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# 'Failure to Remove' Claims: Some Further Developments

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The new year is not yet a month old and yet there have already been two significant judgments handed down since the last strains of *Auld Lang Syne* died out. Both are of considerable assistance to those defending 'failure to remove' claims against local authorities.

## *Negligence Claims: the Tindall Case*

In a series of articles published last year, I analysed in detail the decisions at first instance in *HXA v Surrey CC* [2021] EWHC 250 (QB) [link] and *YXA v Wolverhampton CC* [2021] EWHC 1444 (QB), [2021] PIQR P19 [link], and the decision of Stacey J on appeal [link]. A further article by my colleague Katie Ayres looked at the decision of Lambert J in *DFX v Coventry CC* [2021] EWHC 1382 (QB), [2021] PIQR P18 [link]. The claimants in *HXA* and *YXA* have now sought permission to appeal to the Court of Appeal. The outcomes of the stalled appeal in *Champion v Surrey CC* and the part-heard application in *DEF v Kirklees MBC* are awaited.

The focus of the argument in the cases decided to date has been on whether a duty of care is owed by virtue of an assumption of responsibility by the defendant. The decision in *Tindall v Chief Constable of Thames Valley Police* [2022] EWCA Civ 22 focuses principally on other exceptions to the general rule, which have not yet been the subject of any decision in the context of 'failure to remove'-type claims. It will be recalled that in *N v Poole BC* [2019] UKSC 25, [2020] AC 780 at [76], the Supreme Court approved the following summary of the exceptions from an article.

> 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.

As the name of the case makes clear, the case is nothing to do with social services. It concerned a road traffic accident on a freezing spring morning in 2014 on the A413. Black ice had formed on a section of the road. Very early in the morning, a passing motorist, Mr K had skidded on the ice and crashed. He was hurt, though not seriously. He telephoned the police and reported his accident, and the fact that there was ice on the road. Officers arrived about 20 minutes later, and in the meantime Mr K was seeking to alert other road users to the danger. The officers were informed by Mr K of the danger, cleared the road of debris and placed a sign on the road to instruct motorists to go slowly. Insufficient attempts were made to secure the attendance of a gritting lorry. Mr K was taken away in an ambulance. The officers then removed the sign and left the scene. Some 20 minutes later, the claimant's husband was driving along the road when a driver coming in the opposite direction lost control on the ice and collided with his car. Both, tragically, were killed.

The pleaded case against the police was that the officers had made the danger worse in that following their attendance, Mr K ceased his efforts to warn vehicles. They had also failed to take proper steps to protect motorists using the road.

In her judgment [2020] EWHC 837 (QB), [2021] RTR 1, Master McCloud dismissed the police's application to strike out. An appeal was directed to proceed directly to the Court of Appeal.

Giving judgment for the Court of Appeal, Stuart-Smith LJ reviewed the authorities in detail at [23]-[53]. He gave a useful summary at [54] in the following terms (citations omitted):

> i) Where a statutory authority (including the police) is entrusted with a mere power it cannot generally be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. In general the duty of a public authority is to avoid causing damage, not to prevent future damage due to causes for which they were not responsible ....
>
> ii) If follows that a public authority will not generally be held liable where it has intervened but has done so ineffectually so that it has failed to confer a benefit that would have resulted if it had acted competently ....
>
> iii) Principle (ii) applies even where it may be said that the public authority's intervention involves it taking control of operations ....
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> iv) Knowledge of a danger which the public authority has power to address is not sufficient to give rise to a duty of care to address it effectually or to prevent harm arising from that danger ....
>
> v) Mere arrival of a public authority upon, or presence at, a scene of potential danger is not sufficient to found a duty of care even if members of the public have an expectation that the public authority will intervene to tackle the potential danger ....
>
> vi) The fact that a public authority has intervened in the past in a manner that would confer a benefit on members of the public is not of itself sufficient to give rise to a duty to act again in the same way (or at all) ....
>
> vii) In cases involving the police the courts have consistently drawn the distinction between merely acting ineffectually .... and making matters worse ....
>
> viii) The circumstances in which the police will be held to have assumed responsibility to an individual member of the public to protect them from harm are limited. It is not sufficient that the police are specifically alerted and respond to the risk of damage to identified property .... or injury to members of the public at large .... or to an individual ....;

ix) In determining whether a public authority owes a private law duty to an individual, it is material to ask whether the relationship between the authority and the individual is any different from the relationship between the authority and other members of the same class as the individual ....

Coming to his conclusions, Stuart-Smith LJ rejected the suggestion that the police had done anything to stop Mr K warning motorists: at [66]. Although not expressly so stated, this deals with exception (ii) from the article mentioned above. Furthermore, the police did not make the danger worse by removing their sign before leaving; they were merely restoring the road to its former state: at [67]-[68]. It was not therefore a case where the police created the risk, or made it worse.

At [71], a further submission for the claimant was rejected in the following terms:

I cannot accept the Claimant's submission that a duty can arise in circumstances "where a defendant had the power to exercise physical control, or at least influence, over a third party, including a physical scene (such as the accident scene in the present case) and, absent their negligence, ought to have exercised such physical control." The submission is far too wide. If correct, it would mean that whenever a public authority has the power to prevent harm and, if acting competently, ought to have prevented it, then a duty of care to prevent the harm arises. This is directly contrary to the firmly established principles that are set out in and derived from the authorities to which I have referred.

At [72], Stuart-Smith LJ referred to the case law on the 'control exception' (iii) in the article cited in *Poole*. Of *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, it was said that of the Borstal officers that:

.... the officers' control over the trainees was (or should have been) complete, the trainees were a known source of danger, and the officers introduced the danger into close physical proximity to the claimants' boats.

In the instant case, by contrast, the police officers "came across a potential danger for the existence of which they had not in any way been responsible".

Two principle points can be derived from this judgment in relation to 'failure to remove' claims in negligence:

— It is frequently suggested by claimants that by failing to intervene, or by returning a child from respite care as in *YXA*, the defendant created or enhanced the danger to the child. That argument was well dealt-with by the Master in *HXA*, but this decision makes it clear at a higher judicial level that merely allowing a pre-existing danger to continue cannot amount to the creation or enhancement of a danger.

— Similarly, it is frequently suggested that there was a failure on the part of social workers to exercise control over parents or others responsible for abuse or neglect, so that exception (iii) applies. The judgment makes it clear, as it should already have been, that the exception is much narrower than that. In fact, since social workers cannot exercise physical control over any person who presents a danger to a child, the chances of relying on it ought to be even more fanciful than is the position with the police.

## *HRA Claims: AB v Worcestershire CC*

The case law so far has focused on claims in negligence. Until now, there has been no judicial consideration of the possible parallel claims under the Human Rights Act 1998, save for a passing mention in the *DFX* case, in which the judge found that the failure of the claimant to prove breach of duty in her negligence claim was also fatal to her claim under the 1998 Act, and declined to consider the other issues arising under the Act: at [247]. This is mirrored by the surprising paucity of claims which have reached the Strasbourg court.

The judgment of Margaret Obi, sitting as a Deputy High Court Judge, in *AB v Worcestershire CC* [2022] EWHC 115 (QB) is the first which considers a claim under the 1998 Act in detail. The claimant was a young man born in 2002 and now aged 20. He lived in the area of the second defendant, Birmingham City Council ("BCC"), until about November 2011, and then in the area of the first defendant, Worcestershire County Council ("WCC"). There were periodic references to social services. The claimant was not accommodated at any time by BCC, but following a disclosure to his school that he had been pushed and scratched by his mother, in July 2013 he and his younger brother were placed in foster care, where he remained until April 2014. He initially expressed himself to be happy to have returned home, but later complained that his mother was calling him names and hitting him. In August 2014, he was accommodated by agreement after an allegation was made that he had sexually abused a friend of his brother. He never returned to the care of his parents.

The tortuous and deeply unsatisfactory procedural history of the litigation was summarised by the Deputy Judge at [10]-[19]. Initially, claims in negligence and for breach of Arts 3, 6 and 8 of the Convention were being advanced. The defendants made applications to strike out and for summary judgment. By the time of the hearing, the court was considering the fifth version of the Particulars of Claim which had been advanced, and all the claims except the claims under Arts 3 and 6 of the Convention had been abandoned.

The Deputy Judge summarised the case law cited to her concerning the meaning of "inhuman and degrading treatment" in Art 3 at [28]-[32], the test

for the imposition of an operational duty to protect at [33]-[35], and the investigative duty at [36]-[37].

## *The Article 6 Claim*

The Deputy Judge dealt shortly with the claim under Art 6. She accepted the defendants' submissions that although Art 6 created rights in relation to "the determination of .... civil rights and obligations", there was no such right at issue. The claimant did not have a civil right to seek a care order or to have one made: at [54]. In any case, it was not arguable that a care order would have been made on the basis of any of the particular incidents identified in the Particulars of Claim: at [55]. Since the gravamen of the case was that a care order should have been applied for at an earlier stage, it added nothing to the Art 3 claim anyway: at [57]. The Art 6 claim was therefore struck out.

## *The Article 3 Claim*

In relation to the Art 3 claim, the issue was whether the defendants should be granted summary judgment. She dealt with three substantive issues arising on the claim:

— whether the treatment of the claimant ever met the threshold for treatment or punishment falling within Art 3;

— whether a operational duty could be owed under Art 3 to children living in the community; and

— whether an investigative duty could be owed under Art 3 to children.

The judge was critical of some of the ongoing deficiencies of the claimant's pleaded case, which referred to two chronologies, one of which had been served late in the day, and which asserted psychiatric injury but in respect of which no medical evidence had been served: at [61]-[62]. At [63] she noted that although it had been argued that inferences could be drawn as to the nature of ongoing treatment, it had not been pleaded that the court would be invited to infer that there was additional ill-treatment of him beyond that recorded in the records, and that it was accepted that the claimant would not be able to add anything to the content of the records at trial.

She then entered into a detailed analysis of the allegations made in relation to the two local authorities: at [65]-[85]. This will repay careful reading, but she accepted that most of the incidents which came to the attention of the authorities were transient in nature and did not involve persistent or sufficiently serious neglect or abuse to bring them within the scope of Art 3. Furthermore, there was no arguable case that a care order ought to have been sought at any stage, the cogent reasons for breaking up the family being absent despite the mother's unsatisfactory care: at [86]. The Art 3 claim was therefore bound to fail in terms of the existence of a duty and causation.

The second issue was one which had been raised on behalf of BCC. She accepted the submissions made on its behalf that it was established by authority that the operational duty under Art 2 could only be owed to those over whom the public authority had exercised control. Since the claimant had never been in the control of BCC, no operational duty could be owed by the council towards him: at [88]-[93].

Both defendants relied on the third argument, which was that the investigative duty was directed towards the identification and criminal punishment of behaviour, rather than the protection of individuals. The Deputy Judge again accepted that submission: at [94]-[100].

Summary judgment was therefore granted to the defendants, and the claims against them brought to an end.

## *Discussion*

"Inhuman and degrading treatment" is not well-defined in the Strasbourg jurisprudence. There has been a noticeable dilution of the concept by the Strasbourg court over the years. The position of the court appears to be that sexual abuse of a child to any degree would fall within the meaning of that phrase, while physical abuse would do so if it caused substantial injury, pain or suffering or was repeated or inflicted in humiliating circumstances. The position in relation to neglect is less clear. In *Z v UK* (2001) 34 EHRR 3, the case brought by the unsuccessful claimants in *X v Bedfordshire CC* [1995] 2 AC 633, the court referred to the "serious ill-treatment and neglect suffered by the children over a period of years": at [70]. The UK government did not contest that the Art 3 threshold was crossed: at [72], [74]. In *DP v UK* (2002) 36 EHRR 14, it was said that a "clear pattern of victimisation or abuse" needs to be shown to justify severing family ties: at [113].

The importance of the Deputy Judge's decision in relation to this issue, therefore, is to show that unless there is evidence of consistent neglect or ill-treatment of sufficient severity, a claimant is unlikely to succeed in demonstrating that the Art 3 threshold is crossed.

The second argument accepted by the Deputy Judge is much more far-reaching. If correct, it should enable many, perhaps most claims under Art 3 to be defended on the basis of the absence of a duty, because most 'failure to remove' claims arise from children who are experiencing neglect or abuse within the family home.

The obvious question is what is required for a child to be within the "care and control" of a local authority. Does this require a care order? Or is it sufficient if a child, as with this claimant during the latter part of his time in WCC's care, is cared for temporarily under s20 of the Children Act 1989? It is debateable whether "assumption of responsibility" in the case law discussed by the Deputy Judge has the same meaning as in the private law of negligence. Further clarification of this point is needed.

The conclusions on the other issues are useful, because there is a frequent misconception amongst claimants' representatives that the investigative duty applies to local authorities, or that there is a viable claim under Art 6. As the Deputy Judge's judgment shows, there is nothing in these arguments. It is correct that the operational duty under Art 3 necessarily involves an obligation of inquiry, because there will be liability if the public body *ought to have* been aware of the risk of Art 3 ill-treatment, not merely when it did know. However, there is no separate obligation of investigation other than that inherent in complying with the operational duty (assuming that it applies at all).