THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellants who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellants or of any member of their families in connection with these proceedings.

Trinity Term
[2019] UKSC 25
On appeal from: [2017] EWCA Civ 2185

JUDGMENT

Poole Borough Council (Respondent) *v* GN (through his litigation friend "The Official Solicitor") and another (Appellants)

before

Lady Hale, President
Lord Reed, Deputy President
Lord Wilson
Lord Hodge
Lady Black

JUDGMENT GIVEN ON

6 June 2019

Heard on 16 and 17 July 2018

Appellants
Elizabeth-Anne Gumbel QC
Iain O'Donnell
Duncan Fairgrieve
Jim Duffy
(Instructed by Leigh Day & Co)

Respondent
Lord Faulks QC
Paul Stagg
Katie Ayres

(Instructed by Wansbroughs Solicitors (Devizes))

1st Intervener
(The AIRE Centre)
Andrew Bagchi QC
Philip Havers QC
Hannah Noyce
(Instructed by Allen & Overy LLP)

2nd and 3rd Intervener
(Article 39 and Care Leavers Association)
Caoilfhionn Gallagher QC
Aswini Weereratne QC
Nick Brown
(Instructed by Simpson Millar LLP)

4th Intervener
(Coram Children's Legal Centre)
Deirdre Fottrell QC
Martin Downs
Tom Wilson
(Instructed by Coram Children's Legal Centre)

NB: 2nd to 4th Interveners – written submissions only

LORD REED: (with whom Lady Hale, Lord Wilson, Lord Hodge and Lady Black agree)

1. This appeal is concerned with the liability of a local authority for what is alleged to have been a negligent failure to exercise its social services functions so as to protect children from harm caused by third parties. The principal question of law which it raises is whether a local authority or its employees may owe a common law duty of care to children affected by the manner in which it exercises or fails to exercise those functions, and if so, in what circumstances.

The facts

2. The claimants, who have been given anonymity for the purposes of these proceedings and whom I shall refer to as Colin and Graham (not their real names), seek damages for personal injuries suffered while they were children living in the area of the respondent council. There has been no investigation of the facts, but the matters on which they rely, as set out in the particulars of claim, can be summarised as follows.

3. In May 2006 the claimants and their mother, whom I shall refer to as Amy (not her real name), were placed by the council in a house on an estate in Poole, adjacent to another family who to the council's knowledge had persistently engaged in anti-social behaviour. Colin was then nine years old and Graham was seven. Colin is severely disabled both mentally and physically, and requires constant care. The council made extensive adaptations to the house in order to meet his needs, and provided him with a "care package" through its child health and disability team. He had an allocated social worker. The support provided in respect of Colin was kept under review over the relevant period by the child health and disability team together with Colin's social worker. A core assessment of his needs was updated in November 2006.

4. Following the placement an incident occurred when children belonging to the neighbouring family sat on Amy's car and kicked a football against it. When she remonstrated with them they abused and threatened her. She reported the matter to the council's chief executive. As a result the police attended and issued a warning to the neighbouring family. This resulted in their targeting Amy and her family for harassment and abuse which persisted over a period of several years. It included vandalism of Amy's car, attacks on the family home, threats of violence, verbal abuse, and physical assaults on Amy and Graham. These incidents were reported to the council. Various measures were taken against the neighbouring family, including

eviction, the obtaining of injunctions, proceedings for contempt of court, anti-social behaviour orders, and the imposition of sentences of imprisonment, but the harassment nevertheless continued. When Amy's requests for assistance from the council and other agencies failed to bring the abuse to an end or to secure the rehousing of her family, she contacted councillors and Members of Parliament, prompting coverage by local and national media. This resulted in the Home Office commissioning an independent report, which was critical of the police and of the council's failure to make adequate use of powers available under anti-social behaviour legislation.

5. Graham expressed suicidal ideas during 2008, and in September 2009, aged ten, ran away from home leaving a suicide note. He was then provided with psychotherapy by the local health authority. A social worker undertook an initial assessment of his needs in October 2009, concluding that Amy should be referred to mental health services and that a core assessment of Graham's needs should be carried out by the council's family support team. That assessment was completed in February 2010. Graham was then allocated the same social worker as Colin. In May 2010 the strategic manager for children's services acknowledged that the initial assessment had been flawed. In July 2010 a child protection strategy meeting decided that the risk of Graham's harming himself should be managed under a child in need plan rather than through the child protection system. The child in need plan was completed later that month. In November 2010 the council concluded that its assessment of Graham's needs had been flawed and that a revised core assessment should be undertaken by Graham's social worker. Following its completion in June 2011, the council decided to undertake an investigation in relation to Graham under section 47 of the Children Act 1989 ("the 1989 Act"). The following month a child protection conference decided to make Graham subject to a child protection plan.

6. In the meantime it had been decided that the family should be rehoused away from the estate. A suitable house was identified, and the necessary adaptations were made. Amy and the children moved into their new home in December 2011.

7. It is alleged that the abuse and harassment which the children underwent between May 2006 and December 2011 caused them physical and psychological harm.

The history of the proceedings

8. The claim form which instituted the present proceedings was issued on behalf of Amy and the children in December 2014, following the striking-out of an earlier claim issued in 2012. The council is the sole defendant. Particulars of claim were served in April 2015. They advanced allegations under two limbs. The first was to

the effect that the council, in the exercise of its housing functions, owed Amy and the children a duty of care to protect them from abuse and anti-social behaviour by rehousing them. The second limb was to the effect that the council owed the children a duty of care in relation to the exercise of its functions under sections 17 and 47 of the 1989 Act, which are explained below, and failed to protect them from harm by allowing them to continue to live on the estate.

9. In April 2015 the council applied for the claim to be struck out. On 2 October 2015 Master Eastman acceded to the application and struck out the claim. The main focus of the hearing before him was on the first limb of the claim, and he dealt relatively briefly with the second limb. Referring to *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 and to the discussion in Charlesworth & Percy on Negligence, 10th ed (2001), he concluded that no duty of care arose out of the statutory powers and duties of local authorities under the 1989 Act.

10. The claimants appealed in relation to the second limb of the claim only. On 16 February 2016 Slade J allowed the appeal: [2016] EWHC 569 (QB); [2016] HLR 26. She considered that the principal issue arising was whether the decision of the Court of Appeal in *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151; [2004] QB 558, in which it declined to strike out a child's claim against a local authority arising from action which it had taken to separate her from her father following a negligent investigation of suspected child abuse, had been impliedly overruled by the decisions of the House of Lords in *Mitchell v Glasgow City Council* [2009] UKHL 11; [2009] AC 874 and of this court in *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] AC 1732. She concluded that it had not, and that there was no absolute bar to a negligence claim by a child against a local authority for failure to safeguard him or her against abuse. Whether a common law duty of care was owed by the council to the claimants would in her view depend upon a full examination of the facts. By an order of the same date she gave the claimants permission to amend their particulars of claim.

11. Amended particulars of claim were served in March 2016. These allege both a common law duty of care owed by the council and a duty of care owed by its social workers, social work managers and other staff allocated to the claimants or tasked with investigating their situation, for the breach of which the council is said to be vicariously liable. It is said that the claimants "rely in terms of the statutory backdrop giving rise to a common law duty of care on the statutory duty to safeguard the welfare and promote the upbringing of all children in a local authority's geographical area, as set out in sections 17 and 47 of [the 1989 Act]."

12. In relation to the council itself, it is said that it had a duty to protect children in its area, and in particular children reported to it as being at foreseeable risk of harm. Such a risk is alleged to have been communicated to the council in the present

case from July 2006, placing it under a duty to investigate whether the claimants were at foreseeable risk of harm, and thereafter to take reasonable steps to protect them from any such risk. The council is said to have "accepted a responsibility for the claimants' particular difficulties" in "purporting to investigate the risk that the claimants' neighbours posed to them and subsequently in attempting to monitor the claimants' plight". It is said that "in so far as such investigation is shown to have been carried out negligently and/or negligently acted on, the defendant is liable for breach of duty".

13. In relation to vicarious liability, it is said that each of the social workers and social work managers who was allocated as the social worker or manager for the claimants or tasked with investigating their plight owed them a duty of care. That duty is said to have included a duty to protect them from physical and psychiatric damage, to monitor their welfare, to arrange for the provision of such medical treatment as they required, to visit them and ascertain their views, wishes, anxieties and complaints, to ascertain whether either of them was at risk of harm from which their mother was unable to protect them, and in the event of such risk to remove them from such risk "using the discretion of the defendant to remove the claimants to a home where they would be safe". It is said that the social workers and social work managers knew or ought to have known that the claimants and their mother were being subjected to violence and abuse from which she was unable to protect them "due mainly to her own position and vulnerability as a victim of such violence and abuse", that Colin was being targeted for mockery because of his disabilities, and that Graham was being assaulted and was threatening to commit suicide.

14. In relation to breach of duty, it is said that the council "failed to assess the ability of the claimants' mother to protect her children from the level of abuse and violence they were subjected to", and "failed to assess that the mother was unable to meet the claimants' needs whilst she lived on the estate with them". As a result, it failed to remove the children from their home:

> "On the balance of probabilities competent investigation at any stage would have led to the removal of the claimants from home. A child in need assessment should with competent care have been carried out in respect of each claimant by September 2006 at the latest. By September 2006 no competent local authority would have failed to carry out a detailed assessment and on the balance of probabilities such detailed assessment if carried out competently would and should have led to the conclusion that each of the claimants required removal from home if the family as a whole could not be moved. With the information obtained by competent assessment in September 2006 on application to the court the defendant would have obtained at least respite care and if necessary by (sic) interim

> care orders in respect of each claimant. Any competent local authority should and would have arranged for their removal from home into at least temporary care."

15. The council appealed against Slade J's decision. On 21 December 2017 the Court of Appeal allowed the appeal: [2017] EWCA Civ 2185; [2018] 2 WLR 1693. Irwin LJ gave the main judgment, with which Davis and King LJJ agreed. Having considered the authorities in detail he concluded that two considerations in particular militated against liability. The first was the concern articulated in *X (Minors) v Bedfordshire County Council* and in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 that "liability in negligence will complicate decision-making in a difficult and sensitive field, and potentially divert the social worker or police officer into defensive decision-making". The second was the principle, illustrated by cases such as *Mitchell v Glasgow City Council* and *Michael v Chief Constable of South Wales*, that in general there is no liability for the wrongdoing of a third party, even where that wrongdoing is foreseeable. In his view, none of the exceptions to that general principle applied, since this was not a case in which the council, performing its social services functions, brought about the risk of harm or had control over the individuals representing the risk, nor had it assumed responsibility towards the claimants. The decision of the Court of Appeal in *D v East Berkshire* was in his view inconsistent with the subsequent decision of this court in *Michael*, where the majority had rejected an argument, based explicitly on *D v East Berkshire*, that the common law should be developed in order to achieve consistency with Convention rights. In his view the Court of Appeal was therefore not bound to follow its decision in the *East Berkshire* case, applying the doctrine of stare decisis as explained in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, 725-726. In those circumstances, there was no basis for holding the council liable for the wrongdoing of third parties.

16. King LJ added, in relation to the pleading quoted at para 14 above, that there appeared to be no understanding of the statutory basis upon which an order resulting in the removal of the claimants from their mother could have been made. She explained that where a mother did not consent to the removal of her children from her care under an interim care order, the local authority must satisfy the court, pursuant to section 38(2) of the 1989 Act, that there were reasonable grounds for believing that the threshold criteria mentioned in section 31(2) were satisfied: in particular, that the child concerned was suffering, or likely to suffer, significant harm attributable to the care given to him not being what it would be reasonable to expect a parent to give to him. On the facts of the case it seemed highly unlikely that it could be shown that there were reasonable grounds to conclude that the threshold criteria could be satisfied. Further, numerous Court of Appeal decisions had made it clear that satisfaction of the threshold criteria should not be equated with satisfaction of the case for the removal of a child from its parent. A care plan for the immediate removal of a child from its parent should only be approved by the court if the child's safety demanded immediate separation: see for example *In re G (Interim Care*

Order) [2011] EWCA Civ 745; [2011] 2 FLR 955. There was no such order as a "respite care order". She added that the pleadings should have particularised the broad basis on which it was said that the threshold criteria were capable of being satisfied, and why the council would have been permitted to remove the children from their mother. Had that been done, it would have been apparent that the proposal that they should be removed from their mother was legally unsustainable.

17. Davis LJ added at paras 117-118, in relation to the alleged duty to seek and obtain a care order under the 1989 Act:

> "It was never said that the mother was an unfit mother. She loved and cared for her (vulnerable) children. They loved and needed her. Nothing she did or did not do caused them any harm: it was the harassment of the neighbours which did. … In the circumstances of this case, there was no justification for potentially separating, without the mother's consent, mother from children, children from mother by use of care proceedings. To countenance care proceedings in the Family Court in order to overcome (or provide a subsequent remedy for) the problems caused by the neighbours on the estate would be, I would have thought, tantamount to an abuse of the process of that court."

The legislative context

18. The particulars of claim focus on sections 17 and 47 of the 1989 Act, although mention is also made of the Children Act 2004. No reliance is placed on the functions of local authorities under legislation relating to the provision of support to carers, the provision of housing, or protection from anti-social behaviour.

19. Section 17 appears in Part III of the 1989 Act, which is concerned with support for children and families. In particular, section 17 is concerned with the provision of services for children in need, their families and others. Section 17(10) defines a child in need:

> "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; or
>
> (c) he is disabled …"

Colin was a child in need as so defined, since he was disabled. Graham was also assessed to be a child in need in July 2010.

20. Under section 17(1) it is the "general duty" of every local authority "(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". For the purpose of facilitating the discharge of that general duty, every local authority has the specific duties and powers set out in Schedule 2. These include a duty to take reasonable steps to identify the extent to which there are children in need within their area, a duty to assess the needs of any child who appears to be in need, and a duty to take reasonable steps, through the provision of services under Part III of the Act, to prevent children suffering ill-treatment or neglect: paragraphs 1, 3 and 4 respectively. Under section 17(6) the services provided under that section may include providing accommodation.

21. Section 17(1) does not impose a duty to meet the needs of any particular child. Rather, it is to be read as imposing a duty on the local authority to provide a range and level of services appropriate to meet the various needs of children in its area: *R (G) v Barnet London Borough Council* [2003] UKHL 57; [2004] 2 AC 208, para 109. In relation to the provision of accommodation, it is necessary to bear in mind the observations of Lord Hope of Craighead in that case at paras 92-93, with which Lord Millett and Lord Scott of Foscote agreed:

> "92. … Although the services which the authority provides may 'include' the provision of accommodation (see section 17(6)), the provision of residential accommodation to rehouse a child in need so that he can live with his family is not the principal or primary purpose of this legislation. Housing is the function of the local housing authority, for the acquisition and management of whose housing stock detailed provisions are

> contained in the Housing Acts. Provisions of that kind are entirely absent from this legislation.
>
> 93. … A reading of that subsection [section 17(1)] as imposing a specific duty on the local social services authority to provide residential accommodation to individual children in need who have been assessed to be in need of such accommodation would sit uneasily with the legislation in the Housing Acts. As Mr Goudie pointed out, it could have the effect of turning the social services department of the local authority into another kind of housing department, with a different set of priorities for the provision of housing …"

22. Section 47 appears in Part V of the 1989 Act, which is concerned with the protection of children. In particular, section 47(1) imposes a duty on local authorities, where there is "reasonable cause to suspect that a child ... in their area is suffering, or is likely to suffer, significant harm", to make 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. Under section 47(3) those enquiries shall, in particular, be directed towards establishing (so far as material) "(a) whether the authority should make any application to the court, or exercise any of their other powers under this Act … with respect to the child".

23. Compulsory powers of intervention are provided in Parts IV and V of the 1989 Act. In particular, an application can be made to the court under section 31 for a care order or a supervision order, but in terms of section 31(2) such an order can only be made by the court if it is satisfied (so far as material):

> "(a) that the child concerned is suffering, or is likely to suffer, significant harm;
>
> and
>
> (b) that the harm, or likelihood of harm, is attributable to -
>
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him …"

An interim care order can be made under section 38 of the 1989 Act, but only if the court is "satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2)": section 38(2).

24. Even if these tests are satisfied at what has become known as the "threshold" stage, it remains to be considered at the "welfare" stage whether an order ought to be made. The Court of Appeal has held that interim care orders should be made only where the children's safety requires removal, and removal is proportionate in the light of the risks posed by leaving them where they are: *In re G (Interim Care Order),* para 22. In relation to care orders, the court must treat the welfare of the child as the paramount consideration, and any interference with article 8 rights must be proportionate: *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911, paras 32, 73 and 194-195.

Relevant developments in the law of negligence

25. It is accepted that the provisions of the 1989 Act which impose duties on local authorities do not create a statutory cause of action. The question is whether local authorities may instead be liable at common law for breach of a duty of care in relation to the performance of their functions under the Act. In order to answer that question, it will be necessary to consider a number of authorities decided over the period between about 1995 and the present day. Before doing so, it may be helpful to begin with an overview, necessarily stated in general and simplified terms, of how legal thinking about the liabilities of public authorities in negligence developed over that period. As will become apparent, the period has been marked by shifting approaches by the highest court. In its recent case law this court has attempted to establish a clearer framework.

26. As was explained in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] AC 736, paras 31-42, public authorities other than the Crown were traditionally understood to be subject to the same general principles of the law of tort, at common law, as private individuals and bodies: see, for example, *Entick v Carrington* (1765) 2 Wils KB 275 and *Mersey Docks and Harbour Board v Gibbs* (1866) LR 1 HL 93. That position might be altered by statute, by imposing duties whose breach gave rise to a statutory liability in tort towards private individuals, or by excluding liability for conduct which would otherwise be tortious at common law: see respectively *Gorris v Scott* (1874) LR 9 Ex 125 and *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430.

27. In particular, as Lord Reid explained in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1030, a person performing a statutory duty was liable for an act

which, but for the statute, would be actionable at common law, if he performed the act carelessly so as to cause needless damage. His liability arose because the defence which the statute provided extended only to the careful performance of the act. The rationale, Lord Reid explained, was that:

> "Parliament deems it to be in the public interest that things otherwise unjustifiable should be done, and that those who do such things with due care should be immune from liability to persons who may suffer thereby. But Parliament cannot reasonably be supposed to have licensed those who do such things to act negligently in disregard of the interests of others so as to cause them needless damage."

Lord Reid added at p 1031 that the position was not the same where Parliament conferred a discretion. If the discretion was exercised lawfully, then the act in question would be authorised by Parliament:

> "But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his power. Parliament cannot be supposed to have granted immunity to persons who do that."

28. Like private individuals, public bodies did not generally owe a duty of care to confer benefits on individuals, for example by protecting them from harm: see, for example, *Sheppard v Glossop Corpn* [1921] 3 KB 132 and *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74. In this context I am intentionally drawing a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better), rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale of the distinction drawn in the authorities, and partly because the distinction between acts and omissions seems to be found difficult to apply. As in the case of private individuals, however, a duty to protect from harm, or to confer some other benefit, might arise in particular circumstances, as for example where the public body had created the source of danger or had assumed responsibility to protect the claimant from harm: see, for example, *Dorset Yacht Co Ltd v Home Office*, as explained in *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15; [2004] 1 WLR 1057, para 39.

29. This traditional understanding was departed from in *Anns v Merton London Borough Council* [1978] AC 728, where Lord Wilberforce laid down a new

approach to determining the existence of a duty of care. It had two stages. First, it was necessary to decide whether there was a prima facie duty of care, based on the foreseeability of harm. Secondly, in order to place limits on the breadth of the first stage, it was necessary to consider whether there were reasons of public policy for excluding or restricting any such prima facie duty. These included, in the case of public authorities exercising discretionary powers, the supposed non-justiciability of decisions falling into the category of policy as opposed to operations. That two-stage approach had major implications for public authorities, as they have a multitude of functions designed to protect members of the public from foreseeable harm of one kind or another, with the consequence that the first stage inquiry was readily satisfied, and the only limits to liability became public policy, including the distinction between policy and operations.

30. The *Anns* decision led to a period during which the courts struggled to contain liability, particularly for "pure" economic loss (ie, economic loss which was not the result of physical damage or personal injury) and for the failures of public authorities to perform their statutory functions with reasonable care. Clarification of the general approach to establishing a duty of care in novel situations was provided by *Caparo Industries plc v Dickman* [1990] 2 AC 605, but the decision was widely misunderstood as establishing a general tripartite test which amounted to little more than an elaboration of the *Anns* approach, basing a prima facie duty on the foreseeability of harm and "proximity", and establishing a requirement that the imposition of a duty of care should also be fair, just and reasonable: a requirement that in practice led to evaluations of public policy which the courts were not well equipped to conduct in a convincing fashion.

31. Although the decision in *Anns* was departed from in *Murphy v Brentwood District Council* [1991] 1 AC 398, its reasoning in relation to the liabilities of public authorities remained influential until *Stovin v Wise* [1996] AC 923, where a majority of the House of Lords reasserted the importance of the distinction in the law of negligence between harming the claimant and failing to confer a benefit on him or her, typically by protecting him or her from harm. The distinction between policy and operations was also rejected. The resultant position, as explained by Lord Hoffmann in a speech with which the other members of the majority agreed, was that "[in] the case of positive acts, therefore, the liability of a public authority in tort is in principle the same as that of a private person but may be *restricted* by its statutory powers and duties" (p 947: emphasis in original). In relation to failures to perform a statutory duty, Lord Hoffmann stated at p 952 that "[i]f such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed".

32. Further clarification was provided by the decision in *Gorringe v Calderdale Metropolitan Borough Council*. In a speech with which the other members of the

Appellate Committee agreed, Lord Hoffmann reiterated at para 17 the importance of the distinction between causing harm and failing to protect from harm, in the context of a highway authority's alleged duty of care to provide warning signs on the road:

> "It is not sufficient that it might reasonably have foreseen that in the absence of such warnings, some road users might injure themselves or others. Reasonable foreseeability of physical injury is the standard criterion for determining the duty of care owed by people who undertake an activity which carries a risk of injury to others. But it is insufficient to justify the imposition of liability upon someone who simply does nothing: who neither creates the risk nor undertakes to do anything to avert it."

Lord Hoffmann also emphasised the difficulty of finding that a statutory duty or power generated a common law duty of care, observing at para 32 that it was "difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide".

33. Lord Hoffmann stressed at para 38 that the House was "not concerned with cases in which public authorities have actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care". For example, "[a] hospital trust provides medical treatment pursuant to the public law duty in the [National Health Service Act 1977], but the existence of its common law duty is based simply upon its acceptance of a professional relationship with the patient no different from that which would be accepted by a doctor in private practice." The duty in such a case "rests upon a solid, orthodox common law foundation and the question is not whether it is created by the statute but whether the terms of the statute (for example, in requiring a particular thing to be done or conferring a discretion) are sufficient to exclude it".

34. It took time for the significance of *Stovin v Wise* and *Gorringe* to be fully appreciated: they were not cited, for example, in *Smith v Chief Constable of Sussex Police* [2008] UKHL 50; [2009] AC 225. Confusion also persisted concerning the effect of *Caparo* until clarification was provided in *Michael* and *Robinson*. The long shadow cast by *Anns* and the misunderstanding of *Caparo* have to be borne in mind when considering the reasoning of decisions concerned with the liabilities of public authorities in negligence which date from the intervening period. Although the decisions themselves are generally consistent with the principles explained in *Gorringe* and later cases and can be rationalised on that basis, their reasoning has in some cases, and to varying degrees, been superseded by those later developments.

35. For the purposes of the present case, it is necessary to consider a number of decisions of the House of Lords concerned with local authorities' duties of care to children affected by their discharge of their statutory functions, together with some other cases in which the Court of Appeal's decision in *D v East Berkshire* was considered, and the decisions in *Mitchell*, *Michael* and *Robinson*.

X (Minors) v Bedfordshire County Council

36. The first authority which is germane to the present case is *X (Minors) v Bedfordshire County Council*, decided by the House of Lords in 1995. The case concerned a number of claims against local authorities, some relating to their functions under child care legislation and others to their functions as education authorities. All of the claims had been struck out as disclosing no cause of action.

37. In one of the child care appeals, the *Bedfordshire* case itself, five children brought claims for damages against the council for failing to exercise its statutory powers and duties (including those conferred or imposed by sections 17, 31 and 47 of the 1989 Act, and similar provisions in earlier legislation) so as to protect them from harm at the hands of their parents. In the other child care appeal, *M (A Minor) v Newham London Borough Council*, a child and her mother brought claims for damages against the council, the area health authority and a consultant psychiatrist employed by the latter. The case against the council was based on vicarious liability for the negligence of a social worker in its employment. It was alleged that he and the psychiatrist had been negligent when investigating allegations of child abuse. They interviewed the child without taking a full history of the mother's domestic circumstances, with the consequence that they mistakenly assumed, when the child referred to her abuser by his first name, that she was referring to the mother's partner, rather than to another man with the same first name who had previously lived at the mother's address. They then told the mother that her partner was the abuser, leading her to exclude her partner from her home. On the basis of the psychiatrist's and social worker's conclusion that the mother would be unable to protect the child from her partner, the child was taken into compulsory care and placed with foster parents, where she remained for almost a year. Eventually the mother obtained sight of a transcript of the interview, from which it was apparent that the child had not identified her partner as the abuser. She then informed the local authority, and the child was returned to her care.

38. It should be noted at the outset that the *Bedfordshire* and *Newham* cases were radically different from one another. In the former case, the allegation was that the council had failed to protect the children from harm inflicted by third parties. The question therefore arose whether there were circumstances, such as an assumption of responsibility to protect the children from harm, which placed the council under a common law duty to protect them. That question did not arise in the *Newham* case.

There, the allegation was that the council's employee had himself harmed the child, by negligently causing her to be removed from her home and detained against her will, with the result that she suffered a psychiatric disorder. Unlike in the *Bedfordshire* case, there was no need to establish an assumption of responsibility towards the child: that is not a necessary ingredient either of the tort of wrongfully depriving a person of her liberty, or of the tort of negligently inflicting a psychiatric injury. No such distinction was however drawn between the two claims.

39. Lord Browne-Wilkinson gave the leading speech, with which Lord Jauncey of Tullichettle, Lord Lane and Lord Ackner agreed. He began by dispelling confusion about some aspects of the law governing the liability of public authorities, concluding at pp 734-735 that "in order to found a cause of action flowing from the careless exercise of statutory powers or duties, the plaintiff has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory power or duty is not sufficient." He went on to explain at p 736 that the exercise of a statutory discretion could not be impugned unless it was so unreasonable as to fall outside the ambit of the discretion conferred:

> "It is clear both in principle and from the decided cases that the local authority cannot be liable in damages for doing that which Parliament has authorised. Therefore if the decisions complained of fall within the ambit of such statutory discretion they cannot be actionable in common law. However if the decision complained of is so unreasonable that it falls outside the ambit of the discretion conferred upon the local authority, there is no a priori reason for excluding all common law liability."

In these respects, Lord Browne-Wilkinson's approach accords with more recent authorities, as well as the older authorities to which he referred.

40. In relation to the *Bedfordshire* case, Lord Browne-Wilkinson convincingly rejected the contention that the statutory provisions created a cause of action for breach of statutory duty. In considering whether the circumstances were such as to impose a duty of care on the council at common law, Lord Browne-Wilkinson considered that questions arising from the policy/operational distinction could not be resolved at that preliminary stage. Nor could the question whether the council had acted in the reasonable exercise of its discretion. There remained the three issues mentioned in *Caparo*: whether the defendants could reasonably foresee that the claimants might be injured, whether their relationship with the claimants had the necessary quality of proximity, and whether it was in all the circumstances just and reasonable that a duty of care should be imposed. The first two of these issues were

conceded. The only question which required to be decided was whether it was just and reasonable to impose a duty of care.

41. In that regard, Lord Browne-Wilkinson concluded at pp 749-751 that there were a number of reasons of public policy for denying liability: the multi-disciplinary nature of the system of decision-making, the delicacy and difficulty of the decisions involved, the risk that local authorities would respond to the imposition of liability by adopting a defensive approach to decision-making, the risk of vexatious and costly litigation, and the availability of administrative complaints procedures. Lord Browne-Wilkinson also noted that *Caparo* required that, in deciding whether to develop novel categories of negligence, the court should proceed incrementally and by analogy with decided categories. The nearest analogies, in his view, were the cases where a common law duty of care had been sought to be imposed upon the police, in relation to the protection of members of the public, and upon statutory regulators of financial dealings, in relation to the protection of investors. In neither of those situations had it been thought appropriate to impose a common law duty of care: *Hill v Chief Constable of West Yorkshire* and *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175.

42. No claim was made in the *Newham* case on the basis of direct liability. In relation to the question of vicarious liability raised by that case, and also potentially by the *Bedfordshire* case, Lord Browne-Wilkinson accepted at p 752 that the social worker and the psychiatrist exercised professional skills, and that in general a professional duty of care is owed irrespective of contract and can arise even where the professional "assumes to act for the plaintiff" pursuant to a contract with a third party, as in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 and *White v Jones* [1995] 2 AC 207. The social worker and the psychiatrist had not, however, assumed any responsibility towards the claimants. Although the carrying out of their duties involved contact with or a relationship with the claimants, they were nevertheless employed or retained to advise the local authority and the health authority respectively, not to advise or treat the claimants. The position was not the same as in *Smith v Eric S Bush* [1990] 1 AC 831, where the purchaser of a house had foreseeably relied on the advice given by the surveyor to the building society which was going to lend money on the security of the property. Even if the advice tendered by the social worker to the local authority came to the knowledge of the child or his parents, they would not regulate their conduct in reliance on the report. The effect of the report would be reflected in the way the local authority acted. Nor was the position the same as in *Henderson v Merrett Syndicates*, where the duty of care to the claimants was imposed by the terms of the defendants' contract with a third party; so also in *White v Jones*. Lord Browne-Wilkinson concluded at p 753:

> "In my judgment in the present cases, the social workers and the psychiatrist did not, by accepting the instructions of the local authority, assume any general professional duty of care to

> the plaintiff children. The professionals were employed or retained to advise the local authority in relation to the well-being of the plaintiffs but not to advise or treat the plaintiffs."

Lord Browne-Wilkinson added that in any event, the same policy considerations which led to the view that no direct duty of care was owed by the local authority applied with at least equal force to the question whether it would be just and reasonable to impose a duty of care on the social worker and the psychiatrist. The psychiatrist also benefited from witness immunity.

43. The fundamental problem with this reasoning, so far as relating to an assumption of responsibility, is that as explained in para 38 above, the liability of the social worker and the psychiatrist in the *Newham* case did not depend on whether they had assumed a responsibility towards the child.

44. Lord Browne-Wilkinson's conclusion that there was no assumption of responsibility in the child abuse cases can be contrasted with his conclusion in the education cases, which concerned failures to diagnose and address special educational needs. He concluded in the first of those cases (the *Dorset* case) that a direct claim could lie against the local authority on the basis that it was offering a service to the public, namely the provision of psychological advice, which the claimant had accepted. By holding itself out as offering a service, it came under a duty of care to those using the service, in the same way as a health authority conducting a hospital under statutory powers was under a duty of care to those whom it admitted. There could also be vicarious liability for negligence on the part of the educational psychologists which the local authority employed to provide the service, and on whose professional advice the claimant's parents were said to have relied.

45. The position was similar in the second education case (the *Hampshire* case), which was based on vicarious liability for the negligence of a headmaster and an advisory teacher. Lord Browne-Wilkinson concluded that, whether it was operated privately or under statutory powers, a school which accepted a pupil assumed responsibility for his educational needs. The education of the pupil was the very purpose for which the child went to the school. The head teacher, being responsible for the school, came under a duty of care to exercise the reasonable skills of a headmaster in relation to such educational needs. The position was the same where an advisory teacher was brought in to advise on the educational needs of a specific pupil, whether he was consulted privately or was provided by the local authority. If he knew that his advice would be communicated to the pupil's parents, he must foresee that they would rely on such advice. Therefore, in giving that advice, he owed a duty to the child to exercise the skill and care of a reasonable advisory teacher.

Barrett v Enfield London Borough Council

46. The next case in the House of Lords concerned with local authorities' statutory responsibilities towards children was *Barrett v Enfield London Borough Council* [2001] 2 AC 550. The House declined to strike out a claim alleging that, in making or failing to make a number of decisions relating to a child who had been in its care throughout his childhood, a local authority had been in breach of a common law duty of care, and also alleging that social workers employed by the local authority had failed in a duty of care owed by them in carrying out its obligations to monitor the child's welfare. Most of the allegations concerned failures to confer benefits on the claimant.

47. The critical difference from *X (Minors) v Bedfordshire*, as Lord Slynn of Hadley explained in a speech with which Lord Nolan and Lord Steyn agreed, was that the claim in *Barrett v Enfield* related to conduct occurring after the child had been taken into care. Lord Slynn drew on the analogy of a school which accepted a pupil and thereby assumed responsibility for his educational needs, giving rise to a duty of care, as Lord Browne-Wilkinson had stated in *X (Minors) v Bedfordshire*, and that of a prison which had a prisoner in its custody, and consequently assumed responsibility for his physical wellbeing, again giving rise to a duty of care, as had been held in *R v Deputy Governor of Parkhurst, Ex p Hague* [1992] 1 AC 58. As Lord Hutton explained in his concurring speech, with which Lord Nolan and Lord Steyn agreed, the effect of taking the child into care was that the local authority assumed responsibility for his care. The statutory powers and duties might have provided the local authority with defences in respect of its specific acts or omissions, but that could not be decided without an investigation of the facts.

48. The committee rejected the argument that to impose liability on local authorities for careless acts or omissions in relation to a child in their care would be contrary to public policy. Lord Slynn approved at p 568 an observation in the Court of Appeal that the argument that imposing a duty of care might lead to defensive conduct "should normally be a factor of little, if any, weight". He also rejected the argument that the administrative remedies to which Lord Browne-Wilkinson had referred in *X (Minors) v Bedfordshire* were likely to be as effective as the recognition of a duty of care.

Phelps v Hillingdon London Borough Council

49. In *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 an enlarged committee of the House of Lords considered a number of claims alleging negligence in the assessment of children with special educational needs, with the result that they did not receive the educational facilities which would otherwise have

been provided. As in the *Bedfordshire* case, the claims were based on failures to confer a benefit. They were advanced both on the basis of the local authorities' vicarious liability for breaches of a duty of care owed by teachers and educational psychologists in their employment, and also on the basis that the authorities were themselves in breach of a duty of care owed to the children.

50. In the one case which had gone to trial (the *Phelps* case), it was established, contrary to the understanding on which the education cases had been decided in *X (Minors) v Bedfordshire*, that the local authority did not offer a psychology service open to the public, in the same way as a hospital is open for the purpose of treating patients. Instead, the psychology service was established to advise the local authority. Nevertheless Lord Slynn, with whose speech Lord Jauncey of Tullichettle, Lord Lloyd of Berwick, Lord Hutton and Lord Millett agreed, concluded at p 654 that "where an educational psychologist is specifically called in to advise in relation to the assessment and future provision for a specific child, and it is clear that the parents acting for the child and the teachers will follow that advice, prima facie a duty of care arises". Lord Clyde, with whose speech Lord Jauncey, Lord Lloyd, Lord Hutton and Lord Millett also agreed, emphasised at p 675 that the psychologist in the *Phelps* case was advising the child through her parents, as well as the local authority, since it was clear that they were going to rely on the advice in question. As in *X (Minors) v Bedfordshire*, the question whether the child (through his or her parents) was the intended recipient of professional advice, or could be expected to rely on advice provided to the local authority, was the key to whether there was an assumption of responsibility giving rise to a duty of care. Lord Millett commented at p 677 that this reasoning was based on the *Hedley Byrne* principle (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465).

51. In addressing counter-arguments based on public policy, the committee called into question much of the policy-based reasoning advanced by Lord Browne-Wilkinson in *X (Minors) v Bedfordshire*. The idea that the multi-disciplinary nature of decision-making was a good reason for denying the existence of a duty of care was rejected by Lord Slynn, Lord Nicholls and Lord Clyde at pp 655-656, 665-666 and 674 respectively. The risk of vexatious and costly litigation, and the availability of statutory complaints procedures, were also rejected by Lord Nicholls and Lord Clyde as reasons for refusing to recognise a duty of care, at pp 667 and 672 respectively.

D v East Berkshire Community NHS Trust

52. The case of *D v East Berkshire Community NHS Trust*, decided by the Court of Appeal in 2003, involved three appeals which were heard together. In the first appeal ("*East Berkshire*"), a mother claimed damages in respect of psychiatric injury alleged to have been suffered as a result of being falsely accused by doctors of

suffering from Munchausen syndrome by proxy. In the second appeal ("*Dewsbury*"), a father and his daughter claimed for psychiatric injury and financial loss resulting from unfounded allegations by doctors and social workers of sexual abuse, which led to the father and daughter being prevented from seeing one another for about a fortnight. The daughter's claim was thus analogous to that of the child in the *Newham* case considered in *X (Minors) v Bedfordshire*. In the third appeal ("*Oldham*"), parents claimed in respect of psychological distress suffered as a result of unfounded allegations by doctors of having inflicted injuries on their daughter, which led to the child being separated from her parents for almost a year. The *Dewsbury* appeal was thus the only case which concerned social workers and the local authority which employed them. The claims in the three appeals were brought against the local authority in the *Dewsbury* case, and the health authorities in the other two cases, on the basis of vicarious liability. In each case, the court of first instance had determined as a preliminary issue that no duty of care was owed. It was common ground in the appeals that the critical issue was whether the third element of the tripartite test understood to have been adopted in *Caparo*, that the imposition of a duty of care was fair, just and reasonable, was satisfied.

53. In that regard, the Court of Appeal noted that several of the policy factors which Lord Browne-Wilkinson relied on, in *X (Minors) v Bedfordshire*, had been questioned in *Barrett v Enfield* and *Phelps v Hillingdon*. Furthermore, the Human Rights Act 1998 had come into force since *X (Minors) v Bedfordshire* was decided. The effect of section 8 was to impose a potential liability on local authorities to compensate children where there was a failure to protect them from ill-treatment and neglect which infringed their rights under article 3 of the European Convention on Human Rights, and to compensate children and their parents where the children were taken into care, or prevented from having contact with a parent, in circumstances which violated their rights under article 8. Litigation of a kind which in *X (Minors) v Bedfordshire* the House of Lords had considered it important to avoid as a matter of public policy had therefore become, under statute, a potential consequence of the conduct of those involved in taking decisions in child abuse cases. In those circumstances, the court stated at para 81, "the reasons of policy that led the House of Lords to hold that no duty of care towards a child arises, in so far as those reasons have not already been discredited by the subsequent decisions of the House of Lords, will largely cease to apply". It concluded at para 84:

> "It follows that it will no longer be legitimate to rule that, as a matter of law, no common law duty of care is owed to a child in relation to the investigation of suspected child abuse and the initiation and pursuit of care proceedings. It is possible that there will be factual situations where it is not fair, just or reasonable to impose a duty of care, but each case will fall to be determined on its individual facts."

54. Although a duty of care might be owed to the child, the court considered that the position of the parents was different. In view of the potential conflict between the best interests of the child and the interests of the parents, there were in the court's view cogent reasons of public policy for concluding that, where child care decisions were being taken, no common law duty of care should be owed to the parents. Another way of expressing the point would have been to say that the imposition of a common law duty of care towards the parents would be inconsistent with the statutory framework, since it would interfere with the performance by the authority of its statutory powers and duties in the manner intended by Parliament.

55. Applying those conclusions to the facts of the individual appeals, the court concluded that no duty of care was owed to the mother in the *East Berkshire* case, the father in the *Dewsbury* case, or the parents in the *Oldham* case. On the other hand, *X (Minors) v Bedfordshire* could no longer be regarded as precluding the claim by the child in the *Dewsbury* case against the local authority for negligence in the manner in which its employees contributed to the child protection investigation. The court did not need to consider whether there had been an assumption of responsibility towards the child, since the doctors and social workers were alleged to have harmed her, rather than to have failed to protect her from harm.

56. The Court of Appeal's reasoning effectively knocked away the public policy objection to liability. It did not, however, undermine some other aspects of the reasoning in *X (Minors) v Bedfordshire*. It remained the position that, where a decision under challenge was taken in the exercise of a statutory discretion, it was necessary to establish that the decision fell outside the ambit of the discretion and was not, therefore, authorised by Parliament. It also remained necessary, in circumstances where a duty of care depended on an assumption of responsibility, to establish that there had been such an assumption of responsibility, and that the duty contended for fell within its scope.

57. The parents in *D v East Berkshire* appealed to the House of Lords. Their appeals were dismissed: [2005] UKHL 23; [2005] 2 AC 373. No issue was taken with the Court of Appeal's decision concerning the child in the *Dewsbury* appeal, and it was conceded that the doctors in the other appeals owed a duty of care to the children. Like the Court of Appeal, the House of Lords considered that the duty of care admittedly owed to the child in any case of suspected abuse would be compromised by the imposition of a concurrent duty of care towards the parents, since the interests of the parents might conflict with those of the child. In those circumstances, no duty of care could be owed to the parents.

58. Lord Nicholls, in a speech with which Lord Steyn, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood agreed, observed at para 82 that the law had moved on since the decision in *X (Minors) v Bedfordshire*:

> "There the House held it was not just and equitable to impose a common law duty on local authorities in respect of their performance of their statutory duties to protect children. Later cases mentioned by my noble and learned friend, Lord Bingham of Cornhill, have shown that this proposition is stated too broadly. Local authorities may owe common law duties to children in the exercise of their child protection duties."

The latter sentence made it clear that the House of Lords accepted that a duty of care could be owed to the child.

Later authorities

59. The case of *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465 was not concerned with social services, but it raised a question as to whether there were circumstances in which lower courts might not be bound by decisions of the House of Lords, in the light of contrary decisions of the European Court of Human Rights. In a speech with which the other members of the committee expressed agreement on that aspect of the case, Lord Bingham concluded that lower courts should normally follow precedents which are binding on them under the domestic principles of stare decisis. He admitted one partial exception to that rule. Explaining that there were a number of considerations which made *X v Bedfordshire* a very exceptional case, he stated at para 45 that on these extreme facts "the Court of Appeal was entitled to hold, as it did in para 83 of its judgment in *D* [*v East Berkshire*], that the decision of the House in *X v Bedfordshire*, in relation to children, could not survive the 1998 Act".

60. The case of *Mitchell v Glasgow City Council*, decided by the House of Lords in 2009, concerned the question whether a local authority owed a duty of care to warn one of its tenants that he might be in danger when it responded to previous violent behaviour towards him by his neighbour by inviting the neighbour to a meeting and telling him that continued anti-social behaviour could result in his eviction. Following the traditional approach re-established in *Stovin v Wise* and *Gorringe*, the local authority was held not to be under a duty of care to protect its tenant from harm inflicted by a third party. It was accepted that there were particular situations where a duty of care could arise, such as where the defendant had created the source of the danger, or where the third party was under the defendant's supervision or control, or where the defendant had assumed a responsibility to the claimant which lay within the scope of the duty alleged, but no such circumstances existed in the case at hand. No reference was made to the decision of the Court of Appeal in *D v East Berkshire*.

61. The case of *Michael v Chief Constable of South Wales Police*, decided by this court in 2015, concerned the question whether the police owed a duty of care to a person who made an emergency call reporting threats of violence by a third party. Following essentially the same approach as in *Stovin v Wise*, *Gorringe* and *Mitchell*, this court decided by a majority that no duty of care was owed. It was recognised that liability for harm caused by a third party could arise in certain situations, such as where the wrongdoer was under the defendant's control, or where the defendant had assumed a responsibility towards the claimant to protect her, but the situation in the case at hand was not considered to be of that kind.

62. In *Michael*, the decision of the Court of Appeal in *D v East Berkshire* was relied on in support of an argument that the common law should be developed in harmony with the obligations of public authorities under the Human Rights Act. That argument was however rejected by Lord Toulson, who observed that the same argument had also been rejected by the House of Lords in *Smith v Chief Constable of Sussex Police*. The majority of the court agreed. As explained earlier, the reasoning of the Court of Appeal in the *East Berkshire* case was not that, because the European Court of Human Rights had found violations of the Convention, it followed that British courts should follow suit under the law of tort. Rather, the reasoning was that, since claims could be brought under the Convention, it followed that claims could also be brought under the Human Rights Act: a possibility which pulled the rug from under some of the policy-based reasoning in *X (Minors) v Bedfordshire*.

63. Most recently, the decision of this court in 2018 in the case of *Robinson v Chief Constable of West Yorkshire Police* drew together several strands in the previous case law. The case concerned the question whether police officers owed a duty to take reasonable care for the safety of an elderly pedestrian when they attempted to arrest a suspect who was standing beside her and was likely to attempt to escape. The court held that, since it was reasonably foreseeable that the claimant would suffer personal injury as a result of the officers' conduct unless reasonable care was taken, a duty of care arose in accordance with the principle in *Donoghue v Stevenson* [1932] AC 562. Such a duty might be excluded by statute or the common law if it was incompatible with the performance of the officers' functions, but no such incompatibility existed on the facts of the case. The court distinguished between a duty to take reasonable care not to cause injury and a duty to take reasonable care to protect against injury caused by a third party. A duty of care of the latter kind would not normally arise at common law in the absence of special circumstances, such as where the police had created the source of danger or had assumed a responsibility to protect the claimant against it. The decision in *Hill v Chief Constable of West Yorkshire* was explained as an example of the absence of a duty of care to protect against harm caused by a third party, in the absence of special circumstances. It did not lay down a general rule that, for reasons of public policy, the police could never owe a duty of care to members of the public.

64. *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.

65. 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.

Assumption of responsibility

66. It is apparent from the cases so far discussed that the nature of an assumption of responsibility is of importance in the present context. That topic should be considered before turning to the circumstances of the present case.

67. Although the concept of an assumption of responsibility first came to prominence in *Hedley Byrne* in the context of liability for negligent misstatements causing pure economic loss, the principle which underlay that decision was older and of wider significance (see, for example, *Wilkinson v Coverdale* (1793) 1 Esp

75). Some indication of its width is provided by the speech of Lord Morris of Borth-y-Gest in *Hedley Byrne*, with which Lord Hodson agreed, at pp 502-503:

> "My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."

It is also apparent from well-known passages in the speech of Lord Devlin, at pp 528-529 and 530:

> "I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Norton v Lord Ashburton* [1914] AC 932, 972 are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. ... I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. … Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility."

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 and *Spring v Guardian Assurance plc* [1995] 2 AC 296. In the latter case, Lord Goff observed at p 318:

> "All the members of the Appellate Committee in [*Hedley Byrne*] spoke in terms of the principle resting upon an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill. Lord Devlin, in particular, stressed that the principle rested upon an assumption of responsibility when he said, at p 531, that 'the essence of the matter in the present case and in others of the same type is the acceptance of responsibility'. … Furthermore, although *Hedley Byrne* itself was concerned with the provision of information and advice, it is clear that the principle in the case is not so limited and extends to include the performance of other services, as for example the professional services rendered by a solicitor to his client: see, in particular, Lord Devlin, at pp 529-530. Accordingly where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct."

69. That approach is reflected in the cases previously discussed. 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.

70. It is convenient at this point to consider a submission advanced on behalf of the council in the present case, said to be supported by some recent decisions of the

Court of Appeal, that a public authority cannot assume responsibility merely by operating a statutory scheme. The submission was based primarily on the judgment of Dyson LJ in *Rowley v Secretary of State for Work and Pensions* [2007] EWCA Civ 598; [2007] 1 WLR 2861, paras 51-55, where it was held that the Secretary of State, in carrying out his statutory duty to make an assessment of child support maintenance, did not assume a responsibility towards the parent with care of the children in question. Dyson LJ focused on the requirement that responsibility must be "voluntarily accepted or undertaken", as Lord Devlin put it in *Hedley Byrne* at p 529: a requirement which, he held, was not met merely by the Secretary of State's performance of his statutory duty under the legislation.

71. That decision was followed in *X v Hounslow London Borough Council* [2009] EWCA Civ 286; [2009] 2 FLR 262, a case with similarities to the present case, where it was held that a local authority's social services and housing departments had not assumed a responsibility to protect vulnerable council tenants and their children from harm inflicted by third parties. Sir Anthony Clarke MR, giving the judgment of the Court of Appeal, observed at para 60 that the case was not one of assumption of responsibility unless the assumption of responsibility could properly be held to be voluntary. That was because "a public authority will not be held to have assumed a common law duty merely by doing what the statute requires or what it has power to do under a statute, at any rate unless the duty arises out of the relationship created as a result, such as in Lord Hoffmann's example [in *Gorringe*, para 38] of the doctor patient relationship." Since the claimants' case amounted to no more than that the council had failed to move them into temporary accommodation in breach of its statutory duty or in the exercise of its statutory powers, it failed because none of the statutory provisions relied on gave rise to a private law cause of action.

72. The correctness of these decisions is not in question, but the dicta should not be understood as meaning that an assumption of responsibility can never arise out of the performance of statutory functions. Dyson LJ based his reasoning in *Rowley* on the decision of the House of Lords in *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28; [2007] 1 AC 181, where the question was whether the bank had assumed responsibility to the Commissioners to prevent payments out of an account, by virtue of having been served with freezing orders. Dyson LJ cited Lord Bingham's statement at para 14 that there was no assumption of responsibility by the bank: they had no choice. Lord Hoffmann considered the question more fully. He observed at para 38 that a duty of care is ordinarily generated by something which the defendant has decided to do: giving a reference, supplying a report, managing a syndicate, making ginger beer:

> "It does not much matter why he decided to do it; it may be that he thought it would be profitable or it may be that he was providing a service pursuant to some statutory duty, as in

> *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 and *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223."

He added at para 39:

> "The question of whether the order can have generated a duty of care is comparable with the question of whether a statutory duty can generate a common law duty of care. The answer is that it cannot: see *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057. The statute either creates a statutory duty or it does not. (That is not to say, as I have already mentioned, that conduct undertaken pursuant to a statutory duty cannot generate a duty of care in the same way as the same conduct undertaken voluntarily.) But you cannot derive a common law duty of care directly from a statutory duty. Likewise, as it seems to me, you cannot derive one from an order of court."

73. There are indeed several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme. An example mentioned by Lord Hoffmann is *Phelps v Hillingdon*, where the teachers' and educational psychologists' assumption of responsibility arose as a consequence of their conduct in the performance of the contractual duties which they owed to their employers. Another example is *Barrett v Enfield*, where the assumption of responsibility arose out of the local authority's performance of its functions under child care legislation. The point is also illustrated by the assumption of responsibility arising from the provision of medical or educational services, or the custody of prisoners, under statutory schemes. 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*.

The present case

74. In the light of the cases which I have discussed, the decision in *X (Minors) v Bedfordshire* can no longer be regarded as good law in so far as it ruled out on grounds of public policy the possibility that a duty of care might be owed by local authorities or their staff towards children with whom they came into contact in the performance of their functions under the 1989 Act, or in so far as liability for inflicting harm on a child was considered, in the *Newham* case, to depend upon an

assumption of responsibility. Whether a local authority or its employees owe a duty of care to a child in particular circumstances depends on the application in that setting of the general principles most recently clarified in the case of *Robinson*. Following that approach, it is helpful to consider in the first place whether the case is one in which the defendant is alleged to have harmed the claimant, or one in which the defendant is alleged to have failed to provide a benefit to the claimant, for example by protecting him from harm. The present case falls into the latter category.

75. Understandably, the reasoning of Irwin LJ in the Court of Appeal in the present case did not follow the approach set out in *Robinson*, which was decided after the Court of Appeal had given its decision. The first consideration on which Irwin LJ placed particular emphasis, namely the concern expressed in *X (Minors) v Bedfordshire* and *Hill v Chief Constable of West Yorkshire* that liability in negligence would complicate decision-making in a difficult and sensitive field, and potentially divert the social worker or police officer into defensive decision-making, has not been treated as sufficient reason for denying liability in subsequent cases such as *Barrett v Enfield, Phelps v Hillingdon* and *D v East Berkshire*. His view that the decision of the Court of Appeal in *D v East Berkshire* had been implicitly overruled by *Michael* was mistaken: the decision in *D v East Berkshire* has not been overruled by any subsequent decision. In *Michael*, as explained earlier, this court rejected an argument which was said to be supported by *D v East Berkshire*, but it did not disapprove of the true ratio of that decision. More fundamentally, in cases such as *Gorringe, Michael* and *Robinson* both the House of Lords and this court adopted a different approach (or rather, reverted to an earlier approach) to the question whether a public authority is under a duty of care. That approach is based on the premise that public authorities are prima facie subject to the same general principles of the common law of negligence as private individuals and organisations, and may therefore be liable for negligently causing individuals to suffer actionable harm but not, in the absence of some particular reason justifying such liability, for negligently failing to protect individuals from harm caused by others. Rather than justifying decisions that public authorities owe no duty of care by relying on public policy, it has been held that even if a duty of care would ordinarily arise on the application of common law principles, it may nevertheless be excluded or restricted by statute where it would be inconsistent with the scheme of the legislation under which the public authority is operating. In that way, the courts can continue to take into account, for example, the difficult choices which may be involved in the exercise of discretionary powers.

76. The second consideration on which Irwin LJ based his decision, namely the principle that in general there is no liability for the wrongdoing of a third party even where that wrongdoing is reasonably foreseeable, is plainly important but, as he recognised, not conclusive in itself. In *Robinson*, this court cited at para 34 a helpful summary by Tofaris and Steel, "Negligence Liability for Omissions and the Police"

(2016) 75 CLJ 128, of the situations in which a justification commonly exists for holding that the common law imposes such a liability:

> "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."

77. The present case is not brought on the basis that the council was in the second, third or fourth of these situations. It was suggested in argument that a duty of care might have arisen on the basis that the council had created the source of danger by placing Amy and her family in housing adjacent to the neighbouring family. The difficulty of sustaining such an argument is however apparent from *Mitchell*, paras 41, 61-63, 76-77 and 81-82. As Lord Brown pointed out in the last of these passages, there is a consistent line of authority holding that landlords (including local authorities) do not owe a duty of care to those affected by their tenants' anti-social behaviour. It is also necessary to remember that there is no claim against the council based on its exercise of its functions under housing legislation.

78. The claim against the council is based instead on an assumption of responsibility or "special relationship". The particulars of claim state:

> "In purporting to investigate the risk that the claimants' neighbours posed to the claimants and subsequently in attempting to monitor the claimants' plight as set out in the sequence of events above, the defendant had accepted a responsibility for the claimants' particular difficulties and/or there was a special nexus or special relationship between the claimants and the defendant. The defendant purported to protect the claimants by such investigation and in as far as such investigation is shown to have been carried out negligently and/or negligently acted on the defendant is liable for breach of duty."

The "sequence of events" referred to is a chronology of events. In relation to investigation and monitoring by the council's social services department, it refers to the assignment of social workers to the claimants, to the various assessments of their

needs, and to meetings at which the appropriate response to Graham's behaviour was discussed.

79. Irwin LJ rejected the contention that there was an assumption of responsibility by the council on the ground that there was an insufficient basis to satisfy the approach of the Court of Appeal in *X v Hounslow London Borough Council* and *Darby v Richmond-upon-Thames London Borough Council* [2017] EWCA Civ 252. I have also come to the conclusion that the particulars of claim do not provide a basis on which an assumption of responsibility might be established, for the following reasons.

80. As Lord Browne-Wilkinson explained in relation to the educational cases in *X (Minors) v Bedfordshire* (particularly the *Dorset* case), 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 express or more commonly implied, usually from the reasonable foreseeability of reliance on the exercise of such care. Thus, whether operated privately or under statutory powers, a hospital undertakes to exercise reasonable care in the medical treatment of its patients. The same is true, mutatis mutandis, of an education authority accepting pupils into its schools.

81. In the present case, on the other hand, 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. It may have been reasonably foreseeable that their mother would be anxious that the council should act so as to protect the family from their neighbours, in particular by re-housing them, but anxiety does not amount to reliance. Nor could it be said that the claimants and their mother had entrusted their safety to the council, or that the council had accepted that responsibility. Nor had the council taken the claimants into its care, and thereby assumed responsibility for their welfare. The position is not, therefore, the same as in *Barrett v Enfield*. In short, the nature of the statutory functions relied on in the particulars of claim did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care.

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. Reference is made to an email written in June 2009 in which the council's anti-social behaviour co-ordinator wrote to Amy that "we do as much as it is in our power to fulfil our duty of care towards you and your family, and yet we can't seem to get it right as far as you are concerned", but the email does not appear to have been concerned with the council's functions under the 1989 Act, and in any event a duty of care cannot be brought into being solely by a statement that it exists: *O'Rourke v Camden London Borough Council* [1998] AC 188, 196.

83. I would therefore conclude, like the Court of Appeal but for different reasons, that the particulars of claim do not set out an arguable claim that the council owed the claimants a duty of care. Although *X (Minors) v Bedfordshire* cannot now be understood as laying down a rule that local authorities do not under any circumstances owe a duty of care to children in relation to the performance of their social services functions, as the Court of Appeal rightly held in *D v East Berkshire*, the particulars of claim in this case do not lay a foundation for establishing circumstances in which such a duty might exist.

84. The council is also sought to be held liable on the basis of vicarious liability for the negligence of its employees. That is an aspect of the case to which the Court of Appeal did not give separate consideration.

85. The particulars of claim state:

> "Each of the social workers and/or social work managers and other staff employed by the defendant who was allocated as the social worker or manager for the claimants or tasked with investigating the plight of the claimants owed to the claimants a duty of care."

It appears from the particulars of claim that social workers carried out assessments of the claimants' needs on the council's instructions, and provided the council (and others who may have been involved in decision-making) with information and professional advice about the children for the purpose of enabling the council to perform its statutory functions.

86. There is no doubt that, in carrying out those functions, the social workers were under a contractual duty to the council to exercise proper professional skill and care. The question is whether, in addition, they also owed a similar duty to the

claimants under the law of tort. That depends on whether the social workers assumed a responsibility towards the claimants to perform their functions with reasonable care. In considering that question, it may be helpful to compare the position of the social workers with the positions of the educational psychologists and the advisory teacher in *X (Minors) v Bedfordshire*, and the educational psychologists in *Phelps v Hillingdon*.

87. In the former case, Lord Browne-Wilkinson accepted in relation to the *Dorset* proceedings that the local authority could be vicariously liable for negligence on the part of its educational psychologists because they were providing professional advice to parents on which the parents had foreseeably relied. In the *Hampshire* proceedings, he accepted that an advisory teacher, brought in to advise on a pupil's educational needs, owed a duty to the child to exercise reasonable skill and care provided he knew that his advice would be communicated to the pupil's parents, and could therefore reasonably foresee that they would rely on such advice. In *Phelps v Hillingdon*, the duty of care of the educational psychologist towards the child was again based on the fact that it was reasonably foreseeable that the child's parents would rely on the advice provided. Those were all cases where the duty of care arose on the basis of the *Hedley Byrne* principle. In the present case, on the other hand, there is no suggestion that the social workers provided advice on which the claimants' mother would foreseeably rely.

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.

90. 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 further difficulties that arise in relation to the breach of duty alleged. 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). 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 the neighbouring family, rather than a lack of reasonable parental care. There were simply no grounds for removing the children from their mother.

Conclusion

91. The particulars of claim in these proceedings do not disclose any recognisable basis for a cause of action. The complaint is that the council or its employees failed to fulfil a common law duty to protect the claimants from harm inflicted by their neighbours by exercising certain statutory powers. The relevant provisions do not themselves create a cause of action. Reliance is placed on an assumption of responsibility arising from the relationship between the claimants and the council or its employees, but there is nothing to suggest that those relationships possessed the necessary characteristics for an assumption of responsibility to arise. Furthermore, it is clear that the alleged breach of duty, namely a failure to remove the claimants from the care of their mother, has no possible basis. Although the court does not have before it all the evidence which might emerge at a trial, there is no reason to believe that the claimants could overcome these fundamental problems as to the legal basis of their claim. That being so, it is to the advantage of all concerned that the claim should not proceed to what would be a costly but inevitably fruitless trial.

92. For these reasons, which differ from those of the Court of Appeal, I would dismiss the appeal.