

HXA and YXA : Guidance from the Supreme Court on negligence in failure to remove cases

21 December 2023

Since the case of *N v Poole* in 2019, whether a local authority owes children in their area a duty of care to protect them against harm from third parties has been the subject of much discussion.

In HXA and YXA, *HXA (Respondent) v Surrey County Council* the defendants applied to have the claimants' cases struck out on the basis that there was no arguable cause of action. Their applications succeeded at first instance and on appeal to the High Court. However, the Court of Appeal held that the claims should not be struck out because the existence of a duty of care was arguable. The Defendants appealed to the Supreme Court.

The Supreme Court has determined that following *N v Poole*, the defendant local authorities did not assume responsibility for HXA and YXA and their claims were correctly struck out in the first instance. In addition, the Supreme Court clarified that this was not a developing area of law and following *N v Poole*, the law is certain.

Local authorities will now, hopefully, be able to successfully repudiate these claims; focusing their precious resources on providing family support and child protection services to current service users.

Summary of the cases

HXA

HXA lived with their mother and 3 siblings. From September 1993, there were a number of concerning referrals to the local authority regarding inappropriate chastisement, verbal abuse and lack of supervision. In 1993 and 1994 five investigations were conducted. Consequently, HXA and siblings were placed on the child protection register. In November 1994, it was agreed legal advice was to be sought and it was recommended that an assessment should be carried out with a view to initiating child protection proceedings. Neither happened. The local authority continued to monitor the family.

In 1996, HXA's mother commenced a relationship with Mr A. There were concerns about Mr A's behaviour. HXA made an allegation of inappropriate touching against Mr A. The local authority considered that some 'keeping safe' work should be done with HXA, but it was not carried out. Mr A and her mother were later convicted of offences against HXA and were imprisoned.

YXA

YXA suffered with epilepsy, learning difficulties and autism spectrum disorder. In March 2008, a Paediatrician advised the local authority that YXA was being inappropriately and excessively medicated and recommended that he should be removed into care. The local authority and YXA's parents agreed that the Claimant should have respite care pursuant to **section 20 Children's Act 1989**. He received that regular respite care.

A number of concerns were raised including YXA's parents' drinking excessively, smoking cannabis and physical assaults against YXA. In December 2009, YXA's parents admitted to hitting YXA. YXA was accommodated in care on a full time basis pursuant to **section 20 Children's Act**. Care Proceedings were initiated, and a Care Order was granted in March 2011.

The Supreme Court's decision

The Supreme Court set out their reasons for concluding there was no arguable duty of care in the present cases:

- It is clear that a local authority has relevant statutory duties and powers. However, it is also established law that the mere fact that there is a statutory duty does not mean that a common law duty of care is owed. When Courts are deciding whether a local authority owes a duty of care, they must consider whether the same principles would have been applied if the local authority was a private individual.
- When applying the above principle and considering whether a private individual would have owed the children a duty of care to protect them from harm, the claimant must establish a relevant assumption of responsibility. This is because this type of claim involves pleading a failure to protect each claimant from harm by a third party. To establish liability the claimant must prove that, either:
 1. The Defendant assumed responsibility for the Claimant.
 2. The Defendant has done something to prevent another from protecting the Claimant from danger.
 3. The Defendant has a special measure of control over the danger.
 4. The Defendant's status creates an obligation to protect the Claimant from that danger.

The Supreme Court held that only the first question on assumption of responsibility was relevant in the pleaded cases of HXA and YXA. The Supreme Court Judgment refers to the proposed investigations under **section 47 Children's Act** in HXA. It concludes that the local authorities' investigation does not involve the provision of a service to HXA. The investigation was to enable the local authority to decide whether to initiate care proceedings. Furthermore, the local authority obtaining legal advice does not involve the provision of a service to HXA. The legal advice was for the local authority.

In YXA, the Supreme Court concluded that providing respite care for YXA did not constitute an assumption of responsibility to use reasonable care to protect YXA from abuse in the family home. Furthermore, the local authority's failure to investigate and commence care proceedings each time YXA was returned home, also did not establish an assumption of responsibility. The Supreme Court stated that it was difficult to see why a duty of care would arise, after a return from respite care, if it had not arisen beforehand.

The Supreme Court concluded that after *N v Poole* the law is clear. In failure to remove cases local authorities do not, absent a Care Order assume responsibility for children in their area to protect them from harm simply because they are working with them. Consequently the cases were correctly struck out in the first instance.

The Supreme Court acknowledged that there are situations that where an assumption of responsibility can be established and provided the following examples:

- When a Care Order has been granted and the local authority has taken over parental responsibility for the child.
- When local authorities accommodate a child pursuant to **section 20 Children's Act**, they owe the child a limited duty to protect them from harm during their placement.

Following a period of uncertainty, stakeholders will be relieved to obtain this clear, concise guidance from the Supreme Court.

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