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Public Authority Briefing

In this end of year article, Andrew Warnock QC asks the question many involved with the public sector have been asking since *Poole v GN* – when does an Assumption of Responsibility arise?

Whilst the Supreme Court did not give the clearest guidance, an analysis of the cases on Assumption of Responsibility in this area shows that some principles can now be established.

Assumption of Responsibility

Following the decision of the Supreme Court in *Poole Borough Council v GN* [2019] UKSC 25, there has been much interest in the question of when a public authority will be considered to have assumed a duty of care in tort which would not otherwise have existed.

The essential facts of *Poole v GN* were that the child claimants were the victims of a campaign of harassment by their neighbours. They alleged that the local authority social workers had failed to protect them by failing to assess whether their mother was able to meet their needs and failing to exercise their statutory powers to remove them from the housing estate and their mother's care. The Supreme Court held that no duty of care was owed to the claimants in the law of tort. The Court referred to its earlier decisions in the cases of *Michael v Chief Constable of West Wales* [2015] UKSC 2 and *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4 – both of which concerned when the police may be sued for negligence – and reiterated that public authorities are subject to the same rules in the law of tort as private individuals. Like private individuals, they do not generally owe a duty of care in tort law to confer benefits on third parties, for example by protecting them from harm, and this is so even if they have statutory powers or duties to do so. A tortious duty to protect another from harm caused by someone else arises only in limited and special circumstances, such as where the local authority has assumed a responsibility to protect the claimant from the harm in question. No such assumption of responsibility was capable of arising on the facts as alleged in the *Poole* case and hence the case was struck out.

When might an assumption of responsibility arise? To answer this question it is necessary to look more closely at the nature and ingredients of an assumed duty.

The concept has its origins in quite different cases, involving economic loss. In *Hedley Bryne & Co Ltd v Heller & Partners Ltd*, a bank voluntarily gave a credit reference in respect of its customer to a third party; it did so negligently, resulting in loss to the third party who relied on it. The House of Lords held that but for a disclaimer of liability, the bank would have been liable to the third party, because where a person who has a special skill undertakes to apply that skill for the benefit of another, then irrespective of whether they have entered a contract they will owe a duty of care if the other person relies on them.

In *Henderson v Merretts Syndicates* [1995] 2 AC 145, the principle was applied to managing agents who conducted underwriting activities for or on behalf of the claimant insurance underwriters. In *Spring v Guardian* [1995] 2 AC 296, the concept was applied to an employer who provided a reference about his former employee to a new employer. In *X v Bedfordshire County Council* [1995] 2 AC 633, a local education authority which

provided an educational psychology service was held to have arguably assumed a duty of care to children whose parents relied upon advice provided by it. In *Phelps v Hillingdon* [2001] 2 AC 619, a local authority educational psychologist who assessed and reported on a child's educational needs was held to owe a duty of care because it was foreseeable that the child's parents would rely upon her advice and they did so. In *Barrett v Enfield LBC* [2001] 2 AC 550, it was held that a local authority which took a child into care arguably assumed responsibility to keep him safe from personal injury. This last case in particular has provided the basis for much of the discussion about when there is an assumption of responsibility in the context of taking a child into care.

It is to be noted that in many of these cases the relationship between the parties, although not contractual, was "akin to contract", the only missing ingredient being consideration. All of the cases involved services either being provided by private individuals/corporations or which could have been provided by such individuals. In the *Phelps* and *X v Bedfordshire* cases the duties fitted within the category of professional-client relationships, a well-established duty situation at common law. In *Barrett* the duty has parallels with the well-recognised in loco parentis duties owed by schools.

This is to be contrasted with the situation which pertained to the *Poole* case. The local authority social workers were performing statutory functions in the arena of child protection. Whilst it may be possible to retain a social worker in a private context, such a person would not have the statutory powers of intervention in family life conferred on local authorities by Parliament. Children and parents may depend upon social workers doing their job properly, in the same way that they may depend upon the police doing so, but they do not take action in reliance upon advice given by them. Reliance has therefore been seen as a problematic concept in this context, which is plainly quite different to a professional negligence scenario, so is it still an important part of assumption of responsibility?

Shortly before the *Poole* case, the Supreme Court considered the assumption of responsibility test in two economic loss claims. In *NRAM v Steel* [2018] UKSC 13, the issue was whether a solicitor acting on a mortgage transaction was liable for a negligent misrepresentation which she made to the other party (not her client). The Supreme Court held that she did not. The Court held that the concept of assumption of responsibility is the foundation of liability for negligent misrepresentation and ordinarily governs such claims. Two crucial features were necessary to establish an assumption of responsibility (1) that the representee must reasonably have relied on the representation and (2) that the representor should reasonably have foreseen that he would do so. In *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] UKSC 43, a bank issued a credit reference in respect of a customer to company A, not knowing that company A was in fact an agent of company B, a casino, which was considering extending credit to the customer. The bank was held not to have assumed a duty of care to the casino, because to be deemed to have assumed a duty the representor must not only know that the statement is likely to be communicated to and relied upon by another party, but it must be part of the statement's known purpose that it should be communicated and relied upon by that other party. Although the *NRAM* and *Playboy* cases involved very different facts from those in *Poole*, the emphasis that the Supreme Court placed in both on reasonable and foreseeable reliance on the performance of a service as a prerequisite to the finding of an assumption of responsibility is instructive. It lies at the heart of the court's decision in the *Poole* case. Lord Reed pointed out that social workers undertaking child protection work do not provide professional services to parents and their children, but act on behalf of the local authority (see para 69). He said (at para 81):

> "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 rehousing 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."

Some lawyers have sought to argue that where a local authority social worker carries out a core assessment of a child's needs or where a local authority registers a child on the child protection register a duty of care is thereby assumed to the child, but in this writer's opinion these arguments miss the point that neither of these situations involves the provision of a service upon which people rely in the relevant sense; they may, like the claimants and their mother in the *Poole* case, be anxious or even dependent upon the statutory function being performed properly, but they do not have a relationship "akin to contract" and nor do they receive advice upon which they will act.

A closer look at the facts of the *Poole* case confirms this. The local authority had allocated social workers to the claimants. Social workers were investigating and monitoring their plight. The social workers had carried out assessments of the claimants and formulated both child in need and child protection plans. In an email to the claimants' mother, the local authority had even acknowledged a duty of care, but as Lord Reed said "a duty of care is not brought into being solely by a statement that it exists". None of these actions amounted to an assumption of responsibility.

What might constitute an assumption of responsibility? Something more than the mere performance (or non-performance) of statutory functions is required; some additional ingredient which makes the relationship more akin to one of contract or involves real and relevant reliance or fits a recognised duty of care situation. An example in the policing context is *Swinney v Chief Constable of Northumbria* [1997] QB 464 – the police entered into a special relationship with an informer whom they undertook to keep safe in exchange for information.

As noted above, when social services positively intervene and take a child into care, they then assume a duty for that child's safety and well-being (see the *Barrett* case). However, the instances of a duty of care being assumed in a "failure to remove a child" type case are likely to be few and far between.

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About the Author

Andrew Warnock QC is a member of Chambers' Public Sector and Human Rights Group, he specialises in public authority claims with particular expertise in social services, education, child abuse, human rights and the police.

Members of Chambers' Public Sector and Human Rights Group have appeared in many of the leading cases involving public and local authorities, including *Poole*.