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

Michaelmas Term
[2023] UKSC 52
On appeal from: [2022] EWCA Civ 1196

JUDGMENT

HXA (Respondent) v Surrey County Council (Appellant); YXA (a protected party by his litigation friend the Official Solicitor) (Respondent) v Wolverhampton City Council (Appellant)

before

Lord Reed, President
Lord Briggs
Lord Sales
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
20 December 2023

Heard on 24 and 25 October 2023

Appellants
Lord Faulks KC
Paul Stagg
Thomas Jones
(Instructed by DWF Law LLP and Browne Jacobson LLP)

Respondents
Elizabeth-Anne Gumbel KC
Justin Levinson
(Instructed by Scott-Moncrieff and Associates Ltd and Bolt Burdon Kemp LLP)

LORD BURROWS AND LORD STEPHENS (with whom Lord Reed, Lord Briggs and Lord Sales agree):

1. Introduction

1. These two cases are concerned with claims in the tort of negligence brought against local authorities by HXA and YXA, who were children when they suffered sexual or physical abuse by a parent or parent's partner. It is alleged that the local authorities owed a common law duty of care to the claimants, when children, to protect them from that harm. The liability of local authorities in the tort of negligence for a failure to protect against harm by a third party has been explored and clarified by this court, in the context of alleged failures by a local authority's social services department, in *N v Poole Borough Council* [2019] UKSC 25, [2020] AC 780 ("*N v Poole*"). The decisions in these cases turn on the application of the decision and reasoning in that leading case.

2. The defendant local authorities have applied to have the statements of case struck out (under CPR r 3.4(2)(a)) as disclosing no arguable cause of action. Their applications succeeded at first instance and on appeal to a High Court judge, but the Court of Appeal overturned those decisions and held that the claims should not be struck out because it was arguable that there was a duty of care owed as alleged. The defendants now appeal to the Supreme Court.

3. It is common ground that, applying *N v Poole*, the claimants need to establish that there was a relevant assumption of responsibility by the local authorities. Accordingly, this appeal is concerned with whether the particulars of claim provide some basis for the leading of evidence at trial from which a relevant assumption of responsibility can be made out, in accordance with the principles in *N v Poole*, so that the local authorities arguably owed HXA or YXA a duty of care at common law to protect them from harm.

4. The claims are brought against the defendants in respect of both direct (ie personal) and vicarious liability. That is, it is alleged that each local authority was in breach of a duty of care that the authority itself owed to each claimant; and it is also alleged that social workers, employed by the local authorities, were themselves in breach of a duty of care such that the local authority, as employer, was vicariously liable for the tort of its employees committed within the scope of their employment. But in terms of the correct analysis of the law, it is common ground that nothing in this case turns on whether one is looking at the defendants' direct, or vicarious, liability. Not least for ease of exposition, it is therefore appropriate for us to focus throughout on the direct liability of the defendants.

2. Factual background

5. The court is required to determine the defendants' applications to strike out by reference to assumed facts as pleaded in the claimants' amended particulars of claim. In setting out a summary of assumed facts in each case it must always be borne in mind that there have been no factual findings in these proceedings and that not all the facts alleged in the two cases are admitted by the defendants in their defences. However, it is appropriate to highlight that it is clear that, as children, both HXA and YXA were subjected to severe abuse by, in the case of HXA, HXA's mother and her partner, and, in the case of YXA, by YXA's parents. As Baker LJ recorded, at para 2 of his leading judgment in the Court of Appeal, [2022] EWCA Civ 1196, [2023] 1 WLR 116, the background to both cases is "shocking and disturbing."

(a) HXA summary of alleged facts

6. We gratefully adopt the summary of the facts alleged in HXA's case as set out by Baker LJ in the Court of Appeal at paras 5 to 8.

> "5 HXA was born in 1988 and is now aged 33. She has three younger siblings, two of whom have learning disabilities. Their childhood was characterised by sustained abuse and neglect, perpetrated by their mother and at a later date by her partner Mr A, whom she met in 1996 and married a year later.
>
> 6 From at least September 1993, there were a series of referrals to the local authority, Surrey County Council, about the mother's inappropriate physical chastisement, verbal abuse and lack of supervision of her children. Between September 1993 and July 1994, five investigations were conducted under section 47 of the Children Act 1989. During this time, the names of HXA and her siblings were placed on the child protection register. In November 1994, after seeking legal advice, the local authority resolved to undertake a full assessment with a view to initiating care proceedings. In the event, however, no such assessment was carried out. The local authority continued to monitor the family but on at least some occasions no decisions or actions were taken despite ongoing concerns being reported.
>
> 7 In July 1996, HXA's mother formed a relationship with Mr A. Four years earlier, he had been convicted of assault on his own infant son. Thereafter concerns about Mr A's behaviour

> towards HXA and her siblings were raised with the local authority by several sources. In 1999, there were allegations of sexual abuse of HXA and her younger sister SXA by both Mr A and Mr A's father. It is alleged by HXA that she reported abuse to staff at her school which was run by the local authority's education department. In January 2000, it was recorded at a case conference that HXA had alleged that Mr A had touched her breast. The local authority decided not to investigate the matter due to fear of how Mr A would react and because it was wrongly thought that there had been no previous similar concerns. It resolved not to take any action beyond carrying out 'keeping safe' work with HXA and SXA. In the event, however, no such work was undertaken. In 2004, aged 16, HXA moved out of the family home.
>
> 8 In 2007, after SXA had made further allegations as a result of which she was removed from her mother's care under an emergency protection order, the police carried out an investigation during the course of which HXA was interviewed. As a result of this investigation, both Mr A and the children's mother were prosecuted. In January 2009, Mr A was convicted of seven counts of rape of HXA between the ages of nine and 16 and sent to prison for 14 years. Her mother was convicted of indecently assaulting her and sentenced to nine months' imprisonment."

(b) YXA summary of alleged facts

7. We also gratefully adopt the summary of the facts alleged in YXA's case as set out by Baker LJ at paras 13 to 14.

> "13 YXA, who is now aged 19, suffers from epilepsy, learning disabilities and autism spectrum disorder. Initially he lived with his parents in London where the family came to the attention of the local authority social services department. In 2007, when he was six years old, he moved with his family to the West Midlands. A few weeks after their arrival, an assessment by the local authority for that area, Wolverhampton City Council, identified concerns about his parents' ability to care for him. In March 2008, a paediatrician advised the local authority that YXA was being inappropriately and excessively medicated and recommended that he should be taken into care. Thereafter, under an

> agreement reached between the local authority and the parents under section 20 of the Children Act 1989, a pattern of respite care was established whereby YXA spent roughly one night a fortnight and one weekend every two months in foster care.
>
> 14 In the course of the next 18 months, further concerns arose about YXA's treatment in his parents' care. There were allegations that the parents drank and took cannabis to excess, that they physically assaulted YXA, and that they were continuing to administer medication excessively. Eventually in December 2009, the parents admitted smacking him and giving him excessive medication to keep him quiet. With their consent, YXA was accommodated full time under section 20. Care proceedings were then started and a final care order made in March 2011 on the basis of a care plan under which YXA remained in long-term foster care."

3. Procedural history and the particulars of claim as to an assumption of responsibility

8. We here set out a summary of the procedural history in respect of each case. Furthermore, as "the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred" (see *N v Poole* at para 82) it is appropriate at this stage to set out each claimant's (amended) particulars of claim which assert that there was an assumption of responsibility on the part of the defendants.

9. The claim form which instituted the proceedings on behalf of both HXA and SXA (HXA's younger sister) was issued in September 2014. Surrey County Council is the sole defendant. Lengthy extensions of time were agreed and endorsed by the court, in part to await the outcome of the proceedings which ultimately resulted in the judgment of this court in *N v Poole*. In the event, it was not until 23 October 2019 that particulars of claim were served in relation to both HXA and SXA. By a consent order in October 2019, SXA's claim was stayed pending the outcome of HXA's claim. In relation to HXA, the particulars of claim advanced allegations relating to both the defendant's social services department and the defendant's education department. The allegation relating to the defendant's education department concerned an occasion on which it is alleged that HXA had reported abuse to staff at her school which was run by the defendant's education department.

10. On 31 January 2020, the local authority applied to strike out the part of HXA's claim relating to the defendant's social services department. No application to strike out

was made in respect of that part of the claim concerning HXA's disclosures to the school and hence in respect of the claim relating to the defendant's education department.

11. On 15 February 2021, Deputy Master Bagot QC delivered judgment striking out those paragraphs of HXA's claim directed at the defendant's social services department but leaving in the paragraphs directed at the education department ([2021] EWHC 250 (QB)). An appeal notice was filed, and the appeal duly listed, along with the appeal in YXA's case, before Stacey J. On 8 November 2021, Stacey J handed down judgment dismissing the appeal ([2021] EWHC 2974 (QB)).

12. Turning to YXA, the claim form, which instituted the proceedings on behalf of YXA, was issued in July 2018. Southwark London Borough Council and Wolverhampton City Council were the defendants. In August 2019 particulars of claim were served against both defendants. YXA claimed damages in negligence or, alternatively, damages pursuant to the Human Rights Act 1998 on the basis of alleged breaches of YXA's rights under Article 3 (prohibition on inhuman and degrading treatment) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights. Southwark London Borough Council and Wolverhampton City Council made applications to strike out the negligence claims on 14 January 2020 and 30 July 2020 respectively. But there has been no application to strike out YXA's claim under the Human Rights Act 1998. In July 2020 YXA served a Notice of Discontinuance in respect of his claim against Southwark London Borough Council, leaving Wolverhampton City Council as the sole remaining defendant.

13. Wolverhampton City Council's strike-out application was heard by Master Dagnall who handed down judgment on 26 May 2021 striking out YXA's negligence claim ([2021] EWHC 1444 (QB), [2021] PIQR P9). An Appellant's Notice was filed, and the appeal duly listed, along with the appeal in HXA's case, before Stacey J. As stated above, Stacey J dismissed both appeals in a judgment handed down on 8 November 2021.

14. Both HXA and YXA appealed to the Court of Appeal. The Court of Appeal delivered judgment on 31 August 2022 allowing the appeals in both cases. Baker LJ gave the leading judgment, with which Lewis and Elisabeth Laing LJJ agreed.

15. In his judgment Baker LJ criticised the claimants' pleadings in both claims as being "at times excessively discursive": see paras 9 and 15 of his judgment. Excessively discursive elements included the pleadings in relation to an assumption of responsibility by the defendants. The technique adopted in both claims was to set out a long chronology described as a "sequence of events" which, in HXA's claim, stretched to 59 paragraphs summarising the involvement of the local authority with her and her family

over the entire period between 1993 and 2007. We agree with those criticisms of the claimants' pleadings made by Baker LJ.

16. In the event, in HXA's claim, out of those 59 paragraphs, the only pleaded matters relied on by her in the Court of Appeal were two paragraphs, namely paras 14(l) and 14(vv): see para 108 of Baker LJ's judgment. Similarly, only one of the paragraphs was relied on in YXA's claim, namely para 5.2: see paras 15 and 108 of Baker LJ's judgment. Those three paragraphs are the only particulars of claim relied on before this court as providing some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred.

17. It will be helpful to set out now those three paragraphs (and the paragraphs linking the alleging facts to an assumption of responsibility). Paras 14(l) and 14(vv) relate to HXA's claim that there was an assumption of responsibility by the defendant. Para 14(l) alleges:

> "In November 1994 there was a child protection investigation after the Defendant received a referral alleging that [HXA's] mother had assaulted [HXA]. The Defendant's social worker decided to seek legal advice with a view to initiating care proceedings. The Defendant resolved to undertake a full assessment, but did not do so."

Para 14(vv) alleges:

> "On 27 January 2000, a child protection conference was held. It was noted that [HXA] had reported that [Mr A] had touched her breast. The Defendant resolved not to investigate this due to fear of how [Mr A] would react and because it was wrongly thought that there had been no previous similar concerns. It was resolved to do keeping safe work with [HXA], although this was never done."

On the basis of those paragraphs (and it should be noted for completeness that neither paragraph referred to Mr A's father), it is alleged on behalf of HXA at para 15 of the particulars of claim that:

> "… the Defendant assumed responsibility for the welfare of [HXA] … [and] for investigating the plight of [HXA] …"

18. Turning to para 5.2, in relation to YXA's claim that the defendant assumed responsibility, para 5.2(a) alleges:

> "On 28 April 2008, a pattern began of [Wolverhampton City Council] receiving the Claimant into its care for approximately [one] night every [two] weeks and [one] weekend every [two] months with the Claimant's parents' agreement pursuant to section 20 of the Children Act 1989."

This pattern continued until YXA was taken into care, with his parents' consent, in December 2009. Under the heading of "Assumption of Responsibility", YXA, at para 6.10, identified the matters for which the defendant assumed responsibility as being:

> "… the Defendant … assumed a responsibility for his welfare, protection and safety."

4. The legislative context

(a) A general overview of the relevant legislative provisions

19. The legislative context involves consideration of various sections in Part III, Part IV and Part V of the Children Act 1989 ("the 1989 Act"). The provisions in those parts have been amended on several occasions since the commencement in October 1991 of most of the provisions in the Act. For the purposes of this appeal, we are concerned with the provisions which were in force between 1996 and 2004 in the case of HXA and between 2007 and 2009 in the case of YXA.

20. Several duties are imposed on local authorities in Parts III, IV and V of the 1989 Act. In considering the legislative context we will set out several of those duties. In addition to the duties imposed by the 1989 Act, section 11(2) of the Children Act 2004 imposes a duty on local authorities to make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children.

21. Before we turn to those duties, it is important to make clear that it is common ground that, in the light of the decision of the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, the provisions of the 1989 Act (and the Children Act 2004) which impose duties on local authorities do not create a statutory cause of action actionable in tort. That is, it is not suggested that breach of any of those

duties by either of the defendant local authorities gives rise to a claim for the tort of breach of statutory duty. We are also not concerned with the possible enforcement of those statutory duties through judicial review proceedings or by a claim for damages under the Human Rights Act 1998 (or conceivably for the tort of misfeasance in public office). Rather, the claims on behalf of HXA and YXA are advanced on the basis that the defendants owed them a common law duty of care based on an assumption of responsibility by the defendants. But we consider that, in analysing the common law duty of care, it is important as background context to understand the statutory duties (and powers) applicable to the operations of the social services departments of the local authorities in these cases.

22. Part III of the 1989 Act is concerned with support for children and families by local authorities. By way of contrast Part IV, which is headed "Care and Supervision", and Part V, which is headed "Protection of Children", are concerned with compulsory powers of intervention in the lives of children and their families.

23. Section 17, which appears in Part III, 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 ...."

24. Section 17(1) imposes a general duty on the local authority to provide a range and level of services appropriate to meet the various needs of children in its area. It does not impose a duty to meet the needs of any particular child. Section 17(1) provides:

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs."

25. Section 17(2) provides that, for the purpose principally 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, and to reduce the need to bring proceedings for care or supervision orders: paragraphs 1, 3, 4 and 7 respectively. As originally enacted, the services provided under section 17(6) "may include giving assistance in kind or, in exceptional circumstances, in cash". However, by an amendment effective from 7 November 2002 and therefore relevant, in point of time, to YXA's claim, the services provided under that section may include providing accommodation.

26. Section 20, which appears in Part III, is concerned with the provision of accommodation for children. Section 20 is relevant to YXA's claim as he relies, for there being an assumption of responsibility by the defendant local authority, on the provision of regular accommodation in foster care under section 20 between April 2008 and December 2009: see para 18 above. The section, in so far as relevant, provides:

> "(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—
>
> (a) there being no person who has parental responsibility for him;
>
> (b) his being lost or having been abandoned; or
>
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.
>
> …
>
> (4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare.

…

(6) Before providing accommodation under this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare—

(a) ascertain the child's wishes and feelings regarding the provision of accommodation; and

(b) give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as they have been able to ascertain.

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

(a) has parental responsibility for him; and

(b) is willing and able to—

(i) provide accommodation for him; or

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

objects.

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

27. Section 22, which appears in Part III, imposes further duties on local authorities. Section 22 is headed "General duty of local authority in relation to children looked after by them". In so far as relevant, it provides in section 22(3) that it shall be the duty of a local authority looking after any child "to safeguard and promote his welfare". Section 22(1) provides that any reference to a child who is looked after by a local authority includes "a child who is provided with accommodation by the authority in the exercise of any functions (in particular those under this Act)." As YXA was provided with

accommodation by the local authority under section 20, the local authority owed him a statutory duty under section 22(3) to safeguard and promote his welfare.

28. We agree with the observation of Baker LJ, at para 90 of his judgment in the Court of Appeal, that:

> "[t]here is a fundamental difference between the general duty under section 17(1) of the 1989 Act and the specific duty under section 22(3). Under section 17(1)(a) every local authority is under a general duty to safeguard and promote the welfare of children in need within their area by providing a range of services appropriate to their needs. Under section 22(3), a local authority looking after a child is under a specific duty to safeguard and promote his welfare."

29. Prior to 1 April 2011 further duties on local authorities were to be found in section 23, which appeared in Part III. Section 23 set out the ways in which looked-after children were to be accommodated and maintained. Furthermore, the Arrangements for Placement of Children (General) Regulations 1991 (SI 1991/890) made under section 23(2)(a), provided in regulation 3(1):

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

30. Section 31, which appears in Part IV, provides that an application can be made to the court for a care order or a supervision order. However, section 31(2) provides that 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 . . ."

If a care order is made, then "it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains in force": section 33(1). By virtue of section 22 (see para 27 above), receiving the child into their care places the local authority under an obligation to look after and to safeguard and promote the child's welfare. A further effect of a care order is to be found

in section 33(3)(a) which provides that "[w]hile a care order is in force with respect to a child, the local authority designated by the order shall—(a) have parental responsibility for the child." Section 33(3)(b) also provides that, while a care order is in force, the local authority has the power to determine the extent to which, for instance, a parent, may meet his or her parental responsibility insofar as it is necessary to do so to safeguard or promote the child's welfare. In this way the local authority can control the extent to which the parent should exercise responsibility. In contrast, a supervision order is designed to help and assist a child whilst leaving responsibility with the parents. If a supervision order is made then duties are placed on the supervisor including, for instance, a duty to advise, assist and befriend the supervised child: section 35(1).

31. An interim care order or an interim supervision 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). If an interim care order or an interim supervision order is made, then the interim orders shall have effect for such period as may be specified in the order or a shorter period if one of the events listed in section 38(4) occurs before the expiry of that specified period.

32. A further power to intervene in the lives of children and their families is to be found in section 44 of the 1989 Act headed "Order for emergency protection of children." Section 44(1) provides that "the court may make the order if, but only if, it is satisfied that" for instance, "there is reasonable cause to believe that the child is likely to suffer significant harm if … he is not removed to accommodation provided by or on behalf of the applicant". If an emergency protection order is in force then, amongst other matters, it authorises "the removal of the child at any time to accommodation provided by or on behalf of the applicant and his being kept there": section 44(4)(b)(i). It also gives the applicant parental responsibility for the child: section 44(4)(c).

33. Section 47(1), which appears in Part V, 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".

(b) Seven points on section 20

34. As we have mentioned, section 20 (set out in para 26 above) is of particular relevance to YXA's claim. In understanding that section more fully, we make seven points.

35. First, there is a clear distinction between the provision of accommodation pursuant to section 20 and compulsory intervention in the lives of children and their families under section 31 of the 1989 Act (set out in para 30 above). As Lady Hale stated in *Williams v Hackney London Borough Council* [2018] UKSC 37, [2019] AC 421, ("*Williams*") at para 1:

> "Compulsory intervention in the lives of children and their families requires the sanction of a court process. Providing them with a service does not."

36. Second, the parents retain parental responsibility throughout the period a child is being accommodated, but if a parent does agree to the removal or accommodation of her child under section 20 then:

> "… she is simply delegating the exercise of her parental responsibility for the time being to the local authority": see para 39 of *Williams*.

37. Third, by virtue of section 20(8) and at any time whilst a child is being accommodated, either one or both of his parents, without giving any notice and without expressing any reason, can remove the child from the accommodation.

38. Fourth, if the circumstances fall within section 20(1) there is a duty on the local authority to accommodate the child. If they fall within section 20(4) there is power to do so: see para 41 of *Williams*.

39. Fifth, a local authority should be thinking of the longer term in relation to children accommodated under section 20. At para 50 of *Williams,* Lady Hale stated:

> "Thus, although the object of section 20 accommodation is partnership with the parents, the local authority have also to be thinking of the longer term. There are bound to be cases where that should include consideration of whether or not the

> authority should seek to take parental responsibility for an accommodated child by applying for a care order . . .”

40. Sixth, it can be seen that there is a clear distinction in the circumstances in section 20(1)(c) giving rise, on the one hand, to the duty to accommodate and the circumstances in section 20(4) triggering the power to provide accommodation and, on the other hand, the threshold for compulsory intervention in the lives of children and their families under section 31.

41. Finally, there is nothing in section 20 to place a limit on the length of time for which a child may be accommodated but it is inappropriate and an abuse of section 20 to delay the issue of public law proceedings while accommodating children or young people: see *Worcestershire County Council v AA* [2019] EWHC 1855 (Fam) at para 13.

42. Accordingly, YXA, as a child accommodated under section 20, was owed a specific statutory duty by the defendant to safeguard and promote his welfare. We proceed on the basis that there would be potential failures to comply with the specific statutory duty owed to YXA under section 22(3) if the local authority did not think of the *longer term* or if it did not consider *whether or not it should seek to take parental responsibility for him by applying for a care order* (see para 39 above). The temporal reach of the specific statutory duty in respect of an accommodated child to safeguard and promote his welfare is not confined merely to the mechanics of his return to his parents.

43. However, as we have explained at para 21 above, the issue in these cases is not about the breach of a statutory duty by a local authority. It is about the different question of whether there is a duty of care owed at common law by a local authority to protect a child from harm. We can now turn to look in detail at the leading case on that question.

5. *N v Poole*

44. In *N v Poole*, the claimants were two children, referred to as Colin and Graham (not their real names). Colin was severely disabled both mentally and physically, and required constant care. Accordingly, he was a “child in need” under section 17 of the 1989 Act. In May 2006 the children with their mother were placed by the local housing authority in accommodation. They remained in the accommodation until they were rehoused in December 2011. Whilst in the accommodation the children were subjected to significant and persistent harassment and abuse by their neighbours, which was known about by the local authority. During the period May 2006 to December 2011 the local authority, exercising its social services functions, carried out initial and core assessments, child protection enquiries, and convened strategy meetings and child

protection conferences. In short, the local authority monitored, investigated and assessed the risks that the neighbours' harassment and abuse presented to both Colin and Graham. In 2008 Graham, because of the harassment and abuse, expressed suicidal thoughts. Thereafter, the local authority assessed the situation and, amongst other responses, referred Graham to mental health services. In July 2010, at a child protection strategy meeting, it was decided by the local authority that the risk of Graham harming himself should be managed under a child in need plan. In June 2011 the local authority decided to undertake an investigation in relation to Graham under section 47 of the 1989 Act. In July 2011 a child protection conference decided to make Graham subject to a child protection plan. However, by December 2011 ongoing harassment and abuse was no longer an issue as the children and their mother were rehoused away from the estate.

45. The claimants brought proceedings against the authority alleging that they had suffered physical and psychological harm as a result of the authority's breach of its common law duty of care to protect them from such abuse, derived from its statutory duties under sections 17 and 47 of the 1989 Act. Accordingly, *N v Poole* was concerned with the liability of a local authority for what was alleged to have been a negligent failure to exercise its social services functions so as to protect the children from harm caused by third parties. The principal question of law which the appeal in *N v Poole* raised was "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 [its social services functions], and if so, in what circumstances." (para 1).

46. That principal question of law arose in the context of an application by the local authority for the children's claim to be struck out on the basis that it was not arguable that a common law duty of care was owed to the children in respect of its functions under section 17 and 47 of the 1989 Act. The central allegation by the claimants in the amended particulars of claim was that there was an assumption of responsibility by the local authority, and hence a duty of care was owed, because the local authority "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." (para 12).

47. Master Eastman struck out the claim but his decision was reversed by Slade J. Her decision (not to strike out) was in turn reversed by the Court of Appeal. The claimants appealed to this court which dismissed the appeal. Lord Reed gave the sole judgment, with whom Lady Hale, Lord Wilson, Lord Hodge and Lady Black agreed.

48. Lord Reed set out how the legal thinking about the liabilities of public authorities in the tort of negligence had developed in recent years (over the period from about 1995 to the date of the judgment in *N v Poole*). During that period the courts had sought to re-establish the "traditional understanding" (para 29) that had been disrupted by the approach taken in *Anns v Merton London Borough Council* [1978] AC 728. That

traditional understanding had been explained by the House of Lords (particularly in the speeches of Lord Hoffmann) in *Stovin v Wise* [1996] AC 923 and *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057; and later by the Supreme Court in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 ("*Michael*") and *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 ("*Robinson*"). That understanding stressed the crucial distinction between acts and omissions or, in what Lord Reed considered to be more helpful language, between, on the one hand, harming the claimant and, on the other hand, failing to confer a benefit on the claimant, typically in the context of public authorities, by protecting the claimant from harm. A public authority would only be liable for a failure to protect the claimant from harm if a private individual would also have been liable, as where, for example, the defendant had created the source of danger or there was an assumption of responsibility by the defendant to protect the claimant from harm.

49. Based on his analysis of the past authorities from about 1995, especially *Michael* and *Robinson*, Lord Reed stated, in what may be regarded as the critical para (para 65) in his judgment, that:

> "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." (Emphasis added).

50. Lord Reed proceeded to discuss the nature of an assumption of responsibility by a public authority to protect a claimant from harm. He began by referring to the leading cases on an assumption of responsibility in the tort of negligence, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ("*Hedley Byrne*") and *Spring v Guardian Assurance plc* [1995] 2 AC 296, albeit that they were not dealing with public authorities or preventing harm by third parties but were rather dealing with misrepresentations causing pure economic loss.

51. At para 68, Lord Reed set out the approach in *Spring v Guardian Assurance plc* by reference to the observation of Lord Goff of Chieveley, 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."

52. Lord Reed was of the view that the requirement of, and the approach to, an "assumption of responsibility" in *Spring v Guardian Assurance plc* reflected the approach in several of the cases on the liability of public authorities which he had previously discussed. He stated, at para 69:

> "In *X (Minors) v Bedfordshire* [1995] 2 AC 633, 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* [2001] 2 AC 550, the local authority assumed responsibility for the welfare of a child when it took him into its care. In *Phelps v Hillingdon* [2001] 2 AC 619, 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."

53. Lord Reed rejected the submission that "a public authority cannot assume responsibility merely by operating a statutory scheme" (para 70) but made clear that the operation of a statutory scheme may generate an assumption of responsibility if the defendant's conduct pursuant to the scheme meets the criteria set out in cases such as *Hedley Byrne* and *Spring v Guardian Assurance plc*.

54. Lord Reed proceeded to apply those principles to the pleaded case of an assumption of responsibility in the particulars of claim. We have set out those particulars at para 46 above. Lord Reed held, at para 81, that the local authorities "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." He reasoned:

> "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 rehousing 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* [2001] 2 AC 550."

He concluded, at para 81:

> "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."

55. Lord Reed continued by stating at para 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*." (Emphasis added).

56. Lord Reed then considered whether the particulars of claim did 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. He concluded that the particulars of claim did not lay a foundation for establishing circumstances in which such a duty might exist. Accordingly, the appeal against the order striking out the claims was dismissed.

57. Lord Reed's judgment provides an authoritative guide to deciding whether there has been a relevant assumption of responsibility by the social services departments of local authorities. However, we would note at this stage, and shall return to the point below (see para 108), that care has to be taken in relation to the concept of reliance especially when considering claims by children.

6. *DFX v Coventry City Council*

58. Subsequent to the judgment in *N v Poole*, there has been one significant case that has proceeded to trial on the question whether a common law duty of care was owed by the local authority's social workers to the claimants: *DFX v Coventry City Council* [2021] EWHC 1382 (QB), [2021] PIQR P18 ("*DFX*").

59. *DFX* involved a claim brought by four claimants who had been members of a family of nine children with whom the local authority had been involved for 15 years, exercising its powers and duties in a variety of ways. Eventually in 2009, the local authority took care proceedings which resulted in care orders that placed eight of the nine children in long-term foster care. The claimants, who alleged that they had been abused and neglected by the parents, brought claims in the tort of negligence against the local authority. The local authority, which was sued as being vicariously liable for the social workers, contended, amongst other matters, that the social workers did not owe the claimants a common law duty of care.

60. Applying *N v Poole,* Lambert J held that, on the facts, the social workers and hence the defendant public authority did not owe the claimants a relevant duty of care at common law. She also dismissed the claims on the alternative basis that there was no breach of duty. She further rejected the claims on the issue of causation of damage.

61. In relation to the duty of care, Lambert J's essential reasoning was as follows:

(i) The relevant principles on a duty of care owed by public authorities were to be gleaned from the Supreme Court's decision in *N v Poole* (and prior to that *Michael* and *Robinson*). This was an omissions claim under which the claimants were alleging that the defendant had failed to confer a benefit.

(ii) Applying *N v Poole*, it was necessary to decide whether a private individual would have owed a duty of care and the question then turned on whether there was a relevant assumption of responsibility.

(iii) To decide whether there was that assumption of responsibility in a context where statutory duties were owed involved asking, colloquially, whether there was "something more" than the duty owed under the statute.

(iv) The facts were thought to be similar to the alleged facts in *N v Poole* and, for similar reasons to those given by the Supreme Court in that case, there was no relevant assumption of responsibility and hence no duty of care owed in this case.

7. The decisions of the courts below

62. As has been explained at paras 11 and 13 above, the claims of HXA and YXA in the tort of negligence, in respect of the defendants' social services functions, were struck out by, respectively, Deputy Master Bagot QC and Master Dagnall. Both decisions were then appealed to Stacey J who dismissed the appeals. But the Court of Appeal then allowed the appeals in both cases. It is helpful to look at the essential reasoning in the lower courts with particular emphasis on the Court of Appeal.

(a) The judgment of Deputy Master Bagot QC in HXA

63. The essential reasoning of Deputy Master Bagot QC was as follows:

(i) This case is indistinguishable from *N v Poole.* As it was held in that case that the claim should be struck out, because there was no arguable duty of care, so the claim should be struck out in this case.

(ii) The specific allegations in the pleadings, to the effect that there was an assumption of responsibility, could not succeed.

(iii) Certainly, a duty of care arises where a care order has been made because then the local authority has accepted parental responsibility. But one cannot reverse engineer back from when a care order is made to say that there is a duty of care at earlier stages.

(iv) As there was a Supreme Court decision on point (*N v Poole*), or at least closely analogous, one could not describe this as a developing area of the law so as to preclude a strike out.

(b) The judgment of Master Dagnall in YXA

64. It was accepted by Master Dagnall that there had been an assumption of responsibility, and therefore some duty of care was owed, during the actual periods when YXA was being accommodated and that this would extend to "the mechanics of the return" (para 90) to the parents' care at the end of that period. The question was whether the provision of such accommodation gave rise to a more extensive duty of care which extended beyond the period whilst YXA was accommodated.

65. The master considered that this question divided into two sub-questions, being: (1) whether the provision of the respite care accommodation gave rise to a more general duty of care including to consider taking care proceedings generally; and (2) whether it could give rise to a specific duty of care regarding whether the claimant should actually be returned to the parents at the end of the agreed respite care period, at least without care proceedings having been considered and, if appropriate, taken.

66. The master addressed and answered in the negative the first sub-question. He considered that the responsibility assumed was in relation to the provision of accommodation and matters linked to or flowing from that, not the position for the future once the accommodation had come to an end.

67. The master also addressed and answered in the negative the second sub-question. He considered that the local authority was under a statutory duty to return YXA to his

parents and as YXA was merely being returned back to the original situation, it was difficult to see why a duty of care would arise if it had not already arisen.

68. Accordingly, Master Dagnall struck out the claims in negligence that related to the defendant's social services functions.

(c) The judgment of Stacey J

69. Stacey J relied heavily on the distillation of the legal principles, derived in particular from *N v Poole,* in Lambert J's judgment in *DFX*. The judge rejected the submission that this was a developing area of the law given that the Supreme Court in *N v Poole* had clarified the approach and that the alleged facts were so closely analogous to those in *N v Poole* and *DFX.*

70. She explained that the essence of the claim was an allegation of a failure to take care proceedings timeously and not making things better. She also explained that to find the necessary assumption of responsibility "something else" (see paras 67, 70 and 76) was required distinct from merely complying with a statutory duty.

71. At para 65, the judge, relying on *N v Poole* at para 78, said that:

> "[i]t is beyond doubt that a local authority 'investigating and monitoring' a child's position and by 'taking on a task' or exercising its general duty [under] section 17, or placing a child on the child protection register, or investigating under section 47 does not involve the provision of a service to the child on which they can be expected to rely."

72. At para 67 she considered the assumed fact in respect of HXA contained in para 14(l) of the particulars of claim: see para 17 above. She stated:

> "The claim that the decision to undertake a full assessment in November 1994 gives rise to an assumption of responsibility is also unarguable. I agree with the deputy master - why must the fact of consideration being given to applying for a care order amount to an assumption of responsibility? [Counsel for the claimants] had no answer. A duty of care is recognised to arise when a care order is made, because at that point the local authority has parental responsibility under the Act, which is the 'something else' sufficient to amount to an assumption of

> responsibility. Resolving to seek legal advice and undertake a full assessment is not sufficient to amount to that extra something."

73. At para 68 she considered the assumed fact in respect of HXA contained in para 14(vv) of the particulars of claim: see para 17 above. She considered that, on a proper analysis, the criticism in relation to the decision to undertake keeping safe work was that the local authority had failed to institute care proceedings; and the claim was indistinguishable from *N v Poole*.

74. At para 70 she considered the assumed fact in respect of YXA contained in para 5.2 of the particulars of claim: see para 18 above. She observed that YXA's claim was advanced on the basis of an alleged duty of care which, if properly discharged, would involve the taking of care proceedings. She held that the fact of section 20 temporary accommodation could not be used as a peg on which to assert the assumption of responsibility. She added that "there is no logical reason why the provision of section 20 [accommodation] would make a difference" and considered that "it does not amount to the 'something else' needed to indicate an assumption of responsibility to take care proceedings". Rather, it was merely an assumption of responsibility of a duty of care in relation to the accommodation itself.

75. Accordingly, Stacey J dismissed both appeals.

(d) The judgment of Baker LJ in the Court of Appeal

76. Baker LJ stated at para 91:

> "Depending on the facts of the case, an assumption of responsibility may arise out of the local authority's conduct where it acquires parental responsibility for a child when granted a care order under section 31, as occurred in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, or an interim care order under section 38."

77. He continued by stating that in his view the circumstances in which a duty of care may arise are not confined to "cases where [the local authority] acquires parental responsibility under the Children Act 1989". Baker LJ then posed the question, at para 92, "In what other circumstances does a local authority assume responsibility for a specific child so as to give rise to a duty of care?" He considered that this question could "only be answered definitively on a case by case basis by reference to the specific facts of each case".

78. The central plank of Baker LJ's judgment is to be found at paras 100, 105 and 106. He stated, at para 100, that "this is still an evolving area of the law" and that "the ramifications of the change of direction heralded by the decisions of the Supreme Court in *Robinson* and *Poole* are still being worked through." Accordingly, he held at para 101 that "as this area of law is still developing, it would be wrong to reach a definitive conclusion and strike out a claim *before the evidence has been heard, the facts have been found and a thorough analysis of the exercise of those powers and duties has been undertaken at trial*." (Emphasis added). His starting point that these cases should go to a full trial because this was an evolving area of the law was repeated at para 105. He stated that as this is:

> "still an evolving area of the law … it will only be through careful and incremental development of principles through decisions reached after full trials on the evidence that it will become clear where precisely the line is to be drawn between those cases where there has been an assumption of responsibility and those where there has not. If the assumption of responsibility were to be confined to cases where a local authority had acquired parental responsibility under a care order, the line would be clear. But in my view that is not the effect of the decision in *Poole*."

He envisaged, at para 106, that "[in] due course, as a body of case law emerges, it will become easier at the outset of proceedings to identify the circumstances in which an assumption of responsibility can exist so as to give rise to a duty of care. At that point, there will be greater scope for striking out claims which on any view [fall] short of establishing a common law duty of care."

79. In relation to YXA's claim of an assumption of responsibility based on accommodation under section 20, Baker LJ stated at para 94 that, in his judgment, "contrary to the view expressed by Master Dagnall and endorsed by Stacey J, this potential assumption of responsibility is not necessarily confined to the actual periods when the child was being accommodated". It was incorrect to think that the assumption of responsibility "extended only to encompass 'the mechanics of the return' to the parents' care." Rather, "the responsibility may well extend beyond the specific period when they are being accommodated."

80. Again, in relation to YXA's claim, Baker LJ, at para 95, considered that the fact that the parents have the power under section 20(8) to remove the child from section 20 accommodation does not absolve the local authority from its statutory duty under section 22(3) to safeguard and protect the child's welfare. Rather, he envisaged that the conduct of the local authority pursuant to the statutory scheme relating to the accommodation of the child, may amount, on certain facts, to "something more" so that

the assumption of responsibility that arises therefrom may give rise to a duty of care at common law. We proceed on the basis that Baker LJ was giving this as an example of how the question as to whether a duty of care arose could only be answered by reference to the specific facts of the case established at trial.

81. The conclusion in relation to YXA's claim is to be found at para 102 of Baker LJ's judgment. He referred to the authorities of *Williams* and *Worcestershire County Council v AA* for the fact that "the circumstances in which a child may be accommodated under section 20 vary widely". As a consequence, he considered that "the extent of the responsibility assumed by a local authority when a child is accommodated under section 20 will plainly vary from case to case" so that "[w]hether or not there was an assumption of responsibility so as to give rise to a common law duty of care and, if so, whether there was a breach of that duty which caused or contributed to the damage suffered by YXA cannot be determined without a full investigation of the facts." Accordingly, he concluded that "this was not a claim which should have been struck out under CPR r 3.4(2)(a)."

82. As regards HXA's claim, Baker LJ stated, at para 96, that "a duty of care may arise in circumstances where a local authority, acting in accordance with its duties under statute, regulation, or statutory guidance, has taken, or resolves to take, a specific step to safeguard or promote the welfare of a child which amounts to an assumption of responsibility for a child." At para 97 he suggested that an example of circumstances where a local authority's resolution to take a specific step could give rise to an assumption of responsibility might be a decision to undertake or to commission a specific piece of work to assess the level of risk and/or protect a child from a particular type of harm.

83. The conclusion in relation to HXA's negligence claim is to be found at para 103 of the judgment. Baker LJ observed that the local authority was involved with the family for a number of years, exercising its statutory powers and duties. First, he referred to the assumed fact contained in para 14(l) of the particulars of claim: see para 17 above. Baker LJ stated that:

> "In November 1994, there was a child protection investigation after the local authority received a complaint that the child had been assaulted by her mother. A decision was taken to seek legal advice with a view to initiating care proceedings and to carry out a full assessment. It is alleged that those decisions were never implemented. It is to my mind at least arguable that, in resolving to take those steps, the local authority was assuming responsibility for the children."

Secondly, he referred to the assumed fact contained in para 14(vv) of the particulars of claim: see para 17 above. He stated that:

> "In 1999, an allegation of sexually inappropriate behaviour by the mother's partner was reported to the school. In January 2000, another allegation of sexual abuse by the mother's partner was reported to a social worker employed by the same local authority. In the light of that allegation, the local authority decided to take specific action designed to protect HXA and her sister, namely arranging for 'keeping safe' work to be carried out. It is to my mind at least arguable that, in deciding to carry out that work, the local authority was assuming responsibility for the children. …To my mind, the agreement to carry out keeping safe work could be said to amount to 'something more' so as to amount to an assumption of responsibility .... In those circumstances, it seems to me that it would be wrong to strike out this claim."

84. In conclusion, the Court of Appeal allowed both appeals.

85. Before leaving the judgment of Baker LJ, it is worth adding that he cited with apparent approval a suggestion made by Simon Deakin in a case-note on *N v Poole*, "Liability in Negligence in Providing a Public Good: Really Not So Different?" (2019) 78 CLJ 513, 516. This suggestion was that the fact-specific inquiry needed for a duty of care might mean that that this sort of case could be better dealt with on breach of duty and causation, rather than duty of care, grounds.

8. Our reasons for why there was no arguable duty of care in these cases

86. The following reasons explaining why, in our view, there was no arguable duty of care in these cases may all be said, in general terms, to flow from the decision and reasoning in *N v Poole.* As was said at the outset (see para 1 above), the decisions in these cases turn on the application of the decision and reasoning in that leading case.

(a) How the common law here interacts with statute

87. It is clear that a local authority has relevant statutory duties and powers under, for example, the 1989 Act (see paras 22-33 above). It is also established law (see para 21 above), as laid down in *X (Minors) v Bedfordshire CC*, that, in respect of such duties and powers, there is no cause of action for the tort of breach of statutory duty even if the breach of statutory duty is a negligent breach. That does not mean that the common law

tort of negligence has been excluded by statute. The statute is, in that respect, neutral. But what it does mean, as emphasised in *N v Poole* (see para 49 above), is that the courts must decide whether there is a duty of care at common law by applying to the public authority the same principles that would be applied if the public authority had been a private individual. See also, generally, the illuminating articles by MJ Bowman and SH Bailey, "Negligence in the Realms of Public Law – A Positive Obligation to Rescue" [1984] PL 277; SH Bailey and MJ Bowman, "Public Authority Negligence Revisited" (2000) 59 CLJ 85. It further means that one has to be very careful not to slide back to resting the duty of care, and breach, at common law on the mere fact that the public authority had statutory duties towards, and powers in respect of, the claimant. In our view, some of the submissions made by Ms Gumbel KC on behalf of HXA and YXA fell into this trap. That is, she sometimes relied on there being a statutory duty on the local authority to safeguard children in need as the very reason why there must be a duty of care owed to such children. As we have just indicated, what is required (which the courts, perhaps unhelpfully, have sometimes referred to - see paras 61(iii), 70, 72, 74, 80, 83 above - as the "something more" or "something else") is that there would have been a duty of care owed - because, for example, there is an assumption of responsibility - had the public authority been a private individual. This is not to deny that, assuming that there would otherwise be a common law duty of care owed, a particular statute may expressly or impliedly exclude that duty of care.

(b) The need for an assumption of responsibility

88. Applying the approach of looking at whether a private individual would have owed the children a duty of care to protect them from harm, it is clear that the claimants must here establish a relevant assumption of responsibility. This is because we are concerned with a failure to benefit the claimants by protecting them from harm by a third party. To establish liability for such a failure to benefit (which can be viewed as imposing liability for an omission), which is the exception rather than the rule in the common law, one of the recognised exceptional principles must be established. These principles were neatly encapsulated by Stelios Tofaris and Sandy Steel, "Negligence Liability for Omissions and the Police" (2016) 75 CLJ 128 in a summary which was cited and approved in *Robinson* and then in *N v Poole*.

> "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."

89. It was common ground that, of the relevant principles, only "assumption of responsibility" is here in play. For example, there was no suggestion that the defendants had made the position worse by preventing another from protecting the claimants.

90. As was observed by the Privy Council in *JP SPC 4 v Royal Bank of Scotland International Ltd* [2022] UKPC 18, [2023] AC 461 ("*JP SPC 4*"), at para 60, the principle of an assumption of responsibility has been criticised by some commentators as being elusive and tending to obscure the real reasoning: see, for example, Kit Barker, "Unreliable assumptions in the modern law of negligence" (1993) 109 LQR 461; and Christian Witting, *Street on Torts*, 16th ed (2021), pp 53-55. Other commentators consider it to be an important and distinctive source of legal obligation: see, for example, Donal Nolan, "Assumption of Responsibility: Four Questions" (2019) 72 Current Legal Problems 123. Certainly, the courts have continued to apply it and to find it useful not only in the context, with which we are here concerned, of liability in the tort of negligence for failures to benefit but also, as we have seen at para 50 above, in respect of claims in the tort of negligence for pure economic loss (which is what *JP SPC 4* was concerned with). The precise ingredients of an assumption of responsibility appear to vary according to the general context in which it is being used. As we shall see, for example, the notion of reliance that may be central to an assumption of responsibility in the classic area of pure economic loss for negligent misrepresentations, as laid down in *Hedley Byrne*, appears not to be a necessary requirement in the context with which we are concerned in these cases.

(c) There was here no relevant assumption of responsibility

91. It is very common for the language of "assumption of responsibility" to be used at a high level of generality. However, it helps to sharpen up the analysis always to ask, what is it alleged that the defendant has assumed responsibility, to use reasonable care, to do? Although Ms Gumbel framed the assumption of responsibility in several different ways, in essence she needs to satisfy the court that there was, arguably, an assumption of responsibility, to use reasonable care, to protect HXA and/or YXA from the abuse that the local authority was aware of or ought to have known about. If properly discharged, that duty of care would then have led, so it is alleged, to the local authority seeking a care order (whether interim or final), or an equivalent order (see para 32 above). In our view it is clear that there was no such assumption of responsibility.

92. In filling in the detail as to why there was here no arguable assumption of responsibility, it is important to consider the particulars of claim. We have explained earlier (see paras 16-18 above) that there are three relevant paras in the particulars of claim that provide the alleged details relied on by the claimants.

93. In relation to HXA's claim we have set out the particulars in paras 14(l) and 14(vv) at para 17 above. HXA alleges that an assumption of responsibility flows from the facts in those paras. Para 14(l) commences with the allegation that "there was a child protection investigation after the Defendant received a referral alleging that [HXA's] mother had assaulted [HXA]." Para 14(l) also alleges that "the defendant resolved to undertake a full assessment, but did not do so." In relation to the assault there are no particulars as to whether and, if so, what degree of violence was involved. We assume and proceed on the basis that it was a serious assault. We also assume and proceed on the basis that the investigation, which was carried out and the full assessment which was to be carried out, was an investigation and assessment under section 47 of the 1989 Act (see para 33 above). However, the nature of the statutory function relied on does not itself entail the local authority assuming responsibility towards HXA to perform the investigation with reasonable care. Furthermore, it is clear from para 81 of *N v Poole* (see para 54 above) that a local authority investigating HXA's position does not involve the provision of a service to HXA. Rather, the investigation is to enable the local authority to decide whether to bring care proceedings, which investigation would have involved determining the ability of HXA's mother and her partner (Mr A) to keep HXA safe, the level of risk to HXA and whether the section 31 threshold was met. In addition, no facts are alleged in the particulars from which it could be inferred that HXA had entrusted her safety to the local authority or that the local authority had accepted that responsibility. Para 14(l) also contains the allegation that "the Defendant's social worker decided to seek legal advice with a view to initiating care proceedings." Again, a local authority deciding to obtain legal advice does not involve the provision of a service to HXA. The legal advice would have been advice to, and for the benefit of, the local authority.

94. Turning to para 14(vv), this involves an allegation that the local authority resolved not to investigate HXA's report that Mr A had touched her breast but rather resolved to do, but in fact did not do, keeping safe work with HXA. Again, it is clear that a local authority investigating HXA's position does not involve the provision of a service to HXA so that an assumption of responsibility does not flow from the fact that an investigation has been carried out. Similarly, a failure to carry out an investigation is a failure in respect of the local authority's ability to decide whether to bring care proceedings. It is not a failure of a service to be provided to HXA. Furthermore, "keeping safe" work cannot be said, as alleged by HXA, to be an assumption of responsibility for her welfare or for investigating her plight, let alone an assumption of responsibility to use reasonable care to protect HXA from the abuse.

95. So, in HXA's case, internal decisions to carry out keep safe work and assessment, designed to keep the children safe within the family and to find out further information, fall significantly short of being an assumption of responsibility to use reasonable care to protect HXA from the abuse. They are merely initial steps to prepare the ground for a possible later application for a care order. There was therefore no relevant assumption of responsibility to HXA flowing from any of the facts alleged in

paras 14(l) or 14(vv); and there is no basis in those particulars for the leading of evidence at trial from which a relevant assumption of responsibility can be made out.

96. As regards the details of the particulars of claim in respect of YXA, these allege that an assumption of responsibility flows from the fact of a pattern of accommodation having been provided to him by the local authority under section 20 of the 1989 Act between April 2008 and December 2009: see para 5.2 in the particulars of claim set out at para 18 above.

97. Providing respite accommodation for YXA did not constitute an assumption of responsibility to use reasonable care to protect YXA from the abuse. The local authority was temporarily taking YXA away, with the consent of his parents, on the basis that he would be returned. Indeed, the local authority had a duty to return YXA to his parents: see paras 36 - 37 above. It would be flatly contradictory to say that the local authority had thereby assumed responsibility to protect YXA from the abuse in circumstances where it was under a duty to return him to his parents.

98. Furthermore, inherent in YXA's claim is an acceptance that the failure to investigate under section 47 and to commence care proceedings under section 31 did not amount to a relevant assumption of responsibility on the part of the local authority. In those circumstances it is difficult to see why a duty of care would arise, after a return from respite care, if it had not already arisen beforehand. Put another way, it is not alleged that there was here any significant change in circumstances during the period of respite care. As there was no assumption of responsibility to protect YXA from the abuse during the period when the child was in the parental home, there could be no such assumption of responsibility when the child was returned to the same situation as before.

99. There was therefore no relevant assumption of responsibility flowing from the facts alleged in para 5.2 and there is no basis in those particulars for the leading of evidence at trial from which a relevant assumption of responsibility can be made out.

100. As we shall explain below (see para 107), this is not to deny that there was a more limited assumption of responsibility during the period that YXA was with the foster parents. But that is not the relevant assumption of responsibility that YXA needs to establish in order to found the alleged duty of care.

(d) These cases are indistinguishable from N v Poole

101. The denial of an assumption of responsibility in these two cases is, in any event, dictated by the decision that there was no assumption of responsibility in *N v Poole*.

Given that in *N v Poole* there was no assumption of responsibility to protect children from their abusive neighbours, it is hard to see how there was an assumption of responsibility in our cases to protect the children from the abuse by a parent or parent's partner. Of course, there are some distinctions in the facts, most obviously that the harm was from neighbours rather than from inside the family, but essentially the decision in *N v Poole* is indistinguishable; and there has been no suggestion by Ms Gumbel that that case should be overruled. The parallels with the HXA case are especially clear. As Lord Faulks KC correctly noted in his written submissions, the actions of the local authority defendant in *N v Poole* included the carrying out of initial and core assessments, child protection enquiries and convening strategy meetings and child protection conferences (see para 44 above). And, as was said in *N v Poole*, investigating and monitoring the claimants' position did not involve the provision of a service or benefit by the local authority.

(e) After N v Poole this is not a developing or uncertain area of law

102. The judgments in the lower courts in our cases, of Deputy Master Bagot QC, Master Dagnall and Stacey J, and the decision of Lambert J after a trial in *DFX*, all indicate that the courts have not been finding it too difficult to apply *N v Poole* to decide that there was no assumption of responsibility in these types of case. In contrast, the Court of Appeal has thrown the area into doubt - and would make it very difficult to strike out - by incorrectly stressing that this is an unclear developing area of the law so as to require the evidence to be heard at full trials in order to establish a body of case law. As we have said, these cases turn on applying *N v Poole*. Our decisions in these appeals should remove any conceivable doubt that lawyers may have had in understanding the full impact of *N v Poole*.

103. We therefore agree with the insightful comments in a case-note on the Court of Appeal's decision by Douglas Brodie, "Child Protection Litigation: Opening the Floodgates?" (2022) 169 Rep B 3. He wrote, at p 3, that the Court of Appeal had "cast doubt on what appeared to be an increasingly settled position." And at p 5 he said: "The Court of Appeal do not offer anything by way of criteria that would help explain how an assumption of responsibility would arise in the context of a statutory framework. The overall approach remains vague and offers little to potential litigants."

104. It follows that our primary disagreement with Baker LJ is with his central reasoning that this is an unclear and still developing area of the law such that one ought not to strike out at a stage before the facts have been established. We also reject the idea, see para 85 above, that these matters are better dealt with by focusing on breach of duty or causation. Where it is clear that the pleadings do not disclose circumstances giving rise to a duty of care, the waste of costs inherent in an unnecessary full trial on breach and causation can be sensibly avoided.

(f) Conclusion

105. We therefore conclude that there was no arguable duty of care owed to the claimants in these cases. However, as we shall now go on to explain, this conclusion clearly does not mean that there can never be an assumption of responsibility, and hence a duty of care owed, by the social services department of a local authority to protect a child from harm.

9. Examples of an assumption of responsibility by the social services department of a local authority to protect a child from harm

106. We agree with Baker LJ that it is plainly incorrect to say that there can never be an assumption of responsibility by a local authority, in respect of social work functions, to protect a child from harm. The obvious example is where the local authority has obtained a care order and has thereby taken on parental responsibility for a child: see para 30 above. In that situation, therefore, the local authority has assumed responsibility to use reasonable care to protect the child from harm including harm from third parties. This is exemplified by *Barrett v Enfield London Borough Council* [2001] 2 AC 550 ("*Barrett*") which was explained and approved in *N v Poole* at paras 69, 73 and 81. Lord Faulks submitted that that case did not establish that there was an assumption of responsibility even where a care order had been obtained because the decision not to strike out was based on a number of factors including that, at the time the case was decided, the decision in *Osman v United Kingdom* (Application No 23452/94) (1998) 29 EHRR 245 was casting a shadow over English courts' general approach to a strike out application. We reject that submission. The decision in *Barrett* is correct and is not restricted in the way suggested by Lord Faulks.

107. We also agree with Baker LJ that it is incorrect to say that there can only be an assumption of responsibility where, as in *Barrett*, the local authority has obtained a care order. While acknowledging that there may be other examples of an assumption of responsibility arising on particular facts, it is helpful to focus on the YXA case. In our view, and in agreement with Master Dagnall (see para 64 above), by accommodating YXA under section 20 of the 1989 Act, there was an assumption of responsibility by the local authority during the time that the child was in respite care, including the mechanics of return, to use reasonable care to protect the child against harm including from third parties (and it should also be noted that, as laid down in *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355, in respect of abuse by the foster parents themselves, the local authority may be vicariously liable to the child for the torts of the foster parents). The assumption of responsibility flows from the fact that the child's safety has been entrusted to the local authority by the parents, the local authority has accepted that responsibility, and indeed the parents may be said to have delegated parental responsibility to the local authority (see para 36 above). If one thinks of the analogy of a private individual, a similar duty of care at common law

would arise if a private individual was requested by a parent to, then agreed to and did, accommodate the parent's child. The assumption of responsibility flows from the fact that the private individual was entrusted by the parent with the child's safety and accepted that responsibility. An assumption of responsibility would be for the period of time that the child was being accommodated (and in respect of the mechanics of return) so that the private individual would owe a common law duty of care to protect the child against harm including from third parties during that period of time.

10. A footnote on reliance

108. In the last two paragraphs, we have discussed situations in which there may be an assumption of responsibility, and hence a duty of care owed, by a local authority to protect a child from harm. That discussion suggests that it appears not to be a necessary feature of an assumption of responsibility in this area that there is reliance, in any real sense, by the claimant. For instance, in a case like YXA, where one has a vulnerable young child with learning difficulties, it would be inappropriate to insist on specific reliance by the child in order to find that there was an assumption of responsibility triggering a duty of care during the respite period.

11. Overall conclusion

109. Applying the leading case of *N v Poole*, there was no assumption of responsibility by the defendant local authorities to use reasonable care to protect HXA and YXA from abuse by a parent or parent's partner. Expressed at a more granular level, the particulars of claim provide no basis for the leading of evidence at trial from which a relevant assumption of responsibility can be made out. It follows that there is no arguable duty of care owed as alleged and the claims in both cases were correctly struck out at first instance. For all the reasons we have given, we would allow the appeals.