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Reparation and Child Protection: Clarity and Consistency*:* *HXA v Surrey CC*

A. INTRODUCTION

The plethora of statutory functions that local authorities possess mean that they are tempting targets in negligence actions. The aggrieved claimant will assert that they should have exercised such functions for their benefit and that the statutory framework puts the parties in a position of proximity for the purposes of the law of duty of care. Cognisant of such vulnerability the courts, ever since the decision of the House of Lords in *Dorset Yacht v Home Office*, have taken a protective stance where local authorities and other public bodies are concerned.[1] The form that protection takes has varied over the years but its existence has been constant.

The often deeply unpleasant circumstances at the heart of child protection cases mean that further litigation against local authorities is only to be expected. Claimants can always point to specific statutory powers which were not utilised but should, it is said, have been exercised for their benefit. Alternatively, it may be said that powers that were exercised should have been used competently. As recently as 2018 the Supreme Court put forward guiding principles which told us, in the child protection case of *N v Poole* (*Poole*), that the mere exercise of statutory functions would not give rise to a duty of care.[2] The latter position was subject to exception and, in particular, a duty would arise should the defender assume responsibility. *Poole* appeared to set out the law in the clearest of terms but, somewhat surprisingly, very similar issues were to come before the Supreme Court in *HXA v Surrey CC* (*HXA*).[3]

B. THE CLAIM IN *HXA*

HXA is the latest decision to consider when the exercise of statutory functions by a local authority will give rise to a right of action at common law. *HXA* involved appeals to the Court of Appeal against decisions in two cases striking out claims in negligence arising out of the

[1] [1970] AC 1004.
[2] [2020] AC 780 at para 65.
[3] [2023] UKSC 52.

exercise of statutory functions under the Children Act 1989.[4] Apart from *HXA* itself, the appeal also concerned *YXA v Wolverhampton CC*. Each claimant as a child had been subjected to severe abuse and neglect. Both claimants were involved with social services for a number of years whilst they remained at home with their families and continued to suffer abuse. The issue on appeal was whether, at any stage in its contact with the children, the local authorities could be said to have assumed responsibility for their welfare so that they owed a duty of care.

Given that it is now trite law that the mere exercise of statutory functions does not give rise to a duty of care, the claimant's position is inevitably a challenging one. As Cornford points out "Claimants' lawyers are…forced to resort to trying to identify particular decisions taken by the authorities in the course of their dealings with the claimants that could be interpreted as amounting to assumption of responsibility".[5] In *HXA* a number of "particular decisions" by the defendant were highlighted in an attempt to show that a duty had arisen. For example, it was alleged that:

> In November 1994 there was a child protection investigation after the Defendant received a referral alleging that [HXA'S] mother had assaulted [HXA]. The Defendant's social worker decided to seek legal advice with a view to initiating care proceedings. The Defendant resolved to undertake a full assessment, but did not do so.[6]

The Court of Appeal held that the claims should not have been struck out. The issues raised were said to be highly fact sensitive and the area of law concerned was seen as one that was in a development phase.

C. SUPREME COURT

The Supreme Court in *HXA* saw no reason whatsoever to depart from or otherwise distinguish *Poole*. As a result, it was held that no assumption of responsibility by the defendants had arisen to take reasonable care to protect the claimants from abuse:

[4] [2022] EWCA Civ 1196.
[5] T Cornford, "Liability for failure to exercise child protection powers" (2022) 38 PN 84 at 89.
[6] *HXA* (n 3) at para 17.

> Expressed at a more granular level, the particulars of claim provide no basis for the leading of evidence at trial from which a relevant assumption of responsibility can be made out. It follows that there is no arguable duty of care owed as alleged and the claims in both cases were correctly struck out at first instance.[7]

HXA adheres to the long standing policy of restricting negligence claims against public authorities and, more particularly, endorses the guiding principles set out in *Poole*. A number of more specific points might be made. First, it would be perfectly possible to provide a measure of protection for public bodies at the stage of standard of care as the Outer House did in *Burnett v Grampian Fire and Rescue Service* and the Court of Appeal in *HXA*.[8] The Supreme Court has always eschewed that approach and continues to do so. Second, the Court of Appeal had seen cases of this type as highly fact sensitive and, as a corollary, a trial might well be required to determine the position on duty. The Supreme Court are of the view that *Poole* provides clear demarcation lines between situations that give rise to a duty and those that do not. Third, alternative remedies such as a claim under the Human Rights Act 1998 are seen as providing appropriate redress for claimants. Fourth, the view is taken that we are in a settled area of law and it must be said that prior to the decision of the Court of Appeal that had very much appeared to be the case. Fifth, questions still remain as to when an assumption responsibility will arise and the remainder of this article explores that issue.

D. ASSUMPTION OF RESPONSIBILITY

The Supreme Court were clear, the outcome in *HXA* notwithstanding, that an assumption responsibility could arise in some circumstances. By way of guidance, the Court made reference to *Poole* which in turn had referred to the criteria expounded in *Hedley Byrne v Heller* (*Hedley*) and *Spring v Guardian Assurance*.[9] I would question whether those decisions are particularly helpful in determining whether an assumption of responsibility arises in the context of public authority liability. Detached from the “akin to contract” environment within which it was conceived the concept tells us very little when the interaction between the parties is readily (and arguably entirely) explicable by the statutory framework. A further

[7] *HXA* (n 3) at para 109.

[8] *Burnett v Grampian Fire and Rescue Service* [2007] CSOH 3, 2007 SLT 665 overruled by *A J Allan v Strathclyde Fire Board* 2016 SC 304.

[9] *Poole* (n 2) at para 73 referring to *Hedley Byrne v Heller* [1964] AC 465 and *Spring v Guardian Assurance* [1995] 2 AC 296.

difficulty lies with the notion of specific reliance which is pivotal to the establishment of a duty on the basis of *Hedley*:

> [I]n a case like YXA, where one has a vulnerable young child with learning difficulties, it would be inappropriate to insist on specific reliance by the child in order to find that there was an assumption of responsibility triggering a duty of care during the respite period.[10]

This is highly problematic for claimants as the courts in the UK have shown little interest in adopting a concept of general reliance "in the sense that persons in the position of the plaintiff may be expected to act in reliance on the authority exercising its powers".[11] Recognition of the latter form of reliance might be required to render a negligence claim viable but would limit the scope of the protection afforded to public bodies.

The forgoing notwithstanding, *W v Essex* may offer an example of the applicability of *Hedley* in the child protection context.[12] There, the House of Lords refused to strike out a claim brought by parents after a child fostered with them abused their existing children. The claim was based on an assurance (which was not honoured) given to them that a child who was a sexual abuser would not be placed with them. It is though difficult to see what renders *W* materially different to other situations where a local authority places a child with foster parents. In the normal course of things dialogue between potential foster parents and the local authority will inevitably take place which is likely to be wide ranging and a variety of assurances given. There is much to be said for the argument of counsel for the defendants that "[t]he instant case is an extreme example of fostering going wrong and the law should not take a specific turning in the face of an extreme and exceptional case".[13] *W* may be juxtaposed with the subsequent Court of Appeal decision in *X v Hounslow LBC* (*X*) where the claim that a duty of care was owed to vulnerable tenants to protect them from the criminal acts of others was rejected.[14] This was despite the fact that social workers were very much engaged with the tenants and, for instance, gave advice and assistance to them in managing their lives.

[10] *HXA* (n 3) at para 108.
[11] *Stovin v Wise* [1996] AC 923 at 937.
[12] [2001] 2 AC 592.
[13] Ibid at 595.
[14] [2009] EWCA Civ 286.

I would maintain that the approach in *X* is to be preferred and the law on negligent misstatements should not be used to circumvent *Poole*. It may be noted that in *Poole* the Supreme Court said with reference to *X* that the "correctness of these decisions is not in question, but the dicta should not be understood as meaning that an assumption of responsibility can never arise out of the performance of statutory functions".[15]

Public bodies will, in the exercise of their statutory functions, provide information or advice on a very regular basis. A claimant's chances of success should not turn on the somewhat arbitrary circumstances of whether a statement was made and on how loquacious the defender has chosen to be. Indeed, hitherto the courts have shown little inclination to allow *Hedley* to circumvent the position articulated in public authority cases. Thus, we find that the Court of Appeal have held that assurances given as to building inspection did not undermine the common law's denial of recovery for pure economic loss in *Murphy v Brentwood*. [16]

E. ASSUMPTION OF A DIFFERENT ROLE

Barrett v LB of Enfield was viewed as a paradigm example of a duty of care arising in the context of child protection.[17] It might be said that this is because the defendant took on a different role (and not merely responsibility) which carried with it specific obligations in law. *Barrett* concerned the responsibility of a local authority for a child who had been taken into care. No action on the statute arose but it was held that a common law duty in negligence did; crucial to this outcome was the fact that the defendant took on a parenting role. *Barrett* is perfectly consistent with *Poole* where Lord Reed indicates that "public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty".[18] Where the defender's behaviour mirrors that of a private actor one would expect the position on duty to be the same:

> [A] similar duty of care at common law would arise if a private individual was requested by a parent to, then agreed to and did, accommodate the parent's child. The

[15] *Poole* (n 2) at para 72.
[16] *King v North Cornwall DC* [1995] 2 WLUK 132; *Murphy v Brentwood* [1991] 1 AC 398.
[17] [2001] 2 AC 550.
[18] *Poole* (n 2) at para 65.

> assumption of responsibility flows from the fact that the private individual was entrusted by the parent with the child's safety and accepted that responsibility.[19]

F. EXCEPTIONAL CASES

The reiteration that a claim may be made should there be an assumption of responsibility may be in part a reflection of the common law's aversion to categorical rules.[20] The courts may wish to reserve the right to provide a remedy in particularly meritorious or exceptional situations. Intervening ineffectually will not suffice though: a "public authority will not generally be held liable where it has intervened but has done so ineffectually so that it has failed to confer a benefit that would have resulted if it had acted competently".[21]

Welton v North Cornwall DC may be an example of a genuinely exceptional case.[22] There, the question arose whether a duty of care was owed by a local authority in respect of its environmental health officers when they were purporting to exercise statutory powers in relation to food hygiene: "the conduct which is at the heart of this case, namely the imposition by Mr. Evans, out with the legislation, of detailed requirements enforced by threat of closure and close supervision"[23] was somewhat extreme. The zealous, to say the least, behaviour of the inspector prompted the Court of Appeal to hold that a duty was owed: "[i]n the scale and detail of the directions he gave, and the degree of control he exerted, he was conducting himself in a manner which was exceptional."[24]

Nevertheless, if it is felt that the approach in *Welton* was correct it remains rather difficult to predict when a situation will be viewed as exceptional. Is it when gross negligence occurs? This would seem to be unlikely as such a concept would be the product of great uncertainty. I would suggest that what is more likely to be significant is the element of going beyond what was permitted to the defendant by the legislation.[25] However, should a duty arise on that basis its scope would be limited to the loss flowing from the element of unlawfulness.

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[19] *HXA* (n 3) at para 107. And see D Brodie, "The role of statute: catalyst or constraint" (2013) Jur Rev 227 at 236.
[20] R Ahdar, "Contract doctrine, predictability and the nebulous exception" [2014] 73 CLJ 39.
[21] *Tindall v Chief Constable* [2022] EWCA Civ 25.
[22] [1997] 1 WLR 570.
[23] Ibid at 581.
[24] Ibid at 584-5.
[25] R Mullender, "Negligent Misstatement, Threats and the Scope of the Hedley Byrne Principle" (1999) 62 MLR 425 at 428.

G. CONCLUSIONS

The general trend, for a good number of years, has been to keep public authority liability in negligence within decidedly limited bounds. It is therefore entirely unsurprising that *HXA* chose to unequivocally endorse *Poole* and avoid the increase in the volume of litigation that would have arisen had the approach of the Court of Appeal been followed. However, a lack of clarity over the application of the concept of assumption responsibility in a statutory context remains. I also have considerable reservations over its workability but until the courts find it to be irrelevant (or create a tailor made version) in such cases it will act as a chimera for litigants.[26]

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[26] For further discussion, see T Cornford, "Assumption of Responsibility by Public Authorities" (2018) 30 Denning LJ 55.