Neutral Citation Number: [2021] EWHC 250 (QB)

Case No: QB-2014-004479

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2021

**Before** :

**DEPUTY MASTER BAGOT QC**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **(1) HXA**<br>**(2) SXA (A protected party by her litigation friend Andrea Webb)** | **Claimants** |
| **- and –** | |
| **Surrey County Council** | **Defendant** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Justin Levinson** (instructed by **Scott Moncrieff & Associates Ltd**) for the **First Claimant**
**Paul Stagg** (instructed by **DWF LLP**) for the **Defendant**

Hearing date: 6 November 2020

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

**DEPUTY MASTER BAGOT QC :**

This judgment is in 7 parts as follows:



## I. Introduction and background

1. This is an application by the Defendant, heard remotely by MS Teams, and made under CPR 3.4(2)(a) to strike out the significant majority of the First Claimant's claim. Whilst it mirrors the First Claimant's claim, the Second Claimant's claim was stayed pending the outcome of the First Claimant's claim, by Order dated 3 October 2019. It is alleged that the statement of case discloses no reasonable grounds for bringing those aspects of the claims made to which I will refer in this judgment as "the relevant claims".

2. There has been no material disagreement between the parties as to the threshold to be applied. Different formulations are set out in the case law and I have regard, for instance, to the Editors' notes and case law referred to at section 3.4.2 in *The White Book*. The guidance can best be summarised by observing that I must be satisfied that the relevant claims are bound to fail if the Defendant is to succeed on its application. Statements of case which are

suitable for striking out include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides. It is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact. Where an area of law is subject to some uncertainty and developing, it is highly desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts. I also bear in mind the words of caution in relation to striking out alleged assumption of responsibility cases specifically, discussed below.

3. The Claimants are half siblings. They have the same mother, but different fathers. Their dates of birth are:

   i) First Claimant, "HXA", female: 26 March 1988;

   ii) Second Claimant, "SXA", female: 2 November 1993.

4. The Claimants have 2 sisters, who are full siblings of the Second Claimant. They have severe learning disabilities. They are:

   i) MIX – born in April 1991;

   ii) MEX – born in April 1992.

5. The Defendant was responsible for the management and provision of social services in the area in which the Claimants grew up.

6. The Claimants' childhoods were characterised by abuse and neglect perpetrated by their mother and one of their mother's partners ("Mr A"). On

12 January 2009, at Guildford Crown Court, Mr A was convicted of 7 counts of rape (specimen charges) in relation to the First Claimant and the Claimants' mother was convicted of indecently assaulting the First Claimant. Mr A was sentenced to 14 years imprisonment and the Claimants' mother to 9 months imprisonment.

7. The Claimants seek damages for psychiatric and other injuries suffered by them as a result of child abuse, which they allege would have been avoided or lessened had the Defendant's social workers exercised reasonable care for their safety and wellbeing in accordance with the duties alleged.

8. The alleged failure by the Defendant's school staff to act upon a report of abuse by the First Claimant, in 1999, is not subject to this application (paras. 31-35 of the Particulars of Claim). The Defendant accepts that it is at least arguable that a duty of care arises in the school context and that this allegation needs to be determined on the facts. But the Defendant says that all the other allegations made, i.e. those at paras.1 to 30 of the Particulars of Claim, fall to be struck out.

## II. The Facts in more detail

9. For present purposes, on this strike out application, I must take the facts to be those alleged by the First Claimant. Although they are set out at considerable length in the Particulars of Claim (para. 14 under the heading 'sequence of events'), I will reproduce them here in full to avoid any shortcoming of detail if I merely summarised them. The only amendment I have made is where

family names are used in the pleading, I have reduced those entries to read, e.g. "[Mr A]" rather than using the full name, to reduce the risk of inadvertently providing a route to the identification of the Claimants, whose names have been anonymised in these proceedings. Paragraph 14 reads:

*"The Defendant had dealings with the Claimants' family from no later than September 1993. In particular, the following events are relevant to this claim. A more detailed chronology is contained in the social services records:*

a. *In September 1993, it was noted that the Claimants' mother, who had learning difficulties, had been rough with the First Claimant and left her unsupervised in the bath.*

b. *In March 1994, a neighbour reported seeing the Claimants' mother hit the First Claimant so hard that she fell off her bike. The First Claimant was not medically examined or spoken to alone. The Defendant provided the family with no support or advice.*

c. *In July 1994, MEX was noted to have bite marks and bruising.*

d. *On 6 July 1994, the Claimants' mother reported that the First Claimant had been sexually assaulted by an older boy or boys. The Claimant was not spoken to.*

e. *On 28 July 1994, a child protection conference was convened. The children's names were placed on the child protection register under the category of neglect. By July 1994, there had been five section 47 investigations in the 10 months since September 1993. There were also documented concerns about the Claimants' mother's excessive and inappropriate physical chastisement of all the children and the lack of supervision afforded them*

f. *The Claimants' mother separated from the Second Claimant's father in*

*1994.*

g. *On 2 August 1994, several neighbours visited the Defendant's office to raise concerns about the Claimants' mother's verbally abusive behaviour towards the children and the lack of supervision afforded to them.*

h. *On 15 September 1994, there were child protection investigations after MEX presented with bruising. The Claimants' mother refused to co-operate with the investigation.*

i. *On 26 September 1994, MEX sustained further injuries.*

j. *In October 1994, a referrer informed the Defendant that she had witnessed the Claimants' mother leave her children unsupervised outside a shop, that the older children had attacked the Second Claimant and that others had witnessed similar behaviour on other occasions. The Defendant took no action.*

k. *On 31 October 1994, the Claimants' mother was refusing to attend the family centre with a view to preventing the First Claimant being interviewed.*

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.*

m. *In January 1995, the case was transferred to the Defendant's Children with Disabilities Team from the Defendant's Child Protection Team, notwithstanding the child protection concerns. The children were on the child protection register at this time.*

n. *In February 1995, the Claimants' mother was noted to be engaging in sexual activity in the children's presence. The Defendant resolved not to*

*commence a section 47 assessment as it did not wish to jeopardise its relationship with the Claimants' mother.*

o. *In April 1995, MIX sustained a possibly non-accidental injury.*

p. *In June 1995, the children's names were removed from the child protection register.*

q. *In September 1995, the Claimants' mother formed a relationship with [Mr D], a Schedule One offender, who was a member of the household between mid-1995 and July 1996. [Mr D] had been convicted of assaulting the child of his former partner.*

r. *In October 1995, the Second Claimant sustained a black eye and bruising to her head.*

s. *In January 1996, a marked deterioration in MEX and MIX's behaviour was reported. Child protection investigations were commenced.*

t. *In March 1996, an assessment of the risks posed by the Claimants' mother's relationship with [Mr D] was undertaken. It was concluded that the matter should proceed to an initial child protection case conference. It was noted that the children's behaviour had deteriorated over recent months, that there had been 10 section 47 child protection investigations since September 1993, that [Mr D]'s children were the subjects of care orders, that he had injured a 3 year old child and that the couple had refused to discuss their relationship.*

u. *On 30 April 1996, an initial child protection conference was held.*

v. *In June 1996, the Claimants' mother admitted to smacking MEX and leaving marks on her legs. There were several other suspicious injuries in June and July 1996.*

w. *In July 1996, the Claimants' mother formed a relationship with [Mr A]. [Mr A] was a Schedule One offender. In 1992, he had been*

*convicted of assault occasioning actual bodily harm to his own child, then 8 weeks old, by shaking him with sufficient force so as to cause conjunctival hemorrhages, and by breaking his leg. He had denied his offending. [Mr A] moved into the family home within days of [Mr T] departing in July 1996.*

x. *On 25 October 1996, MEX sustained severe bruising to her back and legs, which were thought to have been non-accidentally caused. The Claimants' mother subsequently admitted that she had assaulted MEX and was cautioned. A child protection conference was convened.*

y. *On 6 November 1996, the names of the Second Claimant, MEX and MIX were entered on the child protection register. The First Claimant's name was omitted as she was spending time with her grandparents and father although she remained a regular visitor to the home. The Defendant resolved to assess the First Claimant's needs.*

z. *On 25 October 1996, MEX, who had been with foster carers, returned home after a child psychologist, Dr Parmar, advised that the Claimants' mother would not deliberately hurt the children, but had snapped under pressure.*

aa. *On 11 November 1996, MEX sustained injuries consistent with having been slapped.*

bb. *On 20 December 1996, [Mr A]'s ex-wife and the mother of their two sons reported that [Mr A] appeared to have less control of his anger since he began his relationship with the Claimants' mother.*

cc. *In February 1997, there were 2 child protection investigations concerning injuries to MEX and MIX. The Claimants' mother admitted causing one of the injuries and blamed the other on the First Claimant.*

dd. *In March 1997, the Defendant concluded that [Mr A] did not pose a risk to the Claimants but noted concerns about "over chastisement".*

*The Defendant concluded that the children should remain in the care of their mother and [Mr A] with adequate support so as to reduce the risk of over chastisement.*

*ee. In April 1997, MEX sustained non-accidental injuries to her head. She was placed in respite care.*

*ff. On 2 May 1997, the police recorded that [Mr A] had approached a 16 year old girl at a train station, offered her a lift and then asked if he could kiss her. The Defendant's lack of proper investigations may have meant that it did not learn of this until 2006.*

*gg. In May 1997, the Defendant convened a child protection conference. The names of the Second Claimant, MEX and MIX were put on the child protection register. The Second Claimant's name remained on the child protection register until 2000.*

*hh. In June 1997, the Defendant undertook sessions with the First Claimant at a family centre.*

*ii. In June 1997, the Defendant asked Dr Gaitonde, a child and adolescent psychiatrist, to assess family functioning.*

*jj. In July 1997, the Claimants' mother and [Mr A] married.*

*kk. In August 1997, it was resolved to return MEX home.*

*ll. In October 1997, MEX sustained further significant bruising to her back and kidney area thought to have been non-accidentally caused, probably by 2 hard slaps. [Mr A] admitted to causing the injuries. He was cautioned. MEX and MIX were placed in foster care. The Claimants' mother prioritised her relationship with [Mr A] over having MEX and MIX remain at home.*

*mm. In November 1997, the Defendant decided that a forensic assessment of [Mr A] would be undertaken by a psychiatrist, Dr*

*Peermahomed.*

nn. *In November 1997, Dr Peermahomed reported that [Mr A] showed no remorse for his abusive behaviour towards MEX and that his view was that "she deserved what she got".*

oo. *In a subsequent letter dated 18 December 1997, Dr Peermahomed appears to have revised his opinion of [Mr A]'s abusive behaviour towards MEX on the basis that he had since learnt how the family were living in cramped conditions without "the support that foster carers / school have". Dr Peermahomed recommended that MEX and MIX be returned home with support.*

pp. *On 20 January 1998, there were child protection investigations following reports that [Mr A] had physically assaulted the Second Claimant.*

qq. *A child protection conference was held in March 1998. Dr Parmar produced a report which stated that [Mr A] could be helped and that MEX and MIX should be returned home. Dr Gaitonde had been unable to complete her assessment of [Mr A] as he had declined to make himself available for appointments. She informed the Defendant that she was not in agreement with Dr Parmar's recommendation that MEX should return home or her conclusions generally.*

rr. *At the child protection review conference in August 1998, a report was presented by social work consultants, Mr Page and Ms Cross. They highlighted serious risk factors and were critical of those who had minimised [Mr A]'s conduct. It was noted that noted that evidence pointed to the Claimants' mother and [Mr A] being able to parent appropriately at times, but that they could also be abusive parents who lost control at times of stress. They identified the risk that the Claimants' needs would be overlooked by comparison to their learning disabled sisters. They recommended that work with the parents aimed at helping them acknowledge their capacity for violence towards the*

*children needed to be undertaken and that there should be a systematic assessment of the extent to which their attitudes and understanding had changed as a result.*

ss. *In October 1998, MIX sustained bruising to the base of her spine. It was noted also that she had blood in her urine. Medical opinion was that this had been caused by a slap.*

tt. *On 22 February 1999, MEX was returned home.*

uu. *In July 1999, it was noted that the Second Claimant had bleeding from her genital area and that the Claimants' mother had declined to take her to the GP as advised.*

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.*

ww. *In June 2000, it was noted that [Mr A] had hit the First Claimant to the head.*

xx. *In July 2000, a neighbour reported concerns about [Mr A]'s verbal abuse of all four girls, that he had been seen to kick one of them and that the mother seemed unconcerned. The Defendant took no action.*

yy. *In February and May 2003, bruising was noted on MIX.*

zz. *In 2004, the First Claimant moved out of the home to live with her now husband.*

aaa. *On 12 October 2005, the Second Claimant reported to school staff that her mother had thrown a slipper at her, that [Mr A] hit her regularly and that she did not want to go home because it was horrible there. Staff reported that the Second Claimant had a bruise to her*

*knee.*

*bbb. On 15 June 2006, the Defendant received an anonymous referral. This referrer reported alleged sexual abuse of the Claimants by [Mr A]'s father. The Defendant resolved to commence a section 47 investigation, but failed to do so.*

*ccc. A further referral was received from the NSPCC on 3 July 2006. The Defendant took no action.*

*ddd. In April, the Second Claimant reported to an educational welfare officer at school that [Mr A]'s father, [MA], touched her in a sexually inappropriate way. She later disclosed that [Mr A] also touched her in a sexually inappropriate manner, that the Claimants' mother was aware of this and had actively participated in his abusive behavior apart from on one recent occasion, when she had intervened to stop him. She also reported having informed the Claimants' mother about the grandfather's sexually abusive behaviour, but had been advised not to speak of it to anyone.*

*eee. In April 2007, the First Claimant also made a complaint to the police about sexual abuse she had suffered at the hands of [Mr A] and his father between the ages of 9 and 16.*

*fff. On 27 April 2007, the Defendant obtained an emergency protection order in respect of the Second Claimant.*

*ggg. On 12 January 2009, at Guildford Crown Court, [Mr A] was convicted of 7 counts of rape (specimen charges) in relation to the First Claimant and the Claimants' mother was convicted of indecent assaulting the First Claimant. [Mr A] was sentenced to 14 years imprisonment and the Claimants' mother to 9 months imprisonment. The Claimants rely on these convictions."*

## III. The core legal framework and submissions

10. Both Counsel have considerable experience in this field and I am grateful for their erudite and helpful submissions, both written and oral, to which I have had regard.

11. Mr Stagg on behalf of the Defendant submitted that it is not arguable that the Defendant owed the First Claimant a duty of care in the exercise of its child protection functions.

12. Unsurprisingly, front and centre of both parties' submissions was the decision of the Supreme Court in *N v Poole BC* [2019] UKSC 25, [2020] AC 780 ("*Poole*"). But the parties differed as to the proper scope of that decision on duties of care owed by social services authorities. The Defendant submitted that properly analysed and applied, *Poole* was a complete answer to this case and meant the relevant claims were bound to fail. Mr Levinson for the First Claimant argued that the facts of the present case are materially different from *Poole* so as to mean that a duty of care is at least arguable most notably, amongst other points, because the facts alleged (and which must be assumed) raise a case for an assumption of responsibility which should be tested at trial.

13. Mr Stagg pointed out that prior to the decision in *Poole*, in which Lord Reed gave the lead judgment with which all the other Justices agreed, Lord Reed set out the proper approach, focussing on precedent, to identifying whether there was a duty of care, in *Robinson v Chief Constable of the West Yorkshire Police* [2018] UKSC 4, [2018] AC 736: para. 26. That was a case concerned with the existence of a duty of care on the police, but it is worth restating the point made by Mr Levinson at para.5 of his skeleton, that the circumstances in

which a duty of care will arise are not particular to social services departments (to which I would add, in the context of *Robinson*, or the police); they are the same not only for all public bodies, but private bodies too: see *Poole* at para.65. Returning to *Robinson*, where the existence or non-existence of a duty of care had been established, justice and reasonableness form a part of the basis on which the law has arrived at the relevant principles: para.26. It is therefore unnecessary and inappropriate to reconsider whether, in *Caparo* terms, it is fair, just and reasonable to find a duty or to look to justice, reasonableness and the wider merits, discarding established principles, as this would be a recipe for inconsistency and uncertainty. At para.27, Lord Reed also emphasised that it is normally only in novel situations necessary to go beyond those established principles by incremental developments and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which earlier authorities were concerned. At para.29, it was further noted that in the ordinary run of cases, courts consider what has been decided previously and follow the precedents. Two important features were highlighted, namely:

i) maintaining the coherence of the law; and

ii) the avoidance of inappropriate distinctions.

14. In *Poole*, the case concerned two children, one of whom suffered from severe disabilities. They and their mother were placed by the Defendant local authority on a housing estate where they were subjected to significant and sustained harassment and abuse by a neighbouring family already known to the Defendant for engaging in persistent anti-social behaviour. They brought a

common law claim, said to derive from the failure of the Defendant to exercise its powers under the Children Act 1989 to safeguard and promote the welfare of the children. The claim was that if those duties had been carried out competently, the standard there, as in the instant case being the well-known *Bolam* test, the Defendant would either have moved the family as a whole or moved the Claimant children out of the home. On the Defendant's application, the claim was struck out as the Defendant did not owe a duty of care at common law to protect the Claimants from harm caused by third parties. The Supreme Court dismissed the appeal against the strike out.

15. In the bundle in the present case, I had available to me a redacted copy of the Particulars of Claim in *Poole* as referred to by Lord Reed in the judgment. Those detail the extent of the investigating, monitoring, making of assessments and holding of meetings by the Defendant in that case.

16. Although I have had regard to the whole judgment, in his helpful skeleton argument and amplified in oral submissions, Mr Stagg summarised the salient parts of Lord Reed's judgment in *Poole* as follows (references being to the pages of the authorities bundle) with some additional observations and adjustments by me added:

    i) As noted in *Robinson*, public authorities are generally subject to the same principles as to tortious liability as private individuals: para 26. [A208-209]

    ii) As with private individuals, public bodies do not generally owe a duty of care "*to confer benefits on individuals, for example by protecting them from harm*": para 28. [A209] The mere fact that public bodies

have statutory powers and duties in relation to protecting people from harm does not mean that they owe a common law duty of care to do so *"even if, by exercising their statutory functions, they could prevent a person from suffering harm;"*: para 65(2). [A220] An allegation of failure to exercise child protection functions competently so as to protect a child amounts to an allegation of failure to protect from harm: para 74. [A224]

iii) However, a duty of care might be owed in exceptional cases such as "*where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm*": para 65(3). [A220-221] In para 76 [A225], Lord Reed quoted from an academic article by Tofaris and Steel, "*Negligence Liability for Omissions and the Police"* [2016] CLJ 128, as to the circumstances in which a Defendant might owe a duty of care to prevent harm to a Claimant:

> In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger.

iv) In relation to an assumption of responsibility, it was usually necessary to show reliance by the claimant on the undertaking, express or implied, that reasonable care would be taken: paras 67-68. [A221-222] The absence of such reliance was critical to the absence of liability in *X v Bedfordshire CC* [1995] 2 AC 633: para 69 of *Poole*. [A222] An assumption of responsibility could arise in the context of a public

authority performing statutory duties or exercising statutory powers, providing that the general criteria for the existence of an assumption of responsibility are met: paras 70-73. [A222-224] However, if they are not, the existence of statutory functions alone will not create a duty of care which would not otherwise exist: *Attorney-General for Scotland v Adiukwu* [2020] CSIH 47, 2020 SLT 861, paras 16, 54(4), 73-74. [A13, A23, A26]. It is worth adding the passage from para.80 of *Poole* cited by Mr Levinson as to what would and would not constitute an assumption of responsibility:

> *"…a public body which offers a service to the public often assumes a responsibility to those using the service. The assumption of responsibility is an undertaking that reasonable care will be taken, either expressly or more commonly implied, usually from the reasonable foreseeability of reliance on the exercise of such care."*

Two well-established examples are then given of a hospital in relation to its patients and a local education authority taking pupils into its schools.

v) In *Poole*, there was no sufficient pleaded case which alleged an assumption of responsibility. The council had provided social workers, had assessed the needs of the Claimants and had discussed them at meetings: para 78. [A226] However, the council's "*investigating and monitoring the claimant's position did not involve the provision of a service to them on which they or their mother could be expected to rely*". The council's social services duty "*did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care*": para 81.

[A226] There was nothing in the facts alleged about particular behaviour by the council other than the performance of statutory functions to enable an assumption of responsibility to be inferred: para 82. [A226-227] Similarly, the social workers did not provide advice or conduct themselves so as to induce reliance on their work: paras 87-88. [A228]

vi) Mr Levinson highlighted the cautionary words about striking out a case where assumption of responsibility is alleged (para.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."* [A228]

"*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*": para 82. [A227]

17. On the question of strike out, Mr Levinson also reiterated the point I noted at paragraph 2 of this judgment, cautioning against striking out claims in a developing area of law relying, for instance, on the observations in the speech of Lord Slynn in *W v Essex County Council [2001] 2 AC 592.*

18. I was referred to *Capital & Counties plc v Hampshire CC* [1997] QB 1004 at 1027B-1028D, for the proposition that in English law there is no doctrine of 'general reliance' under which there is some sort of presumption that members of the public, without more, rely on public bodies to protect them.

19. Mr Levinson referred me to the seminal case of *Hedley Byrne v Heller* [1964] AC 465 and specifically what is meant by reliance in various contexts: at 494-495. The point is made that, in the doctor and (unconscious stranger) patient example, the lack of awareness that someone is helping is not a bar to reliance.

20. Mr Stagg took me to *Kalma v African Minerals Ltd* [2020] EWCA Civ 144. That was an appeal against the striking out of claims by citizens of Sierra Leone against mining companies which had called the police to deal with unrest, supplying them with money and equipment, whereupon the police used excessive force on the Claimants. Their claims were based on allegations of both positive acts and negligent omissions by the mining companies and a failure to protect them from harm at the hands of the police. One of the grounds of appeal was that the Judge had analysed the case as being one of 'pure omissions'. Coulson LJ (with whom Irwin LJ and Dame Victoria Sharp P. agreed) held (para. 121):

> "*I agree with the judge that a court has to be very careful in over-analysing the potential difference between acts and omissions and the tortious liability that arises from each. I also agree with the judge that, merely because something can be presented as an act does not mean that what are, on a proper analysis, omissions can be, as the judge put it, "brought wholesale within the parameters of a duty of care"*."

21. Coulson LJ went on to hold (para.123) the underlying complaint made in that case "*was an omission: that the [defendant] had failed to protect the claimants from the harm caused by the [police]*".

22. I was also referred to three strike out decisions since *Poole,* but I will discuss those in more detail when applying the legal principles to the instant case in part V of this judgment. After all, those decisions were carrying out the same exercise of analysis on an interim basis with which I am tasked.

## IV. Application of the law

23. The Defendant submits that the social services here carried out a similar process of monitoring, investigation and assessment as in *Poole* and there is no arguable distinction in analysis. The same statutory functions were being exercised in both cases and, taking the broad approach in accordance with *Kalma*, the allegations are similarly those of failing to protect the First Claimant from the actions of third parties. Mr Levinson accepted early in his oral submissions for the First Claimant that this is a case of failing to confer a benefit (i.e. a failure to protect the First Claimant from harm caused by third parties), rather than any attempt to say that the local authority caused the harm.

24. The Defendant then develops the submissions to say that absent any real basis to say that a duty arises merely from what the social workers did, the First Claimant must, but is unable to, establish the existence of one of the exceptions to the rule.

25. The First Claimant counters that the Defendant in *Poole* was not in a position to protect the children and so could not be relied on to do so. The Court can only make a care order, where the child is exposed to significant harm attributable to a lack of parental care. There was no lack of parental care in that case; the harm was coming from outside the home in the form of anti-social behaviour and abuse by neighbours. So, Mr Levinson explains the distinction with *Poole* on the basis that there, social services could not be said to have been assuming a responsibility to do something which could never

lawfully be done. He contrasts that with the present case where the Claimants were suffering significant harm due to their mother's lack of parental care. So, he says that the outcome is different on the present facts. There was an assumption of responsibility (or at least arguably so for the purposes of determining this application).

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

i) Firstly, the inability to seek a care order in the circumstances of *Poole* was central to difficulties in establishing breach and causation (had they arisen for determination) and not to the existence of a duty at all;

ii) Secondly, I consider it apparent that the lack of an ability to remove the children was an additional and stand-alone reason why the claim was struck out rather than the sole reason. At para.90, Lord Reed observed (underlining added):

> "*Any uncertainty as to whether the case is one which can properly be struck out without a trial of the facts is eliminated by the <u>further difficulties that arise in relation to the breach of duty alleged</u>. The case advanced in the particulars of claim is that "any competent local authority should and would have arranged for [the claimants'] removal from home into at least temporary care". As King LJ explained, however, in order to satisfy the threshold condition for obtaining care orders under section 31(2) of the 1989 Act, it would be necessary to establish that the claimants were suffering, or were likely to suffer, significant harm which was attributable to a lack, or likely lack, of reasonable parental care. The threshold condition applicable to interim care orders requires the court to be satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2). <u>Nothing in the particulars of claim suggests that those conditions could possibly have been met. The harm suffered by the claimants was attributable to the conduct of</u>*

> *the neighbouring family, rather than a lack of reasonable parental care. There were simply no grounds for removing the children from their mother.*"

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

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

27. Mr Levinson gave an example of an assumption of responsibility in *X and Y v London Borough of Hounslow* [2009] EWCA Civ 286. The case concerned vulnerable adults who it was said should have been re-housed before they suffered assaults and sexual abuse inflicted in their home by local youths who, to the knowledge of the Defendant, had been harassing the Claimants. In fact,

the claim failed including because there was no breach of duty by the social worker. But Mr Levinson points to the observations made by Sir Anthony Clarke MR, at paras.95 and 98 including, "*...if anyone assumed a responsibility it can only have been Tajinder Hayre as the responsible social worker…"* Relying upon the endorsement of *Hounslow* in *Poole* (para.72), the First Claimant says that social workers, performing normal social work functions for vulnerable people can assume a responsibility to them.

28. I agree with Mr Stagg that caution must be exercised in taking passages in authorities out of context. The First Claimant's reliance on *London Borough of Hounslow* is such an example. The passages at paras.95 and 98 were in the context of a discussion about breach, rather than the existence of a duty at all.

29. Although relying upon other examples in the Particulars of Claim, Mr Levinson in his skeleton argument and submissions focussed on three examples, already set out above in the citation from that pleading, for the ways in which it was said the Defendant assumed a responsibility and otherwise created a duty of care namely:

    i) Paragraph 14(e), the July 1994 child protection conference and placing of the children's names on the child protection register. It is said the only possible purpose of this was to protect the Claimants. They were the only beneficiaries and were relying on the Defendant to undertake the task competently for their protection. The Defendant took on responsibility for devising safe plans etc., thereby providing a service, and created a duty of care to discharge those functions competently.

This contrasts with *Poole* because the steps were intended to ensure the mother acted responsibly.

ii) Paragraph 14(l), the November 1994 child protection investigation following an allegation of assault by the mother on the First Claimant. The decision was to seek legal advice about initiating care proceedings and undertake a full assessment, although the latter was not done. Mr Levinson builds on the uncontroversial proposition that a local authority owes a duty of care to children once they are taken into care, by saying that the required voluntary act giving rise to an assumption of responsibility is the decision to seek a care order. By deciding to progress towards a care order, the Defendant assumed responsibility for the protection of the Claimants, giving rise to a duty of care, breached by the failure to progress that plan.

iii) Paragraph 14(vv), the 27 January 2000 child protection conference arising from the report of Mr A touching the first Claimant's breast. The decision was to do keeping safe work, although this was not done. Keeping safe work is intended to make a child aware of the distinction between appropriate and inappropriate activities so that the child can take protective steps if concerned. Mr Levinson submits that this is a specialised professional service comparable to the work of an educational psychologist in a school and would undoubtedly amount to "*the performance of some task or the provision of some service for the claimant*" constituting an assumption of responsibility giving rise to a

duty of care. The Defendant should not escape liability for the failure even to commence the task.

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

31. As for the particular examples cited, the Defendant's response to those is compelling and, in my judgment, correct as an application of the law:

    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.

32. Although there are (as there always would be, even between closely analogous cases) some factual elements present in the history which differ from *Poole,* it does not involve a factual undertaking of responsibility being taken to be relied upon by the Claimants. I agree with the submission that save for the general plea of reliance in para.17 of the Particulars of Claim, there is no allegation here of reliance on any specific act or undertaking of the local authority and nor realistically could there be.

33. A duty of care is recognised to arise when a care order is made, because the local authority has parental responsibility. But up until that point, parental responsibility remains unequivocally with the parent(s). A duty of care cannot,

in my view, effectively be reverse engineered from the point at which a duty arises on the making of a care order, in the way that the First Claimant would wish. This involves saying that because the duty arises on the making of the order, so there is a duty to conduct any care proceedings brought competently; and so, there is a duty to decide whether to institute care proceedings competently; therefore, there is a duty to investigate competently to decide whether to bring care proceedings. That attempt to trace back a duty at an earlier and earlier stage does not provide a viable route to an arguable case here, in my judgment.

34. Although in the pleaded case, the First Claimant relies upon the other categories, where a duty may arise, as set out in the article cited at [16(iii)] above, those were not pressed home in the skeleton argument and were only briefly mentioned in oral submissions by Mr Levinson who put the assumption of responsibility at the core of the case. If that reflected an unspoken recognition that those other grounds probably could not save the case from a strike out, if an assumption of responsibility was not arguably made out, then that was a realistic approach to adopt.

35. But in case it becomes relevant, I will deal with those points, albeit more briefly as I do not consider that they assist the First Claimant:

i) *Adding to the danger* (paras.20-21 of the Particulars of Claim): it is said that the Defendant did this by "*endorsing the parenting provided to the Claimants…[and]…allowing [Mr D] and [Mr A] who were both known Schedule One offenders to live in the Claimants' home…[and]…did not remove [Mr D or Mr A] of the Claimant's from*

*the home"*. I do not follow how that was *adding* to the danger. The Defendant had no statutory power to remove partners of their mother from the home. The children could not be removed without a Court Order. The danger is created by those individuals coming into the home and that does not amount to the *Defendant* adding to the danger. The harm is something the Claimants are already being exposed to. The flaw in this proposition can also be confirmed by applying such a proposition to the *Poole* case. If correct, this proposition would have been a complete answer to the charge that there was no duty of care in *Poole*, if it could be said that the Defendant there added to the danger by not bringing the harassment to an end.

ii) *Failing to control wrongdoers* (paras.22 to 23 of the Particulars of Claim): again, this is a reference to Mr D and Mr A, *"…the only way of controlling their access to the Claimants was to remove the Claimants [from the home]"*. It is also a reference to the Claimants' mother and the same allegation is made that this probably could only have been achieved by removing the Claimants. Again, the difficulty here is that there was no right to control the behaviour of those third parties of a type which would be required to lead to an arguable duty. An example is the control which the Home Office had over the actions of the Borstal boys, who escaped whilst under supervision on an island visit and caused property damage in, *Home Office v Dorset Yacht Co Ltd* [1970] QB 1004. But here there was no such control over or right to control the wrongdoers. Furthermore, this would be tantamount, in my view, to the exception extinguishing entirely the effect of the rule of

non-liability for omissions, by creating a liability for all omissions which the case law indicates is incorrect as a proposition.

iii) *Preventing Others from Protecting the Claimant[s]* (paras. 24 to 25 of the Particulars of Claim]: the allegation here is effectively that other referrers, agencies and participants in child protection conferences would likely have taken further steps by making further referrals or taken action themselves which would have led to protective measures being put in place, had the Defendant not held out that it would investigate competently. Again, I do not think that this allegation raises any reasonable grounds for an arguable duty of care. There are no facts pleaded to the effect that another agency wanted to put in place protective measures but was dissuaded from doing so by the local authority. This exception to the rule does not appear to have any relevance to the facts as pleaded. The only effective measure would have been to remove the Claimants from the home. No other agency could or would practically have achieved that here. The Police have a limited power to take a child to a place of safety (see section 46 of the Children Act 1989) but are not meant to do so if an emergency protection order is in place or in contemplation. There is a reference in the history to the NSPCC, but Mr Levinson did not contradict Mr Stagg's explanation in his skeleton argument and oral submissions that the NSPCC has not exercised its notional power to bring care proceedings since 1993; it now liaises with local authorities to protect children. There is no realistic basis for saying that the Defendant prevented any other agency from providing protection.

36. The First Claimant also points to the minimal savings which it is said would be achieved by striking out the relevant claims, given the case relating to the allegation of 1999 disclosures to school staff will continue. Far from disposing of the whole claim, even without the relevant claims, detailed investigations and evidence will be required. The First Claimant submits that the outcome which should have followed that disclosure will inevitably involve consideration of the same factual background that pertains to the part of claim subject to the strike-out.

37. In my view, the overriding objective, of doing justice between the parties and the individual considerations to be taken into account, must be a factor in the Court's determination of this or any case management decision. But, even if I accepted the proposition that only minimal savings would be made, that could not, alone, trump the need to make a decision under CPR 3.4(2)(a) or permit a large proportion of a claim to proceed to trial where a party had established the threshold for striking out those parts of the opposing party's claim. But, here, the Defendant is correct to observe that there will in all probability be significant savings of time, costs and court resources if the case is shorn of the relevant claims. Looking at what action would have been taken by the local authority as a consequence of a report by the school is wholly different from examining the myriad other allegations on the question of liability, rather than merely as matters of background. It will be less time consuming and costly to investigate and determine the school allegation alone: resulting in fewer documents, fewer witnesses, fewer experts and a significantly shorter trial. But by parity of reasoning, those probable procedural advantages could not justify

a strike-out alone, the touchstone being the test in CPR 3.4(2)(a), qualified by the words of caution in *Poole*.

## V. Strike-out decisions since *Poole* and determination

38. The First Claimant submitted that there have been few reported strike-out decisions in cases concerning the existence of a duty of care since *Poole* and that an inference could be drawn, of a general recognition that the law is still developing, despite the Supreme Court opining on the scope of the duty. Mr Levinson referred me to *Chief Constable of Essex v Transport Arendonk* [2020] EWHC 212 (QB) concerning a claim against the police arising out of goods stolen from a lorry while its driver was detained at a police station. It was said that the police had assumed a responsibility for the security of the lorry. Laing J held, on appeal, that the Recorder had been correct not to strike out the claim. This provides very limited assistance as that was a factual situation far removed from the present one, which is much closer to *Poole.* Indeed, I note that at para. 93, Laing J specifically recognised that different context in which *Poole* arose. There was no authority on point which precluded a duty of care: para.85. The outcome was therefore unsurprising in what appears to have been a novel situation.

39. The parties have identified two strike out decisions in actual abuse cases since *Poole*. Neither is binding on me but in reaching my decision I have had regard for their persuasive force.

40. In *Champion v Surrey CC*, an unreported decision of HHJ Roberts sitting in the County Court at Central London, the Court dismissed a strike out application in a claim brought against the same local authority for the exercise of its child protection services. Although there are naturally some differences, I have found it difficult to make a *material* factual distinction between the sort of child protection involvement by the local authority Defendants alleged in *Poole* and that alleged in *Champion* (although there is less detail on the facts in that judgment) or in the present case. I do not accept that such differences as there are change the legal analysis or the principles to apply. HHJ Roberts is an experienced Judge (including as a former QB Master) for whom I have considerable respect. But, on this occasion, I take a different view from him on the appropriateness of striking out cases on facts such as the present, which have apparent overlap with those in *Champion* and notwithstanding the words of caution about doing so in *Poole*.

41. Here, I consider that to avoid striking out would require the making of inappropriate distinctions, the undermining of the coherence of the law and be to ignore the importance of precedent where, as here, I consider there is a precedent, in determining whether a duty could arguably arise. Any of those escape routes would be contrary to *Robinson*. In any event, I do not consider that the threshold of an arguable assumption of responsibility is satisfied here, whatever the position may have been in that case. I understand that an appeal against the decision in *Champion* is pending, permission having been granted by a High Court Judge.

42. I prefer the approach taken by the Chief Justice of St Helena in *A v Attorney-General of St Helena* [2019] SHSC 1. That was also a case of sexual abuse on the Claimant by adults during her childhood and allegations that social services had failed to protect her from harm. Whilst each case of course turns on its own facts, what we are told of the circumstances and allegations there have parallels with this case: see paras. 25 to 26. The Chief Justice found, at para.28, that the case was squarely on all fours with *Poole*. The same point could be made in the present case. Whilst there are some factual differences, those do not alter the legal principles to be derived and applied.

43. The Chief Justice found that the involvement of the social services authorities with the Claimant did not give rise to an assumption of responsibility or, hence, to an arguable duty of care. I have reached the same conclusion here so, as in the case before the Chief Justice, the consequence is that the (relevant) claims should be struck out.

44. Whilst I have borne closely in mind the cautionary words in the authorities, including *Poole*, in my judgment this is a case where the allegations of an assumption of responsibility can and should be determined on a strike-out application. There is no real possibility that such a case might be made out so as to mean it should be permitted to proceed to trial. Notwithstanding it is a significant hurdle for a Defendant to overcome, especially in an application which turns on the absence of an arguable duty of care, in my view the application has been made out.

## VI. Conclusion

45. One can have nothing but sympathy for the shocking and long-standing abuse which the Claimants endured as children. But I must make my decision based not on the sympathy I feel but on the legal principles which apply.

46. My task has been to determine whether there are viable claims against the Defendant local authority arising out of their child protection activities in relation to the First Claimant. In the circumstances and for the reasons discussed above the relevant claims are, in my judgment, bound to fail as there is no arguable duty of care. Where there is a recent Supreme Court judgment which is on point or at least closely analogous, I do not accept that this can be described as a developing area of law (or a developing point within that area). Such a conclusion is not inconsistent with other aspects of abuse claim jurisprudence still developing. I reiterate the learning from *Robinson* about the importance of precedent, of maintaining the coherence of the law and avoiding inappropriate distinctions. Were I to accede to the First Claimant's response to the application here, I consider that I would be making inappropriate distinctions to avoid applying a clear precedent from the highest court, thereby allowing legally flawed claims to continue past the interim stage. To do so would be no kindness to the First Claimant only for the relevant claims to fail at trial, as I consider inevitable; better to focus on an arguable allegation (upon which it will be for others to rule on another occasion). It would also be contrary to the overriding objective to permit the relevant claims to proceed as it would result in significant further costs and court resources being expended

on the wider issues, beyond the much narrower point of the disclosure to the school.

47. In reality, whilst there are naturally some factual differences, there is 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.

48. It follows that the relevant claims, at paragraphs 1 to 30 of the Particulars of Claim, must be struck out. The alleged failure by the Defendant's school staff to act upon the report of abuse, in 1999 (see paras. 31 to 35 of the Particulars of Claim), is not subject to this application or the strike out and remains to be case managed and determined by the Court in the usual way.

## VII. Post-Script: Costs and Application for Permission to Appeal

49. Having circulated this judgment in draft, the parties provided a proposed consequential Order which was agreed save for two points. I am asked to resolve those two issues on paper based on the parties' succinct written submissions received by email.

### Costs

50. The parties agree that costs should follow the event and the First Claimant should pay the Defendant's costs of the application, subject to the restrictions

on enforcement arising from CPR 44 Section II (QOCS). I am asked summarily to assess those costs. I bear in mind all the circumstances but in particular the factors in CPR 44.4 in assessing the amount of costs. There are no relevant conduct issues. I do not have any detailed information on the value of the claim as this application was concerned with liability. It is not a catastrophic injury claim but it is a potentially significant multi track value claim which is of importance to both parties, particularly the First Claimant. There was a considerable amount riding on this application for both parties. Abuse claims raise issues of sensitivity and complexity requiring specialist skill and knowledge from the legal representatives and that was on display on both sides of this application. Time and effort had clearly been spent.

51. The First Claimant submits that the £10,934.50 (no VAT is claimed) sought by the Defendant is too high because this was a short application based on limited material and involved legal submissions in an area with which the Defendant's Counsel was already very familiar. In its brief written observations on costs, the Defendant, more accurately in my view, characterises this as a heavy application which required a good deal of preparation.

52. I consider that the only reason why the application was heard comfortably within the four hour time estimate was that both parties' Counsel had prepared helpful written submissions and addressed me orally with the economy and focus which only comes from assiduous preparation and mastery of the not inconsiderable volume of written material and authorities.

53. With those factors and submissions in mind, whether stepping back and looking at the total sum sought in the Defendant's costs schedule, or

scrutinising the component parts, I am unable to identify any aspects which appear disproportionately or unreasonably incurred or disproportionate or unreasonable in amount.

54. Comparisons between the sums claimed by each party usually need to be treated with caution, given the often different hourly rates, as here, and the different demands on those bringing and defending claims or making and responding to applications. But a cross-check against the c.40% higher sum of £15,443.33 (before VAT, so as to compare like-with-like) claimed in the First Claimant's costs schedule is a factor tending to confirm my above conclusion.

55. I therefore summarily assess the Defendant's costs of the application in the sum claimed of £10,934.50.

**Application for Permission to Appeal**

56. The First Claimant seeks permission to appeal my decision. In addition to the matters raised at the hearing, permission is sought because the First Claimant submits that this is a new and developing area of law where there have been a number of recent decisions on strike out applications in similar cases, which have been decided differently. An example is the case of *Champion* considered in paragraph 40 of the judgment. It is said that there are others. As there is to be an appeal in *Champion*, the First Claimant submits that it would be appropriate for this case to be considered on appeal at the same time as it is likely to be beneficial for the appellate court to consider a number of appeals together to test slightly different factual scenarios. Success on an appeal in *Champion* would make this case inconsistent with that approach which would lead to unfairness.

57. The Defendant is neutral on the question of permission to appeal.

58. Applying CPR 52.6, I may grant permission to appeal if I consider the appeal would have a real prospect of success, the First Claimant not submitting that there is some other compelling reason for the appeal to be heard.

59. For the reasons set out in my main judgment above, I do not consider that on the points I have had to determine, this is a new and developing area of law. I do not have details before me of any other strike out decisions post-*Poole* other than the two cases discussed in part V of this judgment. Therefore, I would not be in a position to determine whether it is appropriate for other cases to be considered on appeal at the same time as *Champion.* The Supreme Court, in *Poole*, has considered the question of duty of care in the exercise of child protection functions within the last two years. I have concluded that it did so in circumstances which are sufficiently analogous to those arising in this case to mean there is a binding precedent on me setting out the relevant legal principles to apply and none of the relevant exceptions which can create a duty have arguably been made out. I do not consider that there are real prospects of success in demonstrating otherwise and I refuse permission to appeal.

60. If, on an application to a High Court Judge, permission to appeal is granted, that appeal Court will be better placed to determine whether this appeal should be heard with any others, details of which it can consider but which are not before me, save the first instance decision (but not the appeal documents) in *Champion*.