Neutral Citation Number: [2021] EWHC 2974 (QB)

Case No: QA-2021-000065 & QA-2021-000146

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2021

Before :

THE HONOURABLE MRS JUSTICE STACEY

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Between :

HXA	**Claimant/ Appellant**
- and –	
Surrey County Council	**Defendant/ Respondent**
YXA (A Protected Party by his Litigation Friend THE OFFICIAL SOLICITOR)	**Claimant/ Appellant**
- and –	
[discontinued] (1) Wolverhampton City Council (2)	**Defendant/ Respondent**

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Mr Justin Levinson (instructed by **Scott-Moncrieff and Associates Ltd** for HXA and **Bolt Burdon Kemp** for YXA) **for the Claimants/Appellants**
Mr Paul Stagg (instructed by **DWF LLP** in the HXA appeal and **Browne Jacobson LLP** in the YXA appeal) **for the Defendants/Respondents**

Hearing date: 7th July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be Monday 8th November 2021 at 11am.

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THE HONOURABLE MRS JUSTICE STACEY

The Honourable Mrs Justice Stacey:

1. There are two, quite separate, appeals in different cases before the court which have been listed to be heard together since the same legal issues arise in both. It is acknowledged and accepted that in both cases the appellants (who were the claimants below) suffered appalling abuse and shocking treatment as children from, in YXA's case his parents, and in HXA's case, from her mother and her mother's partner Mr A. In each case there was also a long history of social services involvement with each of their families. The respondents to the appeal are the local authorities responsible for the management and provision of social services in the respective areas where the claimants lived and grew up at the material time. I shall continue to refer to the appellants as the claimants (each of whose privacy is protected by an anonymity order pursuant to CPR 39.2(4)) and to the respondents to the appeal as the defendants, as they were below.

2. The claimants bring proceedings against their respective local authorities, including a claim in the tort of negligence, for damages for psychiatric and other injuries suffered as a result of the alleged abuse perpetrated by YXA's parents against him, and by HXA's mother and Mr A against her, which they allege would have been avoided or lessened had the defendants' social workers exercised reasonable care for their safety and wellbeing. In HXA's case it was said that the defendant should have applied for a care order for her in order to comply with the duty and in YXA's case compliance with the duty would have involved an application for a care order being made considerably sooner than it was.

3. In both cases the defendants applied to strike out the claims. In both cases the Deputy Master and Master respectively found that it was not arguable that a common law duty of care was owed by the local authority to the claimants to protect them from the harm that they suffered from the abuse and neglect of their parents and, in HXA's case, Mr A, and those parts of the claims were therefore struck out under Civil Procedure Rule 3.4(2)(a) as showing no reasonable ground for bringing the claim in the tort of negligence.

4. Both claimants rely on two grounds of appeal. The first was 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 defendant had assumed responsibility for the welfare and protection of the claimants. The second ground of appeal in HXA's case was that the Deputy Master had been wrong to strike out those parts of the claim because this is a developing area of law where similar cases have been decided in the claimant's favour. YXA's second ground relied not only on the developing area of law argument, but also that his case is fact sensitive and as the same factual matters will be considered in his claim under the Human Rights Act 1998, the judge should have exercised his discretion in the claimant's favour.

5. For the purposes of the strike out application, the facts are taken to be those alleged by the claimants in their particulars of claim. I summarise below in turn, the allegations made by each claimant.

6. HXA was born in 1988 and is now aged 33. She is her mother's oldest child and her full sister, SXA, born in November 1993 is a second claimant in the proceedings whose claim has been stayed pending the outcome of HXA's appeal. They have two younger

half-sisters who have learning disabilities. HXA and her younger siblings' childhood in Surrey was characterised by abuse and neglect perpetrated by their mother and also by Mr A when he formed a relationship with HXA's mother in July 1996. They married in July 1997.

7. From at least September 1993 matters of concern were raised with Surrey County Council about HXA's mother's inappropriate physical chastisement, verbal abuse and lack of supervision of her children from a wide range of sources including the NSPCC, which continued over the years. There were 5 investigations conducted under s.47 Children Act 1989 (the Act) in the 10 month period from September 1993 to 28 July 1994, when HXA and her siblings' names were placed on the Child Protection Register for neglect. There were well documented concerns of excessive and inappropriate treatment by their mother.

8. In November 1994, after seeking legal advice, the defendant resolved to undertake a full assessment with a view to initiating care proceedings, but failed to do so. Thereafter on some occasions no decisions or actions were taken on reported concerns. On other occasions decisions were made not to take further action for fear of alienating HXA's mother or Mr A. On further occasions decisions to commence investigations or take further action were made, but not acted upon. Concerns about Mr A's behaviour towards the children were raised by a number of sources from late 1996 and it was known to the defendant that Mr A had been convicted after trial of assault occasioning actual bodily harm to his own child, then aged 8 weeks old by shaking him with sufficient force so as to cause conjunctival haemorrhages and by breaking his leg. Allegations of sexual abuse of HXA and her younger sister SXA by both Mr A and Mr A's father (MA) began to emerge in 1999. On 27 January 2000 a child protection conference was held when it was noted that HXA had reported that Mr A had touched her breast. The defendant resolved not to investigate the matter due to fear of how Mr A would react and because it was wrongly thought that there had been no previous similar concerns. It was resolved to do "keeping safe" work with HXA and SXA but this was never done. HXA moved out of the family home in 2004 to live with her now husband.

9. In 2007 the defendant obtained an emergency protection order in respect of SXA after she had reported sexual abuse by Mr A and MA to a school educational welfare officer in 2006. HXA reported sexual abuse by Mr A and MA to the police in April 2007. On 12 January 2009 at Guildford Crown Court, Mr A was convicted of 7 specimen counts of rape of HXA when she was between the ages of 9 to 16 and sentenced to 14 years imprisonment. HXA's mother was convicted of indecently assaulting HXA and sentenced to 9 months immediate custody.

10. HXA also alleges a failure by the defendant to act upon a report of abuse that she made to the defendant's staff at her school in 1999. The school is described in the particulars of claim as being owned, managed and operated by the defendant. The defendant accepts that it is at least arguable that a duty of care arises in the school context and that the allegation needs to be determined on its facts since it was arguable that a duty of care was owed in the educational setting and that allegation was therefore not part of the strike out application.

11. YXA was born in November 2001 and is now aged 19. He is disabled and has epilepsy, learning disabilities and autistic spectrum disorder. Although now an adult he lacks

capacity and the claim is brought by his litigation friend. He and his family moved to the Wolverhampton City Council area in August 2007 when he was aged 6. The defendant had dealings with YXA within a month of the family's arrival in September 2007 and completed an assessment on 6 November 2007 which showed that YXA had a high level of need and identified concerns about his parents' ability to care for him. In March 2008 a paediatrician, Dr Moore, advised the defendant that YXA was being given triple his prescribed dose of medication by his father with adverse consequences for his health and that he should be received into the defendant's care. From 28 April 2008, a pattern began of the defendant receiving YXA into its care for approximately 1 night every 2 weeks and 1 weekend every 2 months with his parents' agreement pursuant to s.20 of the Act.

12. Further concerns were reported in 2008: from a clinical psychologist advising that YXA's parents had been hitting him, to further reports of excessive medication being given to him by his parents, to a psychiatrist informing the defendant of YXA's mother's excessive alcohol and cannabis consumption. The defendant also knew of a long history of substance abuse by both the parents. Concerns were raised at a looked after child review conducted in July 2008 and thereafter. Following further problems and matters raised in 2009 - including YXA being hospitalised for seizures thought to be caused by excessive medication, suspicions by the hospital staff that his mother had been hitting him and reports of domestic violence - on 17 December his parents admitted that they had medicated him inappropriately to keep him quiet and had smacked him. On 18 December 2009 YXA was received into the defendant's care with his parents' agreement. After making good progress in foster care, an interim care order was made in July 2010 and a final care order made in March 2011.

13. The issues in the appeals are as follows:

    i) On the assumed facts in each case did the defendant local authority assume a responsibility towards the claimant so that a duty of care arguably arose as a result of the following particular behaviour by the defendants?

        a) In HXA's case when:

            i) the defendant placed her name on the child protection register on 28 July 1994, or

            ii) in November 1994 when the defendant decided to undertake a full assessment with a view to initiating care proceedings but failed to do so, or

            iii) on 27 January 2000 when the defendant resolved to undertake keeping safe work with HXA, but failed to do so?

        b) In YXA's case when he was given intermittent accommodation provided by the local authority away from the family home under s.20 of the Act?

    ii) Was it wrong to strike out the negligence claims on the basis that the law in this area is a developing area of law?

iii) Was it wrong to strike out the negligence claims on the basis that certain aspects of each claim would remain even if the negligence claims were struck out?

Law: (1) Legislative context

14. The Act sets out the responsibilities – both statutory powers and obligations - of every local authority to children within their area to support children and families. It includes the duty to take steps, including by way of investigation, to protect children in the community and specifies the circumstances when various duties arise such as to provide accommodation, to seek orders from a court to interfere with parental rights and, ultimately, to seek an order from the court to remove a child from its parents.

15. Where children within a local authority are "in need" a general duty is imposed on local authorities to provide a range and level of services appropriate to those children's needs in order:

> "(a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families" (s.17(1))

And

"(10) For the purposes of this Part a child shall be taken to be in need if –

> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired or further impaired without the provision of him for such services; or
>
> (c) he is disabled".

16. Every local authority also has a number of specific duties and powers for the purpose of facilitating its discharge of the general duty (contained in Schedule 2 of the Act) which include a duty to take reasonable steps to identify the extent to which there are children in need within their area; a duty to assess the needs of any child who appears to be in need; and a duty to take reasonable steps, to prevent children suffering ill treatment or neglect through the provision of the range of services set out in Part III (ss.17-30A) of the Act.

17. By providing the specific powers and duties the Act requires local authorities to support children in need, including disabled children, within the community and in accordance with section 17(1)(b), insofar as possible within the family unit. Local authority services provided under section 17 are provided on a voluntary basis: the local authority has no power to require a family to accept them.

18. A local authority has both a general duty to provide accommodation for children in certain circumstances set out in s.20 of the Act and also has the power to provide accommodation if they consider that to do so would safeguard or promote the child's welfare, subject to the ongoing consent of the parent who may remove a child at any time (s.20(8)). A child accommodated under s.20 for a continuous period of at least 24 hours comes within the definition of a "looked after child". Further duties are imposed on local authorities in relation to looked after children including:

> "22(3)(a) to safeguard and promote his welfare; and
>
> (b|) to make such use of services available for children cared by their own parents as appears to the authority reasonable in his case."

19. The Act imposes duties on local authorities to protect children in Part V which includes a duty under s.47 to investigate a child's circumstances and

> "where a local authority-
>
> ……..
>
> (b) have reasonable cause to suspect a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm,
>
> the authority shall make, or cause to be made, such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare." (s.47(1))

20. The Act requires that the enquiries shall be directed towards establishing whether the authority should make any application to court or exercise any of their powers under this Act (s.47(3)). An application to court may be for a care order (ss.31 and 33) or a supervision order (ss.31 and 35) and includes both interim and final orders (see Part IV Care and Supervision).

21. If the local authority's investigations lead it to consider that removal from parental care is warranted, the local authority must obtain permission from the court by a care order under s.31 or an emergency protection order under s.44. If a court is satisfied that the criteria have been met and a care order is made, it is the local authority's duty to "receive the child into their care and keep him in their care while the order remains in force" (s.33(1)). The local authority exercises parental responsibility and may determine the extent to which a parent continues to exercise that responsibility (s33(3) and (4)).

22. If the local authority decides not to apply for an emergency protection order, they must consider whether and when to review the case at a later date and take other safeguarding action to promote the child's welfare (s.47(7) and (8)).

23. A helpful summary of a local authority's investigative powers is set out in paraphs 33-44 of *DFX and Ors v Coventry City Council* [2021] EWHC 1382 (QB).

Law: (2) case law: existence of a duty of care owed by public authorities.

24. In *DFX* Mrs Justice Lambert conducted a comprehensive review of the relevant recent Trinity of leading authorities of *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 and *N v Poole Borough Council* [2020] AC 780 to set out a distillation of the key principles of the approach to the question of whether and when a public authority owes a common law duty of care against the background of a statutory duty or power:

> "169. In determining the existence or otherwise of a duty of care in the three cases, Lord Toulson and Lord Reed applied the orthodox common law approach and the established principles of law. What follows is a distillation of the key general principles drawn from those cases. It is intended to provide the uncontroversial backdrop to the issues which I must decide in this case.
>
> i) At common law public authorities are generally subject to the same liabilities in tort as private individuals and bodies. Accordingly, if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority. It follows therefore that public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence (*Robinson* at [33]).
>
> ii) Like private individuals, public authorities are generally under no duty of care to prevent the occurrence of harm. In *Michael*, Lord Toulson said at [97]: "*English law does not as a general rule impose liability on a defendant (D) for injury or damage to the person or property of a claimant (C) caused by the conduct of a third party (T): Smith v Littlewoods Organisation Ltd [1987] AC 270. The fundamental reason as Lord Goff explained is that the common law does not generally impose liability for pure omissions. It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else*".
>
> iii) The distinction between negligent acts and negligent omissions is therefore, as Lord Reed said in *Poole* at [28] of fundamental importance. Lord Reed reflected that the distinction to be drawn could be better expressed as a "*distinction between causing harm (making things worse) and failing to confer a benefit (not making things better) rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale for the distinction drawn in the authorities and*

> *partly because the distinction between acts and omissions seems to be found difficult to apply*".
>
> iv) Public authorities do not therefore owe a duty of care towards individuals to confer a benefit upon them by protecting them from harm, any more than would a private individual or body, see *Robinson* at [35]. Lord Reed continues at [36] "*That is so, notwithstanding that a public authority may have statutory powers or duties enabling or requiring it to prevent the harm in question*". The position is different if, on its true construction, the statutory power or duty is intended to give rise to a duty to individual members of the public which is enforceable by means of a private right of action. If, however, the statute does not create a private right of action, then "*it would be to say the least unusual if the mere existence of the statutory duty (or a fortiori, a statutory power) could generate a common law duty of care*". It follows that public authorities like private individuals and bodies generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party.
>
> v) The general rule against liability for negligently failing to confer a benefit is subject to exceptions. The circumstances in which public authorities like private individuals and bodies may come under a duty of care to prevent the occurrence of harm were summarised by Tofaris and Steel in "*Negligence Liability for Omissions and the Police*" 2016 CLJ 128. They are (i) when A has assumed responsibility to protect B from that danger; (ii) A has done something which prevents another from protecting B from that danger; (iii) A has a special level of control over that source of danger; or (iv) A's status creates an obligation to protect B from that danger."

25. Only the assumption of responsibility route to the establishment of a duty is applicable in this case. The concept is wide: see Lord Morris in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465

> "if someone possessed of a special skill undertakes quite irrespective of contract to apply that skill for the assistance of another person who relies upon such a skill a duty of care will arise."

26. In *Poole* Lord Reed identified two possible routes by which it can be inferred that a public authority has assumed responsibility [80-83]. Firstly, where the nature of the statutory functions relied on by the claimant in themselves entail that the council assumed or undertook a responsibility towards a claimant to perform those functions with reasonable skill and care, such as by taking a child into its care and exercising parental responsibility as in *Barrett v Enfield London Borough Council* [2001] 2 AC 550. There is no dispute that local authorities "may owe common law duties to children in the exercise of their child protection duties" (*D v East Berkshire Community Health*

NHS Trust [2005] 2 AC 373). Secondly "from the manner in which the public authority has behaved towards the claimant in a particular case".

> "80 As Lord Browne-Wilkinson explained in relation to the educational cases in *X (Minors) v Bedfordshire [1995]* 2 AC 633 (particularly the *Dorset* case), a public body which offers a service to the public often assumes a responsibility to those using the service. The assumption of responsibility is an undertaking that reasonable care will be taken, either express or more commonly implied, usually from the reasonable foreseeability of reliance on the exercise of such care. Thus, whether operated privately or under statutory powers, a hospital undertakes to exercise reasonable care in the medical treatment of its patients. The same is true, mutatis mutandis, of an education authority accepting pupils into its schools.
>
> 81 In the present case, on the other hand, 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* [2001] 2 AC 550. 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.
>
> 82 It is of course possible, even where no such assumption can be inferred from the nature of the function itself, that it can nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Since such an inference depends on the facts of the individual case, there may well be cases in which the existence or absence of an assumption of responsibility cannot be determined on a strike-out application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred. In the present case, however, the particulars of claim do not provide a basis for leading evidence about any particular behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred. Reference is made to an e-mail written in June 2009 in which the council's

> anti-social behaviour co-ordinator wrote to Amy that "we do as much as it is in our power to fulfil our duty of care towards you and your family, and yet we can't seem to get it right as far as you are concerned", but the e-mail does not appear to have been concerned with the council's functions under the 1989 Act, and in any event a duty of care cannot be brought into being solely by a statement that it exists: *O'Rourke v Camden London Borough Council* [1998] AC 188, 196.
>
> 83 I would therefore conclude, like the Court of Appeal but for different reasons, that the particulars of claim do not set out an arguable claim that the council owed the claimants a duty of care. *Although X (Minors) v Bedfordshire* [1995] 2 AC 633 cannot now be understood as laying down a rule that local authorities do not under any circumstances owe a duty of care to children in relation to the performance of their social services functions, as the Court of Appeal rightly held in *D v East Berkshire* [2004] QB 558, the particulars of claim in this case do not lay a foundation for establishing circumstances in which such a duty might exist."

27. As Lambert J observed in her discussion in *DFX*, whether it can be inferred from the manner in which a public authority has behaved towards a claimant in a particular case that the public authority has assumed a responsibility and a duty of care, will depend on the facts of the individual case [178], which neatly brings us to the outline facts in *DFX*.

28. In *DFX* four siblings in a family of nine children claimed in negligence against the local authority social services department for their failure to protect them from the risks posed by family, members, friends and acquaintances. All the children were on the child protection register at one point and the social services department had been involved with the claimants and their family under their powers and duties under the Act from 1995 – 2010. In June 2010 full care orders were made and care plans removing eight of the children from the family were approved by the court following interim orders made in March 2010.[1]

29. The claimants relied on a generalised assertion that by engaging with the claimants and their parents - by "taking on a task" - the defendant had assumed responsibility for the claimants' plight and that the defendant was therefore liable for the consequences of completing the task incompetently. The claimants also relied on three specific matters:

    i) In 1996 the defendant had commissioned a psychological assessment of the claimants' parents conducted by the Reaside psychiatric unit, a specialist forensic centre dealing with sex offenders, to assess the risk of harm to the children in the light of the father's convictions for indecent assault and both parents' learning difficulties. The report, received in January 1997, recommended monitoring for the family. It was the claimants' case that the defendant had "assumed responsibility to the existing children of father for their

1. [1] The full facts of the case are set out in the judgment in *DFX* at paragraphs 45 – 164.

protection" by undertaking the monitoring work recommended by the Raeside report and by purporting to provide the help that was recommended in the report. By doing so the defendant had assumed responsibility for the claimants' welfare and to keep them safe from the foreseeable risk of harm posed by their father whilst they remained in contact with him.

ii) In February 2002 the defendant assessed the children as being at risk of significant harm and that the criteria for instituting care proceedings under s.31 of the Act had been met. It was the claimants' case that when the defendant decided that the issuing of care proceedings was necessary it had assumed responsibility to the claimants for competently pursuing those proceedings.

iii) By taking on direct work with the claimants and the family through Gill Kane, family support worker and also by providing eight sessions of direct work with the children through Ms Kaur.

30. Lambert J found that each allegation was an "omissions" or "failure to confer a benefit" claim since it was not suggested that any direct act by the defendant had caused the claimants to suffer harm – the injury alleged was inflicted by the claimants' father and/or a family friend with the cypher AD.

> "The only allegation with real causative potency is the failure to commence proceedings which would have led to the claimants being removed from the family….and that the omission alleged is a failure by the local authority to exercise a statutory function" [194 - 195].

31. Lambert J next analysed the circumstances when a duty of care might arise out of the failure to exercise a statutory function (see [196]-[198]) to conclude:

> "199. I conclude that whilst the fact that a public authority is operating within a statutory scheme does not of itself generate a common law duty of care, it does not follow that a failure to exercise a statutory function, including taking a step which can only be taken lawfully by statute, can never be compensable at common law. Whether a duty of care is generated by (on the facts of this case) an assumption of responsibility depends upon whether there is, putting it colloquially, "something more": either something intrinsic to the nature of the statutory function itself which gives rise to an obligation on the defendant to act carefully in its exercising that function, or something about the manner in which the defendant has conducted itself towards the claimants which gives rise to a duty of care. As Lord Reed made clear, and as Ms Gumbel submits, this question is one which is "fact sensitive"."

32. Lambert J swiftly dismissed the generic "taking on a task" allegation as having been conclusively rejected in *Poole*. Next, applying the law to the facts and the three specific allegations of breach of duty before her, the Judge concluded that even though the commissioning of the Raeside report amounted to the taking of a step, the report was not obtained for the claimants' benefit nor indeed for their parents' benefit. Rather, it

was for the benefit of the local authority's social services department as part of its assessment of risk under s.47 in order to assist the social workers acting on behalf of the local authority to determine how best to fulfil their statutory obligations.

33. Furthermore, if viewed objectively, it would not be reasonably foreseeable that the claimants would rely upon the defendant discharging its functions with reasonable skill and care such as to give rise to a duty of care. Lambert J noted that if care proceedings had been commenced, the parents, the children and the local authority would all have been separately represented and the viewpoint of the claimants would not necessarily be aligned to that of the local authority or that of other family members.

34. In relation to the decision to commence care proceedings in 2002 which was not followed through, Lambert J considered the argument to be even weaker:

> "A recommendation that care proceedings be commenced for the purpose of sharing parental responsibility cannot, it seems to me, be described as a positive act which had the effect of generating a duty of care, nor characterised as the provision of advice or service upon which the claimants might reasonably foreseeably rely, so giving rise to a duty of care to act carefully" [204]

35. On the facts in *DFX*, Lambert J concluded that there was nothing in the nature of the statutory functions being exercised by the defendant under s.47 and s.31 of the Act which generated a duty of care. Nor was there anything in the manner in which those functions were exercised which generated a duty of care. She went on to find that the defendant had not assumed responsibility to exercise those functions with reasonable skill and care and there was not "something more". Finally she concluded that the facts did not fall into any category in which the common law has recognised a duty arising. The claimants were impermissibly seeking to create a common law duty of care from the defendant "merely operating a statutory scheme" contrary to the established principles set out in *Stovin v Wise* [1996] AC 923 and *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057.

36. In relation to the third matter – the direct work undertaken by the social workers and family support team - Lambert J noted that the work was undertaken pursuant to s.17 of the Act and it was offered and accepted on a wholly voluntary basis. As such, different considerations may arise when addressing the issue of reliance. But if a duty of care was generated by this work, the scope of that duty would be limited to the performing of the direct work competently. On the facts of the case in *DFX* the quality of the direct work itself was not found wanting.

Law: (3) strike out

37. Under CPR 3.4(2)(a) the court may strike out a statement of case if it appears to the court that the statement of case discloses no reasonable grounds for bringing or defending the claim. It therefore breaks down into two questions: are there no reasonable grounds and if not, should the court exercise its discretion to strike out? The court assumes that the facts stated would be proved at trial and considers whether they could give rise to a claim in law. An application to strike out should not be granted unless the court is certain that the claim is bound to fail. It is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by

hearing oral evidence. Statements of case which are suitable to striking out include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides. It is not however appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact. As noted in *Poole*:

> "89. The existence of an assumption of responsibility can be highly dependent on the facts of a particular case, and where there appears to be a real possibility that such a case might be made out, a court will not decide otherwise on a strike-out application. In the circumstances which I have described, however, the particulars of claim do not in my opinion set out any basis on which an assumption of responsibility might be established at trial."

38. Appellate courts have repeatedly urged caution in the use of the Court's strike out powers (see for example *W v Essex County Council* [2001] 2 AC 592) and the well-known words of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 "Where the law is not settled but is in a state of development ….. it is normally inappropriate to decide novel questions on hypothetical facts" agreeing with Sir Thomas Bingham MR that:

> "If, on the facts alleged in the statement of claim, it is not possible to give a certain answer whether in law the claim is maintainable then it is not appropriate to strike out the claim at a preliminary stage but the matter must go to trial when the relevant facts will be discovered"

39. The appeal court will allow an appeal where the decision of the lower court was wrong (CPR 52.21(3)(a)) and erred either in law or in the exercise of its discretion (there being no challenge to the approach to the assumed facts in these appeals). In an appeal based on an impermissible exercise of judicial discretion, the appellate court will consider if the judge below has taken into account immaterial factors, omitted to take account of material factors, or erred in principle. In matters of judicial discretion there may be more than one permissible answer and it is not for the appellate court to decide how it would have exercised the discretion, but whether the court below was wrong in what it did, in light of the overriding objective and the breadth of the scope of the discretion being exercised.

Judgment below: HXA

40. After setting out the issues, the facts, the law and the parties' respective positions, Deputy Master Bagot QC considered Mr Levinson's submission that *Poole* could be distinguished from the present case on the facts. In *Poole*, the issue was not the risk of harm from the claimant's own family, but from the persistent antisocial behaviour of a neighbouring family and the local authority had no legal power to obtain a care order under s31 on account of the neighbour's behaviour. Mr Levinson contrasted the assumed facts in HXA where the claimants were suffering significant harm due to their mother's lack of parental care and the power of the local authority to obtain a care order, as indeed they eventually did for SXA. The argument was rejected. The inability to seek

a care order in the circumstances of *Poole* was central to difficulties in establishing breach and causation (had they arisen for determination) and not to the existence of a duty at all. In any event, in *Poole*, the lack of an ability to remove the children was an additional and stand-alone reason why the claim was struck out rather than the sole reason (at para 90 per Lord Reed). (Deputy Master Bagot noted that the point was dealt with at the tail end of the 92 paragraphs of Lord Reed's judgment which he considered to be indicative of its lack of centrality to the Supreme Court's reasoning). Instead, the Deputy Master found *Poole* to be a close analogy.

41. Turning to the matters relied on as an assumption of responsibility, the Deputy Master found as follows:

> "As for the particular examples cited, the Defendant's response to those is compelling and, in my judgment, correct as an application of the law:
>
> i) The features relied upon in the first example also arose in *Poole*, where one of the children was placed on the child protection register and there were s.47 investigations into allegations of significant harm. There is nothing which places this in a different category from what went before, such as carrying out assessments and having meetings with partner organisations. I agree with the observation made that it is a distinction without a difference, in the circumstances. It is no more a service provided for the children than it was in the *Poole* case. That is not a factual circumstance which can arguably give rise to an assumption of responsibility.
>
> ii) The assertion that consideration being given to applying for a care order must amount to an assumption of responsibility does beg the question, why? It is difficult to see how taking advice from a legal officer in the Council changes the way in which the Council is holding itself out in terms of its child protection functions. It is not a significant further step especially given that there is no allegation that any proceedings were issued. Again, I do not accept this is a factual circumstance which can arguably give rise to an assumption of responsibility.
>
> iii) If a child protection plan has been drawn up and implemented, as in *Poole*, but no duty arises, it is difficult to see how this is changed by saying that some advice is going to be given. There is no allegation that inappropriate advice was given, it is simply an allegation of omission. That does not amount to an assumption of responsibility." [31]

42. He went on to conclude:

> "A duty of care is recognised to arise when a care order is made, because the local authority has parental responsibility. But up until that point, parental responsibility remains unequivocally with the parent(s). A duty of care cannot, in my view, effectively

> be reverse engineered from the point at which a duty arises on the making of a care order, in the way that the First Claimant would wish. This involves saying that because the duty arises on the making of the order, so there is a duty to conduct any care proceedings brought competently; and so, there is a duty to decide whether to institute care proceedings competently; therefore, there is a duty to investigate competently to decide whether to bring care proceedings. That attempt to trace back a duty at an earlier and earlier stage does not provide a viable route to an arguable case here, in my judgment." [33]

43. In answer to the proposition that only minimal savings would be achieved by striking out the relevant claims, given that the case relating to the allegation of disclosures to school staff in 1999 would continue, the Deputy Master found that:

> "even if I accepted the proposition that only minimal savings would be made, that could not, alone, trump the need to make a decision under CPR 3.4(2)(a) or permit a large proportion of a claim to proceed to trial where a party had established the threshold for striking out those parts of the opposing party's claim. But, here, the defendant is correct to observe that there will in all probability be significant savings of time, costs and court resources if the case is shorn of the relevant claims"

44. He concluded that there was no real possibility that the case might be made out so as to mean it should be permitted to proceed to trial since the claimant's submissions were based on inappropriate distinctions which would have the consequence of avoiding applying a clear precedent from no less than the highest court in the land and would allow legally flawed claims to continue past the interim stage. It would be contrary to the overriding objective since it would result in significant further costs and court resources being expended on the wider issues, beyond the much narrower point of the disclosure to the school.

45. Finally he concluded:

> "In reality, whilst there are naturally some factual differences, there is much overlap in the process of monitoring, investigation and assessment carried out by the local authority in *Poole* and the present case. *Poole* cannot sensibly be distinguished from this case in terms of the appropriate legal analysis to be applied to the respective factual matrices when considering the question of duty of care."

46. Therefore, notwithstanding the proper caution to be adopted and correctly directing himself as to the test to be applied in considering a strike out application, the Deputy Master acceded to the defendant's application.

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47. Master Dagnall reviewed all the authorities and also had the benefit of Deputy Master Bagot's judgement in HXA before him. He struck out the allegations of breach of what he described as the general duty as follows:

> "It seems to me that there is nothing materially different between this case and N v Poole. On the pleaded case, the defendant had (or should have had) the knowledge of significant harm (or the risk of it) and the power to intervene. The same existed in N v Poole but that was held as insufficient to amount to any assumption of responsibility; and paragraph 81 made clear that even a decision to investigate and monitor was not sufficient to create any duty. This, like N v Poole, is a pure non-intervention case where the ability to intervene existed; but where it was held that no duty existed to take steps to confer a benefit by way of protecting from harm from others" [82]

48. He found that no general duty of care arises to consider care etc, proceedings simply because the claimant has temporary accommodation provided for him or her by s20 of the Act [93]. The Master concluded that the circumstances were not analogous to *Barrett v Enfield LBC* [2001] 2 AC 550.

49. However the Master considered it was a more complex question whether the provision of intermittent temporary accommodation[2] under s.20 amounted to an assumption of responsibility and gave rise to a common law duty of care "to safeguard and promote his [the claimant's] welfare" imposed by s.22(3) of the Act.

> "The argument seems to me to divide into two sub-questions, being (1) whether the provision of the Respite Care accommodation gave rise to a more general duty of care including to consider taking care proceedings generally and (2) whether it could give rise to a specific duty of care regarding whether the Claimant should actually be returned to the Parents at the end of the agreed Respite Care Period[3], at least without care proceedings having been considered and if appropriate taken." [92]

50. He noted that there was no dispute between the parties that a duty of care arose in relation to the defendant's performance of the functions of providing accommodation for the claimant and ancillary matters (such as transportation to and from the accommodation and education whilst accommodated) but the claimant was seeking to impose a duty of care to do something outside the performance of those functions both in nature and temporally.

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[2] The judgment uses the term "respite care" which Mr Levinson objected to as inaccurate since he stated that the purpose of the s.20 accommodation was to protect YXA, not to provide respite for his parents. A neutral term is used in this judgment. For the sake of completeness I record that Mr Stagg noted that the claimant had not pleaded the reason why accommodation had been provided to YXA, (from the various powers given to the defendant in s20 to provide accommodation) and he made no admissions.

[3] See f/n 2 above

51. He concluded that the taking of care proceedings was not to be regarded as part of, or related to, the provision of accommodation for only a temporary period and only with the consent of the parents. It did not extend to promoting the safety and welfare of the claimant generally for the future in ways which were not connected with doing so at that particular point of time.

52. He next considered the second question: "whether a duty of care could exist not to return the claimant to what was (or should have been) known to be a place of danger without considering and (if appropriate) taking care etc. proceedings." He found that the defendant was not under such a duty by dint of having provided the accommodation, whereas it was under a positive duty to return the claimant to his parents under s.20 of the Act.

53. Having concluded that no reasonable grounds had been pleaded to give rise to a duty of care at common law, the Master considered whether he should exercise his discretion in light of the cautious approach required by the authorities to what had been a developing area of law. He concluded that the principles have now been settled by *Poole* and that there were neither sufficient nor compelling reasons to allow the claim to go forward, even though the same evidence would be relevant to both the common law claim and the Human Rights Act 1998 claim, which had not been subject to the strike out application. The defendant's application was granted.

Claimants' submissions

54. HXA alleged that the defendant local authority first assumed responsibility for her welfare and protection on 28th of July 1994 when her name was placed on the child protection register under the category of neglect and care proceedings were contemplated. The defendant should have sought and obtained a care order to protect her and in breach of that duty failed to do so. Five s.47 investigations had been conducted in the 10 months since September 1993 and there were documented concerns about the claimant's mother's excessive and inappropriate physical chastisement of all the children and the lack of supervision afforded to them (paragraph 14(e) of the particulars of claim). The claimant and her sisters were the only beneficiaries and were relying on the defendant to undertake the task competently for their protection. Devising, implementing monitoring and enforcing a child protection plan were services provided to the claimants for their intended benefit and upon which they relied to be undertaken competently for their protection. No one else was doing this for the claimants. It was submitted this was an example of the defendant "undertak[ing] the performance of some task or the provision of some service for the claimant" so as to give rise to a duty of care in accordance with *Poole*.

55. Secondly in November 1994 the defendant assumed responsibility when there was a child protection investigation after the defendant had received a referral alleging that the claimant's mother had assaulted her. The defendant's social worker decided to seek legal advice with a view to initiating care proceedings and the defendant resolved to undertake a full assessment, but did not do so (allegation 14(l) in the particulars of claim). It was submitted that by deciding to progress towards seeking a care order the defendant had assumed responsibility for concluding that process competently for the protection of the claimant. The responsibility assumed was said to be for safeguarding the claimant's welfare.

56. Thirdly (and Mr Levinson considered this to be his best point) the defendant assumed responsibility for the claimant on 27 January 2000 when it resolved to do "keeping safe" work with the claimant after it was reported at a child protection meeting that Mr A had touched the claimant's breast The "keeping safe" work was never done (allegation 14 (vv) of the particulars of claim). The defendant resolved not to investigate for fear of how Mr A would react and because it was wrongly thought that there had been no previous similar concerns. "Keeping safe" work should have been a specialised professional service provided to the claimant undertaken by a trained social worker. It would involve a social worker identifying the particular risks from which the child requires protection – in this case physical and sexual abuse by adult family members – and undertaking a programme of work with the child intended to equip her or him with the skills to differentiate between appropriate and inappropriate behaviour in adults and the steps the child should take if s/he is concerned. It was submitted that undertaking "keeping safe" work would amount to "the performance of some task or the provision of some service for the claimant" constituting an assumption of responsibility giving rise to a duty of care. It was said to be analogous to the work of an educational psychologist capable of giving rise to a duty of care (see *Phelps v Hillingdon LBC* [2001] 2 AC 619). The fact the work was never done constituted a breach of the duty and the Deputy Master was wrong to conclude that the allegation was simply of an omission. By doing so the Deputy Master had elided duty with breach and failed to recognise that the provision of advice can give rise to an assumption of responsibility. *Poole* cannot properly be regarded as authority for whether or not conducting "keeping safe" work can amount to an assumption of responsibility since it did not arise for consideration in *Poole*.

57. Turning to the second ground it was submitted that the Deputy Master was wrong to conclude that this is no longer a developing area of law in light of the Supreme Court's judgement in *Poole*, since *Poole* had only set out the overarching principles and provided limited guidance as to their application to different scenarios. The law is still developing, to be decided on a case-by-case basis, dependant on the particular facts in each case and the negligence cause of action was not apt for strike out. There are conflicting first instance decisions and at appellate level in the St Helena Court of Appeal which reversed a first instance strikeout decision (*A v Attorney General of St Helena* [2020] ref 544 of 2018 (unreported)) demonstrating the continuing uncertainty in this area.

58. Similar arguments were deployed in YXA. On the facts in YXA's case it was alleged the defendant had assumed responsibility to protect him from harm when he was a "looked after child" on each occasion when he was in the defendant's care pursuant to s.20 of the Act from 28 April 2008 onwards. There was no criticism of the accommodation provided but the challenge was to the defendant's decision to allow him to return home to his parents. During the short periods of care with his parents' agreement of approximately one night every two weeks and one weekend every two months agreement it was said that the defendant assumed responsibility to safeguard his welfare which would have required them to seek a care order and not return him to his parents. It was not alleged as a continuous obligation but was said to arise on each occasion that he was intermittently received into care. It was submitted that the defendant had "undertaken the performance of some task or the provision of some service for the claimant" and thus assumed responsibility and that the scope of the duty would have encompassed not permitting the claimant's return to the unsafe

environment of his parents' home. The claimant was a "looked after child" under the Act notwithstanding his occasional short term admission to care was on a voluntary basis. Reliance was placed on *Barrett*– the Master had erred in concluding that it was not analogous - and it was said that the duty of care owed to a looked after child set out in *Barrett* arguably extended to applying for a care order to prevent the claimant returning to an unsafe situation.

59. Secondly, since it was a developing area of law the claim should not have been struck out at a preliminary stage. Furthermore the claimant brought his claim not only in negligence but also for damages under the Human Rights Act 1998 (HRA). Since the HRA claim arose out of precisely the same facts and allegations of breach there would have been no or minimal costs saving and court time and for that reason also the claim should not have been struck out.

Defendant's submissions

60. Mr Stagg submitted that both first instance decisions were right and had correctly analysed and applied *Poole* which was indistinguishable on the facts in both cases. The mere fact that various steps are taken by a local authority in the discharge of its child protection functions without care proceedings being brought is not enough to give rise to an assumption of responsibility has now been made clear in *DFX* by Lambert J. It was not possible to carve out positive acts in either case which are both fundamentally about a failure to confer a benefit (see *Kalma v African Minerals Ltd* [2020] EWCA Civ 144) by failing to remove the claimants from their parents. The essence of the criticism and alleged negligence of the defendants in both cases is their failure to commence care proceedings under s.31 of the Act at all in HXA's case and earlier than they did in YXA's case which cannot be described, in the words of Lord Reed as making things worse or causing harm (or negligent act in the language of the older cases) but is an allegation of failure to confer a benefit or in the words of Lord Reed of not making things better (or, in the language of the earlier cases, of a negligent omission).

61. To the extent that there was conflicting authority, for example, *A v AG St. Helena* and one or two first instance extempore judgments, there had been a misreading of *Poole* and the judgments predated *DFX* which is now the exposition at the highest level thus far on the matter. The argument that this is "a developing area of law" is therefore simply wrong in light of both *Poole* and *DFX*. The Supreme Court in *Poole* established that generally no duty of care is owed unless sufficient facts are pleaded to set up an arguable exception to that rule. *DFX* authoritatively demonstrated the clear and correct application of *Poole* and in both judgments under appeal in these cases, the facts pleaded do not arguable give rise to a duty of care.

62. Finally, as to the point that some parts of both claims have not been struck out – in HXA's case relating to an alleged disclosure to the school and in YXA there is a parallel claim under the HRA – in both cases the weight to be attached to that factor was a matter of the exercise of the first instance judge's case management discretion and since it could not be said to have been a wrong decision in either case, the court could not intervene.

Analysis and discussion

63. In spite of Mr Levinson's valiant efforts to describe the claims in terms of allegedly negligent acts, in both cases all the allegations relied on are unquestionably allegations of negligent omissions, as is abundantly clear if considered by reference to the terminology preferred by Lord Reed and the "distinction between causing harm (making things worse) and failing to confer a benefit (not making things better) rather than the more traditional distinction between acts and omissions". In both cases the harm was being done by the claimants' families and Mr A. The essence of the claim is an allegation of a failure to take care proceedings timeously and not making things better. The attempt to carve out positive acts from a case which is principally about a failure to confer a benefit is to fail to identify correctly the underlying complaint, as per the Court of Appeal in *Kalma*:

> "merely because something can be presented as an act does not mean that what are, on a proper analysis, omissions can be, as the judge put it, "brought wholesale within the parameters of a duty of care"" [121]

Or to put it colloquially, to fail to see the wood for the trees.

64. The real question therefore is whether the claimants can distinguish the assumed facts in their claims, with those in binding, decided cases, where claimants were unsuccessful in establishing that the defendant had assumed responsibility to protect them from danger and thus bring them within the exception to the general rule against liability for negligently failing to confer a benefit. In considering that question *Robinson* reminds us of the importance of precedent, the maintenance of coherence and the need to avoid inappropriate distinctions.

65. It is beyond doubt that a local authority "investigating and monitoring" a child's position and by "taking on a task" or exercising its general duty on the s.17, or placing a child on the child protection register, or investigating under s.47 does not involve the provision of a service to the child on which they can be expected to rely (*Poole* para 78, *DFX* para 180). "Something more" is required (*X v Hounslow LBC* [2008] EWCA Civ 286 and *DFX* para 199). The defendants are "merely operating a statutory scheme" which does not create a common law duty of care (see *Stovin* and *Gorringe*).

66. For the reasons set out by Lambert J in *DFX*, and Lord Reed in *Poole*, the placing of HXA on the child protection register on 28 July 1994, does not amount to "something more" which deals with the first limb of Mr Levinson's challenge in HXA.

67. The claim that the decision to undertake a full assessment in November 1994 gives rise to an assumption of responsibility is also unarguable. I agree with the Deputy Master – why must the fact of consideration being given to applying for a care order amount to an assumption of responsibility? Mr Levinson had no answer. A duty of care is recognised to arise when a care order is made, because at that point the local authority has parental responsibility under the Act, which is the "something else" sufficient to amount to an assumption of responsibility. Resolving to seek legal advice and undertake a full assessment is not sufficient to amount to that extra something.

68. Mr Levinson considered the defendant's decision to undertake "keeping safe" work with HXA and then not doing it, to be his best point. The particulars of claim do not suggest that if the keeping safe work had been done the claimant would have been able to protect herself and be safe from harm from Mr A and her mother, but rather it was alleged that if the keeping safe work had been done, care proceedings would have resulted. So firstly the allegation is expressly framed as an omission/failure to confer a benefit by not doing the keeping safe work, not an allegation of a positive act that amounted to an assumption of responsibility. Secondly, on a proper analysis, as with the other two matters, the criticism is the failure to institute care proceedings and is therefore indistinguishable from the reasoning in *Poole* and *DFX* and fails for the same reasons. As noted in *DFX*, even if a duty of care was generated by direct work, the scope of that duty would be limited to the performing of the direct work competently (para 210). It does not amount to the necessary something else. A number of questions are involved. It requires a careful analysis of exactly what is the responsibility is that defendant is said to have assumed, to identify for whose assistance it is provided and consider also the issue of reliance. Each of which would involved fundamental problems for HXA to overcome.

69. In YXA it is important to distinguish between the duty of care which arguably arises after the making of a care order when the local authority becomes the statutory parent (*Barrett*) and the entirely different position of a child, albeit a "looked after child" such as YXA (as defined in the Act) receiving temporary and intermittent care under s.20 with the consent of the child's parents, where the parents retain exclusive parental responsibility.

70. There was no criticism of the standard of care received by YXA during the intermittent periods of his temporary s.20 accommodation, which could give rise to a potential claim. Instead the claim was advanced, as it was in *HXA*, on the basis of an alleged duty of care which, if properly discharged, would involve the taking of care proceedings. 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 s.22(3)(a) cannot support a duty of care where none would otherwise exist. There is no logical reason why the provision of s.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. Nor is the Burning Building line of cases of any assistance when the claim is not pleaded in such terms and the facts alleged do not support such a claim, as discussed at length by Master Dagnall in his judgment. It was sensibly not pursued before me.

71. As to the argument that Master Dagnall erred in considering that YXA's case was not analogous to *Barrett*, the submission does not withstand close scrutiny. Although *Barrett*, too was a strike out claim, the issue was not a criticism of the social workers failure to remove him from his family through child protection proceedings, but the local authority's alleged failings after he had been placed in the care of the local authority. It was an allegation of causing harm, not an allegation of not conferring a benefit. By the same reasoning, *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151 and the so-termed "wrongful removal" cases are not comparable.

72. The Supreme Court has now clarified the approach to be taken to ascertain whether a duty of care is owed in its judgements of *Michael*, *Robinson* and *Poole.* The facts alleged in these two appeals are on point, and so closely analogous to the recent Supreme Court judgements and now DFX and at first sight cannot now be described as a developing area of law, as noted by Deputy Master Bagot.

73. I next consider the authorities relied on by Mr Levinson in support of his argument. Although none are directly binding on me, they may be persuasive and provide important context. With the greatest respect to the appeal court in *A v Attorney General of St Helena* comprised of circuit judges (unreported, 20 January 2020) it was an extempore decision which did not have the benefit of the judgment in *DFX* and may have misunderstood the basis of the claim in *Poole*. It appeared to be under the impression that *Poole* "involved whether or not there was a duty of care in relation to housing" which was expressly not the case in *Poole* (see [18] and [77]) and was therefore incorrectly distinguished. The reasoning of the first instance judgment of the Chief Justice is more cogent.

74. Other first instance decisions decided prior to *DFX* are to be treated with some caution as the judges would not have had the benefit of Lambert J's careful analysis. *Champion v Surrey CC* [2020] (unreported, HHJ Roberts Central London CC) where a similar strike out application was refused in a claim against a social services department in relation to its child protection functions is under appeal and permission has been granted. In *AA v CC* [2020] (unreported, HHJ Godsmark QC Nottingham CC) a strike out application was refused because it was arguable that it was not a failure to confer a benefit claim and that the defendant council was alleged to have caused harm through their becoming embroiled in private law proceedings between the parents and the child, BB which therefore distinguished it from *Poole*. In the alternative HHJ Godsmark QC considered that it was also arguable that the involvement in the private law proceedings gave rise to an assumption of responsibility. Both parties agreed that the case of *AA v CC* was distinguishable on its facts to that of YXA, and the case does not add to Mr Levinson's submissions and provides no assistance. I agree with Mr Stagg's submission that post *Poole* and *DFX* the question of assumption of responsibility by a local authority so as to give rise to a duty of care to remove children from their families in child protection proceedings is not a developing, but a settled, area of law.

Conclusions

75. The Deputy Master and Master in both cases were correct to conclude that the claims were bound to fail for the reasons given in their careful judgments. The allegations were of an omission/failure to confer a benefit/not making things better and in neither case had the claimant asserted facts that could establish that the defendant local authority had assumed responsibility so as to give rise to a duty of care to take care proceedings. Since no duty of care had arisen, the claims in common law negligence were unwinnable. There was no arguable assumption of responsibility that could be found or inferred from either the nature of the statutory function or the manner of behaviour by the defendant in either claim to amount to an arguable case.

76. Even pre *DFX*, both judges were also correct in their analysis that neither case raised issues in a developing area of law so as to tend towards the exercise of the Court's discretion not to strike out notwithstanding the inherent difficulties in the claims. Post *DFX* the position has become clearer still. The facts alleged fall within the established

parameters established by precedent. The application of the principles established by *Poole*, *Robinson* and *Michael* as applied to temporary intermittent accommodation provided with the parents' consent under s.20 does not amount to "something else" so as to amount to an assumption of responsibility to take care proceedings.

77. As to the criticism that the Master erred in *YXA* in the exercise of his discretion since there would be little saving of time or cost as the same evidence would be required for the parallel Human Rights Act claim that was not subject to the strike out application, it was a matter for the Master and fell comfortably within his wide discretion over the exercise of his case management powers. The argument was weaker still in *HXA* where the claim against the defendant for an alleged disclosure to her school would involve little by way of overlapping evidence. There was nothing wrong with either decision (see *Lawrence v Pembrokeshire County Council* [2007] EWCA Civ 446).

78. Neither claim disclosed any recognisable basis for a cause of action in the tort of negligence against the defendants and there was no error in the exercise of the court's discretion to strike out those parts of each claim. Both appeals are refused.