Insight 201

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of *Insight* in which we report on the two most recent cases in the increasing volume of post-*Poole* litigation concerning allegations of failure to remove.

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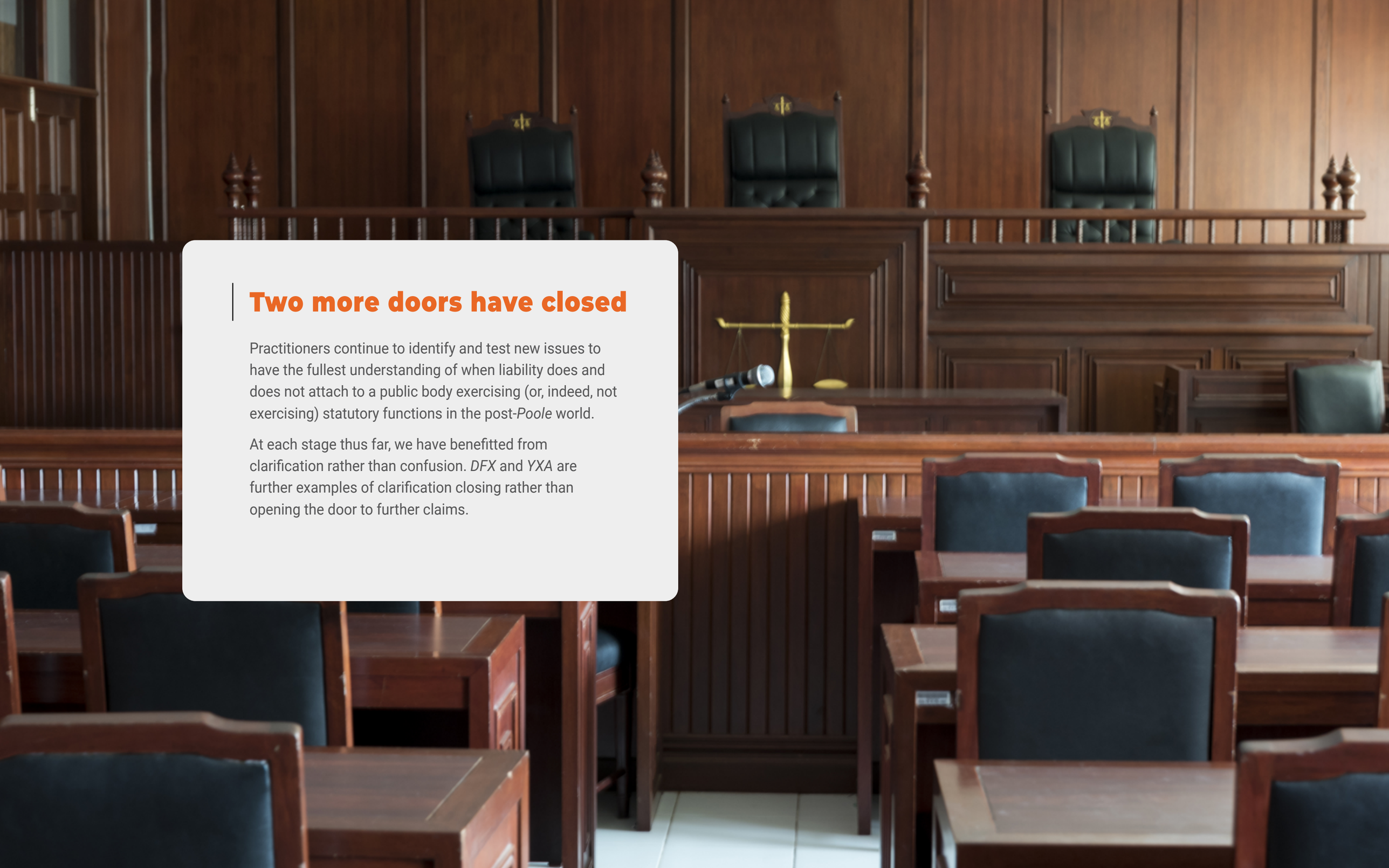

Two more doors have closed

Practitioners continue to identify and test new issues to have the fullest understanding of when liability does and does not attach to a public body exercising (or, indeed, not exercising) statutory functions in the post-*Poole* world.

At each stage thus far, we have benefitted from clarification rather than confusion. *DFX* and *YXA* are further examples of clarification closing rather than opening the door to further claims.

DFX & Others v Coventry City Council [2021] EWHC 1382 (QB)

In this case the defendant's social services department had been involved with the family since 1995. DFX and three of her siblings alleged that they should have been taken into care in 2002/3 rather than seven years later in 2010. They alleged that they had been sexually abused and neglected in the intervening period.

This had initially been a £40M claim but most of this alleged loss fell away when investigations revealed that the learning disabilities suffered by three of the claimants were genetic rather than acquired. Quantum was then agreed subject to liability.

The statement of claim had been amended on at least three occasions prior to trial and underwent further refinement during the hearing. Although there had initially been four bases upon which a duty of care could be founded, by the time of closing submissions the judge had to decide only one issue:

Had the defendant assumed responsibility for the claimants' 'plight', thereby giving rise to a wide-ranging duty of care to keep safe and protect the claimants, a duty which it had then breached?

Even that question had been significantly narrowed, twenty-two paragraphs setting out the basis for the alleged assumption being reduced to three isolated events:

The commissioning of a psychology report in 1997

- Direct work undertaken with the parents and children to educate them as to the risks posed by third parties, and
- An assessment in February 2002 that the children were at significant risk of harm, which led to a decision to institute care proceedings in March 2002. That decision was then reversed in June 2002.

The defence had been similarly rationalised to the following key submissions:

- No duty of care exists
- Imposing liability on a public body for failing to carry out a statutory function of commencing care proceedings under s31 Children Act 1989 is inconsistent with established legal principle
- Applying established common law principles, there is no assumption of responsibility either.

The factual evidence was extensive and complex, covering many thousands of pages and taking up almost half of the judgment. The expert evidence was notable for the judge's critique of the very different levels of practical experience of Maria Ruegger, the claimants' primarily academic expert, who had not worked in front-line social work since 1983 and had never been involved in the process of deciding whether care proceedings should be issued, and the defendant's much more hands-on practitioner, Felicity Schofield.

In the eyes of the judge, this contrast made a very real difference to the weight, or lack thereof, that she could place on their evidence.

Having waded through such lengthy and detailed evidence, the judge then succinctly identified the relevant legal principles and concluded that the claims must fail.

Judgment for the defendant

Her clear and cogent analysis, consistent with the Supreme Court's ruling in *Poole*, reinforced the fact that we have now moved away from the line of cases which began with *X v Bedfordshire* in 1996.

For what might be regarded as typical failure to remove cases such as *DFX*, the correct approach is now very clear:

- Like any private body or individual, a public authority is under a general duty of care to avoid causing actionable harm in situations where an ordinary duty of care would arise. In other words, **there is a duty of care not to cause harm through a negligent act.**
- A public authority does not owe a common law duty of care to prevent the occurrence of harm; in other words, **there is no duty of care to fail to prevent harm through a negligent omission.**
- This distinction between causing harm (making things worse) and failing to confer a benefit (not making things better) is critical.
- It follows that in failure to remove cases (*DFX* is a classic example) the starting point is that there is NO duty of care in failing to prevent harm through failing to confer a benefit.
- There are three exceptions to this:
  - A has assumed responsibility to protect B from the relevant danger,
  - A has done something to prevent another from protecting B from that danger,
  - A has a special level of control over that source of danger; or
  - A's status creates an obligation to protect B from that danger.
- The first exception will invariably be the focus of attention as the other exceptions will rarely arise. Whether there has been an assumption of responsibility in any case will depend upon the facts.

Applying these principles, the judge concluded that responsibility had NOT been assumed by the defendant and thus no duty of care was owed to the claimants. In reaching this conclusion the judge accepted the defendant's submissions:

- This claim centred on the alleged failure of the defendant to discharge its statutory function by commencing care proceedings under s31 Children Act 1989.
- This case is not about the defendant's acts, but rather the defendant's omissions.
- Following the principles in *Poole*, no common law duty can arise from an omission to exercise a statutory function unless, on the facts, one of the listed exceptions applies.
- DFX contended that the defendant had assumed responsibility to create to a duty of care. The judge disagreed. To have assumed responsibility for the purposes of the exception, there had to be *'something more'*, defined as an act by the defendant upon which it was reasonably foreseeable the claimants would place reliance such that there is an obligation on the defendant to exercise reasonable skill and care. However, none of the three isolated events relied upon by *DFX* were enough to trigger the exception.

For the sake of completeness, the judge also concluded that even if she had identified a common law duty, it had not been breached.

Comment:

This is not a precedent-setting case but what it does confirm is the principal ramification of *Poole*: what might have been regarded as 'standard' failure to remove cases are going to be far more difficult to win unless a claimant can demonstrate that the defendant has assumed responsibility.

As is becoming increasingly clear, the bar that a claimant must now clear is much higher. With completely understandable generality, Lambert J described the key ingredient as *'something more'*. It may be implied from this that practitioners will know there is *'something more'* when they see it in the facts. What can be distilled from the extensive factual history of *DFX* is that even though there was a litany of events, and one can feel nothing but sympathy for what the claimants allege they went through, *'something more'* is going to stand out quite starkly from the usual narrative that one sees in failure to remove cases.

This case does not signpost the death knell for failure to remove cases. However, it does reaffirm that only factually exceptional cases are likely to succeed in the post-*Poole* world.

HXA is listed for appeal on 7 July 2021 and although an appeal in *DFX* is unlikely, there are several other common situations in which practitioners will want to investigate whether, when and in what circumstances a positive duty to intervene can now arise.

One of those common situations which had yet to be considered following *Poole* is the accommodation of those in need under the duties and powers conferred by section 20 Children Act 1989. That is no longer the case following the judgment of Master Dagnall in *YXA v Wolverhampton City Council*.

YXA v Wolverhampton City Council [2021] EWHC 1444 (QB)

This was an application pursuant to CPR 3.4 (2) (a) to strike out parts of the particulars of claim as disclosing no reasonable cause of action in a case relating to the exercise of the defendant local authority's power to accommodate under section 20 Children Act 1989 ('section 20').

The facts

YXA was born in 2001. He is autistic and epileptic. He moved with his family into the defendant's area in 2007. It was alleged that the parents engaged in poor parenting conduct, including neglect, substance abuse, and permitting a known paedophile to babysit YXA. The defendant also provided section 20 accommodation in the form of respite care, each time returning YXA to his parents, but did not institute a care proceedings process until 2009.

The allegations

It was contended that the defendant should have:

- Known of the risks to YXA should he have remained at home with his parents, through the papers of the prior local authority (Southwark) and its own reports and referrals;
- Appreciated or investigated the risks to YXA;
- Instituted protective steps in the form of care proceedings rather than returning YXA to his parents at the end of each accommodation period.

HOWEVER, these allegations of negligence could be pursued if, and ONLY if, the facts were sufficient to impose a duty of care in law on the defendant. YXA contended in terms of duty that:

1. The points listed above were enough to give rise to a duty of care in conjunction with Children Act 1989 obligations – referred to in the judgment as 'General Duty matters'; or
2. In the alternative, that providing section 20 accommodation (referred to in the judgment as 'Respite Care matters') taken together with the points listed above, gave rise to a duty of care.

YXA's submissions on the existence of a duty of care

YXA's submissions on General Duty were relatively brief and founded on *HXA* having been incorrectly decided. (The *HXA* appeal hearing is currently only one month away.)

Much more was made of the provision of respite care amounting to an assumption of responsibility

which, in cases of failure to confer a benefit, is necessary for a duty of care to arise. As a fundamental requirement of section 20 was that the local authority must actively conclude that accommodation would promote or safeguard the child's welfare, it followed, argued YXA, that not only was the local authority in loco parentis during the accommodation but, further, there had been an assumption of responsibility in General Duty terms through the active requirements to:

- Provide respite care during the accommodation period;
- Consider care proceedings where the circumstances existed; and
- Decide whether to return the child to the parents at the end of each and every accommodation.

The defendant's submissions

The judgment in *HXA* was correct and a complete answer to any General Duty argument.

Per Lord Reed in *Poole*, this was an omissions case where the allegation was one of failing to confer a benefit. The only way in which YXA could succeed would be to persuade the court that one of the exceptions (to the general rule that no common law duty arose) was satisfied.

As the defendant had not created or enhanced the danger of abuse, the only avenue for YXA was to argue an assumption of responsibility. YXA needed to identify an assumption of responsibility on the facts. The provision of respite care alone was not enough.

Further, there had been no reliance upon anything that the defendant had done (or failed to do) other than by the parents. As the parents were the alleged abusers, this reliance (such as it was) was irrelevant. Finally, parental responsibility always rested with the parents, to whom YXA was returned **pursuant to statutory duty**, and NOT through choice.

Judgment

General Duty: The position on General Duty was very clear following *Poole* and there was no real difference between *Poole* and *YXA*. Where there is non-intervention, and the power to intervene exists, then unless it can be shown on the facts that the defendant assumed responsibility for the claimant or, less likely, created or enhanced the relevant danger then no common law duty of care arises.

As *Poole* demonstrated, decisions to investigate, monitor or (as YXA now confirms) accommodate are not enough without, as Lambert J put it in DFX, ***'something more'***. Nor was there any evidence of reliance on the defendant that could give rise to a duty.

On the pleaded facts, no General Duty was arguable. In fact, the General Duty arguments in the particulars of claim were confined to three paragraphs which were identical to those that had been pleaded in *HXA*. For the same reasons that had been set out in *HXA*, the identical arguments were to be struck out in this case as they disclosed no reasonable cause of action.

Respite Care duty: This was more complicated, as some sort of duty HAD been created on the facts, for example to convey YXA safely to and from the accommodation. However, that duty was not in issue either as to existence or breach. The duty which was contended for was, as set out above, to be considered as arising under either or both of two limbs:

- Section 20 accommodation gives rise to a duty to consider care proceedings where the circumstances existed; and/or
- A duty arises from the process of deciding whether to return the child to the parents at the end of each accommodation period.

The judge decided that section 20 accommodation alone could not give rise to a common law duty. After all, simply because a child is at significant risk of harm does not of itself give rise to a duty – the local authority has a statutory scheme to follow.

A statutory framework also applies in section 20 accommodation cases. A duty can arise from the performance of statutory functions, but not (save for exceptions) from the non-performance, or as is now commonly known post-*Poole*, the failure to confer a benefit. Under the section 20 framework accommodation could only take place with the consent of the parents, who were at liberty to terminate the accommodation at any time.

Further, although there was a limited duty which had arisen on the facts in the context of transportation, it could not be right that this duty somehow expanded to a duty to provide wider benefits to the child in the absence of additional specific action by the local authority and reliance by the child.

The judge also dealt with the argument that having accommodated YXA, the defendant was under a duty regarding the return of YXA to a place that was not dangerous. First and foremost, said the judge, there was a positive statutory duty to return YXA to his parents. There was no pleading of any clear and specific imminent danger. On the pleading, this was simply a case of YXA returning to his original situation, for which no specific risk of imminent harm/danger had been pleaded. And even if it had, it is difficult to see how the defendant could have come under a duty of care through complying with its statutory obligations. It followed that the particulars of claim disclosed no reasonable grounds giving rise to a common law duty of care.

It is entirely possible that this judgment may be appealed; if it is, then there is every chance that it will be conjoined with the appeal in *HXA*, presently listed on 7 July 2021.

A parallel claim under the Human Rights Act has been pleaded and will continue notwithstanding this judgment.

Comment:

The difficulties faced by prospective claimants in this area continue to mount. If there was any doubt as to the full range of negative ramifications for claimants and their advisors following on from *Poole*, virtually every decision since then has confirmed it. We know that *HXA* is listed for appeal in July, and there is inevitably the possibility that *DFX* and/or *YXA* may also be the subject of appeal and heard together with or separately from *HXA*.

Subject to appeal, however, the direction of travel is clear. In the context of standard failure to remove AND section 20 accommodation cases claimants will need to find ***'something more'***, as Lambert J put it in *DFX*, to fix a local authority with a common law duty arising from an assumption of responsibility. Pleadings will have to go beyond arguments that a common law duty arises from the failure to confer a benefit that is available but which a local authority omits to exercise. The facts will have to be very specific to a case in order to circumvent the very high threshold that has now been set by Poole (with guidance from *Michael* and *Robinson*).

There will be cases which will justify a finding of assumption of responsibility. The judge in *YXA* postulated a limited number of potential (albeit probably unique) situations in which an assumption could theoretically occur. But subject to the outcome of any appeal(s) in *HXA* and the current crop of first instance decisions, not only are the prospects becoming increasingly more difficult for claimants but, further, it is very difficult to see how they can make real inroads in the face of these judgments. Some claimants may well succeed on very individual facts, but those cases will be few in number and will serve as exceptions proving the general rules.

For more information on these issues, please contact:

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