

Settled law on failure to remove negligence claims: does section 20 of the Children Act 1989 create a lasting duty of care?

The judgment in *YXA v Wolverhampton City Council* [2021] is significant for several reasons.

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The Supreme Court in *CN & GN -v- Poole Borough Council* [2019] (“Poole”) held that a Local Authority will not ordinarily owe a duty of care to a child simply by virtue of exercising its child protection functions.

Since then the courts have declined to find that:

- by being, even very significantly, involved with a family, a local authority has assumed any responsibility for a child’s safety,
- the Council could be said to be adding to any danger or failing to control any wrongdoer by allowing parents to invite whoever they choose to live in the family home; and
- a failure to act is equivalent to preventing others from protecting a child.

In fact, whilst case law suggests that where in principle sections 47 and 31 of the Children Act 1989 might give rise to an assumption of responsibility, there have been no cases that assist litigants in understanding when this would occur.

What about voluntary respite care?

The Facts

We have been instructed on behalf of the Defendant in the case of *YXA -v- Wolverhampton City Council* [2021].

YXA is a severely disabled man, who suffers from epilepsy, learning difficulties and autistic spectrum disorder. YXA and his family moved to the Defendant’s area in August 2007. The Defendant’s first involvement with the family was in September 2007. In March 2008, a Paediatrician expressed concern about YXA’s father over medicating him and recommended that YXA was placed into care. From April 2008 onwards, the Local Authority provided regular respite care for YXA. He was accommodated one night every two weeks and one weekend every 2 months pursuant to section 20 Children’s Act 1989. His parents retained parental responsibility for YXA. The Local Authority did not acquire it.

In 2008, there were additional concerns about the family, which included the mother’s alcohol and cannabis consumption, physical chastisement and further reports of excessive medication being given to YXA by his parents. In 2009, there were yet more problems, including YXA being admitted to hospital for seizures, which was thought to be caused by over medication. Towards the end of the year, YXA’s parents’ relationship broke down and YXA was placed into emergency respite care. In December 2009, YXA’s mother admitted that YXA’s father shouted and hit YXA and she administered diazepam. YXA was initially accommodated by the Local Authority under section 20 Children’s Act 1989. A Care Order was granted in March 2011.

In respect of the short placements into respite care, the Claimant’s Counsel argued that:

- A duty arose to consider care proceedings each time respite care was provided.
- A duty arose to consider whether it was appropriate to return the child to the parents each time respite ended.

The first instance Judge concluded that:

- There was a statutory duty to return the child on demand to the parents. The duty of care asserted by the Claimant would therefore be inconsistent with the statutory scheme.
- The Claimant's Counsel used 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 local authority created the danger by returning the child to its parents. All that it was doing was returning the child, in accordance to legislation to his parents as it was required to do.

The Judge struck out the common law claim, but not the parallel Human Rights Act Claim.

The Appeal

The Claimant's team appealed the decision on the following grounds:

- that the first instance Judge was wrong to strike out parts of the Particulars of Claim because he should have found that it was at least arguable that a duty of care arose on the basis that the local authority had assumed responsibility for the welfare and protection of the claimant.
- this a developing area of law,
- the case was fact sensitive and as the same factual matters would have been considered in the Human Rights Act 1998 claim, the Judge should have exercised his discretion in the Claimant's favour.

The appeal was heard on 7 July 2021 with the Appeal in HXA -v- Surrey County Council. The Honourable Justice Stacey concluded that:

- It was important to distinguish between the duty of care which arguably arises after a full Care Order where the Local Authority becomes the statutory parent and the entirely different position of a child receiving temporary and intermittent care under section 20 Children's Act 1989 with the consent of the child's parents, where the parents retain exclusive parental responsibility.
- "It is now well established that there is no duty of care owed in relation to child protection functions generally and the fact of s.20 temporary accommodation cannot be used as a peg on which to assert the assumption of responsibility. The imprecise statutory duty in section 22(3)(a) cannot support a duty of care where none would otherwise exist. There is no logical reason why the provision of section 20 would make a difference: it does not amount the "something else" needed to indicate an assumption of responsibility to take care proceedings, merely an assumption of responsibility of a duty of care in relation to the accommodation itself."

The Claimant's appeal was dismissed.

Implications

This Judgment is significant for several reasons:

- Since the cases of Poole and DFX, many claimants have continued to pursue their 'failure to remove' claims, by arguing that the Local Authority assumed responsibility for the Claimant through the extensive work carried out by their social services department. This Judgment confirms the mere fact that various steps are taken by a Local Authority in the discharge of its child protection functions is not enough to give rise to an assumption of responsibility.
- The Honourable Justice Stacey concluded that this is not developing, but a settled area of law. It is likely that claimants will struggle to successfully bring a 'failure to remove' type claim against local authorities, and our experience suggests that limited legal aid agency funding for such claims is now available.
- This is the first case to consider whether a local authority assumes responsibility for a child once it is placed into care pursuant to a section 20 accommodation agreement. The Judgment confirms that when a child is placed into care pursuant to section 20, the Local Authority has a duty of care to organise transport and accommodation, but it does not, without "something more", create a general duty of care beyond this. Post Poole, many firms of solicitors representing claimants in similar cases have asserted that being accommodated pursuant to section 20 automatically demonstrates an assumption of responsibility to protect each child from harm, which is not the case.
- We can expect much more emphasis on potential claims under the Human Rights Act 1998, which trigger interesting questions about funding, limitation and insurance cover.

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