Tindall v Chief Constable of Thames Valley Police
[2022] EWCA Civ 25

HXA v Surrey CC, YXA v Wolverhampton CC
[2022] EWCA Civ 1196

Summary

Tindall* v *Chief Constable of Thames Valley Police

Malcolm Tindall was killed in a car crash; a car driven by Carl Bird lost control on a stretch of black ice and crashed into Tindall's car. An hour earlier a Mr Kendall had lost control of his car on the same stretch of black ice, with the result that his car had rolled over and ended up in a ditch beside the road. Kendall was injured but was still well enough to get out of the car and stand on the road, warning oncoming traffic to slow down. The police turned up, and Kendall told them what had happened and how dangerous the road was because of the black ice. They put out a 'Police Slow' sign while clearing up the debris left by Kendall's accident, while Kendall was taken to hospital, but once the debris was cleared up, they packed up the sign and left the scene, leaving the road in exactly the same condition as it was before Kendall had his accident. And 20 minutes later Carl Bird lost control of his car.

Tindall's widow sued, claiming that the police officers had been negligent in not doing more to warn drivers like Bird of the dangerous stretch of black ice, and that the defendant Chief Constable was vicariously liable for their negligence. The claimant argued that the police officers had owed her husband a duty of care to warn people like Bird to slow down because their presence on the scene had 'led directly to Mr Kendall (and other drivers who would have come to his aid) ceasing his own attempts to warn other motorists by vigorous arm waving and gesticulation at the side of the road' ([10]). Moreover, had the police not attended, 'the fire service would in all probability have taken control and remained at the scene and ensured the safety of road users until the ice hazard was cleared' (ibid). The claimant also reserved the right to argue that the police officers had owed her husband a duty of care on the basis that they had 'Assumed responsibility/control and then relinquished it' (ibid). The defendant chief constable applied to have the claimant's struck out on the ground of disclosing no arguable cause of action.

At first instance, the defendant's application was turned down on the basis that it was arguable on the facts of the case that the police officers had owed Tindall a duty of care, either on the basis that they had 'made things worse' by turning up to the scene and acting as they did, or on the basis of 'assumption of responsibility'. The Court of Appeal reversed the first instance decision and dismissed the claimant's claim: Stuart-Smith LJ gave the only judgment, with which Davies and Thirlwall LJJ agreed.

The Court of Appeal noted that on the current state of the authorities, 'a public authority will not generally be held liable where it has intervened but has done so ineffectually so that it has failed to confer a benefit that would have resulted if it had acted competently' ([54](ii)), and that 'Mere arrival of a public authority upon, or presence at, a scene of potential danger is not sufficient to found a duty of care even if members of the public have an expectation that the public authority will intervene to tackle the potential danger' ([54](v)). The Court of Appeal went on to hold that the claimant's attempts to establish that this was a case where the normal rule that a public body would not be held liable for failing to save someone from harm or failing to confer a benefit on someone did not apply had failed.

In particular, the allegation that 'the arrival and presence of the police caused Mr Kendall to assume (privately) that they would act in a certain way, which influenced him to decide for himself to go to hospital in an ambulance…[was] not a proper basis for holding that the police came under a private duty to prevent road-users from suffering harm' ([66]); and 'The allegation that negligence on the part of the police caused Mr Kendall to cease his own attempts to warn other motorists is equally unsupportable… By the time that Mr Kendall decided to leave in the ambulance the police had not done anything that could reasonably be described as negligent' (ibid). Moreover, the police's 'transient intervention by putting out their "Police Slow" sign, sweeping debris from the road, taking down the sign and leaving…[was] a paradigm example of a public authority responding ineffectually and failing to confer a benefit that may have resulted if they had acted more competently' ([67]).

The Court of Appeal went on to hold that the proposition 'that the police had assumed responsibility so as to give rise to a duty of care to prevent harm…[was] unarguable' ([70]). Furthermore, the claimant's contention that a duty of care could arise where the defendant 'had the power to exercise physical control, or at least influence, over a third party…[was] far too wide' ([71]).

HXA v *Surrey CC, YXA* v *Wolverhampton CC*

The claimants in these cases each sought to recover damages from the defendant local authorities for the abuse they suffered at the hands of their parents (and others), which the local authorities in question were in a position to stop. The claimants in *HXA* were abused by their mother and raped by the mother's partner. The claimant in *YXA* suffered from epilepsy and cognitive disabilities. His parents regularly physically assaulted him and treated him with excessive amounts of medication to keep him quiet. In both cases, the local authorities knew that the claimants were in danger of suffering abuse. In *HXA* the claimants made allegations that they were being abused to the local authority; the local authority investigated these allegations but did nothing, or where they resolved to take some sort of protective action no such action was eventually taken. In *YXA* the local authority responded to concerns about the claimant being abused by establishing – with the agreement of the claimant's parents – 'a pattern of respite care whereby [the claimant] spent roughly one night a fortnight and one weekend every two months in foster care' ([13]).

Once the claimants were free of their abusers – in the case of the claimants in *HXA*, as a result of a police investigation that resulted in their mother and her partner being imprisoned, and in *YXA*, as a result of being put in full time foster care at the age of 8 – they sued the defendant local authorities in negligence. They each alleged that the defendant local authority in their case had owed them a duty of care based on the fact that the defendant had 'assumed a responsibility' to them. In *HXA*, the basis of that assumption of responsibility was said to be 'The actions of the defendant in purporting to assist the family and undertake child protection work and assess the risks posed by the claimants' mother and [her partner]' ([10]). In *YXA*, the defendant local authority was claimed to have assumed a responsibility to the claimant based on the fact that from the age of 7 he was taken into taken into foster care one day a fortnight and two days every two months, with the result that the defendant had 'assumed a responsibility for his welfare, protection and safety' ([15]). The defendant local authorities applied to strike out the claims in *HXA* and *YXA* as disclosing no arguable cause of action. Their application was successful at first instance, but the Court of Appeal held that it was arguable on the facts of the cases in *HXA* and *YXA* that the defendants owed the claimants in those cases a duty of care based on the defendants having 'assumed a responsibility' to the claimants.

Baker LJ gave the only judgment, with which Lewis and Laing LJJ agreed. Baker LJ held that 'the circumstances in which a local authority may assume responsibility for a child so as to give rise to a duty of care under the law of negligence are not confined to cases where it acquires parental responsibility' ([91]). As to what the other circumstances would be where a local authority would be held to have assumed a responsibility 'for a specific child so as to give rise to a duty of care' ([92]) – 'That is a question which can be only answered definitively on a case by case basis by reference to the specific facts of the case' (ibid), and 'this is still an evolving area of law' ([100]). In the cases at hand:

(i) the conduct of a local authority in accommodating a child 'may…amount to an assumption of responsibility so as to give rise to a duty of care at common law' ([93]) and 'this potential assumption of responsibility is not necessarily confined to the actual periods when the child was being accommodated' ([94]) – for example, where a child during a period of accommodation confided that they were being sexually abused at home, the duty of care that the child was owed to protect them from being abused would 'continue after the end of the agreed period of accommodation' ([95]).

(ii) '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' ([96]) – one example of such a situation being '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' ([97]).

Given this, and given that 'there is a very wide range of circumstances in which the social services department of a local authority may become involved in the lives of children in its area who are or are at risk of being abused or neglected…[with the result that] it may not be possible without a full examination of the facts to establish whether or not a duty of care arose…it [would be] plainly wrong to strike out the claims' in this case ([105]).

Comments

These two decisions demonstrate the difficulties the Court of Appeal are still finding in coming to terms with the change in the legal landscape that the UKSC's decision in *Michael* v *Chief Constable of South Wales Police* [2015] AC 1732 was intended to bring about. They got it wrong in *Robinson* v *Chief Constable of West Yorkshire Police* [2014] EWCA Civ 15 (and were corrected by the UKSC); they got it right in *N* v *Poole* [2017] EWCA Civ 2185, but for the wrong reasons (and were again corrected by the UKSC); and now they have got it wrong in both *Tindall* and *HXA, YXA* case (and we must hope they will again be corrected by the UKSC, especially in *HXA, YXA*, where the Court of Appeal's application of the law was egregiously bad).

Tindall was plainly a case that should have been allowed to proceed to trial to determine on a much more specific inquiry into the facts whether what McBride and Bagshaw call the 'interference' exception to the rule against holding defendants liable for omissions in negligence applied. Under that exception 'if A knows or ought to know that B is in need of help to avoid some harm, and A knows or ought to know that he has done something to put off or prevent someone else helping B, then A will owe B a duty to take reasonable steps to give B the help he needs.' Substitute the police officers in *Tindall* for 'A' and the drivers using the road in *Tindall* for 'B', and it is plainly arguable that this principle applied in *Tindall* to find that the police officers owed Tindall a duty of care to carry on doing the job Kendall was doing in warning oncoming drivers of how dangerous the road they were driving on was, for at least

as long as Kendall could have been expected to do that job before giving up and letting fate take its course.

Why did Stuart Smith LJ (the son of the Stuart-Smith LJ whose judgment in *Capital & Counties plc* v *Hampshire CC* [1997] QB 1004 did so much to lay the foundations for the subsequent decision in *Michael*) miss this point in an otherwise impeccable summation of the law post-*Michael*? The reason may be that the idea that the interference exception to the rule against liability for omissions does not get a huge amount of attention and is sometimes completely disregarded. For example, in *Michael* itself, Lord Toulson only listed 'two well recognised types of situation in which the common law may impose liability for a careless omission' (at [98]): and those two situations were where the defendant was in control over a danger to the claimant, and where the defendant assumed a responsibility to the claimant to protect the claimant from harm (at [99] to [100]). As a ground for finding that a defendant owed a claimant a duty of care to protect them from harm, interference was completely overlooked – even though it provided the best case for finding a duty of care in *Michael*. (When the telephone operator told Joanna Michael to keep her landline free (at [138]) there was surely an implied suggestion that she should stay near her phone – thus keeping her in the house where she would later be killed, instead of running for her life.)

While Stuart-Smith LJ's misstep in *Tindall* may be excusable, it is hard to be so kind about Baker LJ's judgment in *HXA, YXA* (or the other members of the Court of Appeal in those cases, who blithely agreed with Baker LJ's judgment instead of raising objections).

It is, first of all, strongly arguable that the concept of an assumption of responsibility has very little role to play in finding that social services owe a duty of care to a child who is in danger of being abused. This is for the simple reason that for D to assume a responsibility to C, D has to make (or give the impression of making) a promise to C to look after C's interests, and C has to rely on that promise (or impression of a promise) in the sense of doing something that they would not otherwise have done. If this is right, it would be very hard to establish an assumption of responsibility in cases like *HXA, YXA*: a local authority does not usually go around making promises to children that they will save them from being abused, and even if such promises were made, the children could not usually rely on them because they are completely dependent on the local authority to save them from being abused.

Now, as it happens, something did happen in *HXA* that *would* have entitled a court to find that there was an assumption of responsibility to one of the claimants in that case. That claimant told her teachers at school that she was being sexually abused by her mother's partner ([9]). If the claimant got the impression from her teachers that they would do something about her allegations, and the claimant relied on that by not trying to repeat those allegations to anyone else (such as the police) then that would be enough to establish an assumption of responsibility by the teachers to the claimant, and a resulting duty of care on their part to take reasonable steps to safeguard the claimant from being sexually abused. The fact that the claimant told her teachers she was being sexually abused was made part of her claim in *HXA*, and quite rightly 'No application to strike out was made in respect of that part of the claim relating to HXA's disclosure to the school' ([11]).

But *nothing else* happened in *HXA, YXA* that would entitle a court to find that there was an assumption of responsibility by the defendants in those cases to the claimants – and certainly not anything pointed to by Baker LJ at [93]-[97] of his judgment as making it arguable that there was an assumption of responsibility by the defendants to the claimants. This, of course, assumes that the definition of when a defendant will assume a responsibility to a claimant offered above is correct. Now – it has to be frankly admitted that others take a wider view as to when a defendant will have assumed a responsibility to a claimant; those others would drop the requirement that the claimant have relied on the defendant to act in a particular way. But even they (their views are discussed on pages 205-206 of the 6th edition of McBride and

Bagshaw) would still retain the requirement that the defendant *promise* (or give the impression of promising) the claimant that the defendant would look out for the claimant. And outside the situation where one of the claimants in *HXA* told her teachers she was being sexually abused, there were no promises made in *HXA, YXA* – and certainly none of the situations pointed to by Baker LJ as arguably giving rise to an assumption of responsibility involve a promise being made to the claimant.

If you drop the requirement that a defendant who has assumed a responsibility to a claimant must have promised the claimant to look after their interests, you blow the doors off the concept of an assumption of responsibility in a way that is completely inconsistent with numerous authorities. It was the need for a promise that proved fatal to the attempt in the Court of Appeal in *Phelps* v *Hillingdon LBC* [1999] 1 WLR 500 to argue that the educational psychologist in that case had assumed a responsibility to the child that she was testing for dyslexia. (Notably, *Phelps* was not discussed at all in *HXA*.) It was the need for a promise that meant no assumption of responsibility could be found to have been made by the telephone operator in *Michael* to Joanna Michael (at [138]). And it was the need for a promise that led Stuart-Smith LJ to think that it was 'unarguable' that the police had assumed a responsibility to Tindall in *Tindall* – so unarguable that he did not even bother to explain why. But that is what Baker LJ attempts to do in *HXA, YXA* on the specious and wholly unconvincing ground that this area of law is still 'evolving' – as though claims for omissions against the social services are a wholly distinct area of law from claims for omissions against the police, or the fire service, or educational authorities, or highway authorities, or any other department or branch of local government that is in a position to fail to save people from harm.

Baker LJ expresses the hope that in the fullness of time, as more and more cases are brought against the social services by children who deserved much better from those who were charged with looking after them, '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' ([106]). This is unlikely and undesirable. Unlikely because if judges like Baker LJ are unwilling to accept and apply in social services cases the current orthodoxy as to when a defendant will assume a responsibility to a claimant, there is no reason to think that unanimity among the judges on this issue will ever be achieved. Undesirable because only lawyers will win from the decades of endless litigation that Baker LJ looks forward to his decision triggering. Resources that should be devoted to looking after children at risk will be spent on countless days of argument over when we can say there has and has not been an assumption of responsibility in cases involving the social services. And the children who are parties to that litigation will not benefit from such litigation being needlessly protracted – certainly not if they lose in the end, and maybe not even if they win.

The UKSC needs to assert itself once again in this area, and rule in *HXA, YXA* that it is unarguable that there was an assumption of responsibility to the claimants in those cases outside the situation where there is already no attempt made to strike out the claimant's claim. And if they do that, then maybe, just maybe, the Court of Appeal will finally get the message and we can all move on to discuss some other area of law. *Michael* was decided over seven years ago (at the time of writing this – September 2022). Seven years is enough. It is time to accept it and move on, and not try to act as though the dissentients in that case somehow won. *Interest reipublicae ut sit finis litium*.

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