exercise control over the source of the danger, and the 'status' of the local authority: see para 76 of the *Poole* judgment. The first two of those were the subject of consideration by Deputy Master Bagot QC in para 35(ii) and (iii) of his judgment in *HXA* and by Master Dagnall at *YXA* at paras 86-87. Another argument is that the inaction of the local authorities "increased the danger" to a child. This was again considered and rejected at first instance in the two cases: *HXA* para 35(i); *YXA* paras 84-85, 100-101. However, the arguments were not repeated on appeal and were not addressed by Stacey J. Nor were

they considered by Lambert J in *DFX*, having apparently been pleaded but not pursued at trial: see para 15 of her judgment.

Future Developments

The other exceptions to the general rule of non-liability for omissions are likely to be considered in the pending decision of the Court of Appeal from the decision of Master McCloud in *Tindall v Chief Constable of the Thames Valley Police* [2020] EWHC 837 (QB), [2021] RTR 6. The Court of Appeal heard argument over two days in October and judgment is awaited.

The appeal in *Champion* remains undecided by the High Court. On October 20th, Cotter J considered an application by the claimant for the appeal to be transferred direct to the Court of Appeal for consideration. He adjourned the matter pending the handing down of Stacey J's judgment.

The adjourned strike-out application before Master McCloud in *DEF v Kirklees MBC* has now been listed for March 15th and 16th 2021, almost a year after the first day of the hearing. The claimant in that case, represented by the same team of counsel as are instructed in *Champion*, relies on a very wide range of arguments in favour of the imposition of a duty of care.

There is also a two-day summary disposal application in *AB v Worcestershire CC* listed on November 17th and 18th 2021, in which the local authorities are also seeking summary judgment on the Human Rights Act claims brought by the claimant.

[note: the final paragraph of this article was amended on January 20th 2022 to reflect the anonymity order made in the case referred to]