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Do local authorities owe a duty of care to children living at home with their family?

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I am, in significant part, a personal injury lawyer. I specialise in acting for social care providers, faith organisations, educational bodies and a whole constellation of organisations that work with children and vulnerable adults.

A significant portfolio of my work is dealing with negligence claims arising out of alleged sexual abuse in childhood. Those cases are based on assertion that, if only a local authority's staff had intervened sooner, a child would have been protected from harm within their own family, or as a result of their own risk-taking behaviour.

Poole in 2019

For decades claimant and defendant lawyers alike proceeded on the basis that it was at least hypothetically possible, depending on the facts of each case, for a local authority to owe children living at home with their parents a common law duty of care.

In 2019, the Supreme Court decision in CN & GN v Poole Borough Council [2019] UKSC 25 challenged that assumption. CN and GN were two children who were housed, with their mother, by the council as the local housing authority. CN, in particular, suffered severe physical and learning difficulties making him totally dependent on others and requiring a high level of supervision; that of course impacted on the nature of the housing the family required. The family were housed on an estate where an antisocial family also lived and over years suffered the effects of their behaviour. This was reported to the council, to local police and to the housing authority. The family viewed the response of those agencies as inadequate. They suffered this humiliating and frightening behaviour until December 2011; for over five years.

The claim was plead in negligence, and the defendant applied to strike it out, relying in significant part of a chain of authorities concerning the police. In Poole both the Court of Appeal and subsequently, the Supreme Court were heavily influenced by the decision of Michael v The Chief Constable of South Wales [2015] UKSC 2. In Michael, a murdered woman's relatives sued in respect of alleged failings by the police in dealing with the victims' pleas for help. The Supreme Court struck out Michael citing established principles that a duty of care is not normally owed to protect a person from the actions of a third party, and that the law does not normally impose liability in negligence in respect of omission to act.

Before looking at the Poole decision, it is worth understanding the family history. There was great deal of social services involvement. A social worker undertook an initial assessment of his CN's needs in October 2009 and referred the family to mental health services, arranging for a core assessment of GN's needs to be carried out by the council's family support team. The children had a social worker allocated at various points and several child protection strategy meetings were held. GN's harming of himself was managed under a child in need plan and there were times when the case met the threshold for placing GN on a child protection plan.

Having considered all the authorities and the facts of this case law, Lord Reed summarised the position; "it follows:

1. That public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would oppose such a duty, unless such a duty would inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived;
2. That public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and

3. That public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty as for example where the authority has created the source of the danger or has assumed a responsibility to protect a claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation."

Applying those principles, the Supreme Court concluded that the pleaded case did not demonstrate a duty of care.

- Arguments that the Council created the source of danger by housing CN and GN's family near antisocial neighbours was rejected. There is a long line of authority establishing that landlords do not owe duties of care in relation to the antisocial behaviour of others.
- The assertion that in working with the family, the social service team assumed of responsibility was also rejected. Investigating and monitoring the children did not, on the Supreme Court's analysis, involve a provision of service to them on which they or their mother could be expected to rely. The safety of the children had not been entrusted to the council. The council had not taken the children into care. Whilst the Supreme Court accepted that there might be circumstances under which an assumption of responsibility could arise, they would not find one on the facts of this particular case.

They include:

A v Attorney General of St. Helena [2020] SHSC1.

The claimant sought damages for a failure to protect her despite disclosures she made to the authorities. As a result of this, she alleged she had been sexually abused by two older men when she was a teenager. The Court rejected all attempts to distinguish her case from Poole and held that the case "falls squarely on all fours with Poole". It was struck out.

HXA and Anor v Surrey County Council [2021] EWHC 250 (QB),

Deputy Master Bagot QC struck out a claim that a child was left in the care of his mother and her various male partners, despite concern and involvement by the Council' social services department. The claimant alleged physical abuse and neglect from his mother and sexual abuse from one of the mother's partners. It was alleged that:

- a duty of care existed by reason of the exercise of child protection functions and as a result of the council's involvement with the claimant's family;
- this involvement itself constituted an assumption of responsibility for the children's safety and welfare;
- the council had added to the claimant's danger by "endorsing" the parenting they received and "allowing" male partners to move in with the mother;
- the council failed to control the wrongdoers and that in action had prevented others from protecting the claimants.

Deputy Master Bagot found it inappropriate to attempt to distinguish Poole on the basis of different factual circumstances. He said that an assertion of reliance to create an assumption of responsibility by the claimants would not suffice something more. He also pointed out that local authorities only obtain parental responsibility at the point a Care Order is made. Until then, parental responsibility remains "unequivocally" with the parents. He found a duty of care cannot be reverse engineered by asserting that the local authority ought to have applied for a Care Order. He dealt with the other arguments as follows:

- the council had no statutory power to remove Mother's partners from the home and the children could not be removed without a Court Order. The harm was something the claimant was already being exposed to;
- the council had no power to control the alleged wrongdoers – the mother and her parents
- the assertion that others were prevented from protecting the children was a suggestion that had the Defendant not held out that it would investigate properly, other agencies would have put in place protective measures. As the judge observed, no other agency could or would practically have achieved removal of the claimants from the home apart from the police who have very limited powers to take a child to a place of safety. In any event "There are no facts pleaded to the effect that another agency wanted to put in place protective measures but was dissuaded from doing so by the local authority."

A full trial

Towards the early summer of 2021, the judgment was handed down after a full and extensive trial of a case, DFX and others v Coventry City Council [2021] EWHC 1328.

The claimants were brought up by their parents, both of whom suffered from learning difficulties. The claimants too all suffered from moderate learning difficulties. The council's social services department commenced supporting the family when the oldest claimant was

born in 1995. That work continued until 2010 when a final care order was made removing all the children from their parent's care. Throughout, there were three main concerns on the part of social workers: whether the parents were capable of looking after the children so they did not suffer neglect, whether the children were at risk of harm from dangerous adults in the local community and finally, whether they were at risk of sexual abuse from their own father who was Schedule 1 offender.

At trial, the judge heard from seven social work professionals including family support workers and had witness statements from a number of others.

The judge was invited to find that in view of the extensive involvement of the social services teams under the Children Act 1989 over a very long period of time with very few, if any gaps, it was clear that in an assumption of responsibility could be demonstrated. It was submitted for the claimants that in obtaining a report from the Reaside Clinic commissioned to assess the parents' ability to care for the children, and in deciding at one child protection conference to apply for a care order and, in performing direct work with the children, the social services department had assumed responsibility for their welfare.

The defendant submitted that:

- in a case such as this, it would be contrary to legal principle to impose an actionable duty on a public body to undertake a purely statutory act;
- secondly, it was argued that where a local authority is exercising its statutory powers, there is no comparable private law analogy. No private individual or other body is authorised to take measures which could interfere with the family's Article 8 rights;
- thirdly, there was no analogous authority where a court had required a local authority to confer a benefit on a child in the community by exercising its statutory child welfare duties or powers.

In making her findings, Lambert J concluded that this an omissions case. The claimant's legal team were in effect arguing that the local authority had failed to confer a benefit on the children by excising its statutory functions and that failure had meant they were not protected from abuse. She then considered whether an assumption of responsibility could be inferred from the actions taken by the Council and in particular whether it was reasonably foreseeable that the claimants would rely on them.

As far as the Reaside report about parenting capacity was concerned, Lambert J accepted the defendant's argument that the local authority, when assessing risk under sections 47 and 31 of the Children Act were making judgments which would inform its own actions. The reports were not commissioned for the benefit of family members.

In summary, the judge indicated that after considering the statutory functions exercised by the defendant under Section 47 and Section 31 of the Children Act 1989 and the way in which they were exercised, she could find anything to generate a duty of care. She found no evidence that the defendant assumed a responsibility to exercise those statutory functions with reasonable skill and care. As she put it, whether an assumption of responsibility is generated depends on whether there is "something more: either something intrinsic to the nature of the statutory function itself which gives rise to an obligation on the Defendant…or something about the manner in which the Defendant has conducted itself towards the Claimants which give rise to a duty of care".

Naturally, what we have seen since then is the claimant legal community reach to prove in each case that there is in fact "something more".

In our own case of YXA v Wolverhampton City Council [2021] EWHC1444 (QB) the court at first instance had to deal with the issue of whether Section 20 care might constitute "an assumption of responsibility".

Appeals

HXA was appealed and heard with the appeal of our own case YXA v Wolverhampton City Council

YXA is a severely disabled young man. The council's first involvement with the family was in September 2007. In March 2008, a paediatrician expressed concern about the father's overmedicating the child and recommended that YXA was placed into care. From April 2008, the local authority provided regular respite care. YXA was accommodated one night every two weeks and one weekend every two months pursuant to Section 20 of the Children's Act 1989. Throughout, these parents retained parental responsibility for YXA.

In 2008, there were additional concerns about the family. Towards the end of the year, the parents' relationship broke down and YXA was placed into emergency respite care. In December 2009, his mother admitted that father shouted at the child and hit him. She also admitted administering diazepam unnecessarily. After a short period of Section 20 care, a care order was granted in March 2011. In respect of the short placements, the claimant's Counsel argued that:

- the 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.

In the first instance, the Judge concluded that there was a statutory duty to return the child on demand to his parents. The duties pleaded by the claimant would be inconsistent with the statutory scheme.

The claimant's Counsel had used the analogy of returning a child to a "burning building". The equivalent of that dramatic example was not alleged to be present in this case. It could not be argued that the local authority created a danger by returning a child to its parents. All that it was doing was returning a child, in accordance with legislation, to his parents as it was required to do.

HXA and YXA were appealed (unsuccessfully) together. The Honourable Justice Stacey concluded after a hearing on 7 July 2021, in her judgment [2021] EWHC 1444 (QB);

It was important to distinguish the duty of care which arose after a full Care Order, where the local authority becomes a statutory parent and the entirely different position of a child receiving temporary and intermittent care under Section 20 of the Children Act 1989 with the consent of the children's parents, where the parents retain exclusive parent responsibility. She went on to say:

"It is now well established that there is no duty of care owed in relation to child protection functions generally and the fact of Section 20 temporary accommodation cannot be used as a peg on which to assert the assumption of responsibility…there is no logical reason why the provision of Section 20 would make a difference; it does not amount to 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."

So, what does this all mean about mean about future practice?

Even before the Poole decision in 2019, we were seeing an increasing number of claims brought against local authorities by children and young people who had been in extended periods of care under Section 20 of the Children Act 1989.

Local authorities might have a duty to bring care proceedings rather than allow extended s20 care in particular cases or risk being in breach of the child or parent's rights under Article 8 of the European Convention on Human Rights. So, claims under the Human Right Act 1998 have become much more common.

What we can confidently expect going forward is that for children who are in unsatisfactory and /or extended periods of Section 20 care, particularly that go beyond respite placements:

- there will a right to bring a potential claim under the Human Rights Act;
- a common law duty of care may also arise because the length of the placement (particularly, if parental consent is the only reason why local authorities have not applied for a care order). We expect it will be argued that this is sufficient to constitute "something more"; the elusive element that was missing in DFX and subsequent judgements.

Each case will revolve on its own facts. Whilst it will inevitably be much more difficult for a claimant's solicitors to demonstrate that a duty of care is owed to a child who is not the subject of a Care Order, we can expect these cases to continue. We are already seeing personal injury cases presented as claims under the Human Rights Act. It is no longer being asserted that the children were owed a common law duty of care, but instead that the actions or inaction of the social workers constituted breaches of the children's Human Rights under Articles 3, 8 and sometimes even Article 6.

About the authors

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