Insight 191

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of **Insight** in which we review how the High Court has dealt with a claim in the aftermath of the UK Supreme Court judgment in *CN & Another v Poole BC [2019] UKSC 25*, relating to the circumstances in which local authority social services departments, and the social workers that they employ, could then owe a duty of care in the exercise of child protection functions.

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Duty of care

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

The current landscape in failure to remove claims

On 6 June 2019 the UK Supreme Court (SC) handed down its judgment in *CN & Another v Poole BC [2019] UKSC 25*, a ruling that the SC took almost a year to deliver following what had been an expedited appeal hearing in July 2018. What the SC produced was a unanimous affirmation of the principles enunciated as long ago as 1996 in the seminal case of *X v Bedfordshire CC*: in essence, that there are limits to the circumstances in which local authority social services departments, and the social workers that they employ, could then owe a duty of care in the exercise of child protection functions.

The inevitable question that arose following *Poole* was where those limits might lie? Since June 2019 there have been various skirmishes as practitioners began the process of developing a clear understanding of the ramifications of the judgment in *Poole*. A wide range of opinions have been voiced and learned analyses have been published. However, only now are we able to observe how judges are intending to apply the law to the facts in a post-*Poole* world.

The latest (and most prominent) example so far is the lucid and cogent reasoning set out by Deputy Master Bagot QC in *HXA & another v Surrey County Council [2021] EWHC 250 (QB)*. This judgment will be far from the last step along what is likely to be a lengthy legal road, but the judicial treatment of the arguments in this case merit scrutiny.

Facts and procedural position

There are two claimants, HXA and her younger sister. As most of the facts and index arguments are common to both claims it was agreed that HXA's claim should proceed alone with her sibling's claim being stayed.

These cases are made no less challenging by the wide range of complex and convoluted factual scenarios that have occurred. Sadly, it is invariably the case that the facts and allegations make for grim reading. The facts in *HXA* are no exception. In short, both claimants suffered physical abuse and neglect from their mother, and sexual abuse from one of the mother's succession of male partners, whilst in their care. The defendant's files recorded numerous concerns and what might be regarded as a relatively high level of involvement on the part of the defendant's social workers.

It was alleged that HXA suffered psychiatric and other injuries that would not have been inflicted to the same degree or at all had the defendant's social workers exercised their duties and responsibilities with reasonable care.

The particulars of claim contained a litany of allegations based on the existence of a duty of care owed by the defendant to the claimant, and as to how a duty of care had been breached by the defendant and its social workers.

A line of argument, that staff in the defendant's school had failed to act adequately or at all in the face of a report of abuse, was put to one side for future determination by the court. However, the defendant applied under CPR 3.4(2)(a) to strike out the balance of the claimant's allegations. It was this application that was the subject of the present judgment.

The duty of care allegations that the defendant applied to strike out

There were six bases on which it was contended that a duty of care arose in *HXA*. Those bases were set out in what has become a relatively standard fashion. As has already been noted, the allegations relating to breach of duty by school staff was left for further consideration and did not come within the remit of this application.

The defendant argued that the other five bases could not be made out on the facts and should be struck out. Those five bases were as follow:

- A duty of care existed through the mere exercise of the defendant's child protection function.
- The defendant had assumed responsibility for the safety and welfare of the claimant, as per *Poole*, through the nature and extent of its involvements with the claimant's family.
- The council had added to the danger by action/inaction which had the effect of both (1) approving or endorsing the parenting; and (2) allowing unsuitable male partners to move in with mother.
- The council had failed to control those who were responsible for the abuse and/or neglect.
- The council's inaction had prevented others from protecting the claimants.

The judgment of Deputy Master Bagot QC

The judge agreed with the defendant's arguments and struck out all five of the bases listed above.

On behalf of the claimants it had been argued, not surprisingly, that *Poole* could be distinguished sufficiently on the facts to enable the court to reach a different conclusion. For example, it was argued that *Poole* was a housing department case, whereas *HXA* was a social services matter in which a care order could have been obtained rather earlier than was ultimately the case.

The judge rejected all of the claimant's submissions in a very clear and concise summary. He dealt first of all with the contention that a duty of care arose purely through the fact that the defendant was exercising its child protection functions:

The relevant extracts from his judgment are:

'26. The difficulties I have with the claimant's submissions on Poole *are fourfold:*

i) Firstly, 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.

ii) Secondly, I consider it apparent that the lack of ability to remove the children was an additional and stand-alone reason why the claim was struck out rather than the sole reason.

iii) Thirdly, if lack of an ability to remove the children had been a critical feature of the decision to strike-out on duty of care grounds, and hence the precedent value of Poole *in a case such as the present, one would have expected this to have been a point highlighted by Lord Reed much earlier in the 92-paragraph judgment than paragraph 90, the final paragraph before the conclusion.*

iv) Fourthly, understood in that way as a point going to breach and causation, this is fatal to the valiant attempt by Mr Levinson to distinguish away Poole *and its effect by contrasting the non-availability of a care order there with the position here. That was not a point which went to the absence of a duty of care in* Poole *and nor was it the reasoning for that finding. When one strips away that, incorrect in my view, basis to distinguish Poole this only goes to enhance the (binding on me) precedent value of* Poole *and the close analogy it provides.'*

'30. I agree with the defendant's response which is to say that this is an attempt to make inappropriate distinctions of the kind deprecated in Robinson. *The bald assertion of reliance in para 17 of the Particulars of claim, that the defendant was made aware that Schedule One offenders were living in the home so that the risks could be assessed; the claimants relied on the defendants to investigate; and the defendant assumed responsibility for doing so, but its investigations and consequential steps taken were inadequate, cannot be made good as there is no foundation of factual averments as to how that reliance arose.'*

The judge was also keen to emphasise that *Poole* could not be circumvented by arguing that as a matter of hindsight the making of a care order can be said to extrapolate backwards, from the point at which the order was made, to the creation of a duty of care at an earlier point in time.

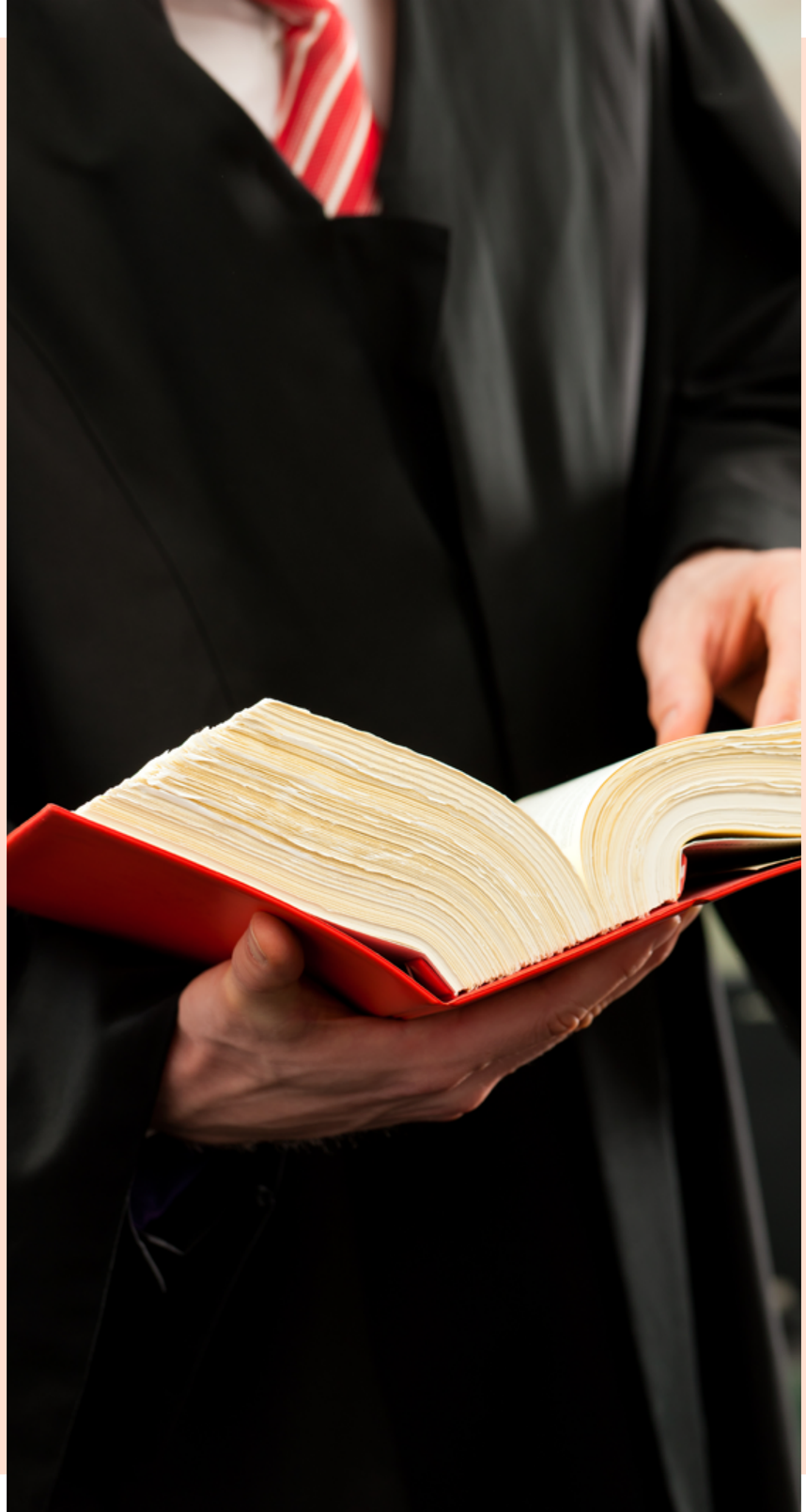
'33. A duty of care is recognised to arise when a care order is made, because the local authority has parental responsibility. But up until that point, parental responsibility remains unequivocally with the parent(s). A duty of care cannot, in my view, effectively be reverse engineered from the point at which a duty arises on the making of a care order, in the way that the claimants would wish. This involves saying that because the duty arises on the making of the order, so here 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 judgement.'

He then went on to deal with the other bases that had been set out in the particulars of claim, making it clear why he rejected each of them:

'i) Adding to the danger […] it is said that the defendant did this by "endorsing the parenting provided to the claimants…[and]… allowing [Mr D] and [Mr A] who were both known Schedule One offenders to live in the claimants' home [and] did not remove [Mr D or Mr A] of the claimant's from home". I do not follow how that was adding to the danger. The defendant had no statutory power to remove partners of their mother from the home. The children could not be removed without a Court Order. The danger is created by those individuals coming into the home and that does not amount to the defendant adding to the danger. The harm is something the claimant's are already being exposed to.

The flaw in this proposition can also be confirmed by applying such a proposition to the Poole *case. If correct, this proposition would have been a complete answer to the charge that there was no duty of care in* Poole*, if it could be said that the defendant there added to the danger by not bringing the harassment to an end.*



ii) Failing to control wrongdoers […] again, this is a reference to Mr D and Mr A, "[…] the only way of controlling their access to the claimants was to remove the claimants [from the home]". It is also a reference to the claimants' mother and the same allegation is made that this probably could only have been achieved by removing the claimants. Again, the difficulty here is that there was no right to control the behaviour of those third parties of a type which would be required to lead to an arguable duty.

An example is the control which the Home Office had over the actions of the borstal boys, who escaped whilst under supervision on an island visit and caused property damage in Home Office v Dorset Yacht Co LTD [1970] QB 1004. *But here there was no such control over or right to control the wrongdoers. Furthermore, this would be tantamount, in my view, to the exception extinguishing entirely the effect of the rule of non-liability for omissions, by creating a liability for all omissions which the case law indicates is incorrect as a proposition.*

iii) Preventing Others from Protecting the claimant[s][…] the allegation here is effectively that other referrers, agencies and participants in child protection conferences would likely have taken further steps by making further referrals or taken action themselves which would have led to protective measures being put in place, had the defendant not held out that it would investigate competently.

Again, I do not think that this allegation raises any reasonable grounds for an arguable duty of care. 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. This exception to the rule does not appear to have any relevance to the facts as pleaded. The only effective measure would have been to remove the claimants from the home. No other agency could or would practically have achieved that here.

The Police have a limited power to rake a child to a place of safety (see CA 1989, s 46) but are not meant to if an emergency protection order is in place or on contemplation. There is a reference in the history to the NSPCC but, Mr Levinson did not contradict Mr Stagg's explanation in his skeleton argument and oral submissions that the NSPCC has not exercised its notional power to bring care proceedings since 1993; it now liaises with local authorities to protect children. There is no realistic basis for saying that the defendant prevented any other agency from providing protection.'

Finally, he rejected the argument that the strike out application should be dismissed because the case would have to go to trial in any event on the allegation concerning the inaction of the school staff, an allegation that fell outside the current application:

'[…] 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.

Looking at what action would have been taken by the local authority as a consequence of a report by the school is wholly different from examining the myriad other allegations on the question of liability, rather than merely as matters of background. It will be less time consuming and costly to investigate and determine the school allegation alone: resulting in fewer documents, fewer witnesses, fewer experts and a significantly shorter trial.'

Further pending cases

There are several further cases in which judgments are pending, including *DXF v Coventry City Council* (heard by the High Court in December 2020), *DEF v Kirklees MBC* (heard on 5 March 2021) and *AGR v Hertfordshire CC* (to be heard in April 2021).

Commentary:

It was inevitable that a series of cases would be heard in which the full ramifications of *Poole* would be considered.

It has taken rather longer than had been anticipated for those decisions to start coming through.

The *HXA* judgment is ostensibly a sound one but considering the wide variety of opinions and scenarios it will be far from the last word on the subject.

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