Neutral Citation Number:]2022] EWCA Civ 1196

Case No: CA-2021-003179 and 3178

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
The Honourable Mrs Justice Stacey
QA-2021-000065 and QA-2021-000146

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 August 2022

Before :

LORD JUSTICE BAKER
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

HXA	**Appellant**
- and -	
SURREY COUNTY COUNCIL	**Respondent**
And	
YXA	**Appellant**
(a protected party by his litigation friend the Official Solicitor)	
-and-	
WOLVERHAMPTON CITY COUNCIL	**Respondent**

- -
- -

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

Hearing date : 10 May 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 31 August 2022.

LORD JUSTICE BAKER :

1. This is a second appeal against the decision of Stacey J (reported at [2021] EWHC 2974 (QB)) to dismiss appeals against decisions in two unconnected cases striking out claims in negligence brought against local authorities arising out of the exercise of their statutory functions under the Children Act 1989. The appeal involves consideration of the circumstances in which a local authority and/or the social workers for whom it is vicariously liable owe a duty of care to a child to whom the local authority is providing child protection services.

2. It is acknowledged on behalf of the respondents that the background to both cases is shocking and disturbing. There is no doubt that each claimant as a child was 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. On this appeal, however, we are not asked to rule on whether either of the local authorities was at fault. The issue is whether, at any stage in its contact with the children, the local authorities can be said to have assumed responsibility for their welfare so that they owed the children a duty of care at common law. The deputy master in the case of HXA and the master in the case of YXA and Stacey J on the conjoined appeals against both decisions all decided that the local authorities could not be said to have assumed responsibility so as to owe a duty of care to the children. As a result, the claims were struck out.

3. It must be stressed that if we allow either or both of these appeals, the consequence is that one or both will proceed to trial. At that stage, the judge will have to decide in each case whether the local authority did in fact owe a common law duty of care, and if so whether there was a breach of duty as a result of which the claimant suffered damage for which she or he is entitled under general legal principles to recover compensation. If we allow these appeals, it does not follow that either claim will ultimately succeed.

SUMMARY OF ALLEGED FACTS

4. It is common ground between the parties that, for the purposes of the respondents' applications to strike out, the court is required to assume that the facts alleged by the appellants are capable of proof. Accordingly, what follows is a summary of the facts alleged in the two cases, not all of which are admitted by the respondents in their Defences.

(1) HXA summary of facts

5. HXA was born in 1988 and is now aged 33. She has three younger siblings, two of whom have learning disabilities. Their childhood was characterised by sustained abuse and neglect, perpetrated by their mother and at a later date by her partner Mr A, whom she met in 1996 and married a year later.

6. From at least September 1993, there were a series of referrals to the local authority, Surrey County Council, about the mother’s inappropriate physical chastisement, verbal

abuse and lack of supervision of her children. Between September 1993 and July 1994, five investigations were conducted under s.47 of the Children Act 1989. During this time, the names of HXA and her siblings were placed on the child protection register. In November 1994, after seeking legal advice, the local authority resolved to undertake a full assessment with a view to initiating care proceedings. In the event, however, no such assessment was carried out. The local authority continued to monitor the family but on at least some occasions no decisions or actions were taken despite ongoing concerns being reported.

7. In July 1996, HXA's mother formed a relationship with Mr A. Four years earlier, he had been convicted of assault on his own infant son. Thereafter concerns about Mr A's behaviour towards HXA and her siblings were raised with the local authority by several sources. In 1999, there were allegations of sexual abuse of HXA and her younger sister SXA by both Mr A and Mr A's father. It is alleged by HXA that she reported abuse to staff at her school which was run by the local authority's education department. In January 2000, it was recorded at a case conference that HXA had alleged that Mr A had touched her breast. The local authority decided 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 resolved not to take any action beyond carrying out "keeping safe" work with HXA and SXA. In the event, however, no such work was undertaken. In 2004, aged 16, HXA moved out of the family home.

8. In 2007, after SXA had made further allegations as a result of which she was removed from her mother's care under an emergency protection order, the police carried out an investigation during the course of which HXA was interviewed. As a result of this investigation, both Mr A and the children's mother were prosecuted. In January 2009, Mr A was convicted of seven counts of rape of HXA between the ages of nine and sixteen and sent to prison for fourteen years. Her mother was convicted of indecently assaulting her and sentenced to nine months' imprisonment.

9. On 26 September 2014, a claim form was filed by HXA and SXA (as a protected party through her litigation friend) against the local authority. Lengthy extensions of time were agreed and endorsed by the court (in part to await the outcome of the proceedings which ultimately resulted in the judgment of the Supreme Court in *N v Poole Borough Council (AIRE Centre and others intervening)* [2019] UKSC 25, [2020] AC 780, considered below). By another consent order in October 2019, SXA's claim was stayed pending the outcome of HXA's claim. In the event, it was not until 23 October 2019 that Particulars of Claim were served. The pleading, which is detailed and at times excessively discursive, set out in paragraph 14 a chronology, described as a "Sequence of Events", which in 59 sub-paragraphs summarised the involvement of the local authority with HXA and her family between 1993 and 2007. These included:

    (1) Under sub-paragraph (l): In November 1994, there was a child protection investigation after the Defendant received a referral alleging that the Claimants' mother had assaulted the First Claimant. 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.

    (2) Under sub-paragraph (vv): On 27 January 2000, a child protection conference was held. It was noted that the First Claimant had reported that Mr A had touched her breast. The Defendant resolved not to investigate this 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 the Claimants, although this was never done.

The chronology also included the occasion when HXA had made allegations to staff at school about Mr A's conduct.

10. Under a heading "Assumption of Responsibility", the claimants pleaded (paragraph 15):

> "In the circumstances, the Defendant assumed responsibility for the welfare of the Claimants on each occasion when reports were responded to having been made to social services by police, other agencies and family members concerned for the safety and welfare of the Claimants. The Defendant assumed responsibility for investigating the plight of the Claimants in the light of this information through the commencement of an assessment and, in some instances, provision of assistance. The allocated social worker also assumed responsibility for investigating the safety of the Claimants in a household where there were multiple risks of significant harm. The referrers relied on the Defendant to keep the Claimants safe in the light of the information passed on. However, the Defendant failed competently to assess the risks posed to the Claimants or to take appropriate action in the light of the known dangers."

It was further averred that the local authority had assumed responsibility for the claimants' welfare in a number of respects, including (under paragraphs 18 - 19):

> "18. The actions of the defendant in purporting to assist the family and undertake child protection work and assess the risks posed by the claimants' mother and Mr A … as set out above were steps in which the defendant assumed responsibility for the protection of the claimants and for the object of assisting the claimants to be safe. The claimants at least impliedly relied on the defendant to protect them….
>
> 19. Further, in intervening in the Claimants' home life, the Defendant assumed responsibility for the plight of the Claimants and the Claimants at least impliedly relied on them to do so competently….."

11. On 31 January 2020, the local authority applied to strike out the part of the claim relating to social services. No application to strike out was made in respect of that part of the claim relating to HXA's disclosure to the school.

12. The hearing of the strike-out application took place on 6 November 2020 before Deputy Master Bagot. Judgment was reserved. On 15 February 2021, the Deputy Master delivered judgment striking out those paragraphs of the claim directed at the local authority's social services department but leaving in the paragraphs directed at the education department. An appeal notice was filed and the appeal duly listed with the

appeal in YXA's case before Stacey J. The appeal hearing took place on 7 July 2021. Judgment was reserved. On 8 November 2021, the judge handed down judgment dismissing the appeal.

(2) YXA summary of facts

13. YXA, who is now aged 19, suffers from epilepsy, learning disabilities and autism spectrum disorder. Initially he lived with his parents in London where the family came to the attention of the local authority social services department. In 2007, when he was six years old, he moved with his family to the West Midlands. A few weeks after their arrival, an assessment by the local authority for that area, Wolverhampton City Council, identified concerns about his parents' ability to care for him. In March 2008, a paediatrician advised the local authority that YXA was being inappropriately and excessively medicated and recommended that he should be taken into care. Thereafter, under an agreement reached between the local authority and the parents under s.20 of the Children Act, a pattern of respite care was established whereby YXA spent roughly one night a fortnight and one weekend every two months in foster care.

14. In the course of the next eighteen months, further concerns arose about YXA's treatment in his parents' care. There were allegations that the parents drank and took cannabis to excess, that they physically assaulted YXA, and that they were continuing to administer medication excessively. Eventually in December 2009, the parents admitted smacking him and giving him excessive medication to keep him quiet. With their consent, YXA was accommodated full time under s.20. Care proceedings were then started and a final care order made in March 2011 on the basis of a care plan under which YXA remained in long-term foster care.

15. A letter of claim against both the London Borough Council for the area where the family had initially lived and against Wolverhampton City Council was sent on YXA's behalf in October 2012 but it was not until July 2018 that the claim form was issued and not until August 2019 that Particulars of Claim were served. As in HXA's case, the pleading was detailed and at times excessively discursive, including citations from case law. It set out a lengthy chronology, again described as a "Sequence of Events", which included a number of events which were said to amount to an assumption of responsibility so as to give rise potentially to a duty of care. These included, at paragraph 5.2(g):

> "On 28 April 2008 a pattern began of the second defendant receiving the claimant into its care for approximately 1 night every 2 weeks and 1 weekend every 2 months with the claimant's parents' agreement pursuant to section 20 of the Children Act 1989."

Under the heading "Assumption of Responsibility", the claimant averred inter alia at paragraph 6.10:

> "In the circumstances, when the Second Defendant received the Claimant into its care, on multiple occasions from August 2007 (when the Claimant moved to the area) onwards, it assumed a

> responsibility for his welfare, protection and safety. The Claimant relied on the Second Defendant for his protection and safety and the promotion of his welfare while he was accommodated by the Second Defendant. As the Second Defendant knew, there was nobody else discharging those functions for the Claimant because the Second Defendant was purporting to do so. On each occasion that the Claimant was in the Second Defendant's care, the Second Defendant resolved to and did return the Claimant from his place of safety in its care, to his family, where he was not safe and foreseeably suffered significant harm. Placing the Claimant or tolerating him returning to such an unsafe environment enhanced the risk and created the situation which caused him harm as set out below."

The pleading proceeded to set out the claimant's case as to duty, breach, damage and causation to which, again, it is unnecessary to refer for the purposes of this appeal.

16. Subsequently the claim against the London Borough Council was discontinued. On 30 July 2020, Wolverhampton City Council applied to strike out the claim. The hearing of the strike out application took place on 26 January 2021 before Master Dagnall. Judgment was reserved. On 26 May 2021, the master delivered judgment striking out the claim. An appeal notice was filed and the appeal duly listed with the appeal in HXA's case before Stacey J. As stated above, the appeal hearing took place on 7 July 2021, after which judgment was reserved and handed down on 8 November 2021 dismissing the appeal.

THE LAW

(1) The relevant statutory provisions

17. The Children Act 1989 forms the foundation for the law relating to children in England. Its provisions have been amended on a number of occasions since the commencement of the majority of its provisions in October 1991. For the purposes of this appeal, we are concerned with the provisions which were in force between 1996 and 2004 in the case of HXA and between 2007 and 2009 in the case of YXA. The following provisions are relevant to this appeal.

18. Part III of the Act was, at the relevant time, headed "Local Authority Support for Children and Families". Section 17 was headed "Provision of services for children in need, their families and others". The provisions of section 17(1) (2) and (10) have remained unchanged ever since they came into force in October 1991. They read as follows:

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—

> (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,
>
> by providing a range and level of services appropriate to those children's needs.
>
> (2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.
>
> …
>
> (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 the 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 for him of such services…."

19. Part 1 of Schedule 2 includes the following provisions. Under paragraph 3:

> "Where it appears to a local authority that a child within their area is in need, the authority may assess his needs for the purposes of this Act at the same time as any assessment of his needs is made under [other specified statutes]."

Under paragraph 4(1):

> "Every local authority shall take reasonable steps, through the provision of services under Part III of this Act, to prevent children within their area suffering ill-treatment or neglect."

Under paragraph 7:

> "Every local authority shall provide services (a) to reduce the need to bring (i) proceedings for care or supervision orders with respect to children within their area …."

20. Section 20 is headed "Provision of accommodation for children: general". Its provisions include the following:

"(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—

(a) there being no person who has parental responsibility for him;

(b) his being lost or having been abandoned; or

(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

…

(4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare.

…

(7) A local authority may not provide accommodation under this section for any child if any person who

(a) has parental responsibility for him; and

(b) is willing and able to

(i) provide accommodation for him; or

(ii) arrange for accommodation to be provided for him,

objects.

(8) Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section.

(9) Subsections (7) and (8) do not apply while any person

(a) who is named in a child arrangements order as a person with whom the child is to live;

(aa) who is a special guardian of the child; or

(b) who has care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children,

> agrees to the child being looked after in accommodation provided by or on behalf of the local authority.
>
> (10) Where there is more than one such person as is mentioned in subsection (9), all of them must agree.
>
> (11) Subsections (7) and (8) do not apply where a child who has reached the age of sixteen agrees to being provided with accommodation under this section."

21. Section 22, headed "General duty of local authority in relation to children looked after by them" includes the following provisions:

> "(1) In this Act, any reference to a child who is looked after by a local authority is a reference to a child who is—
>
> (a) in their care; or
>
> (b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) …
>
> (2) In subsection (1) "accommodation" means accommodation which is provided for a continuous period of more than 24 hours.
>
> (3) It shall be the duty of a local authority looking after any child—
>
> (a) to safeguard and promote his welfare; and
>
> (b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case."

22. Originally, further provisions about the ways in which looked after children were to be accommodated and maintained were set out in section 23 of the Act and regulations thereunder, in particular the Arrangements for Placement of Children (General) Regulations 1991. Regulation 3(1) provided:

> "Before they place a child the responsible authority shall, so far as reasonably practicable, make immediate and long-term arrangements for that placement and of promoting the welfare of the child who is to be placed."

In subsequent years, these provisions have been amended and replaced. Under the laws now in force, section 22C (inserted into the 1989 Act by the Children and Young Persons Act 2008 and in force since 1 September 2009) makes further provision for the ways in which looked after children are to be accommodated and maintained. More detailed provisions are made in the Care Planning, Placement and Case Review (England) Regulations 2010 under section 22C(11). Under regulation 4(1):

> "Where C [a looked after child] is not in the care of the responsible authority and a care plan for C has not already been prepared, the responsible authority must assess C's needs for services to achieve or maintain a reasonable standard of health or development, and prepare such a plan."

Regulation 5 makes provision for the preparation and content of the care plan. In the case of "short break" placements, as defined in regulation 48(2), regulation 5 does not apply. Instead, under regulation 48(3), the arrangements required to be set out in the care plan are modified.

23. Part IV of the Act, headed "Care and Supervision", contains provisions about care and supervision orders made by the court. Under a care order made under section 31, a child is placed in the care of the local authority. The effect of a care order is described in section 33, which includes the following provisions:

> "(1) Where a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains in force.
>
> …
>
> (3) While a care order is in force with respect to a child, the local authority designated by the order shall—
>
> (a) have parental responsibility for the child; and
>
> (b) have the power (subject to the following provisions of this section) to determine the extent to which
>
> (i) a parent … of the child; or
>
> (ii) a person who by virtue of section 4A has parental responsibility for the child,
>
> may meet his parental responsibility for him.
>
> (4) The authority may not exercise the power in subsection (3)(b) unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare."

"Parental responsibility" was described by Baroness Hale of Richmond, the architect of the 1989 Act, as "the conceptual building block used throughout" the Act ("The Children Bill: the aim" [1989] Fam Law 217). It is defined in s.3(1) as meaning

> "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."

24. Part V of the Act is headed "Protection of Children". Section 44 makes provision for a court to make an emergency protection order. Section 47, headed "Local Authority's duty to investigate", provides under subsection (1):

> "Where a local authority
>
> …
>
> (b) have reasonable cause to suspect that a child who lives … 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 …."

Section 47(3) provides that such enquiries shall, in particular, be directed towards establishing whether the authority should, inter alia, make any application to court under the Act. Applications which could be made by a local authority in such circumstances include an application for a care order under section 31.

25. It is also important to note that local authorities are under other statutory duties to safeguard and promote the welfare of children. Under section 11(2) of the Children Act 2004 (not cited to us), each local authority (along with other bodies identified in section 11(1)) is under a duty to

> "make arrangements for ensuring that
>
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and
>
> (b) any services provided by another person pursuant to arrangements by [the local authority] in the discharge of their functions are provided having regard to that need."

Section 11(4) provides that "each person and body to whom this section applies must in discharging their duty under this section have regard to any guidance given to them for the purpose by the Secretary of State." The principal statutory guidance under which local authorities operate when exercising their duties and powers to safeguard and promote the welfare of children is set out in "Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children", the latest version of which was published in July 2018 but which has been in existence in one form or another since the Children Act 1989 came into force. It is this guidance that provides for making children subject to child protection plans with the aim of ensuring the child is safe from harm and preventing them from suffering further harm. Under the current guidance, it is the role of the designated social worker to be "the lead practitioner for inter-agency work with the child and family, co-ordinating the contribution of family members and practitioners into putting the child protection plan into effect".

(2) Case law on section 20

26. There have been a number of cases in recent years about section 20 accommodation in which courts have considered the uses for such accommodation, the meaning of and need for parental consent, and the distinction between the provision of such accommodation and care orders. The focus of attention in many cases has been on the alleged misuse of section 20 in situations in which the parents are unable to give informed consent, for example because they have limited capacity, or because they are in a vulnerable situation, the most egregious examples being cases involving vulnerable mothers of new-born babies. That is not the situation in either of the cases with which we are concerned. Nevertheless, the authorities contain observations which in my view have some relevance to identifying the scope of the power and duties under section 20 and whether such cases can be said to amount to an assumption of responsibility.

27. The leading case on section 20 is now *Williams and another v London Borough of Hackney* [2018] UKSC 37, [2019] AC 421. The case concerned claims for damages for negligence, misfeasance in public office, and breach of human rights brought by parents of eight children who had been accommodated by the local authority under section 20 without, it was argued, the informed consent of the parents. All the claims were dismissed at first instance save for the human rights claim for which the judge awarded damages of £10,000 to each parent. The local authority successfully appealed to this Court whose decision was upheld, albeit for different reasons, by the Supreme Court. It is unnecessary to consider the facts of the case further. The relevance of the case lies in observations of Baroness Hale of Richmond about the nature of accommodation under section 20 and how such accommodation differs from receiving a child into care under a care order.

28. At paragraph 1, Lady Hale observed:

> "In practice, the distinction between these categories is not always clear cut. Some accommodated children in need may also be at risk of harm if they are left at or returned home. In law, however, the distinction is clear. Compulsory intervention in the lives of children and their families requires the sanction of a court process. Providing them with a service does not."

29. At paragraphs 39 to 41, in the course of an analysis of the meaning of consent and the operation of the detailed provisions of section 20 (with which we are not directly concerned in this appeal), Lady Hale said:

> "39. … it may be confusing to talk of parental "consent" to the removal (or accommodation) of her child. If a parent does agree to this, she is simply delegating the exercise of her parental responsibility for the time being to the local authority. Any such delegation must be real and voluntary. Otherwise the local authority have no power to interfere with her parental responsibility by taking the child away….
>
> 41. …[P]arents may ask the local authority to accommodate a child, as part of the services they provide for children in need. If the circumstances fall within section 20(1), there is a duty to

> accommodate the child. If they fall within section 20(4), there is power to do so. Once again, this operates as a delegation of the exercise of parental responsibility for the time being…."

30. As to the duties owed by a local authority to a child being accommodated under section 20, Lady Hale said:

> "49. … there is nothing in section 20 to place a limit on the length of time for which a child may be accommodated. However, local authorities have a variety of duties towards the children whom they are accommodating. Their general duties towards looked after children in section 22 of the 1989 Act include a duty to safeguard and promote their welfare, in consultation with both the children and their parents. This is reinforced by the Care Planning, Placement and Case Review (England) Regulations 2010, SI 2010/959, which require local authorities to assess a child's "needs for services to achieve or maintain a reasonable standard of health or development" and prepare a care plan for her, to be agreed with the parents if practicable (regulation 4(1), (4)). The care plan has to record, inter alia, the arrangements made to meet the child's needs and the long term plan for her upbringing ("the plan for permanence") (regulation 5(a) and (b)).
>
> 50. Thus, although the object of section 20 accommodation is partnership with the parents, the local authority have also to be thinking of the longer term. There are bound to be cases where that should include consideration of whether or not the authority should seek to take parental responsibility for an accommodated child by applying for a care order…."

31. Although, as Lady Hale noted, there is no limit on the time for which a child may be accommodated under section 20, there has been judicial criticism of local authorities who accommodate a child under the section for long periods without making proper long-term plans. One recent egregious example was *Worcestershire County Council v AA* [2019] EWHC 1855 (Fam) in which a child was accommodated under section 20 for eight years from the age of five. It was only after the death of his mother that the local authority started care proceedings which led to the making of a special guardianship order in favour of his foster carers. In giving judgment, Keehan J identified a number of circumstances in which section 20 accommodation would be appropriate:

> "12. As observed by Lady Hale in Williams there are many circumstances in which children and young people may be appropriately accommodated by a local authority. It is a useful tool available to local authorities. I offer the following as examples of the *appropriate* use of s.20 (but I emphasise these are examples only and not an exhaustive list):
>
> i) a young person where his/her parents have requested their child's accommodation because of behavioural

problems and where the parents and social services are working co-operatively together to resolve the issues and to secure a return home in early course;

ii) children or young people where the parent or parents have suffered an unexpected domestic crisis and require support from social services to accommodate the children or young people for a short period of time;

iii) an unaccompanied asylum-seeking child or young person requires accommodation in circumstances where there are no grounds to believe the threshold criteria of s.31 CA 1989 are satisfied;

iv) children or young people who suffer from a medical condition or disability and the parent or parents seek(s) respite care for a short period of time; or

v) a shared care arrangement between the family and the local authority where the threshold for s31 care is not met, yet where support at this intensive level is needed periodically through a childhood or part of a childhood.

13. In all of the foregoing it is likely that the threshold criteria of s.31 CA 1989 are not or would not be satisfied and/or it would be either disproportionate or unnecessary to issue public law proceedings. It is, however, wholly inappropriate and an *abuse* of s.20 to accommodate children or young people as an *alternative* to the issue of public law proceedings or to provide accommodation and to *delay* the issue of public law proceedings."

32. In that case, Keehan J concluded that the local authority had failed to meet the child's needs over a very prolonged period. At paragraph 71 he concluded:

"the failure of this local authority to

i) provide AA with therapeutic support;

ii) provide adequate or effective support to his foster carers;

iii) provide a stable and clear plan for his care, especially to ensure a responsible person or body had effective parental responsibility for him;

iv) institute public law proceedings in respect of him and to provide him with the protection of a judge led process and the protection avoided to him by giving him a voice via a children's guardian;

is egregious in the extreme."

(3) Case law on the duty of care – the decision in *Poole*

33. The extent of the common law duty of care owed by public authorities across the range of services provided including those relating to child protection has been considered by the Supreme Court, and before its creation the House of Lords, in a number of cases over the past 80 years, including *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, *Anns v Merton London Borough Council* [1978] AC 728, *Hill v Chief Constable of West Yorkshire* [1989] AC 53, *Murphy v Brentwood District Council* [1991] 1 AC 398, *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, *Barrett v Enfield London Borough Council* [2001] 2 AC 550, *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, *R (G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208, *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057, *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373, *Mitchell v Glasgow City Council* [2009] UKHL11, [2009] AC 874, *Michael v Chief Constable of South Wales Police (Refuge intervening)* [2015] UKSC 2, [2015] AC 1732, *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 and most recently *N v Poole Borough Council (AIRE Centre and others intervening)* [2019] UKSC 25, [2020] AC 780. The legal principles have evolved very considerably, partly as a result of other developments in the law of negligence effected by cases such as *Caparo Industries PLC v Dickman* [1990] 2 AC 650 and *Stovin v Wise* [1996] AC 923 but also, speaking plainly, because successive judges in the House of Lords and the Supreme Court have taken different approaches when seeking to identify the circumstances in which a public authority may be under a common law duty of care.

34. The interesting legal history is set out in detail in Lord Reed's judgment in the *Poole* case and need not be repeated here. The principles we must apply are as identified in that judgment and earlier authorities are now largely relevant simply as illustrations of those principles.

35. The judgment in *Robinson*, on which, as will be seen, Stacey J relied in reaching her decision in the present case, was a significant staging post in the development of the principles. The importance of the *Robinson* judgment was summarised in *Poole* at paragraph 64 by Lord Reed (who delivered the leading judgments in both cases):

> "*Robinson* did not lay down any new principle of law, but three matters in particular were clarified. First, the decision explained, as *Michael* had previously done, that *Caparo* did not impose a universal tripartite test for the existence of a duty of care, but recommended an incremental approach to novel situations, based on the use of established categories of liability as guides, by analogy, to the existence and scope of a duty of care in cases which fall outside them. The question whether the imposition of a duty of care would be fair, just and reasonable forms part of the assessment of whether such an incremental step ought to be taken. It follows that, in the ordinary run of cases, courts should apply established principles of law, rather than basing their decisions on their assessment of the requirements of public policy. Secondly, the decision re-affirmed the significance of the

> distinction between harming the claimant and failing to protect the claimant from harm (including harm caused by third parties), which was also emphasised in *Mitchell* and *Michael*. Thirdly, the decision confirmed, following *Michael* and numerous older authorities, that public authorities are generally subject to the same general principles of the law of negligence as private individuals and bodies, except to the extent that legislation requires a departure from those principles. That is the basic premise of the consequent framework for determining the existence or non-existence of a duty of care on the part of a public authority."

36. The key statement of the current principles is in paragraph 65 of Lord Reed's judgment in *Poole*:

> "It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation."

37. Lord Reed observed (at paragraph 66) that "the nature of an assumption of responsibility is of importance in the present context." Tracing the development of the concept through *Hedley Byrne & Co. Ltd v Heller & Partners* [1964] AC 465, he continued (at paragraph 68):

> "Since *Hedley Byrne*, the principle has been applied in a variety of situations in which the defendant provided information or advice to the claimant with an undertaking that reasonable care would be taken as to its reliability (either express or implied, usually from the reasonable foreseeability of the claimant's reliance upon the exercise of such care), as for example in *Smith v Eric S Bush*, or undertook the performance of some other task or service for the claimant with an undertaking (express or implied) that reasonable care would be taken, as in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 and *Spring v Guardian Assurance plc* [1995] 2 AC 296."

38. Lord Reed then illustrated how this approach was reflected in the earlier cases involving public authorities, starting with *X v Bedfordshire*, which had concerned a number of claims against local authorities, some relating to their functions under child care

legislation, others to their functions as education authorities. In the *X v Bedfordshire* case itself, five children had brought claims for damages against the local authority for failing to exercise its statutory powers and duties (including those under sections 17, 31 and 47 of the 1989 Act) to prevent them suffering harm in the care of their parents. At paragraph 69, Lord Reed said:

> " …. In *X (Minors) v Bedfordshire*, the social workers were held not to have assumed any responsibility towards the claimants in the child abuse cases on the basis that they were not providing their professional services to the claimants, and it was not reasonably foreseeable that the claimants would rely on the reports which they provided to their employers. In the education cases, on the other hand, the local authority assumed responsibility for the advisory service which it was understood to provide to the public, since the public could reasonably be expected to place reliance on the advice; a school assumed responsibility for meeting the educational needs of the pupils to whom it provided an education; the headmaster came under a duty of care by virtue of his responsibility for the school; and an advisory teacher assumed responsibility for advice which he knew would be communicated to a child's parents and on which they would foreseeably rely. In *Barrett v Enfield*, the local authority assumed responsibility for the welfare of a child when it took him into its care. In *Phelps v Hillingdon*, the educational psychologist assumed responsibility for the professional advice which he provided about a child in circumstances where it was reasonably foreseeable that the child's parents would rely on that advice."

Lord Reed summarised the position in these terms (at paragraph 73):

> "Clearly the operation of a statutory scheme does not automatically generate an assumption of responsibility, but it may have that effect if the defendant's conduct pursuant to the scheme meets the criteria set out in such cases as *Hedley Byrne* and *Spring v Guardian Assurance plc*."

39. The claimants in the *Poole* case were two children, one a "child in need" under section 17 of the 1989 Act, who were placed with their mother by the local housing authority in accommodation where they were subjected to abuse by neighbours known by the authority to have engaged in persistent anti-social behaviour. The claimants brought proceedings against the authority alleging that they had suffered physical and psychological harm as a result of the authority's breach of its common law duty of care to protect them from such abuse, derived from its statutory duties under sections 17 and 47. They asserted that, if the authority had carried out its duties competently, it would have moved them to another property. The claim was struck out by the Master whose decision was overturned by a judge on the first appeal but reinstated by the Court of Appeal and upheld by the Supreme Court. The Supreme Court's decision was based on its conclusion that the Particulars of Claim did not provide a basis on which an assumption of responsibility might be established. It was averred in the pleading that, in purporting to investigate the risk that the neighbours posed to the claimants and then

monitoring the claimants' plight, the local authority had accepted a responsibility for the claimants' difficulties. Lord Reed concluded, however, (at paragraph 81) that

> "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 …. [T]he nature of the statutory functions relied on in the particulars of claim did not itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care."

40. Lord Reed continued (at paragraph 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."

41. Further on, Lord Reed reiterated that a claim in negligence against a local authority arising out of its performance of its statutory duties based on the assumption of responsibility could arise in other circumstances, albeit not those arising on the pleadings in the *Poole* case:

> "88. As has been explained, however, the concept of an assumption of responsibility is not confined to the provision of information or advice. It can also apply where, as Lord Goff put it in *Spring v Guardian Assurance plc*, the claimant entrusts the defendant with the conduct of his affairs, in general or in particular. Such situations can arise where the defendant undertakes the performance of some task or the provision of some service for the claimant with an undertaking that reasonable care will be taken. Such an undertaking may be express, but is more commonly implied, usually by reason of the foreseeability of reliance by the claimant on the exercise of such care. In the present case, however, there is nothing in the particulars of claim to suggest that a situation of that kind came into being.
>
> 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."

42. Furthermore, on the facts of that case, there were "further difficulties" that arose in relation to the breach of duty alleged. As pointed out by King LJ in the Court of Appeal, and accepted by Lord Reed in the Supreme Court, the claim that the children should have been removed was undermined by the terms of s.31 under which, in order to satisfy the threshold for removing a child, it must be demonstrated that the child was suffering or was likely to suffer significant harm attributable to a lack, or likely lack, of parental care. On the facts of *Poole* there were no grounds for removing the children from their mother.

(4) Striking out

43. 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 … the claim …."

When dealing with an application to strike out under CPR 4.3(2)(a), the facts pleaded must be assumed to be true without consideration of any evidence.

44. Practice Direction 3A paragraph 1.4 provides:

> "The following are examples of cases where the court may conclude that particulars of claim … fall within rule 3.4(2)(a)
>
> (1) those which set out no facts indicating what the claim is about …
>
> (2) those which are incoherent and make no sense,
>
> (3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant."

45. Cases which fall outside the established ambit of a duty of care come within the category of cases identified in paragraph 1.4(3) of the Practice Direction. The rationale for striking out such claims is found in the judgment of Lord Reed in *Robinson v Chief Constable of West Yorkshire Police*, supra, at 26 to 29:

> "26. … Where the existence or non-existence of a duty of care has been established, a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles. It is therefore unnecessary and

> inappropriate to reconsider whether the existence of the duty is fair, just and reasonable (subject to the possibility that this court may be invited to depart from an established line of authority). Nor, a fortiori, can justice and reasonableness constitute a basis for discarding established principles and deciding each case according to what the court may regard as its broader merits. Such an approach would be a recipe for inconsistency and uncertainty ….
>
> 27. It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. Following *Caparo* [*Caparo Industries plc v Dickman* [1990] 2 AC 605] the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is "fair, just and reasonable". As Lord Millett observed in *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 108 the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases. But it is also 'engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper'.
>
> …
>
> 29. Properly understood, *Caparo* thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable."

46. On the other hand, there are areas of the law where a degree of uncertainty persists. In *Barrett v Enfield London Borough Council* [2001] 2 AC 550, Lord Browne-Wilkinson said, reiterating a point he had made in *X v Bedfordshire*, supra, at page 557 F to G:

> "In my speech in the *X* Case (at 740-741) with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."

47. In *Gorringe v Calderdale Metropolitan Borough Council*, supra, Lord Steyn at paragraph 2 made this observation about negligence and statutory functions:

> "This is a subject of great complexity and very much an evolving area of the law. No single decision is capable of providing a comprehensive analysis. It is a subject on which an intense focus on the particular facts and on the particular statutory background, seen in the context of the contours of our social welfare state, is necessary. On the one hand the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy. On the other hand, there are cases where the courts must recognise on principled grounds the compelling demands of corrective justice or what has been called "the rule of public policy which has first claim on the loyalty of the law; that wrongs should be remedied": *M (A Minor) v Newham London Borough Council* and *X (Minors) v Bedfordshire County Council* [1992] 2 AC 633, at 663, per Sir Thomas Bingham MR. Sometimes cases may not obviously fall in one category or the other. Truly difficult cases arise."

(5) Case law since *Poole*: *DFX* and *Champion*

48. Since the decision in the *Poole* case, there have been, we were told, four judgments within this jurisdiction on applications to strike out claims arising from alleged negligence by local authorities in failing to carry out their statutory functions under the Children Act to take steps to protect children from harm. Those decisions are the two which are subject to this appeal, in which an application to strike out the claim succeeded, and two others in which the application to strike out was refused, one of which, *Champion v Surrey County Council* (HHJ Roberts, siting in the Central London County Court, 26 June 2020, unreported), is listed for appeal before this Court later this year. So far as we are aware, there has been just one case which proceeded to trial, *DFX v Coventry City Council* [2021] EWHC 1382 (QB), before Lambert J, in which judgment was handed down on 24 May 2021.

49. In *Champion*, the claim arose out of an alleged failure by a local authority to take steps to prevent the infliction of significant physical, emotional and sexual harm on the claimant by his parents. The Particulars of Claim identified a number of ways in which it was said that there had been an assumption of responsibility by the local authority arising out of a series of positive acts over several years when the claimant was between the ages of eight and fifteen, including carrying out assessments and investigations and holding meetings and discussions. It was averred that the claimant was relying on the skill of the local authority's social services department, the key skill being correctly assessing the risk of harm to the claimant. The judge held that the claim was not bound to fail for the following reasons (at paragraph 31):

> "(i) The case must be looked at in the context that the law of tort in relation to the assumption of responsibility is still developing and emerging.
>
> (ii) The Supreme Court was at pains to point out in *Poole Borough Council* that each case turns on its own facts.
>
> (iii) An assumption of responsibility can arise where a claimant entrusts a defendant with the conduct of his affairs in general or particular. Such situations can arise where the defendant undertakes the performance of some task, or the provision of some service for the claimant, with an undertaking that reasonable care will be taken. Such an undertaking is commonly implied by reason of the foreseeability of reliance by the claimant on the exercise of such care.
>
> (iv) 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 (para. 89 of *Poole*).
>
> (v) The Claimant has set out in detail numerous positive acts, which the Defendant undertook for the assistance of the Claimant. The Claimant was reliant upon the Defendant's Social Services Department and the positive acts taken by the Defendant are sufficient to give rise to an arguable assumption of responsibility. For the purposes of this case, it is common ground that it must be accepted that the Defendant was negligent and the Claimant has suffered sexual, physical and psychological injuries.
>
> (vi) I was taken by both parties to a number of first instance decisions, some of which had been upheld on appeal. In my judgment they provide very limited assistance because in some of them the facts are obscure and in others the facts are distinguishable or very different."

50. *DFX* was a claim brought by four claimants who had been members of a family of nine children with whom the local authority had been involved for 15 years, exercising its powers and duties in a variety of ways, before eventually, in 2009, taking care proceedings which resulted in the children being placed in long-term foster care under care orders. The claimants, who alleged that they had been abused and neglected by the parents, brought claims in negligence against the local authority, arguing that (1) the local authority was vicariously liable for the acts of its social workers and others employed in child protection and welfare work; (2) the social workers owed the claimants a private law duty of care to exercise reasonable skill and care in the discharge of this work; (3) the social workers failed to exercise reasonable skill and care in their involvement with the claimants; (4) had the social workers, for whom the defendant was liable, discharged their child welfare and protection function to a reasonable standard then care proceedings would and should have been issued at a significantly earlier date, namely 2002; (5) in these circumstances the abuse suffered by each of the claimants would have been avoided or substantially alleviated.

51. The three issues at trial were (1) whether a private law duty of care was owed by the local authority's social workers to the claimants; (2) if it was, whether there had been a breach of duty, and (3) if so, whether the breach caused the claimants to suffer damage. Lambert J found against the claimants on all three issues. For the purposes of this appeal, it is only necessary to consider her reasoning on the first issue.

52. In the Particulars of Claim, the claimants cited a large number of acts and omissions in support of their case that the defendant assumed responsibility for their plight and therefore owed them a duty to keep them safe. By the end of the hearing, however, that list had been reduced to only three, namely:

    (a) the commissioning of, and response by the social services department to, a psychology report from the Reaside Clinic in Birmingham in 1997;

    (b) the "direct work" undertaken by social workers and family support workers with the parents and the children to educate them as to the risks posed by third parties;

    (c) an assessment in February 2002 that the claimants were at risk of significant harm and a decision to commence care proceedings which was made at a child protection conference in March 2002 but never implemented and which, following further direct work by the social worker, was reversed at a review conference in June 2002.

53. Having considered the evidence, the judge found that the claim alleged a failure to confer a benefit rather than a positive act by the local authority which had caused the claimants to suffer harm. She further found that the claim concerned the authority's allegedly negligent failure to start care proceedings under s.31 of the 1989 Act and, linked to that, a failure to undertake a competent investigation and risk assessment under s.47. Although the claim had raised criticisms of the direct work carried out by the social work team, the expert witness relied on by the claimant had revised her opinion about the adequacy of the work. "She did not consider that work to have been incompetently performed; rather her criticism was that there was no reasonable analysis of the efficacy of that work by the social worker team. Had there been a proper analysis then this would have fortified the need for an application for a care order" (judgment, paragraph 194). Accordingly, this was an "omissions" claim and the omission alleged was the authority's failure to exercise its statutory function of starting care proceedings.

54. The judge recognised, however, that this was not by itself determinative of the claim. Relying in particular on Lord Reed's analysis in the *Poole* case at paragraph 73, she said:

> "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 [for the claimant] submits, this question is one which is 'fact sensitive'."

55. For that reason, she then considered whether, on the facts before her, the local authority had assumed responsibility to perform its statutory functions with reasonable skill and care. Having analysed the "rather sparse way" in which the point was advanced by the claimant, she concluded that it had not.

> "201. There are a number of difficulties with Ms Gumbel's submission. She accepts that before an assumption of responsibility can be inferred there must be (a) an act by the defendant upon which (b) it is reasonably foreseeable that the claimants will place reliance such that there is an obligation upon the defendant to exercise reasonable skill and care. Neither of these requirements is controversial.
>
> 202. Ms Gumbel's argument that the defendant assumed responsibility by obtaining the Reaside report in 1997 is perhaps her strongest point. At least, in this context, the defendant can be said to have taken a step – in the sense that it had done something. However, the Reaside report was obtained, not for the claimants' benefit or for the benefit of the parents, but for the benefit of the local authority's SSD in determining the parents' ability to keep the children safe, the level of risk which the father posed to his children and whether the threshold for registration or care proceedings was met. It was obtained and funded as part of the defendant's assessment of risk under section 47 of the 1989 Act in order to assist the social workers acting on behalf of the local authority to determine how best to fulfil their statutory obligations.
>
> 203. I take into account that, for the purposes of considering whether such a duty has arisen, it will be sufficient if viewed objectively it would be reasonably foreseeable that the claimants

> would rely upon the defendant discharging its functions with reasonable skill and care. But, as [the expert witnesses] confirmed, the local authority's assessment of risk may not be shared by the parents nor the children. Had proceedings been commenced, the parents would have been separately represented and the children's interests represented by a Guardian ad Litem. It would not necessarily follow that the local authority's viewpoint would be aligned with that of the family, children or parents. In these circumstances, I do not accept that it would be reasonably foreseeable that the claimants would rely upon the defendant such as to give rise to a duty of care."

56. She formed the same view about the failure to issue care proceedings in 2002:

> "204. …. 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."

57. Lambert J therefore reached the following conclusions about the existence of a duty of care:

> "209. I conclude therefore that, on the facts of this claim, no duty of care was owed by the defendant to the claimants. I have considered whether there was anything in the nature of the statutory functions being exercised by the defendant under section 47 and section 31 of the 1989 Act or the manner in which those functions were exercised which generated a duty of care. Having done so, I find nothing which suggests to me that the defendant assumed responsibility to exercise those functions with reasonable skill and care. Having looked for "something more" as I have put it, I find nothing. The facts do not fall within any category in which the common law has recognised a duty arising. That being the case I come full circle and agree with Mr Weitzman [for the local authority] that the claimants are, in this case, impermissibly seeking to create a common law duty of care from the defendant "merely operating a statutory scheme" contrary to the, now well-established, principle set out in *Stovin* and *Gorringe*.
>
> 210. I acknowledge that the claimants are critical of some of the direct work undertaken by social workers and by the family support team. This work was undertaken pursuant to section 17 of the 1989 Act, rather than section 47. As Mr Weitzman has accepted, those services are offered and accepted on a wholly voluntary basis and, as such, different considerations may arise when addressing the issue of reliance. However, 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. But [the expert witness] was not critical of the quality of the direct work which was undertaken … which she thought was for the most part thorough and competent. Her point was that the social workers failed to analyse the efficacy or likely efficacy of the work when assessing risk under section 47 of the 1989 Act."

THE JUDGMENTS IN THE PRESENT CASE

The judgment of Deputy Master Bagot QC in HXA

58. At first instance, the deputy master, in his judgment delivered on 15 February 2021, before the judgment was handed down in *DFX*, decided that the case was substantially indistinguishable from *Poole*. The fact that the risk of harm came from within the family rather than outside was relevant to breach of any duty that might arise and causation of damage flowing from that breach but not to the existence of a duty at all. Although there were factual differences, there was

> "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" (paragraph 47).

59. With regard to the specific events which were said to give rise to a duty, he said (at paragraph 31):

> "(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. "

60. He concluded (at paragraph 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 …."

The judgment of Master Dagnall in YXA

61. After a detailed analysis of the case law, Master Dagnall started by striking out a number of aspects of the claim which are not pursued on appeal, based on a general duty to investigate and take proceedings, on the basis that there was no material difference between those aspects and the claim in the *Poole* case. It was, however, a "more complex" question whether a duty of care might exist where the local authority had provided what the master referred to as "respite care" and as a result become liable to the duty under s.22(3). It was common ground, and accepted by the master, that there had been an assumption of responsibility, and therefore some duty of care was owed, during the actual periods when the child was being accommodated and that this would extend to "the mechanics of the return" to the parents' care at the end of that period. The question was whether the provision of such accommodation gave rise to a more extensive duty of care extended.

62. The master continued (at paragraph 92):

> "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, at least without care proceedings having been considered and if appropriate taken."

63. He answered both sub-questions in the negative. As to the first, no duty of care arose simply because a child is, or ought to be known to the local authority to be, at risk of significant harm and Parliament has empowered the authority to seek to intervene through care proceedings. To hold that the section 22(3) statutory duty extends to promoting the safety and welfare of an accommodated child generally for the future was going too far. The responsibility assumed was in relation to the provision of

accommodation and matters linked to or flowing from that, not the position or the future once the accommodation had come to an end. Further (at paragraph 95(vii)):

> "the scheme of section 20 is that it requires and is controlled by the consent of the parents…. It would … be incongruous that the parents by consenting to a provision of accommodation a term of which was that they could always remove the child … were allowing to come into existence a duty (which would otherwise not exist) of the local authority to (at least) consider whether to launch care etc proceedings so as to prevent that removal. The duty which is sought to be imposed seems to me to be at least somewhat inconsistent with the statutory scheme."

As to the second sub-question, the local authority was under a positive duty to return the child to the parents. As there was no pleading of any specific clear or imminent danger, but rather merely a return of the child back to the original situation, it was difficult to see why a duty of care would arise if it had not already arisen. This was not a situation where the local authority had created the danger. Although the danger was from the parents to whom the authority was bound to return the child, the situation was no different from that considered and rejected in the *Poole* case.

The judgment of Stacey J on appeal

64. Having set out the background to both cases, Stacey J summarised the issues arising on the appeals as follows (at paragraph 13):

> "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?"

65. The judge then summarised the statutory provisions and cited passages from the case law, rightly focusing in particular on the judgment of the Supreme Court in *N v Poole Borough Council* [2020] AC 780. She considered the judgment of Lambert J in *DFX*, referring to that judge's citation of other cases including *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736, *Stovin v Wise* [1996] AC 923 and *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057. She reminded herself of the principle that the court's strike out powers must be exercised with caution. She summarised the judgments of the deputy master and master and the submissions made on appeal.

66. In the final section of her judgment, the judge set out the reasons for her decision, in particular the following paragraphs:

> "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 [under] 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. ….
>
> 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 judgments 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."

THE APPEAL

(1) Grounds of appeal

67. In a document headed "Core Propositions" presented to the Court at the outset of the appeal, Ms Elizabeth-Anne Gumbel QC and Mr Justin Levinson described the issue arising in these appeals as being to determine the circumstances in which a local authority and/or its social workers for whom it is vicariously liable owe a duty of care to a child to whom the local authority is providing services and to identify what arguably amounts to an assumption of responsibility in the context of child protection.

68. In their notice of appeal to this Court, the claimants raise seven grounds of appeal:

(1) The judge was wrong to strike out both the claims as unarguable when on the facts as pleaded the claimants each had a strong case for showing there had been an assumption of responsibility.

(2) She was wrong to strike out both cases by comparison with the facts of other first instance cases where the comparison was flawed and the cases were not binding or necessarily correctly decided.

(3) She was wrong, in both cases, not to accept that this is a developing area of law, as the parameters set in *N v Poole BC* have not been applied in the range of cases that local authorities deal with and the circumstances in which there has been an assumption of responsibility have not been considered by the Court of Appeal since the decision in the *Poole* case.

(4) In the case of HXA, the failure to find that a decision to take care proceedings was arguably an assumption of responsibility was plainly wrong.

(5) In the case of HXA, the failure to find that the decision to carry out keeping safe work and thereby provide a service to the Claimant was arguably an assumption of responsibility was plainly wrong.

(6) In the case of YXA, the finding that accommodating YXA pursuant to section 20 of the Children Act 1989 was distinguishable from the decision in *Barrett v Enfield LBC* was plainly wrong.

(7) In the case of YXA, the failure to find that the decision to accommodate YXA and the decision to place him back with his parents or allow his return to his parents and thereby provide a service to the claimant was arguably an assumption of responsibility was plainly wrong.

69. In granting permission to appeal in both cases, Males LJ made the following observations:

> "The reasoning of the Supreme Court in *N v Poole Borough Council* strongly suggests that, for the reasons given by the judge in these cases and by Mrs Justice Lambert in the *DFX* case, the defendant local authorities did not owe a common law duty of care to the claimant children for the purpose of liability in negligence at common law. The Supreme Court appears to have reasoned that the negligent performance of a local authority's statutory child protection functions would not give rise to a common law duty of care, at any rate in the absence of special facts, unless and until the child in question was actually taken into care. If that is right, a negligent failure to apply for a care order would not generally be capable of giving rise to liability at common law, even on strong facts such as those in the present case. Nevertheless, N was not itself a case of abuse by a parent or a parent's partner, while *Barrett* was a case where the complaint was that the child was taken into care when he should not have been. In view of the frequency with which these cases appear to arise, and bearing in mind that the issue is whether the claim is arguable, it is appropriate to give permission to appeal so that the Court of Appeal can consider whether or in what circumstances a duty of care can arise in circumstances falling short of a child being taken into care and whether the claims should be struck out without a trial. it is convenient to give permission in both cases, as they were dealt with together below, and enable a wider range of factual scenarios to be considered."

(2) The claimant's submissions on appeal

70. On behalf of the claimants, Ms Gumbel and Mr Levinson made a number of wide-ranging submissions. I do not consider it necessary to set out all of them in this judgment. Their central arguments can be recast as follows.

71. First, they submitted that the *Poole* case clearly established that a duty of care can be owed by social services departments directly and by the social workers they employ (and for whom they are vicariously liable) to protect children from harm caused by others. They contended that the Supreme Court envisaged that a duty of care would arise out of facts such as those in the present cases.

72. Local authority social workers are the only professionals specifically entrusted with the responsibility of protecting children. Ms Gumbel and Mr Levinson drew an analogy with the situation described in a recent decision in the Privy Council in *Airport Authority v Western Air Ltd (Bahamas)* [2020] UKPC 9. In different circumstances, Lord Kerr described how either (a) creating the danger or (b) assuming responsibility will be sufficient to create a common law duty of care owed by those in a unique position to protect others. In that case, the authority (paragraph 44) had "assumed a relevant responsibility towards the respondent by dint of its being the sole agency which had the means to provide adequate protection for the aircraft." Ms Gumbel and Mr Levinson submitted that in the circumstances of the present two cases, it can be said that the local authorities have assumed a relevant responsibility towards the Appellants: "by dint of its being the sole agency which had the means to provide adequate protection for the [children]."

73. Ms Gumbel and Mr Levinson submitted that the approach adopted both at first instance and by Stacey J on appeal in these cases had been wrongly to make comparisons with other decided first instance cases, in particular the decision in *DFX*, and on that basis decide that there had been no assumption of responsibility. This approach wrongly assumes that first instance decisions are comparable when they are not since each case turns on its own facts.

74. It was further submitted that in fact both Lambert J in *DFX* and Stacey J in the present cases were wrong to conclude that social workers who have taken a decision to monitor the lives of children who are at risk of being abused or neglected have not assumed responsibility for those children in the services they provide. When compared to other professional services such as those provided by teachers and doctors, the child is the subject of the service as much as a pupil or patient. Taking on the investigation of the safety of a child and then doing so negligently is not just failing to confer a benefit but also a failure in providing a competent service. To suggest that the child protection duties of local authorities virtually never involve assuming responsibility for the protection of vulnerable children they are monitoring is not consistent with the decision in question. In the case of these claimants, however, the local authority's involvement went beyond monitoring. It was intervening (and to some extent intruding) in their lives and purporting to do so to protect them. In those circumstances, they were plainly assuming responsibility in the sense described by the Supreme Court in *Poole*.

75. It was argued on behalf of the claimants that if the decisions in the present cases and the decision in *DFX* are correct as to circumstances that cannot amount to an assumption of responsibility, there is very limited scope for a local authority ever to

owe a duty of care to a child being scrutinised under the child protection regime. Such an outcome would remove from social services professional responsibility to provide competent care to children they have identified as at risk of harm or who have been identified to them by other organisations as at risk of harm.

76. As set out in the skeleton argument, the appeal seemed to be seeking the reinstatement of both claims in their entirety. In oral argument, however, the scope of the appeal was much narrower and focused on only a few of the incidents in the "Sequence of Events". In the *HXA* case, it was argued that an assumption of responsibility, and hence a duty of care, arose out of the following events. First, taking a decision in November 1994 to seek legal advice with a view to initiating care proceedings and resolving to carry out a full assessment and then failing to do so must arguably have been an assumption of responsibility and a negligent failure to pursue a decision taken having assumed responsibility. The claimant was entitled to rely on the local authority putting its decision into effect. Secondly, following the report at the child protection conference that Mr A had touched the child's breast, the decision not to investigate based on fear of how Mr A would react and a negligent misconception there had been no previous similar concerns is said to be an obvious example of an assumption of responsibility as the local authority had undertaken the task of addressing the concern and deciding what to do about it. The fact that the decision, which it is alleged was a negligent one, was a decision to do nothing cannot determine that this was a pure omission rather than an assumption of responsibility with a negligent outcome. Thirdly, the decision at the case conference to carry out keeping safe work must arguably amount to an assumption of responsibility. The provision of advice is well recognised to be capable of giving rise to an assumption of responsibility and the fact that the work was never done was a breach of that duty, rather than a factor which negates the existence of the duty. If the local authority would be liable for negligently performed keeping safe work, which it is submitted that it clearly would be, then it cannot escape liability for a more egregious failure even to commence the task having identified the need and resolved to do so.

77. Similarly, it is said to be at least arguable in the *YXA* case that taking a child into care under section 20 of the Children Act 1989 is an assumption of responsibility; the only reason for section 20 being used rather than a court order is the parents' consent, but the obligations in respect of assuming responsibility for protecting the child must be comparable. While the claimant was being looked after by the local authority, they assumed a responsibility for his welfare and safety and owed him a duty of care as had arisen in *Barrett v LB Enfield*. There was nobody else caring for the claimant at the time and he relied on the authority's employees for his safety and protection. This is an example of a defendant "undertaking the performance of some task or the provision of some service for the claimant". The scope of the duty would have encompassed not permitting the claimant's return from a safe environment (foster care) to an unsafe environment (with his parents).

78. Adopting and developing the point made by Males LJ when granting permission to appeal, Ms Gumbel and Mr Levinson pointed out that to date this Court has not had the opportunity to examine the cases in which there is arguably an assumption of responsibility by social workers whose core task is the protection of vulnerable children from harm. Social workers are charged with the crucially important task of child protection and have a range of tools for implementing safety provisions to protect children. The specific cases where such work includes an assumption of responsibility

needs careful analysis and guidance. The factual situations where an assumption of responsibility can be established is clearly now a developing area of law of a type which should not be determined on strike out applications but rather decided after a full investigation of the facts at trial. Ms Gumbel and Mr Levinson cited the observations of Lord Browne-Wilkinson in *X v Bedfordshire* and *Barrett v London Borough of Enfield* quoted above. Furthermore, in claims against a local authority involving allegations of negligence by social workers, not all the relevant facts will be before the court prior to disclosure. In such circumstances, it cannot be said at the strike out stage whether or not there has been an assumption of responsibility or that the claim is bound to fail: *Bluett v Suffolk County Council* [2004] EWCA Civ 1707.

(3) The defendants' submissions on appeal

79. On behalf of the respondent local authorities, Lord Faulks QC and Mr Paul Stagg put forward the following arguments.

80. First, they submitted that the claimants' arguments were based on a misreading on the Supreme Court's decision in the *Poole* case. In particular, they contend that the assertion that social workers should be held impliedly to assume responsibility for the safety of a child with whom they are involved is unsustainable in the light of that decision. An assumption of responsibility arises in relationships in which, as described by Lord Toulson in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732, at paragraph 100,

> "a duty to take positive action typically arises – contract, fiduciary relationships, employer and employer, school and pupil, health professional and patient."

81. Secondly, they argued that the claimants' complaint about the comparison with other cases drawn by the courts at first instance and by Stacey J on appeal is wrong. This is precisely the approach mandated by the Supreme Court in *Robinson* in determining whether a duty of care is owed, and is vital to ensure consistency. The powers exercised by social workers in the *Poole* case where the risk of harm was said to come from abuse by neighbours are exactly the same as would have been utilised if the source of danger was the claimant's mother. It therefore avails these claimants nothing to say that "each case turns on its own facts".

82. Thirdly, it is wrong to say that the general denial of a claim in negligence deprives the professionals involved of any meaningful responsibility. There remains the option of a claim under the Human Rights Act or misfeasance in public office where justified on the facts. Individual social workers can be criticised by the family court and remain accountable to their employer and professional regulator. The local authority itself is accountable through the statutory complaints process and to the Local Government Ombudsman.

83. Fourthly, with regard to the specific factual allegations relied on by the claimant in *HXA*, they submit that:

(1) the decision in November 1994 to take care proceedings and the failure to implement the decision did not amount to an assumption of responsibility: *DFX* paragraph 204, supra;

(2) the suggestion that the decision in January 2000 not to investigate the allegation that Mr A touched the child's breast amounted to an assumption of responsibility is unarguable – this is no more than an allegation of negligence by omission; and

(3) the alleged failure to carry out keeping safe work is also an allegation of negligence by omission – such work would be no more than exercising the statutory functions under s.17(1) and para 4(1) of Schedule 2 to the 1989 Act and it is not suggested that HXA or anyone else was told that work would be carried out or placed any reliance on such work being carried out.

84. Fifth, with regard to YXA's claim, they submit:

(1) unlike in *Barrett*, where the child was subject to a care order, the local authority did not have parental responsibility for YXA who was merely accommodated voluntarily under s.20;

(2) the general power under s.20(4) to safeguard the child's welfare would therefore yield to the provisions of s.20(7) and (8) under which he could have been removed by the parents at any time;

(3) there is no duty to take care proceedings during the period the child is accommodated - at most, a duty of care may be owed in relation to the safety of any accommodation.

85. Finally, Lord Faulks and Mr Stagg submit that it is wrong to characterise this area of the law as "developing". The fact that the judgments of the Supreme Court are still being applied in different factual circumstances does not mean that the law is still developing or evolving. If a case could not be struck out merely because the facts were not identical to a previous case, the jurisdiction under CPR 3.4(2)(a) would be unduly stymied, with consequent waste of costs and judicial resources trying claims that were doomed to fail.

DISCUSSION AND CONCLUSION

86. Before considering the issues, I return briefly to the way in which the two claims have been pleaded. Without being unduly critical, I must record that the task facing this Court, and I am sure the courts below, has been hindered by the manner in which both claims have been pleaded.

87. Particulars of Claim must include a concise statement of the facts upon which the claimant relies: see CPR 16.4. In each of these two cases, the claim is that the defendant owed a duty of care at common law to protect the claimant from harm from parents or others in the household. In each case, it is said that the defendant assumed responsibility for protecting the claimant from that harm. In that context, the claimant should therefore identify the facts which are alleged to amount to an assumption of responsibility and the scope and extent of the alleged duty. Put simply, the claimants must identify clearly

and concisely what it is said that the defendant has assumed responsibility for, and what facts are relied upon as establishing that the defendant has assumed that responsibility. In addition, the claimant should identify the dates upon which the alleged duty arose and, if relevant, the period or periods during which the duty was owed. The claimant must also identify the facts and matters said to establish breach, causation and loss.

88. In the present cases, the particulars of claim were deficient. They did not include a concise statement of the facts upon which the claimants relied. Instead, they each set out a lengthy "sequence of events". In YXA's case, the date on which the local authority started accommodating the child under section 20 is stated to have been 28 April 2008 at paragraph 5.2(g) of the Particulars of Claim but August 2007 at paragraph 6.10. In both cases, it has not been easy to discern the precise basis on which it is claimed that there was an assumption of responsibility. In addition, while the Civil Procedure Rules do not prohibit the pleading of law, that is unnecessary in cases such as these where the legal structure is clear (broadly, duty of care, breach, causation and loss). In my view, it was unnecessary to include selective quotations from cases and other legal material which are relied upon, or which try to anticipate potential defences. The appropriate place for those citations is in a skeleton argument.

89. Despite these difficulties, it has been possible to pick one's way through the pleadings and arrive at the following conclusions.

90. There is a fundamental difference between the general duty under section 17(1) of the 1989 Act and the specific duty under section 22(3). Under section 17(1)(a) every local authority is under a general duty to safeguard and promote the welfare of children in need within their area by providing a range of services appropriate to their needs. Under section 22(3), a local authority looking after a child is under a specific duty to safeguard and promote his welfare. A duty of care cannot arise simply as a result of the local authority's general duties such as those under section 17(1)(a), but it may arise as a result of the local authority's exercise of its specific duties to a child if, on the specific facts of the case, the circumstances amount to an assumption of responsibility for the child. To paraphrase Lord Reed's observation in *Poole* at paragraph 73, the operation of a statutory scheme does not automatically generate an assumption of responsibility, but such an assumption may arise out of the local authority's conduct pursuant to a statutory scheme.

91. Depending on the facts of the case, an assumption of responsibility may arise out of the local authority's conduct where it acquires parental responsibility for a child when granted a care order under section 31, as occurred in *Barrett v Enfield LBC*, or an interim care order under section 38. But in my view the circumstances in which a duty of care may arise are not confined to such cases. It is correct that a local authority by whom a child is accommodated under section 20 does not have parental responsibility for the child, unlike an authority who has been granted a care order for a child. But the circumstances in which a local authority may assume responsibility for a child so as to give rise to a duty of care under the law of negligence are not confined to cases where it acquires parental responsibility under the Children Act 1989.

92. In what other circumstances does a local authority assume responsibility for a specific child so as to give rise to a duty of care? That is a question which can be only answered definitively on a case by case basis by reference to the specific facts of each case. It is not appropriate to seek to lay down guidance in a judgment such as this where the court

is considering appeals against orders striking out claims. I confine myself to observations about the circumstances arising in these two cases.

93. First, a duty of care may arise in respect of looked-after children if circumstances arise which amount to an assumption of responsibility by the local authority. The statutory duties owed by a local authority under section 22 are owed to every child being "looked after" by the authority. That category encompasses not only children who are in care but also children being provided with accommodation under section 20. Just as the conduct of a local authority pursuant to the statutory scheme relating to a child subject to a care order may, depending on the facts, amount to an assumption of responsibility so as to give rise to a duty of care at common law, so may the conduct of a local authority pursuant to the statutory scheme under section 20.

94. In my judgment, contrary to the view expressed by Master Dagnall and endorsed by Stacey J, this potential assumption of responsibility is not necessarily confined to the actual periods when the child was being accommodated, extended only to encompass "the mechanics of the return" to the parents' care. As Lady Hale noted in *Williams v LB Hackney*, "although the object of section 20 accommodation is partnership with the parents, the local authority have also to be thinking of the longer term". That requirement arises because of the authority's obligations under the regulations, as summarised above, to make arrangements and/or prepare care plans for all children being looked after. The scope of those arrangements or plans may be narrower if the child is only being accommodated for a short period, or a series of short periods. Nonetheless, even for those children the responsibility may well extend beyond the specific period when they are being accommodated.

95. To take one obvious example, if during a period of short-term accommodation, a child informed his foster carer, who in turn told the social worker, that he was being sexually abused at home, the local authority would plainly be required, by virtue of its duty under section 22(3), to take steps to protect the child, and that duty would continue after the end of the agreed period of accommodation. Similarly, if in such circumstances the parents withdrew their consent under section 20, and the local authority failed to take steps to protect the child but instead simply returned the child home, it would plainly be in breach of its statutory duty. Although accommodation under section 20 requires parental consent (as prescribed in the carefully crafted provisions of subsections (7) to (11)), I do not agree with Master Dagnall's description of the scheme of the section as being "controlled by the consent of the parents" nor do I see it as "incongruous" that, by consenting to a provision of accommodation from which they can remove the child, the parents are allowing a situation to arise in which the authority is under a duty to safeguard and promote the child's welfare. The fact that the parents have the power under section 20(8) to remove the child from section 20 accommodation does not absolve the local authority from its statutory duty under section 22(3) to safeguard and protect the child's welfare. In such circumstances, the conduct of the local authority pursuant to the statutory scheme relating to the accommodation of the child, may amount, on certain facts, to "something more" so that the assumption of responsibility that arises therefrom may give rise to a duty of care at common law.

96. Secondly, a duty of care may arise in circumstances where a local authority, acting in accordance with its duties under statute, regulation, or statutory guidance, has taken, or resolves to take, a specific step to safeguard or promote the welfare of a child which amounts to an assumption of responsibility for a child.

97. One example might be a decision to undertake or to commission a specific piece of work to assess the level of risk and/or protect a child from a particular type of harm. This is not an appeal against Lambert J's careful and comprehensive decision in *DFX* reached after a full trial. With considerable diffidence, however, I question whether it is necessarily, or at least invariably, correct to say that the fact that an expert's report has been obtained to assist a local authority to assess the level of risk of harm to a child in his parents' care means that the report was not also obtained for the child's benefit. Equally, I question whether it is necessarily, or at least invariably, correct to say that the fact that a local authority's assessment of risk may not be shared by the parents or the child means that it would not be reasonably foreseeable that the child would rely on the local authority to exercise reasonable skill and care when deciding whether to start care proceedings. The fact that the child will be represented in any subsequent care proceedings by a children's guardian is of no consequence. Prior to the issue of the proceedings, the child has no representative or advocate.

98. In each of these broad categories, the question whether a duty of care has arisen will depend on the specific facts of the case, which will include the specific requirements under statute, regulations or guidance in force at the time. There have been a number of changes to statutory powers and duties introduced through amendments to the statute, regulations and guidance in the 30 years since the 1989 Act came into force. Even where a duty of care is established, the claim will only succeed where the claimant proves, in accordance with general tort principles, that the local authority was in breach of the duty and that the breach has caused damage for which the claimant is entitled to compensation. It is important to emphasise that, in exercising their statutory powers and duties, local authority social workers have a wide discretion and are often required to make complex and difficult assessments of what should be done to safeguard and promote the welfare of the particular child. A claimant asserting that there has been a breach of a duty of care in such cases so as to give rise to a claim in negligence is therefore likely to face a high hurdle. This has perhaps been lost sight of in the cases which have focused on the existence or otherwise of a duty of care. As one commentator (Simon Deakin, CLJ 2019 78(3) 516) observed in a case note on the *Poole* case:

> "the fact-intensive quality of this part of Lord Reed's judgment suggests that the case could have been better dealt with on breach and causation grounds. The errors committed by the council did not clearly lead to actionable damage. A jurisprudence focused on 'duty' inevitable means that a more nuanced account of what amounts to fault in complex settings such as this will be slow to emerge."

99. We are not, however, required to decide whether or not the claimants in these proceedings will ultimately succeed in establishing that there was a duty of care, let alone whether there was any breach of duty which caused damage so as to give rise to a claim for compensation. The question for this Court is whether the master and deputy master at first instance, and the judge on appeal, were right to strike out these claims under CPR 3.4. As Lord Reed said in *Poole*, 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."

100. I accept of course (per Lord Reed in *Robinson*), that "where the existence or non-existence of a duty of care has been established … it is unnecessary and inappropriate to reconsider whether the existence of the duty is fair, just and reasonable". I also accept that to proceed by "discarding established principles and deciding each case according to what the court may regard as its broader merits … would be a recipe for inconsistency and uncertainty". In my judgment, however, this is still an evolving area of the law. The ramifications of the change of direction heralded by the decisions of the Supreme Court in *Robinson* and *Poole* are still being worked through. Unusually for child protection cases, the risk of harm to the children in *Poole* came from outside their family. The risks to the children in the present cases came from within their families. To adopt Lord Steyn's words in *Gorringe* quoted above, this is an area of "great complexity" in which "no single decision is capable of providing a comprehensive analysis." It remains as he described it – "a subject on which an intense focus on the particular facts and on the particular statutory background, seen in the context of the contours of our social welfare state, is necessary". The decision in *DFX* is one judgment after a trial at first instance involving one set of facts. There are a range of factual scenarios that might arise in this context which did not arise in that case. It did not involve, for example, a decision to provide a child with keeping safe work or to accommodate a child under section 20.

101. Where a local authority has been involved with the child over a number of years, exercising its statutory duties and powers by providing services to the child in order to safeguard and promote his welfare, identifying whether there has been an assumption of responsibility by the local authority may be a complex exercise. For those reasons, as this area of law is still developing, it would be wrong to reach a definitive conclusion and strike out a claim before the evidence has been heard, the facts have been found and a thorough analysis of the exercise of those powers and duties has been undertaken at trial.

102. As Lady Hale in *Williams v LB Hackney* observed and Keehan J in *Worcestershire CC v AA* illustrated, the circumstances in which a child may be accommodated under section 20 vary widely. Consequently, the extent of the responsibility assumed by a local authority when a child is accommodated under s.20 will plainly vary from case to case. For my part, however, I consider it is certainly arguable that an assumption of responsibility may arise when a child is voluntary accommodated in respite care as occurred in the case of YXA. He was accommodated with the same carers under a regular programme of short breaks or respite care because of concerns about his welfare in the care of his parents. He thus became a looked-after child whose welfare the local authority was under the statutory duty to safeguard and protect. I do not agree with the interpretation preferred by the master and the judge that this was merely an assumption of responsibility leading to a duty of care in relation to the accommodation itself. The duty to safeguard and protect his welfare was not necessarily confined to the limited period when the child was accommodated. Whether or not there was an assumption of responsibility so as to give rise to a common law duty of care and, if so, whether there was a breach of that duty which caused or contributed to the damage suffered by YXA cannot be determined without a full investigation of the facts. In the case of YXA, therefore, I conclude that a local authority accommodating a child under section 20 is capable of amounting to "something more" so as to give rise to an assumption of responsibility by the local authority. Accordingly, this was not a claim which should have been struck out under CPR 3.4(2)(a).

103. In the case of HXA, the child was never accommodated under section 20. But the local authority was involved with the family for a number of years, exercising its statutory powers and duties. The fact that the statutory powers and duties under consideration were substantially the same as were under consideration in *Poole* is, by itself, no answer to the claim. The factual circumstances were very different. In November 1994, there was a child protection investigation after the local authority received a complaint that the child had been assaulted by her mother. A decision was taken to seek legal advice with a view to initiating care proceedings and to carry out a full assessment. It is alleged that those decisions were never implemented. It is to my mind at least arguable that, in resolving to take those steps, the local authority was assuming responsibility for the children. In 1999, an allegation of sexually inappropriate behaviour by the mother's partner was reported to the school. In January 2000, another allegation of sexual abuse by the mother's partner was reported to a social worker employed by the same local authority. In the light of that allegation, the local authority decided to take specific action designed to protect HXA and her sister, namely arranging for "keeping safe" work to be carried out. It is to my mind at least arguable that, in deciding to carry out that work, the local authority was assuming responsibility for the children. Although the terms in which the particulars of claim are drafted as far from clear, I do not agree with the judge's interpretation of the pleading that it does 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. To my mind, the agreement to carry out keeping safe work could be said to amount to "something more" so as to amount to an assumption of responsibility, and as I read the particulars of claim that is what the claimant is averring. In those circumstances, it seems to me that it would be wrong to strike out this claim.

104. The application to strike out HXA's claim did not extend to the allegation that she made a complaint about Mr A's behaviour to staff at school in 1999. It was accepted by the local authority that it is at least arguable that a duty of care arose in those circumstances. It would in my view be an odd outcome if it were accepted that it was possible for this single event to give rise to an arguable duty of care when the series of alleged omissions by the social services department of the same authority did not. The education and social services departments within a local authority do not, or should not, work in silos without any communication passing between them. If it is right for the claim arising out of an alleged breach of an alleged duty of care owed to a child by the local authority exercising its education functions following an allegation of sexual abuse made to a member of the school staff to proceed to trial, it would be odd for a similar claim arising out of a similar alleged breach of a similar alleged duty of care owed to the same child by the same local authority exercising its social services functions following an allegation of sexual abuse reported to a member of the children's services team to be struck out summarily.

105. To sum up, this is still an evolving area of the law in which it will only be through careful and incremental development of principles through decisions reached after full trials on the evidence that it will become clear where precisely the line is to be drawn between those cases where there has been an assumption of responsibility and those where there has not. If the assumption of responsibility were to be confined to cases where a local authority had acquired parental responsibility under a care order, the line would be clear. But in my view that is not the effect of the decision in *Poole*. The responsibility for a child required to give rise to a duty of care can be assumed in wider circumstances. Whether a duty arises will always depend on the specific facts of the

case. As the reports from the family courts demonstrate, there is a very wide range of circumstances in which the social services department of a local authority may become involved in the lives of children in its area who are or are at risk of being abused or neglected. In many such cases, it may not be possible without a full examination of the facts to establish whether or not a duty of care arose or, if it did, whether it was breached. In those circumstances, it is plainly wrong to strike out the claims.

106. In due course, as a body of case law emerges, it will become easier at the outset of proceedings to identify the circumstances in which an assumption of responsibility can exist so as to give rise to a duty of care. At that point, there will be greater scope for striking out claims which on any view full short of establishing a common law duty of care. But at this relatively early stage in the development of the law after the *Poole* case, striking out these claims would in my view be a wrong use of the power under CPR 3.4.

107. For those reasons I would allow both appeals on all grounds

108. The question for a court considering an application to strike out a claim is, to adopt Lord Reed's words at paragraph 89 of his judgment in *Poole*, whether "the particulars of claim … set out any basis on which an assumption of responsibility might be established at trial". Before this Court the only pleaded matters relied on by counsel for the claimants were those set out in paragraphs 14(l) and 14 (vv) of HXA's claim and paragraphs 5.2 of YXA's claim. If my Lord and my Lady agree, the outcome of this appeal will be that those paragraphs are restored, together with the relevant paragraphs relating to assumption of responsibility, breach and damage. I would invite counsel to agree precisely which paragraphs should be restored in the light of our decision and to submit a draft order reflecting their agreement.

LORD JUSTICE LEWIS

109. I agree.

LADY JUSTICE ELISABETH LAING

110. I also agree.