Neutral Citation Number: [2024] EWHC 1675 (KB)

Case No: J90LV003

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
On Appeal from the order of Deputy District Judge Jonson made on 22nd September 2023

Date: 01 July 2024

Before :

MR JUSTICE COTTER

- -

Between :

(1) DENIS HAMILTON
(2) HBC (acting by his litigation friend DENIS HAMILTON)

Appellants

- and -

THE LONDON BOROUGH OF SUTTON

Respondent

- -
- -

The First Appellant in person
Lisa Dobie (instructed by Kennedys Law LLP) for the Respondent

Hearing dates: 23 May 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 01 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Cotter:

1. This is an appeal against the order of Deputy District Jonson made on 22nd September 2023 dismissing the Appellant's application (dated 7th July 2022) for an interim payment and granting the Respondent's application (dated 12th August 2022) striking out the claim and in the alternative granting summary judgment.

2. Permission to appeal was given on three grounds by Mr Justice Constable by his order of 24th January 2024.

3. The first appellant Mr Hamilton, is the maternal uncle of the second appellant, who I shall refer to as HBC (I shall return to the issue of anonymity in due course) who was born on 30th September 2017 and lives with Mr Hamilton pursuant to a special guardianship order.

4. In short the issue which remains on appeal (given the grounds which were refused leave) is whether the Deputy District Judge was correct to find that no duty of care was owed by the Respondent to Mr Hamilton in the period before a special guardianship order was made and whilst HBC was subject to an interim care order obtained by the Respondent. It is Mr Hamilton's case that the Respondent, through is servants or agents, negligently failed to properly assess HBC's developmental progress and as a result failed to recognise (or potentially concealed) that HBC's behaviour was abnormal. In 2021 (so over two years after the special guardianship order was made HBC was diagnosed with autism, attention deficit hyperactivity disorder ("ADHD") and global developmental delay. It is Mr Hamilton's case that if the Respondent had complied with its duty of care to him as a potential special guardian and provided an adequate analysis of HBC's developmental issues he would not have accepted the guardianship. Further he has suffered personal injury and financial loss as a result of the Respondent's breach of duty.

5. At the outset I should acknowledge the excellent, professional standard of Mr Hamilton's written and oral submissions when dealing with the very complex legal issues in this case, and his courteous approach in Court. I do not shy away from saying it was of a much higher standard than I have encountered from a significant proportion of advocates over the years.

Background

6. HBC was born on 30th September 2017. His siblings were known to social services and whilst his mother was pregnant with him, she had been provided with support. After HBC's birth she reported difficulties coping with three children. Such difficulties were not in any way abuse related.

7. On 20th December 2017, whilst HBC was still living with his mother, it was noted within a multi agency child protection conference that HBC was meeting his milestones, gaining weight and feeding and sleeping well.

8. HBC and his siblings were made the subject of a child protection plan on 21st December 2017 and placed with foster carers on the 13th of February 2018.

9. The following day there was an initial hearing and an interim care order was made. HBC was placed with foster parents.

10. On 26th February 2018 the foster parents took HBC to a consultant paediatrician regarding potential issues arising from his traumatic birth. Dr Kundu found no concerns with his development. There was a follow up meeting in May, a head scan in June and a further review in October 2018. As set out in a letter dated 2nd November 2018 Dr Kundu was of the view that:

> "developmentally he seems on track".

In his description he noted that HBC:

> "does clap hands but does not wave bye bye yet",

He described HBC as a "bright, alert, playful child". The Clinical impression was recorded as

> "satisfactory growth and development".

11. The Foster carers maintained detailed records of HBC's development. A document was prepared entitled "All about HBC" dated October 2018 which set out his average day with his routine and details of his behaviour. He was described as a friendly and "quite a laid back" little boy who happily plays with toys independently, likes to interact with toys and books with an adult and when placed alongside children of around his age interacts appropriately. The document states:

> "Dr Kundu, the paediatric consultant at St Helier, who treated (him) at birth (resuscitation) has seen (him) twice since he has been in care. He is very happy with the (sic) HBC's development. HBC has achieved all developmental milestones for his age……
>
> The health visitor came to see him on the 27th of September for his one year check and had no concerns about him. HBC is meeting all his developmental targets.
>
> We had a further visit two Dr Kundu in October and he is completely satisfied with HBC's development I no longer needs to see him."

There is a reference in another document to HBC having learnt to clap his hands and

> "actions like pointing to his head"

12. Mr Hamilton disputes the accuracy of these comments. He does so by reason of the behaviour and abilities that HBC has displayed whilst in his care and the diagnosis of

his conditions. Mr Hamilton advances the straightforward proposition that he must always have been affected and limited by his difficulties and the picture painted of him in the documentation is materially inaccurate.

13. By virtue of the Court order Mr Hamilton had three contact visits with HBC a week from March 2018.

14. Mr Hamilton made an application to be appointed as HBC's special guardian.

15. During the application process Mr Hamilton says that he was provided with reassurance by the foster parents and social workers to the effect that HBC was, as Dr Kundu described it, "developmentally on track". In the period between October and December he raised concerned when he saw HBC dragging on foot whilst walking but was told that this was nothing to be concerned about.

16. As a special guardian Mr Hamilton would be entitled to financial and other support by virtue of the provisions of the Special Guardianship Regulations 2005 so discussions took place with the Respondent as to an appropriate package given his circumstances. Mr Hamilton had some professional assistance during this process and he has produced relevant e-mails from a solicitor. Through its Counsel the Respondent indicated that it would meet a shortfall in potential earnings suffered by Mr Hamilton for nine months the question was posed of his solicitor:

> "Please can you confirm whether Mr Hamilton is agreeable to accept an SGO in the event the Court considers the same to be necessary."

17. Mr Hamilton had been advised to have the financial support package recorded on the order

> "so the court is clear as to the basis on which you have agreed to become a special guardian."

18. On the 31st December 2018 (when HBC was aged 15 months), following a five day final hearing, the interim care order was discharged and a special guardianship order was made in respect of HBC but not his siblings. It was the Respondents position at the hearing (its recommendation to the Court), supported by HBC's guardian, that he was placed with Mr Hamilton. The hearing was contested as his mother sought a return to her care (there was also a suggestion that HBC's maternal grandmother might be appointed a special guardian, but Mr Hamilton told me she did not make a formal application). The financial support package for Mr Hamilton was recorded within the order including that the support plan would be reviewed twice in the first year.

19. From 24th of January 2019 onwards HBC has resided with Mr Hamilton who has parental responsibility.

20. In January 2020 a social worker raised some developmental concerns as part of an annual review.

21. It appears that in April 2021, when he was aged three and a half years HBC was assessed and diagnosed with autism and ADHD. In May 2021 he was diagnosed with global developmental delay. Mr Hamilton has stated that he does not have the skills to cope with HBC's problems. Had he have known about them he would not have accepted the Guardianship role.

Claim

22. Mr Hamilton commenced an action against the Respondent on his own behalf and on behalf of HBC although he was not formally identified as the litigation friend (despite this being properly raised at the hearing by Ms Dobie, and recorded at paragraph 19 of the judgment, this state of affairs had not been rectified at the time of the hearing before me).

23. Mr Hamilton claimed that the Respondent had assumed parental responsibility for HBC, and its servants or agents, including the foster carers had been negligent in failing to identify the conditions from which HBC suffers or worse intentionally failed to disclose them to Mr Hamilton prior to him entering into a special guardianship order.

24. It was pleaded at paragraph 6 of the Particulars of Claim (dated the 13th June 2022) that the Respondent owed the Claimant a duty of care. There were two Claimants Mr Hamilton and HBC and their circumstances were for obvious reasons materially different. However, it is clear given the other content (and the reference to HBC as "H") that the pleading is meant to assert that a duty of care was owed by the Respondent to Mr Hamilton. It was also pleaded that there was a duty of disclosure owed to Mr Hamilton (and a duty to protect his human rights).

25. At paragraphs 11 and 12 it was pleaded that the Respondent (its servants or agents) had relayed incorrect/false information to the Claimant which included that HBC was developing normally and his medical assessments were up to date and that after reliance upon these representations Mr Hamilton entered into negotiations with the Respondent regarding the terms of the special guardianship order. The Respondent had offered a basic level of financial entitlement available to special guardians which Mr Hamilton states he now appreciates was "incorrect and insufficient for HBC's needs". It was, and remains, Mr Hamilton's case the Respondent assumed responsibility for the guardianship application and failed to properly assess HBC's current and likely future needs and it had been foreseeable that conditions which were evident, or becoming evident, could develop with long term adverse implications. It was pleaded that he was induced into appointment as a guardian by the failure to supply information regarding HBC's health and development and the false/negligent representations.

26. Under Particulars of Negligence, it was set out that the Respondent:

"21.1 Failed to properly consider, assess, review, monitor and/or report to the Court and the Claimant on HBC's health status prior to the Order being made pursuant to the Care Planning, Placement and Case Review Regulations 2010, Children Act 1989 and guidance set out in the Independent Reviewing Officers' handbook resulting in false/negligent representations to the Claimant.
21.2 Failed to provide appropriate care services to HBC.
21.3 Failed to safeguard and promote HBC's welfare pursuant to the Children Act 1989.
21.4 Failed to fully disclose all material information and documentation to the Claimant prior to the Order being made.
21.5 Misled the Court and the Claimant by submitting statements that did not disclose HBC's health status accurately."

27. Various particulars of breach of statutory duty and guidance were also set out specifically:

(a) breach of the Care Planning, Placement and Case Review Regulations 2010 (specifically a failure in September 2018 to undertake an assessment and conduct a review); and
(b) breach of The Children Act 1989 section 22; the duty to safeguard and promote welfare.

28. At paragraphs 31 and 32 of the Particulars of Claim there were allegations that the failure to notice that HBC was not meeting his developmental milestones resulted in "emotional neglect" and "medical neglect" (and that the Respondent failed to remove HBC from this "neglectful home"). At paragraph 33 the same matters were framed as child abuse. By the time of the hearing before the Judge Mr Hamilton was not pursuing these allegations and they were not set out in draft amended Particulars of Claim.

29. Mr Hamilton sought damages for:

(a) Personal injuries (psychiatric injury suffered by Mr Hamilton).
(b) Consequential losses, including loss of earnings, care costs, expenses including childcare, cost of therapies and increased housing costs. A schedule of loss and damage accompanied the protective claim.
(c) Aggravated damages.

30. The Respondent filed a defence. It was pleaded that:

(a) It is admitted that when HBC was accommodated with foster carers, and subject to an interim care order, a duty of care was owed to him (alone);
(b) the Respondent did not (and does not) owe Mr Hamilton a duty of care at common law;
(c) The allegations of neglect and failure to share records/record symptoms indicative of autism and/or ADHD lacked adequate particulars and

> "the allegations of neglect are baseless, lack any particulars are entirely inconsistent with the records and history and should be struck out."

and

> "it is strictly denied that developmental delays were (or ought to have been) observed or recorded during the time that HBC was in foster care and /or that such behaviours/symptoms were withheld from Mr Hamilton…..it is denied that HBC had any known and/or identifiable disability at the time of his foster placement."

Subsequent assessments in spring of 2021 did not give rise to an inference of neglect "or even come close to such an inference" given that they were undertaken 2 years and 3 months into the SGO.

(d) No personal injury to HBC had been adequately pleaded, particularised or supported by a medical report and the consequential losses claimed by Mr Hamilton were unrecoverable in law.

(e) Mr Hamilton has the ability to apply to vary or discharge the Special Guardianship Order. There are also mechanisms to apply for more financial support

31. Following service of the defence Mr Hamilton applied for an interim payment and the Respondent applied to strike the claim out.

The hearing before Deputy District Judge Jonson

32. The Judge had the statements of Yasmin Brown, solicitor acting for the Respondent (dated 12th August 2022) and Mr Hamilton (dated 10th January 2023) in response and support of the interim payment application.

33. Mr Hamilton referred to there being false and misleading statements in the defence and Ms Brown's statement. He also asserted that Dr Kundu's assessment of HBC on 9th October 2018 was conducted negligently. He did so by reference to extracts from the American academy of Neurology and the recorded reference to HBC not being able to wave bye bye.

34. Mr Hamilton had made a complaint against both the health visitor and Dr Kundu and he referred to Dr Kundu's response which included the assertion that HBC had none of the risk factors associated with autism; a statement which Mr Hamilton describes as false[1] given the diagnosis of benign hydrocephalus.

[1] Statement paragraph 14.

35. Mr Hamilton argued within the statement that the foster carer's failure to raise concern about HBC not being able to wave (given that they had three children so considerable experience of child development) amounted to a breach of the duty of care. He stated that because HBC could not point or maintain eye contact when he came to live with Mr Hamilton this must have been the position and therefore apparent to the foster carers whilst HBC was in their care. Also between October and December 2018, so after the appointment with Dr Kundu, he raised with the foster carers that HBC was dragging his leg but was reassured that this was nothing to worry about. He now regards this as a red flag[2]. He also raised concerns about HBC's inability to sit still with the Foster carers and he was told that they called him "buzz buzz" due to his levels of activity.

36. Within his statement Mr Hamilton set out a number of matters recorded in the foster carers records which he says could not have been accurate e.g. whether HBC could imitate sounds or facial expressions or understand simple verbal communication or point to something.

Amended Particulars of Claim

37. Mr Hamilton produced a draft amended particulars of Claim and then a revised (second) draft. The following was added under particulars of negligence:

> "21.6 Failed to disclose to the court and the claimant that HBC was not meeting his developmental milestones because HBC could not do the following: 1. Wave at 12 months. 2. Respond when his name was called. 3. Respond to age related instructions. 4. Use his fingers to point. 5. Focus on objects that were pointed to. 6. Respond to verbal communications. 7. Imitate simple gestures such as sticking out his tongue.
> 21.7 Failed to disclose to the court and the claimant that; 1. HBC had sensory issues. 2. HBC's hyperactivity was abnormal and not age related. 3. HBC did not like loud noises or noisy environments."

38. A section entitled "particulars of fraudulent misrepresentation" was added. It was stated that fraudulent misrepresentations entitled Mr Hamilton to amend or cancel the SGO and claim damages for psychiatric injury and financial losses. It was set out that:

> "23. Prior to entering the special guardianship, the defendant made verbal statements to the claimant about HBC's health and development. The defendant's social worker (Cynthia Addai) and foster carers (Mr John Hutton and Mrs Alison Hutton) told the claimant that:
> 1. HBC was developing normally. 2. There were no developmental concerns about HBC. 3. HBC was meeting all of his developmental milestones. 4. HBC had completed and passed all of his medical assessments. 5. If the claimant had any concerns about HBC's behaviour or his development these concerns could be attributed to the developmental trauma that H had suffered after he was separated from his family just five months after his birth. 6. Mrs Alison Hutton told the claimant that HBC's paediatrician (Dr

[2] Statement paragraph 30

Kundu) was pleased with HBC's development because HBC had achieved all of his developmental milestones. This statement was false.

24. The representations were made to the claimant verbally between September 2018 and January 2019.
25. The representations were also reiterated in a life story book that was given to the claimant between December 2018 and January 2019.
26. Excerpts from the life story book are marked as Exhibit HFSB.
27. The representations regarding HBC meeting all his developmental milestones and targets were also reiterated in a booklet which H's foster carers gave to the claimant in October 2018. Excerpts from the booklet are marked Exhibit ABH2018. These representations turned out to be false.
28. The claimant relied on the defendant's misrepresentations regarding HBC's development.
29. The Defendant intended to and did induce the claimant by these misrepresentations to enter into Special Guardianship of HBC.
30. The representations in paragraph 23 were false. HBC was not developing normally. HBC's diagnosis of Benign External Hydrocephalus while he was under the defendant's care was an example of concerns regarding HBC's development.
31. HBC was not meeting all of his developmental milestones. HBC's paediatrician (Dr Kundu) observed and recorded in writing, that HBC could not yet wave during an appointment on 9th October 2018. H could not wave at 12 months; therefore, HBC had missed this milestone.
32. HBC did not complete his statutory review health assessment that was due in September 2018 so there was no reliable medical evidence to confirm that HBC was meeting all of his age-related developmental milestones.
33. The developmental concerns that were present while HBC was under the defendant's care were as follows: 1. HBC could not wave at 12 months. This developmental delay continued until approximately 2022. 2. HBC could not respond when his name was called. 3. HBC was unable to respond to age related instructions. 4. HBC did not use his fingers to point. 5. HBC could not focus on objects that were pointed to. 6. HBC could not respond to verbal communication. 7. HBC was unable to imitate simple gestures such as sticking out his tongue. 8. HBC had sensory issues. 9. HBC's hyperactivity was abnormal and not age related. 10. HBC did not like loud noises or noisy environments. 11. HBC's behaviour and his developmental issues were not caused by developmental trauma; they were as a direct result of HBC's post-natal complications."

39. Mr Hamilton relied upon the content of the draft amended Particulars of Claim at the hearing. He submitted that the assessment of HBC was performed negligently and also the foster parents were negligent in that his developmental challenges should have been picked up earlier (they should have taken the red book to the assessment by Dr Kundu). Mr Hamilton stated that he believed that the Respondent was aware of HBC's medical history and also that the issues regarding his development should have been picked up before the SGO was granted. Had he known of the issues with HH's developmental progress he would not have gone ahead with the SGO as he would not have felt equipped with the necessary skills to become HBC's primary carer.

40. At paragraphs 12-13 of the Judgment it is stated:

> "12. Ms Dobie asked Mr Hamilton what it was that meant HBC should have been diagnosed earlier. Mr Hamilton's answer whilst that HBC wasn't waving goodbye, he wasn't responding to his name properly and he was dragging his feet while walking. Mr Hamilton referred me to paragraph 23 of his amended particulars of claim.
>
> 13. Ms Dobie challenged Mr Hamilton as to what it was that had induced him into taking up the SGO given that Mr Hamilton had received the diary extracts, from the foster carers, prior to the SGO being made. Mr Hamilton's response was that HBC wasn't displaying the developmental progress whilst he was with Mr Hamilton in the same way that he seemed to be doing when he was with the foster carers. Mr Hamilton insisted that he had been told that HBC had been developing normally and had completed all of his medical assessments. Mr Hamilton said he relied upon those statements about HBC's milestones when agreeing to take on the special guardianship."

At first blush these paragraphs suggest that Mr Hamilton was formally questioned/cross-examined. However, I was informed that they refer to Ms Dobie seeking clarification of Mr Hamilton's submissions.

41. At the heart of Mr Hamilton's submission was the argument that as HBC was not hitting his developmental milestones when he came to live with him and the diagnoses have confirmed why there must have difficulties apparent at an earlier stage so there was misrepresentation of his developmental progress.

42. As the judge set out within his judgment Ms Dobie submissions on behalf of the Respondent including the following arguments;

    (a) The pleaded case (even as presented during the hearing with the proposed draft amended Particulars of Claim) did not disclose a valid cause of action;
    (b) The Respondent owed a duty of care to HBC whilst he was in care (so up to the date of the SGO) ; but no duty was owed to Mr Hamilton during that period
    (c) There was no pleaded assertion of an assumption of responsibility which was a necessary foundation for a duty of care existing, or of facts potentially supporting such an assertion.
    (d) the appointment of a special guardian is governed by section 14 Children's Act 1989 and a duty of care does not arise out of the mere exercise of a statutory power.

Judgment of the Deputy District Judge

43. I regret to say that the reserved judgment can properly be described in some respects as an inadequate, and at some points unfortunately worded, document most obviously because it does not adequately set out the reasoning behind the conclusions reached. The parties were entitled to clear and explicit legal and factual analysis. The Judge dealt with the issue of the existence of a duty of care, an issue which had been covered extensively in written and oral argument, in just three sentences (within

paragraph 25). Whilst succinctness in Judgments is to be welcomed (and I recognise my own failings in this regard in some judgments), simply stating that:

> "it is well established that a duty of care does not arise out of the mere existence of a statutory power by a local authority."

and no more does not give sufficient reasoning to enable the parties to understand how the Judge arrived at his conclusion. Mr Hamilton had set out within his statement and submissions why he believed that there had been an assumption of responsibility. The Judge failed to address those arguments.

44. The Judge dealt with the application for an interim payment first (after setting out the relevant history his analysis was essentially contained in two short paragraphs). This was a strange approach as the Judge was to conclude that there was "a factual dispute" as to whether a duty of care was owed to Mr Hamilton, that he needed to avoid a mini trial and that it was:

> "clear to me that there are significant factual issues in dispute."

This was set out before he went onto deal (in short order) with the legal basis of the claim and to strike it out as having no foundation in law. Clearly (and as was pointed out in paragraph 2 of Ms Dobie's skeleton for the hearing) if a claim is to be struck out on this basis there is no need to consider the interim payment application in any detail (not that the Judge did so in any detail). Even if the conclusion on the arguments as to whether the claim had a valid basis in law was that it remained arguable the Respondent's submission would be an obvious hurdle to be faced given the requirement at CPR 25.7(1)(c) that before making an order for an interim payment the Court must be:

> "…satisfied that, if the claim went to trial, the Claimant would obtain judgment."

The Judge would therefore have to conclude that the Respondent's arguments as to why the claim failed in law were so misguided that it was likely that they would be unsuccessful at trial. Only after that hurdle was cleared would it be necessary to consider the nature and extent of likely factual disputes.

45. As regards the central issue on appeal, under the rubric "Common Law duty of care regarding the Negligence claims"; the Judge stated (at paragraph 25)

> "It is well established that a duty of care does not arise out of a mere exercise of a statutory power by a local authority and Ms Dobie argues that there is no pleaded assumption of responsibility. I was referred extensively to GM-v-Poole and the judgment of Lord Reid therein. On hearing evidence I do not find that a duty of care was owed to Mr Hamilton as claimed"

46. The Judge considered the various statutory duties and the claim under the Human Rights Act 1998 and found them to be unparticularised and not argued or adequately

supported during the application and accordingly that they must be struck out. No permission to appeal these aspects has been given.

47. The Judge accepted that an SGO is not a contract (again without any detailed reasoning) and concluded that the misrepresentation claim did not have merit. The Defendant's role was merely to endorse the application.

48. The Judge considered what he described as "Breaches of common law/statutory duty". This is somewhat confusing as the Judge had decided no duty of care was owed and had struck out the alleged breaches of statutory duty. He set out that:

(a) In respect of period whilst HBC was in the case of foster parents

> The allegations by Mr Hamilton that the statement by the foster carer, namely that HBC was meeting his milestones, was negligent does not give rise to a cause of action against the Defendant. It was argued by Ms Dobie that the "waving goodbye" point did not undermine the overall development of HBC and that there was no coherent evidence before the court to state where and when the gaps in HBC's developmental progress started to appear. Ms Dobie made the point that any issues in HBC's progress were not identified by experienced medical professionals and this must therefore cast extreme doubt on Mr Hamilton's arguments. I accept that these issues do not give rise to a cause of action against the Defendant.

And

> "in relation to HBC's shortcomings, in terms of development, it was put to me that this was a case of Mr Hamilton's own experience of HBC rather than being a deliberately false statement of fact. Ms Dobie made the point that a false statement of fact cannot apply if the fact is materially correct. Ms Dobie's point was expanded upon further on the basis that if a foster carer repeats what a paediatrician has said that cannot be a false statement. That must be correct in my judgment. In relation to the alleged missed medical appointment in September 2018 I find that there were other health reviews around that time. It was not made clear to me by Mr Hamilton what a review in September would reveal that the review in October 2018 did not. I do not find that the allegations regarding HBC's developmental challenges give rise to a discernible cause of action." (paragraph 31)

(b) Further that

> "he did not find that the allegations of neglectful care by the foster carers are made out and they are struck out." (paragraph 32)

(c) In conclusion that;

> "I am not persuaded on the evidence that Mr Hamilton or the Defendant (or anyone else involved in HH's wellbeing and development at the time) had

> any significant concerns about HBC's development at any time prior to the SGO or even for a period of time after the granting of the SGO." (paragraph 33)

49. The statements that he did not find the allegations of neglectful care "made out" and that he was not persuaded on the evidence" properly provoke the question as to exactly what analysis the Judge had undertaken given the limited nature of the applications before him. There should have been no "mini-trial".

50. The Judge struck out HBC's claim for personal injury as there was no CPR 35 compliant medical evidence.

51. As for Mr Hamilton's the claim for consequential losses the Judge stated;

> "Mr Hamilton's claims for the cost of a new house and loss of income are ill founded in law. There is no discernible cause of action and the claims must be struck out. The cost of childcare, speech and language therapies are similarly not well founded in law and again must be struck out."

Again he did not explain in nay details why he had reached these conclusions

Grounds of Appeal

52. The Appellant filed a notice of appeal containing seven grounds.

Order of Mr Justice Constable

53. Within his reasons for granting permission to appeal Constable J stated:

> "I note that the application to strike out (to which the majority of the grounds relate) appear from Deputy District Judge's findings to have been conducted as, at least in part, a trial of factual issues upon which, having heard evidence and what appears to have been questioning by Counsel for the Defendant of A1, factual findings were made. Although not an articulated ground, of the court's own motion, I grant permission to appeal the Judge's findings of fact at paragraphs 29-33, on the basis that there is a reasonable prospect of arguing that they were borne from a procedure inappropriate for a strike out application. It should be noted, however, that I have not had the benefit of any Respondent's Notice or submissions from the Defendant in this regard, from which the Court will no doubt benefit at the Permission to Appeal hearing. I shall refer to this as Ground 1A."

54. He also gave permission on Grounds 1 and 5

(a) In relation to ground one he stated:

> "There is a realistic prospect of successfully arguing an appeal that whether or not the Defendant owed A1 a duty by way of

> assumption of responsibility in relation to the information provided to him by the Defendant is a matter which should have been determined at trial and was not suitable for summary dismissal by way of strike out."

(b) In relation to ground 5 he stated

> "Ground 5 concerns the Judge's conclusion that Mr Hamilton's claims for the cost of a new house and the loss of income are ill founded at law. Whilst it seems, on the information from the Court, improbable that these losses would ultimately be recoverable, there is a reasonable prospect of arguing that the Judge's brief reasons for concluding that there was no discernible cause of action was borne out of his conclusion to which Ground 1 and/or Ground 1A. On this basis, Permission to Appeal was granted. "

55. Constable J refused permission on the other grounds (save in relation to costs and then only if the any of the three grounds in respect of which he gave permission were successful).

Issue on appeal

56. It was common ground before me that Mr Hamilton needed to establish that there was a relevant assumption of responsibility by the Respondent applying the principles set out by Lord Reed in **Poole BC-v-GN** [2019] UKSC 25 ("**Poole**"). Accordingly, this appeal has been largely concerned with whether the particulars of claim provide some basis for the leading of evidence at trial from which a relevant assumption of responsibility could be made out (and the parties had prepared accordingly).

Appellant's submissions

57. It was, and remains, Mr Hamilton's case that the Judge erred in applying the principles set out in **Poole**. The assumption of responsibility can be inferred from the manner in which the Respondent through its social worker and the foster carers (for whose acts it was vicariously liable) had behaved towards him and the nature and extent of the statements made to him. Also that the Particulars of Claim (and certainly the draft amended Particulars of Claim), clearly provided some basis for the leading of evidence that an assumption could be inferred. He argued that there was at the least a real possibility of establishing at trial that the Respondent, had assumed a responsibility towards him as a prospective guardian to perform their functions with reasonable care, including the writing of a court report, a healthcare plan detailing HBC's current health and developmental status before the special guardianship order

was granted. It must have been appreciated that he would rely upon these documents before deciding whether to enter into the guardianship.

58. Mr Hamilton also argued that when a local authority processes special guardianship applications it assumes responsibility for evaluating and deciding on the suitability of potential special guardians for the well-being of the child involved. Social workers in this role undertake the responsibility to gather and share pertinent information about a child's well-being before a special guardianship order is granted. This includes information regarding a child's medical history and medical assessments. This process ensures the potential special guardians are adequately informed. By assuming this responsibility social workers establish a duty of care both towards the child and the prospective guardians. He relied upon the decision in **Phelps -v-Mayor of London Borough of Hillingdon** [2001] 2 AC 619 as establishing the principle that the test for the assumption of responsibility is an objective one and that it is not so much that responsibility is assumed (knowingly and deliberately accepted) as that it is recognised or imposed by law.

59. Mr Hamilton also referred to the existence of;

    (a) A duty of care in respect of the making of statements and/or provision of information and advice (relying on ratio in **Hedley Byrne& Company Ltd-v-Heller** [1963] UKHL 4). He argued that a duty arose as the Respondent's employees and /or agents had made statements and provided information regarding HBC's health and development.

    (b) A duty of care in contract law (he argued that his agreement as to financial provision before entering into the guardianship was a contract) alternatively that the relationship was the equivalent of a contract. Mr Hamilton argued that the existence of a legally binding contract could establish the basis for liability to pay damages for negligent or fraudulent misrepresentations.

Respondent's submission

60. Ms Dobie argue that the law was clear following the decision in **Poole** and the Judge was right to conclude that there was no duty of care owed to Mr Hamilton before the guardianship order was made. The duty was solely owed to HBC and the existence of a duty to any other person; specifically a potential guardian could be in conflict with that duty (indeed there could be conflicting duties to a number of individuals who wished to be the guardian).

61. She also submitted that the Judge was clearly right to conclude that the respondent and Mr Hamilton had not entered into a contract in relation to special guardianship. The respondent was fulfilling its obligations (including to provide a financial support package) arising from the duties to HBC and the requirements under the 2005 regulations.

Legal framework

Special Guardianship Orders

62. Special Guardianship status was created to achieve three aims;

    (a) to give the carer clear responsibility for all aspects of caring for the child and for taking the decisions to do with their upbringing (the child to no longer be looked after by a local authority);

    (b) to provide a firm foundation on which to build a lifelong permanent relationship between the child and their carer and be legally secure;

    (c) to preserve the basic link between the child and their birth family.

63. The intention was that the role would be accompanied by access to a full range of support services, including where appropriate, financial support.

64. The Adoption and Children Act 2002 provides the legal framework for special guardianship under the Children Act 1989. Section 115(1) of the 2002 Act inserted new sections 14A-F into the Children Act 1989. The new sections provided for:

    a. those who may apply for a special guardianship order;

    b. the circumstances in which a special guardianship order may be made;

    c. the nature and effect of special guardianship orders;

    d. support services for those affected by special guardians.

65. Any person who wishes to apply for a special guardianship order must give three months' written notice to the local authority of their intention to apply. On receipt of notice of an application, or if the court makes a request, the local authority must investigate and prepare a report to the court about the suitability of the applicant to be a special guardian. The information to be included in the report to the court is set out in regulation 21 and the Schedule. The local authority may arrange for someone else to carry out the investigation or prepare the report on their behalf. The court may not make a special guardianship order unless it has received the report covering the suitability of the applicants.

66. Before making a special guardianship order, the court must consider whether to vary or discharge any other existing order made under section 8 of the Children Act 1989. Unlike adoption orders, special guardianship orders can be varied or discharged on the application of, amongst others, the special guardian. So Mr Hamilton could have applied (and can still apply) to discharge the order.

67. Local authorities are required to make arrangements for the provision of special guardianship support services. These include counselling, advice, information and such other services, including financial support, as are prescribed in the Special

Guardianship Regulations 2005. These Regulations also provide for the assessment of needs for special guardianship support services, and the planning and the reviewing of those support services. The relevant sections of the Regulations for the purposes of this appeal are as follows:

"Regulation 6

6.— (1) Financial support is payable under this Chapter to a special guardian or prospective special guardian—

(a) to facilitate arrangements for a person to become the special guardian of a child where the local authority consider such arrangements to be beneficial to the child's welfare; or

(b) to support the continuation of such arrangements after a special guardianship order is made.

(2) Such support is payable only in the following circumstances—

(a) where the local authority consider that it is necessary to ensure that the special guardian or prospective special guardian can look after the child;

(b) where the local authority consider that the child needs special care which requires a greater expenditure of resources than would otherwise be the case because of his illness, disability, emotional or behavioural difficulties or the consequences of his past abuse or neglect;

(c) where the local authority consider that it is appropriate to contribute to any legal costs, including court fees, of a special guardian or prospective special guardian, as the case may be, associated with—

(i) the making of a special guardianship order or any application to vary or discharge such an order;

(ii) an application for an order under section 8 of the Act;

(iii) an order for financial provision to be made to or for the benefit of the child; or

(d) where the local authority consider that it is appropriate to contribute to the expenditure necessary for the purposes of accommodating and maintaining the child, including the provision of furniture and domestic equipment, alterations to and adaptations of the home, provision of means of transport and provision of clothing, toys and other items necessary for the purpose of looking after the child.

Regulation 11

— (1) The following persons are prescribed for the purposes of section 14F(3) of the Act (persons at whose request an assessment must be carried out)—

(a)a relevant child who is looked after by the local authority or was looked after by the local authority immediately before the making of a special guardianship order;

(b)a special guardian or prospective special guardian of such a child;

(c)a parent of such a child.

(2) Paragraph (3) applies if the local authority receive a written request from or, in the case of a child, on behalf of any of the following persons (not being a person falling within paragraph (1)) for an assessment of his needs for special guardianship support services—
(a)a person mentioned in section 14F(3)(a) to (c) of the Act;
(b)a child of a special guardian;
(c)any person whom the local authority consider to have a significant and ongoing relationship with a relevant child.

(3) The local authority must, if they are minded not to carry out an assessment, give the person notice of the proposed decision (including the reasons for it) and must allow him a reasonable opportunity to make representations in relation to that decision.

(4) Where the request of a person for an assessment relates to a particular special guardianship support service, or it appears to the local authority that a person's needs for special guardianship support services may be adequately assessed by reference to a particular special guardianship support service, the local authority may carry out the assessment by reference to that service only.

Regulation 12

(1) Where the local authority carry out an assessment of a person's needs for special guardianship support services they must have regard to such of the following considerations as are relevant to the assessment—
(a)the developmental needs of the child;
(b)the parenting capacity of the special guardian or prospective special guardian, as the case may be;
(c)the family and environmental factors that have shaped the life of the child;
(d)what the life of the child might be like with the person falling within sub-paragraph (b);
(e)any previous assessments undertaken in relation to the child or a person falling within sub-paragraph (b);
(f)the needs of a person falling within sub-paragraph (b) and of that person's family;
(g)where it appears to the local authority that there is a pre-existing relationship between a person falling within sub-paragraph (b) and the parent of the child, the likely impact of the special guardianship order on the relationships between that person, that child and that parent.

(2) The local authority must, where they consider it appropriate to do so—
(a)interview the person whose needs for special guardianship support services are being assessed;
(b)where the person falling within sub-paragraph (a) is a child, interview—
(i) any special guardian or prospective special guardian, as the case may be, of the child; or

(ii) any adult the local authority consider it appropriate to interview.

(3) Where it appears to the local authority that the person may have a need for services from a Local Health Board, Primary Care Trust or local education authority, they must, as part of the assessment, consult that Local Health Board, Primary Care Trust or local education authority.

(4) After undertaking an assessment, the local authority must prepare a written report of the assessment.

Relevant Procedural rules

68. The Court's power to strike out a statement of case can be found at CPR 3.4 (2)

> "(2) The court may strike out a statement of case if it appears to the court –
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings."

69. The criterion of no reasonable grounds for bringing a claim encompasses claims with facts which, even if true, do not disclose any legally recognisable cause of action and/or where the pleading sets out an "unwinnable case". To strike out a claim on this basis the Court has to be certain that the claim will fail. It has long been recognised that it is not appropriate to strike out a claim in an area of developing jurisprudence as decisions on novel points of law should be based on actual facts. In **Barrett v Enfield London Borough Council** [2001] 2 AC 550, Lord Browne-Wilkinson said, reiterating a point he had made in **X v Bedfordshire** [1995] 2 AC 633

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

70. It is also a settled principle that where a statement of case is found to be defective, before striking the claim out, the Court should consider whether that defect might be cured by amendment, and if it might whether an opportunity to amend should be given.

71. As for summary judgment Part 24 provides:

> "24.3 The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—
> (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

72. The principles to be applied in relation to applications for summary Judgment were set out by Lewison J (as he then was in **EasyAir Ltd-v-Opal Telecoms** [2009] EWHC 339. The Court must consider if the Claimant has a realistic as opposed to a fanciful prospect of success. In reaching its conclusion the Court must consider not only the evidence before it but also evidence that can be reasonably be expected to be before the Court at trial. In **King -v- Steifel** [2021] EWHC 1045 (Comm) Cockerill J stated at paragraphs 21-22:

> "21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that -even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.
> 22. So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up."

Liability of Local Authorities

73. Both parties to this appeal relied upon the decision in **Poole**. Given its central importance I shall consider the case is some detail. The principal question of law which fell to be determined 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. The issue 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 of a failure to protect a family from the severe anti- social behaviour of neighbours which included verbal and physical abuse. It was argued 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."

74. The Supreme Court held that the local authority did not owe a duty of care to protect the children and made it clear there that in this type of case, where the issue is whether a local authority has a duty of care to use reasonable care to confer a benefit on the claimant by protecting them from harm by a third party, it is necessary to establish that the local authority has assumed responsibility to protect the claimant from that harm. After an extensive review of the relevant authorities up to that date Lord Reed set out the at paragraph 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."

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

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

76. Lord Reed then illustrated how this approach was reflected in the earlier cases involving public authorities. He stated at paragraph 69.

> "…. 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."

77. Lord Reed summarised the position in these terms at paragraph 73:

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

78. Lord Reed continued (at paragraph 82):

> "It is of course possible, even where no such assumption can be inferred from the nature of the function itself, that it can nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Since such an inference depends on the facts of the individual case, there may well be cases in which the existence or absence of an assumption of responsibility cannot be determined on a strike out application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred. In the present case, however, the particulars of claim do not provide a basis for leading evidence about any particular behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred."

79. Lord Reed reiterated that a claim in negligence against a local authority arising out of its performance of its statutory duties based on the assumption of responsibility could arise in other circumstances. He stated at paragraph 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."

80. Finally for the purposes of this appeal Lord Reed stated at paragraph 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."

81. After the hearing before the District Judge (in a judgment delivered on 20th December 2023) the Supreme Court further considered in **HXA-v-Surrey County Council** [2023] UKSC 52 (in two cases) the issue of whether a local authority Appellant owed children a common law duty of care to protect them from harm on the basis that the Respondent had assumed responsibility to protect them from such harm.

82. As a child, HXA was physically assaulted by her mother and sexually abused by her mother's partner. The local authority had resolved to conduct "keeping safe" work with HXA but did not in fact do so. In YXA's case, it is alleged that he was physically assaulted by his parents and given excessive medication by them to keep him quiet. The LA provided "respite care" for YXA by placing him in foster care for roughly one night every fortnight and one weekend every two months, with his parents' agreement.

83. The local authority applied to strike out the claims on the basis that they contained no arguable duty of care and therefore should not proceed to trial. The first instance judges and, on appeal, the High Court struck out the claims. The Court of Appeal allowed the appeal of HXA and YXA and reversed the strike-out. The Supreme Court unanimously allowed the appeals, holding that the Claimants' particulars of claim disclosed no basis upon which a relevant assumption of responsibility by Local authorities could be made out at trial. Lord Burrows and Lord Stephens give a joint judgment (with which Lord Reed agreed). The Court stated that Lord Reed's judgment in **Poole** provided an authoritative guide to deciding whether there has been a relevant assumption of responsibility by the social services departments of local authorities and that the decisions in these cases turn on the application of the decision and reasoning in that leading case. Lords Burrows and Stephens endorsed Lord Reed's approach and noted within a joint judgment:

> "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."

84. Their Lordships stated at paragraph 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".

And judgment continued

> "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."

Analysis

85. The parties' written (and oral) submissions focussed on ground one.

86. In my judgment the major difficulty with Mr Hamilton's pleaded case and his submissions before the Judge and before me is that he could not point to what the Respondent did which he argued gave rise to an assumption of responsibility which it did not do (and was not already required to do) due to the duty of care it owed to HBC. Mr Hamilton was simply not in its purview. The informal, and to the extent that they occurred (which Mr Hamilton denies) formal, assessments of HBC's health and development which took place during his time with the foster parents were a regulatory obligation by virtue of the Respondents duties under the interim care order.

87. The foster parents took HBC to see Dr Kundu, and recorded his progress and health issues as they were in loco parentis, not because they, or the Respondent, had one eye on a potential future guardianship application.

88. Nothing that was done on the facts of this case could be considered as a service to Mr Hamilton**.** When he made a special guardianship application there was an obligation upon the Respondent to provide a report to the Court and to provide to him (and any other prospective guardian) relevant information which had arisen from what had been done during the period of the interim care order.

89. What the Respondent did in creating and sharing information about HBC's development arose solely by virtue of the performance of its functions and it was made crystal clear in **Poole** and re-emphasised in **HXA** the performance of a function does not of itself give rise to an assumption of duty. As Lord Reed confirmed a public authority cannot assume responsibility merely by operating a statutory scheme:

> "70. …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."

Lord Reed then 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.

90. In **HXA** Lords Burrows and Stephens stated:

> "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.

And

> "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".

91. Whilst Lords Burrows and Stephens stated that the comments in the previous cases that "something more" (per Lambert J in **DFX v Coventry City Council** [2021] EWHC 1382 (QB) or "something else" was needed were unhelpful, as the above paragraphs in **Poole** explain a Local Authority needs to something beyond merely the exercise of its functions to the child to voluntarily accept a responsibility towards a child or its parent/s. Put simply there will be no liability (to anyone) solely for doing what it has to do under the law.

92. In the present case the inability to identify anything done by the Respondent other than in compliance with its duties to HBC is fatal to the argument that the respondent assumed a responsibility to Mr Hamilton. Accordingly ground one must fail.

93. Given the detailed argument before me it is right that I briefly address some additional points.

94. I raised the issue of the requirement set out within the regulations 11 and 12 to make an assessment, including of the development needs of a child, at the request of a prospective special guardian and the extent to which this could of itself create a common law duty of care and/or, if an assessment is provided, give rise to upon the assumption of responsibility.

95. Ms Dobie short response was the regulations could have neither effect in this case. She pointed out that was not the pleaded case (just as the point did not arise on the pleadings in **Poole**) as no request for such an assessment had been made by Mr Hamilton. So, on the facts of this case, these regulations were not directly, or indirectly, engaged. I accept that this a complete answer to my question. She also submitted that in any event it is now clear post **Poole** and **HXA** that a common law duty of care does not arise without more from the exercise of a statutory power, function or duty. As the Supreme court observed in **HXA**, the nature of the statutory function relied in that cases did not itself entail the local authority assuming responsibility to the child to perform the investigation with reasonable care.

96. She submitted, in my view correctly, that when considering the existence of a duty of care, the content of regulations 11 and 12 does not undermine or derogate from the requirement for an assumption of responsibility before a common law duty arises.

97. Mr Hamilton's argued that there was (in effect) a free standing cause of action based on misrepresentation, the principles having been clarified in Hedley Byrne. However this argument does not take matters further as an assumption of responsibility is still required. Lord Goff explained the requirement in **Spring v Guardian Assurance** [1995] 2 AC 296 as follows:

> "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."

98. As for Mr Hamilton's argument about a duty arising from contract or quasi contract, the Respondent was obliged to provide information about HBC's development and also to provide an appropriate financial package (it would have been vulnerable to a public law challenge if it had failed to do so). It was then up to Mr Hamilton to take a decision as to whether to continue with his application to the Court. He had the right not to proceed with his application and also the right (which he still has) to withdraw from the role or seek to vary the terms of financial provision. Also the decision as to whether or not to make a Guardianship Order (which incorporated reference to the financial assistance package) was that of the court; not an agreement reached between

the parties. Given these factors the Deputy District Judge was correct to find that no contract existed. Nor could the procedure be properly framed as a situation akin to a contract.

99. Ms Dobie also raised another factor that she submitted pointed away from the existence of a duty of care, which is the potential for conflict between a duty owed to HBC and a duty owed to a prospective special guardian.

100. The case of **D v East Berkshire Community NHS Trust** [2005] UKHL 23 involved three appeals in each of which the court of first instance had determined that no duty of care was owed. The Court of Appeal and the House of Lords concluded that no duty of care was owed to the parents, but one was owed to the child. The issue on appeal before the Court of Appeal was whether the third element of the tripartite test in **Caparo** (as it was then understood) was satisfied; that the imposition of a duty of care was fair, just and reasonable. At paragraph 54 it was stated:

> "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."

101. The parents appeals to the House of Lords were dismissed. 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.

102. In **Poole** Lord Reed stated at paragraph 75 that:

> "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."

103. Although as a general proposition I accept that there is clearly the potential for conflict between the duty owed to a child in care and a potential duty to a Special Guardian (indeed there is also the potential for conflict arsing for duties owed to different prospective guardians in the same case), on the facts of the present case there was no obvious conflict between the interests of HBC and Mr Hamilton before the order was made. I would have been troubled if this had been the reason why the Judge struck the claim as it is certainly not a straightforward issue in this particular claim. However as consideration of the conflict only comes into play if a duty of care would ordinarily arise, which on the present facts is not the, it is not necessary to determine the issue.

104. As I indicated during submissions, I accept that this is complicated area of law and that the approach of the Court has developed significantly since 1995 as Lord Reed comprehensively set out in **Poole**. Also as I have already set out it has long been recognised that it is not appropriate to strike out a claim in an area of developing jurisprudence as decisions on novel points of law should be based on actual facts. This was the reason why the Court of Appeal in **HXA** allowed the appeal. Lord Justice Baker stated at paragraph 100:

> "In my judgment, however, this is still an evolving area of the law. The ramifications of the change of direction heralded by the decisions of the Supreme Court in *Robinson* and *Poole* are still being worked through. Unusually for child protection cases, the risk of harm to the children in *Poole* came from outside their family. The risks to the children in the present cases came from within their families. To adopt Lord Steyn's words in *Gorringe* quoted above, this is an area of "great complexity" in which "no single decision is capable of providing a comprehensive analysis." It remains as he described it – "a subject on which an intense focus on the particular facts and on the particular statutory background, seen in the context of the contours of our social welfare state, is necessary". The decision in *DFX* is one judgment after a trial at first instance involving one set of facts. There are a range of factual scenarios that might arise in this context which did not arise in that case. It did not involve, for example, a decision to provide a child with keeping safe work or to accommodate a child under section 20."

105. However the Supreme Court disagreed stating:

> "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."

And

> "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."

106. The Supreme Court has subsequently supported the approach of the Deputy District Judge in this case; that the issue of the assumption of responsibility could be determined at a strike out application with reference to the principles in **Poole**. Given those principles he was right to strike the case out.

Ground 1A and 5

107. As ground one fails on the basis set out above Ground 1A as identified by Constable J and ground 5 automatically falls away. However I shall make some brief observations.

108. It is noteworthy that defence had pleaded that that there was a lack of particularity in the Particulars of Claim about the allegations of "neglect" or failure to notice or report developmental delay. Mr Hamilton sought to meet these assertions with a draft amended Particulars of Claim. The Judge did not consider the extent to which he should proceed on the basis that the Claimant should and would be given be permission to amend his claim. In my judgment it would have been better to address this issue at the outset rather than leaving the parties in doubt.

109. Had the Judge been wrong in that there was a prospect of successfully arguing at trial that there was an assumption of duty then ground 1A would have come into play.

110. I have set out the Judge's approach to the evidence and the concern of Constable J that it was arguable that he assessed the evidence and made findings of fact. Ms

Dobie conceded that in some respects (specifically paragraph 33 "he did not need to go that far.").

111. The Judge had to be careful not to confuse the different tests in respect of a strike out and a summary judgment application. In a strike out application the court is ordinarily required to determine the matter by reference to assumed facts as pleaded.

112. Ms Dobie confirmed that no evidence was given beyond the content of the witness statements. The Judgment referred to Ms Dobie asking Mr Hamilton what was meant by the assertion that HBC should have been diagnosed earlier and also to challenging him about what had induced him to take up the role of special guardian. However such questions were posed during submissions and were only seeking clarification of the case Mr Hamiton advanced.

113. Ms Dobie also submitted that paragraphs 29-33 of judgment appear to be an assessment of the assertions/clarification made by Mr Hamilton as to what his case would be at trial and an analysis of those submissions alongside the documents the judge was taken to as being relevant. The Judge expressly stated that he was conscious of the need to avoid a mini trial when considering the interim payment application given that a there was "a factual dispute as to whether a duty of care was owed to Mr Hamilton in the circumstances namely when he applied for a SGO."

114. It is certainly the case that the Judge's references at paragraph 25 (" On hearing the evidence I do not ….") and at paragraph 29 (that he considered that "there was no coherent evidence") and that he did not find the allegations of negligence "made out" (paragraph 32) properly raises concern that he had somehow assessed the evidence rather merely than noting lacunae. It was the Respondent's case that the "overwhelming evidence" suggested that HBC was very well cared for and no personal injury or financial loss has been identified.

115. Ms Dobie submitted that on applications to strike out and for summary judgment the court is not bound to take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents. However when considering the evidence produced before the Court on a summary judgment application a fortiori a strike out a Judge must be careful not to stray into inappropriate assessment which equates to a mini trial.

116. If there had been information upon which to conclude that Mr Hamilton may establish an assumption of responsibility leading to a duty of care I would have been concerned that it would not have been appropriate to strike out the case on the basis that the evidence did not set out a sustainable case as to breach of that duty.

117. As for Ground 5 the Judge gave no detailed reasoning in respect of the various heads of claim set out within the schedule. The Judge also did not consider the extent to which amendment may produce a legally viable claim.

118. Ms Dobie correctly submitted that as Mr Hamilton's personal injury claim was struck out (and HBC had no injury claim) any financial losses which were a solely a

consequence of any alleged injury also had to be struck out as they would be part of the same claim. However as regards the balance of the financial losses claimed the Judge failed to specifically address each head of damage. Had ground 1 and/or ground 1A been successful and bearing in mind the duty to assist a litigant in person I would have carefully considered whether it would be appropriate to hear detailed submissions on each head in turn or setting aside the order and allowing Mr Hamilton to serve an amended schedule of loss recognising that his personal injury claim had been struck out and setting out the basis for the claims (Ms Dobie submitted that the future losses appeared to be based on "a blend of HBC's condition, his father's alleged psychiatric illness and Mr Hamilton's mother's inability to care for HBC because of her own health issues). The Respondent could then have considered its position in light of the content of that document. As is turned out as Ground 1 failed it was unnecessary to grapple with this issue.

Conclusion

119. For the reasons which I have set out this appeal is dismissed.

120. It is necessary to appoint a litigation friend for HBC and Mr Hamilton there is no reason why Mr Hamilton cannot fill the role.

121. No issue was raised before me as to the identification of HBC although he has been referred to at times by other initials. CPR 39.2(4) sets out that:

> "The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person."

122. Acting of my own volition I consider that HBC's need protection. Sensitive personal information has been before the Court and referred to in the judgments. It would be inappropriate where it to be the case that in the future he can be identified.

123. I leave it to the parties to try and agree and appropriate form of order to include the appointment of Mr Hamilton as HBC's litigation friend and also anonymity.