UKSC 2022/0148

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IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

Neutral Citation of Judgment Appealed Against: [2022] EWCA Civ 1996

BETWEEN:

HXA	**Appellants**
-and-	
SURREY COUNTY COUNCIL	**Respondent**
AND	
YXA	**Appellants**
-and-	
WOLVERHAMPTON CITY COUNCIL	**Respondent**

SKELETON ARGUMENT

ON BEHALF OF THE APPELLANTS

Introduction

1. This is a request for the Court to strike out the cases of YXA and HXA against the decision of the Court of Appeal which made the judgment that the Appellants of both parties were in breach of their statutory powers under the **Children's Act 1989.** The Court of Appeal found that as a result of the errors relating to the judgment being compared to the case of ***Poole Borough Council v GN and Others [2020] AC 780***, the case was overturned which interferes with **sections 20 and 47 of the Children's Act 1989**.

2. The structure of this submission is as follows:

(a) Issues;
(b) Relevant Law;
(c) Grounds of Appeal;
(d) Conclusions.

3. The primary facts are undisputed and may be found in [CA 13-35]

A. Issues

4. Three issues will be dealt with:

(a) Whether the Court of Appeal erred in claiming *Poole* was not applicable to the case at hand;
(b) Whether this area of law is so underdeveloped that there are no applicable principles;
(c) Whether the Court of Appeals' interpretation of **s. 20 Children Act 1989** was incorrect;

It is submitted that the appeal should be struck out if any of these claims are found to be affirmative.

B. Relevant Law

5. The relevant law was considered at [CA 17-57] and is summarised as the following:

(a) The relevant law outlining the current principles regarding a public authority's duty of care is found at [65] of Lord Reed's judgment in ***Poole Borough Council v GN and Others [2020] AC 780*** and can be summarised as such: local authorities do not owe a duty of care when performing social welfare functions by default unless the local authority caused or created the source of the danger that caused the child harm, or the local authority assumed responsibility to protect the child from harm;

(b) ***Section 20 of the Children's Act 1989*** states that "every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation";

(c) ***Section 47 of the Children's Act 1989*** states that "the authority shall make, or cause to be made, such inquiries as they consider necessary to enable them to decide whether they should take action to safeguard or promote the child's welfare";

(d) The Criteria set in ***Hedley Byrne & Co Ltd v Heller & Partners Ltd (1964) AC 465 (HL)*** were brushed over [47] and are put up for interpretation under the application on *Poole*;

(e) ***DFX and Others V Coventry City Council [2021] EWHC 1382 (QB)*** must be considered for Lord Bakers' interpretation of it under s. 47 leaves uncertainty on what gives rise to an assumption of responsibility;

(f) To remind the court of established principles, we refer to ***Michael v Chief Constable of South Wales [2015] UKSC 2*** in addressing the promise to carry out a duty under s. 47;

(g) The Appellants look to ***Patel v Mirza [2016] UKSC 42*** for it reminds the court to look to the policy where there is uncertainty of the law;

(h) Under ***X v Bedfordshire CC [1995] 2 AC 633***, the Appellants move to strike out this case as no cause of action may be found.

6. Strike out criteria;

(a) Strike out—no reasonable grounds for bringing or defending the claim (CPR 3.4(2)(a)) 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 or defending the claim.

C. Grounds of Appeal

Ground 1: The Court of Appeal erred in disregarding the application of *Poole Borough Council v GN and Others [2020] AC 780* to the case at hand

7. On three grounds, the Court of Appeal wrongly urged caution in relying on ***Poole Borough Council v GN and Others [2020] AC 780***, instead suggesting that for the facts were different, it could not be relied upon in this area of law. The Appellants submit *Poole* applies to the law of assumed responsibility, therefore can be compared to the principles in our case.

(a) It was suggested that the facts of *Poole* were so different from the case at hand, it could not be applied as the harm in *Poole* arose from a third party, whereas the harm in YXA and HXA was from inside the house.

(b) Lord Justice Baker also identified that there needs to be "something more" to establish an assumption of responsibility.

8. The Appellants are in agreement that the facts of the case may differ from *Poole's* regarding where the harm was coming from, however, the principle that the council was not found responsible for causing further harm as they were merely performing their statutory duties lies at the heart of comparing the two cases.

9. At [97] in the Court of Appeals judgment, they held that the undertaking of keep safe work was intended to create reliance.

(a) Lord Reed in the case of *Poole* [69-81] clarifies that investigation under s. 47 does not amount to a service on which the claimants could expect to rely.

(b) Reliance on the performance of a service as a prerequisite to the finding of an assumption of responsibility is instructive. However, for social workers undertaking child protection

services such as investigating an act on behalf of the authority rather than for the children/ mother, there is no foreseeability of reliance as of fact.

10. We remind the court that overlooking these crucial principles will vastly widen the scope of law leaving room for uncertainty in many cases in the future. The positive act needs to be a set decision that amount to both parties being "akin to contract" to create reliance. The court may see this as a solution to establish what "something more" is needed.

11. The case of *Poole*, suggests looking at ***DFX and Others V Coventry City Council [2021] EWHC 1382 (QB)*** - Lord Baker in the Court of Appeal questions two elements of the decision in DFX:

    (1) Whether it was right to conclude that the commissioning of the report was for the local authority's benefit and not for the benefit of the child.

    (2) Whether it was right to say that it was not reasonably foreseeable that the child would rely upon the local authority to exercise reasonable care and skill when deciding whether to start care proceedings.

(a) The relevance of those doubts is that one recognized category of cases where a duty of care is owed to the child is where a local authority involves a specialist to provide an assessment.

12. At [103], Lord Baker applies the principle to HXA. He notes that the decision to seek legal advice with a view to initiate care proceedings and carry out a full assessment could amount to an assumption of responsibility. Further, he states that the agreement to do could amount to "something more", therefore amounting to an assumption of responsibility.

(a) Lord Baker is suggesting a duty of care may arise by the mere act of deciding to take a step, even if that step is subsequently not undertaken.

13. The comparison of DFX and HXA made by Lord Baker shows to be contradicting for reliance is not enough to give rise to a statutory duty. The principles of *Poole* are the same, thus those findings are sure to be applied to this case as it is still good law. The Court's findings here were erroneous because the reliance was unreasonable for the local authority provided no promises under s. 47 as it is not a provision of service intended for the claimants.

Ground 2: The Court of Appeal suggests this is a developing area of the law, yet overlooked established principles

14. In deciding if this case is to be struck out, Lord Baker suggests this is a "developing area of law" and the ramification of *Poole* are still being worked through at [100] and for that reason, it would be wrong to strike out a claim before the evidence has been heard.

15. The Appellants submit to the court we are in agreement that the law is always developing, however, we propose key principles are established and we should not stray away from the core statutory provisions.

16. The Court of Appeal ignored whether the "criteria" in ***Hedley Byrne & Co Ltd v Heller & Partners Ltd (1964) AC 465 (HL)*** were met on the pleaded facts in deciding whether the decision to investigate in order to assess the level of risk under s. 47 was an assumption of responsibility.

17. *Hedley Byrne* outlines two criteria for finding if there is an assumption of responsibility:

    (1) An assumption of responsibility by D to exercise reasonable care, judgment, expertise, and skill in the provision of goods or services.

    (2) Reliance on the advisor information given by the other party which was reasonable in the circumstances.

18. On two grounds, the Court of Appeal wrongly found that the claimant's reliance was reasonable:

(a) Firstly, the local authorities did not assure the claimant that work would be undertaken. The Court of Appeal's interpretation of "undertaking" was incorrect. We now refer the court to the case of ***Michael v Chief Constable of South Wales [2015] UKSC 2.*** Lord Touslon indicates that an assurance or "promise" is vital to establish an undertaking of a task. This promise will then be able to amount to reliance for the claimant may act upon this promise after the fact D's created reliance in following through with taking care of them.

(b) Secondly, the Court of Appeal overlooked the correct application of "reasonable grounds". Lord Bingham in ***Customs and Excise v Barclays Bank plc [2006] UKHL 28*** found that for reasonable reliance to occur, it must be indicated that A would have acted differently if it weren't for reliance on B.

19. If my Lords were to consider this, this claim shall be struck out on the grounds that the principles of an established category may be applied. Neglecting these principles imply that the court may be disregarding the previous decision of the Supreme Court, rather than following its set principles.

20. The Supreme Court's decision in ***Patel v Mirza [2016] UKSC 42*** further sets out established principles:

(a) It is more honest that the court looks at underlying policy factors and reaches a balanced judgment for reasons derived from them, rather than applying over complex rules that are not able to be simply applied in practice.

21. These points may be concluded by assessing the principles laid out in ***X v Bedfordshire CC [1995] 2 AC 633*** where it was struck out due to the lack of cause of action as no breach of a statutory duty or tort of negligence could be made out.

(a) The first point to note is that the Court of Appeal expressly stated it was not laying down any guidance about the circumstances in which a local authority assumes responsibility to give rise to a duty of care. That, according to Lord Baker, is a question of specific fact that can only be answered case by case.

22. The Appellants submit that all that the judgment does, strictly speaking, is conclude that the situation is not so unarguable from the point of view of a claimant that these cases should be struck out as there are established principles as revisited under this ground. Further, the Court of Appeal's judgment at [93] - [97] lacks substance where a promise is needed to create reasonable reliance for an assumption of responsibility to occur.

Ground 3: The Court of Appeal's interpretation of the Children Act 1989 s. 20 was mistaken

23. Lord Justice Baker in the Court of Appeal suggests that an assumption of responsibility in relation to children under s. 20 and not necessarily confined to the actual periods when the child was being accommodated. So, even for children who are accommodated for a short period, the responsibility of the local authority may extend beyond the specific period of accommodation [102].

(a) First, he states that in such circumstances, the conduct of the local authority 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.

24. Whilst Lord Baker refers only to the possibility of an assumption of responsibility "on certain facts", it is not clear why he has chosen that particular example if not to suggest that a duty of care would arise upon those facts.

25. The Appellants submit to the court that there is a statutory duty, but no common law duty because an assumption of responsibility could have been found by anything intrinsic to s. 20. As there is no common law duty, there is no assumption of responsibility because

there is nothing intrinsic to give rise to a duty of care. S. 20 is the operation of a statutory duty, which cannot amount to "something more" as it does not generate a common law duty of care.

26. Next, the Court of Appeal at [93] was incorrect in saying s. 20 gives rise to an assumption of responsibility. It must be considered in the context of the statutory backdrop against which the relevant actions were taken.

(a) The court is urged not to ignore leading authorities that set out established principles for s. 20 such as the case of ***Williams v Hackney London Borough Council [2019] AC 421.*** At [1], the difference between accommodating under s. 20 and placing a child under a care order is addressed.

(b) S. 20 does not amount to parental responsibility for the child. It is simply accommodating. It is a care order that establishes parental responsibility to the local authority - see **Children's Act s. 33(3).**

27. The Appellants submit that parental responsibility may give rise to an assumption of responsibility because reliance in this sense is considered to amount to "something more" which is intrinsic to the nature of the statutory function.

Conclusions

28. This Court is invited to strike out this appeal, and set aside the judgment of the Court of Appeal for the following reasons:

REASONS

(A) The case of *Poole* lies at the heart of the issues seen in this case, thus there is no question of law;

(B) The principles regarding an assumption of responsibility are established, deeming this not a developing area of law;

(C) The authority carrying out its duty under s. 20 to accommodate does not amount to a common law duty of care because there is not "something more" in that.

Counsel for the Appellants

Advocacy and the Law

18th May 2023