

Are post-*Poole* waters clearer following *HXA* and *YXA*?

HXA v Surrey County Council, YXA (a protected party by his litigation friend the Official Solicitor) v Wolverhampton City Council

[2022] EWCA Civ 1196
Court of Appeal (Civil Division)
Baker, Lewis and Elisabeth Laing LLJ
31 August 2022

Summary and Background

Following the decision in *HXA v Surrey County Council, YXA (a protected party by his litigation friend the Official Solicitor) v Wolverhampton City Council*¹ it is reasonable to wonder whether the waters will be muddied by an apparent return to a more ambiguous position in respect of local authority liability towards abused children. Since the 2019 decision in *Poole*² the circumstances in which a local authority owes a duty of care towards children seemed almost exclusively to apply to cases where it had assumed parental responsibility for a child and had removed the child from their family, but not in cases where local authorities had omitted to act. Stirring up the post-*Poole* waters provides an opportunity for the parameters to be widened again.

Social work negligence claims against local authorities generally arise from situations where children have been left in abusive or neglectful circumstances. Claims for compensation are brought on the basis that once local authorities' social services are aware of, or should have been aware of, a child's circumstances there is a duty to intervene and take steps to prevent significant harm. A failure to do so amounts to a breach of the common law duty of care.

For such cases to succeed in the tort of negligence a duty of care must first be established on the part of the local authority. In *Poole* however, the Supreme Court held that no general duty arises for failing to improve someone's situation. Alleged negligent failures by social services fall into this category as they amount to a contention that had the child been removed, their situation would have been improved. Following *Poole*, therefore, the position seemed to be that no duty in negligence is generally owed by social services arising from their statutory duties under the Children Act 1989 sections 17 and 47. However, it was also stated in *Poole* that there are exceptions to this general rule in cases where there has been an 'assumption of responsibility'.

The post-*Poole*, debate, therefore, has been concerned with what constitutes an 'assumption of responsibility' and whether this could apply only to circumstances where a local authority has assumed parental responsibility. The 2021 decision in *DFX and Others*³ also determined that there was no assumption of responsibility by social services despite many years of involvement with a family, seemingly reinforcing that a notification of a

1 [2022] EWCA Civ 1196.

2 *N v Poole Borough Council* [2020] AC 780.

3 *DFX and others v Coventry City Council* [2021] EWHC 13282 (QB).

concern, an allegation, an assessment under section 17 Children Act 1989, an investigation under section 47 Children Act 1989, or decisions stopping short of assuming parental responsibility would fail. An application for striking out was therefore made in the case of *HXA and YXA* claiming negligence on the part of local authorities for failing to take steps to protect the claimants.

The facts in *HXA and YXA*

Two appeals were brought by adult Claimants (*HXA* and *YXA*) against a successful striking out decision. The claims were made in the tort of negligence against the Claimants' respective local authorities and included a claim for psychiatric and other injuries suffered by them as children. The claims were based on their contention that had the local authority taken timely steps to remove them from their families, the abuse they suffered would have been avoided or lessened. They contended that the Defendant local authority's social workers failed to exercise reasonable care for their safety and wellbeing and that as a result they were left in abusive situations.

HXA suffered abuse from her mother and mother's partner which had not been acted on once reported. Referrals about suspected physical abuse and neglect by *HXA*'s mother and allegations of sexual abuse by the mother's partner led to assessments and proposed 'keeping safe' work, which for reasons that could not be explained, did not happen. Later, the mother's partner was convicted of sexually abusing *HXA*. In her case it was contended that the defendant local authority should have applied for a care order for her. *YXA* had epilepsy, learning difficulties and autism. A paediatrician had raised concerns that *YXA* was overmedicated, had suffered physical abuse and there was excessive alcohol and cannabis consumption by his parents, recommending that he be taken into care. Although the local authority provided respite care, it was some time before a care order was made. In *YXA*'s case, the contention was that an application for a care order should have been made considerably sooner than it was.

In both cases, the claim was brought on the basis that the general involvement of the local authority and the provision of care gave rise to the 'assumption of responsibility'. The pleadings presented a narrative explanation of the law and involvement of social services, presumably seeking to enable an assumption of responsibility conclusion to be drawn from the cumulative events. In both cases the defendant local authorities applied to strike the claims out at an early stage on the basis that there was no assumption of responsibility and thus no common law duty of care. The First Instance Court allowed the application, and the claims were struck out. The first appeal to the High Court was unsuccessful.

The Claimants made a second appeal, allowing the Court of Appeal to take a different view. It did so, overturning the decision of Mrs Justice Stacey in the High Court. The grounds for allowing the appeal amounted to acknowledgement that child protection cases are complex and contain unique facts. Such cases require a thorough analysis of all the evidence to decide on the question of assumption of responsibility, and this detailed analysis needs to be done at a full trial. This gives no indication of the likelihood of the eventual success of the negligence claim but did re-open the opportunity for the court hearing the case to broaden (or not) the post-*Poole* horizon.

Discussion

The post-*Poole* landscape left avenues for further litigation to clarify when an assumption of responsibility arises. Prior to *HXA and YXA* this did not happen. Instead, the consequence of *Poole* has been to enable defendant lawyers to refuse to consider settlement and apply to strike out claims at an early stage. This was the situation in *HXA and YXA*.

The issue on the second appeal was whether, at any stage in its contact with the children, the local authorities can be said to have assumed responsibility for their welfare so that they owed the children a duty of care at common law. In both cases, the contention was that significant harm was suffered which was foreseeable and preventable, challenging the post-*Poole* position suggesting such cases would be struck out and thus unable to progress to trial. The Claimants' position was that *Poole* had not closed the door on situations which could amount to an assumption of responsibility; the position of the local authorities in applying for striking out was that it had. The court noted that 'the operation of a statutory scheme does not automatically generate an assumption of responsibility, but such an assumption may arise out of the local authority's conduct pursuant to a statutory scheme'⁴ and 'an assumption of responsibility may arise out of the local authority's conduct where it acquires parental responsibility for a child when granted a care order under section 31 Children Act 1989, as occurred in *Barrett v Enfield LBC*, or an interim care order under section 38'.⁵ It seems, therefore, the court erred on the side of the Claimant's position and that local authorities cannot simply rely on such cases being struck out, at least until *HXA and YXA* is decided.

A hurdle to proving an 'assumption of responsibility' exists if it is omissions, rather than acts, by local authorities that give rise to the claim. The local authority decisions in *HXA and YXA* were described as 'omissions', or, as Lord Reed noted in *Poole*, of a 'failure to confer a benefit'. In omission cases, a duty of care will not arise unless the claim falls within one of the recognised exceptions to the 'no duty for omissions' rule. As *Poole* decided that no duty of care arises in respect of social work functions unless 'something more' than carrying out statutory child protection functions is done, the question remains whether the facts of *HXA and YXA* contain something which takes the interaction beyond that which the local authority is obliged to do under its statutory functions. If so, what might the 'something else' be? Until the case returns to trial this question remains unsettled. This seems a potentially dangerous position: if local authorities are in a more litigious position should they take a child into care than if they do not, then it is less risky for a local authority to stop short of taking that action. If they are not liable for failing to confer a benefit, then presumably omitting is less risky than acting. If there is no assumption of responsibility short of a local authority taking parental responsibility over a child, then it is less risky for the local authority not to take parental responsibility. In both cases children such as *HXA and YXA* would not only be left in abusive situations but would have no remedy.

The case will return to trial in Autumn 2023 enabling the law to be tested and developed post-*Poole*. The outcome may be equally restrictive but if it is not tested then no developments can be made. The decision is fundamentally about whether the law was unable to develop beyond cases involving anything that stopped short of a child in care where the local authority has parental responsibility. That seems not to be the case, offering

4 *HXA* (n2) [90].

5 *ibid.*[91] citing *Barrett v Enfield London Borough Council* [2001] 2 AC 550.

renewed hope to those who are seeking compensation from local authorities following childhood abuse either for failure to remove them from, or to protect them from, abuse in the family home.

The apparent still waters following *Poole* did not establish exactly when an assumption of responsibility will arise, or more specifically when it would not. It offered some clarity on when an assumption will *not* arise leaving opaque the deeper question of how circumstances are to be excluded in future cases if they are simply struck out before trial. Falling at this first hurdle renders proving resultant harm to a child irrelevant. If no duty of care can be established, this will put an end to many claims waiting to be progressed and will limit the claims likely to be brought against local authorities in the future, no matter how grave the failure by social services.

The case is due to be heard in Autumn 2023, so as the decision stands, defendants cannot make striking out applications at least until after the outcome of the case is known. Whilst *Poole* remains the leading case as to the duties owed by social services, there is no doubt that this decision by the Court of Appeal has muddied the waters significantly. The Court regarded this as a developing area of the law at ‘a relatively early stage’,⁶ and that the question of ‘assumption of responsibility’ can only be decided by reference to the facts of each case, suggesting that in many cases it may not be possible to establish whether there was a duty ‘without a full examination of the facts’.⁷ On this reasoning it would be plainly wrong to strike out such claims.

The point at which a strike out may be successfully made has at least temporarily moved in favour of Claimants, and it remains to be seen if more claims will therefore be brought. In saying that the Courts should move on to look at whether there has been a breach of duty, rather than whether a duty exists, liability will become more reliant on expert evidence examining the complex interactions between social workers and families. It remains to be seen whether this will lead to decisions widening opportunities for Claimants.

In terms of whether it should widen opportunities, the question of fairness to vulnerable children must be balanced against the question of fairness to overstretched social services. This question is perhaps more germane than the semantics of whether omissions as opposed to acts should attract liability where a statutory duty exists. In summary, the depth of the post-*Poole* waters has not yet been tested, but are likely to be, following HXA and YHA. Ultimately, the lack of specific remedy in such cases is a problem explored by the author in *The Adequacy of Remedies*.⁸ The article made the point that the use of common law negligence in such cases is not a panacea, nor is it adequate if the risks to local authorities are in competition with its decision making in relation to acting on risks to children.

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6 Ibid [106].

7 Ibid [105].

8 L Devine, ‘The adequacy of remedies in case of unsubstantiated child abuse’ (2017) 29 Child & Fam L Q 43.