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Failure to Remove Claims and Section 20 Accommodation: YXA v Wolverhampton City Council

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Since the beginning of the year, three decisions have been handed down in favour of defendants in relation to how the decision in *N v Poole BC* [2019] UKSC 25, [2020] AC 780 affects claims in negligence against social services. The decision of Deputy Master Bagot QC in *HXA v Surrey CC* [2021] EWHC 250 (QB) was the first, and was discussed in an article that I wrote and circulated in February when the decision was handed down [link]. On Tuesday of this week, Lambert J handed down her long-awaited judgment in *DFX v Coventry CC* [2021] EWHC 1382 (QB), in which she dismissed claims by four siblings following a trial. Her decision is discussed in an article by my colleague and fellow junior counsel in *N v Poole*, Katie Ayres, published earlier this week [link].

A common feature of 'failure to remove' claims is that claimants have been accommodated by the local authority at some point in the history under section 20 of the Children Act 1989. Section 20 set out important duties and

powers in relation to the accommodation of children for whom the local authority does not have parental responsibility under a care order. In brief:

— Under sub-section (1), the local authority must accommodate a child in need "within their area" who needs accommodation and who has no person with parental responsibility for him, has been lost or abandoned, or whose carer has "been prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care".

— Sub-section (3) requires the provision of accommodation to a child in need over the age of 16 whose welfare "is likely to be seriously prejudiced" if accommodation is not provided.

— Sub-section (4) provides a power to provide accommodation for a child within their area "if they consider that to do so would safeguard or promote the child's welfare".

Between them, these provisions result in the provision of accommodation to children in a wide variety of circumstances. On one end of the scale, children may be accommodated where there is no concern about a parent's ability to care for them but there is a temporary family emergency, such as where the parent is hospitalised and there is no family member or friend able to care for the child temporarily. Section 20 is also the ultimate source of the power to provide regular respite care for parents who need a break from caring for their children (though see also, in the case of children with disabilities, Schedule 2 paragraph 6). In many other cases, section 20 has been used to care for children on a medium-term or even long-term basis by agreement with their parents. The courts have frequently been critical of the use of

section 20 by local authorities in this way; the expectation is that they should instead bring the case before the court for consideration of whether a care order should be granted: see eg *In re N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112, [2017] AC 167, paras 157-171.

The crucial distinction between children accommodated under section 20 and those accommodated under a care order is where parental responsibility rests. When a child is accommodated under section 20, it is made clear by sub-sections (7) and (8) that the parent, or other individual with parental responsibility, can object to the continuation of the care at any time. By contrast, a care order confers parental responsibility on the local authority, and enables it to restrict the exercise by parents of their parental responsibility: section 33(3).

In 'failure to remove' cases where a child has been accommodated under section 20, it is frequently argued that the accommodation of the child gives rise to a duty of care by way of assumption of responsibility, even if other steps taken by the local authority do not do so. The decided cases to date have not had to address this question, which has been considered for the first time by Master Dagnall in his judgment handed down on Wednesday of this week in *YXA v Wolverhampton CC* [2021] EWHC 1444 (QB).

The claimant is a severely disabled young man who suffered from epilepsy and autistic spectrum disorder. He was born in 2001 and until 2007, lived in the area of the London Borough of Southwark, which was originally the first defendant to his claim but against whom proceedings were discontinued. In 2007, the family moved to Wolverhampton. An early assessment was carried out after information was received from Southwark. Concerns were

expressed by a paediatrician about over-medication by the parents; she thought that the claimant should be received into care. From April 2008, the council provided regular respite care for one night every two weeks and a weekend every two months. There were concerns about the use of physical chastisement and about the use by the parents of a known sexual offender to babysit for him. In December 2009, the claimant was received into the care of the council on a full-time basis by agreement with the parents. A care order was made in the following year.

Master Dagnall recorded at para 24 of his judgment the two ways in which the case was put for the claimant. First, reliance was placed on the general involvement of the local authority for the family by way of its child protection functions. Secondly, it was said that a duty of care arose as a result of the provision of accommodation to the claimant and that he should not have been returned to the care of his parents at the conclusion of each period of accommodation.

After a detailed review of the case law at paras 27-69 and reviewing the competing submissions of Mr Justin Levinson for the claimant at paras 70-71 and myself for the defendant at para 72, the Master set out a useful summary of the common ground between the parties.

At para 75, he rejected the claimant's submission that the decision in *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558 had been approved specifically by the Supreme Court in *N v Poole*. This is an assertion frequently made in the 'templates' which form the basis of many of the Particulars of Claim produced by claimants' representatives in this area

since the decision in *N v Poole*. As the Master said, the assertion is flatly contrary to what *N v Poole* itself decided.

At para 76, he stated that *Barrett v Enfield LBC* [2001] 2 AC 550 was not authority for any wider proposition than that a duty of care arose by way of assumption of responsibility on the making of a care order. In this case, the parents had retained parental responsibility.

In para 78, he stated that he did not accept that the fact that a child was "dependant" on the local authority was to be equated with factual reliance for the purposes of the creation of an assumption of responsibility.

Considering the submissions based on the general involvement of the local authority, the Master concluded at para 82 that there was nothing to distinguish this case from *N v Poole*. He condemned the reasoning of HHJ Roberts in *Champion v Surrey CC* [2020] unreported, June 26th as "unsatisfactory" and approved the decision in *HXA*. In particular, he adopted Deputy Master Bagot QC's rejection of the arguments that the council had increased the risk to the claimant, had failed to control wrongdoers, and had prevented others from protecting the claimant: paras 83-88 and 100-101.

He then turned to consider whether the provision of respite care made a difference. It was noted that some duty of care was probably owed in relation to the provision of the care to the claimant, including the mechanics of the return such as ensuring that he was safely returned home: para 90. In para 92, he analysed the claimant's argument as based on two alternative propositions:

— A duty arose to consider care proceedings when respite care was provided.

— A duty arose to consider whether the child should be returned to the parents at the end of the relevant period.

At paras 93-95, he rejected the first proposition. The provision of accommodation did not alter the fact that the way in which the case was being put involved a failure to confer a benefit. He gave detailed reasons for this and concluded that the fact that there was a statutory duty to return the child on demand to the parents made the suggested duty inconsistent with the statutory scheme. The wording of the legislation was not sufficient to give rise to a duty where none would otherwise exist: para 97.

In relation to the second way of putting the case, he considered the analogy of returning a child to a burning building or to a parent who was obviously an immediate danger to the child. Those dramatic examples were not alleged to be present in this case. It could not be argued that the council 'created' the danger by returning the child to its parents. All that it was doing was returning the child, in accordance with the legislation, to its parents as it was required to do: paras 98-99.

Finally, he considered that it was appropriate to strike out the common law claim even though there was a parallel claim under the Human Rights Act 1998: para 103.

He concluded, therefore, that the claim should be struck out: para 104.

The whole of this thoughtful and lengthy judgment repays careful reading. It is an important contribution to the jurisprudence in this field. It remains to be seen whether the claimant will seek to appeal against the Master's decision. The appeal in *HXA* is currently listed for determination on July 7th and it may

be possible to list the two cases together. It is understood that an appeal is unlikely in *DXF*, so the strike-out cases offer the highest probability of further decisions from the High Court in the near future.