

HXA v Surrey County Council,
YXA v Wolverhampton City Council
[2023] UKSC 52, [2024] 1 WLR 335

Summary

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 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 eight – 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. This claim was rejected at first instance, but the Court of Appeal held that it was arguable on the facts of *HXA* and *YXA* that the defendants owed the claimants a duty of care based on the defendants having 'assumed a responsibility' to the claimants: [2022] EWCA Civ 1196. Baker LJ gave the only judgment, with which Lewis and Laing LJ 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]).

The UK Supreme Court moved swiftly to overturn the Court of Appeal's decision, holding that there was no basis for finding that the defendant authorities had owed the claimants a duty of care. (The UK Supreme Court heard arguments in the appeal in *HXA* and *YXA* in 24-25 October 2023, and the UK Supreme Court's decision was handed down less than two months later, on 20 December 2023. By contrast, the three other UK Supreme Court cases that were decided at the same time as *HXA* and *YXA* were argued in March, June and July 2023 respectively.) Lord Burrows and Stephens handed down the unanimous judgment of the Court (with which Lords Reed, Sales and Briggs agreed). They re-affirmed what had been held in *Michael*, and repeated (repeatedly) in *Robinson* and *N v Poole BC*, that the proper approach to determining whether a public authority owes a claimant a duty of care is to apply 'to the public authority the same principles that would be applied if the public authority had been a private individual' ([87]). It was therefore incorrect for the Court of Appeal to have said that the law on when the social services would owe a duty of care to a child who was in danger of abuse was '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’ ([102]). Applying the established principles as to when a duty of care would be owed to save someone from harm, the only basis for finding a duty of care in *HXA* and *YXA* was that the defendants had ‘assumed a responsibility’ to the claimants ([89]) but it was clear the defendants had not done so in this case ([90]). In *HXA*’s case, the fact that the defendants investigated whether *HXA* was being abused was not enough to show that the defendants assumed a responsibility to *HXA* ([93]-[95]). In *YXA*’s case, providing respite care for *YXA* did not mean that the defendants were assuming responsibility for *YXA*’s safety: ‘The local authority was temporarily taking *YXA* away, with the consent of his parents, on the basis that he would be returned. Indeed the local authority had a duty to return *YXA* to his parents... It would be flatly contradictory to say that the local authority had thereby assumed responsibility to protect *YXA* from the abuse in circumstances where it was under a duty to return him to his parents’ ([97]).

That was sufficient to dispose of the case, but the UK Supreme Court went on to explain when it *would* find that a defendant local authority had ‘assumed a responsibility’ to a child so as to give rise to a duty of care to save the child from being abused. They identified two such situations. The first situation was where the defendant obtained a care order for the child and ‘thereby [took] on parental responsibility for [the] child’ ([106]). The second situation was where the defendant provided the child with temporary accommodation in order to give the child’s long-term carers a break, but in such a case the defendant’s assumption of responsibility and corresponding duty of care to the child would only last as long as the child was in temporary accommodation ([107]). The UK Supreme Court’s willingness to find that the defendant local authority would have ‘assumed a responsibility’ to the child in these two situations led them to note in ‘A footnote on reliance’ that ‘it appears not to be a necessary feature of an assumption of responsibility in this area that there is reliance, in any real sense, by the [child]’ ([108]).

Comments

The decision of the UK Supreme Court will come as no surprise to readers of the note on the Court of Appeal’s decision that can be found elsewhere on this website. That note called on the UK Supreme Court to come down on the Court of Appeal’s attempt to undermine *Michael* and obfuscate this area of law like a ton of bricks, and they duly obliged – and did so as quickly as they possibly could so as to ‘remove any conceivable doubt that lawyers may have had in understanding the full impact of *N v Poole BC*’ ([102]). But the final few paragraphs of the Court’s decision have the potential to undermine their good work in this area.

The problem lies in answering the question: When can we say that a defendant (D) has assumed a responsibility to a claimant (C)? The strongest and strictest line in this area would say that ‘assumption of responsibility’ means the same thing in pure economic loss cases as it does in omissions cases, with the result that D will only be held to have assumed a responsibility to C if D reasonably gave C the impression that D could be relied on to take care in some matter affecting C, and C did so rely on D. The UK Supreme Court declined in *HXA* and *YXA* to take that strong line, ruling instead that you can find that D ‘assumed a responsibility’ to C ‘*in this area*’ (emphasis added) without having to show, for example, that C was relying on D – or, indeed, without having to show that D reasonably led C to believe that D would take care in some matter affecting C. (For example, C could not have been led to believe this where C is only a few months old, but the UK Supreme Court’s two situations where there will be an ‘assumption of responsibility’ can plainly apply in such a case.)

The UK Supreme Court probably declined to take such a strong line as doing so would make the concept of an ‘assumption of responsibility’ largely irrelevant as a ground for finding that a local authority owed a child a duty of care to save them from being abused. (It would not

be *completely* irrelevant. My note on the Court of Appeal's decision in *HXA* and *YXA* points to one situation where in *HXA*, it was arguable that HXA's school had assumed a responsibility to HXA to protect her from being abused, based on HXA's having told her teacher that she was being abused and the teacher's having assured her that she would do something to stop that happening – which might have led HXA not to take further steps to protect herself from being abused, such as going to the police.) But taking the weaker line adopted by the UK Supreme Court in *HXA* and *YXA* just raises the issue (again): When can we say *in this area* that a defendant local authority has assumed a responsibility to a child who is in danger of being abused?

We know from the UK Supreme Court's decision of two situations when there will be no assumption of responsibility (the situations in *HXA* and *YXA*) and two situations when there will be an assumption of responsibility (the situations outlined in the UK Supreme Court's decision) – but is that it? It's hard to imagine that it is. And so while those who are very much in favour of the social services being held liable for failing to save a child from abuse (and who hate the more restrictive stance on that issue that has prevailed since the Court's decision in *Michael*) will have taken a blow from the UK Supreme Court's decision in *HXA* and *YXA*, it is far from a knock-out blow. They will be back, arguing that *this* case is distinguishable from the facts in *HXA* and *YXA* and is much more analogous to the situations where the UK Supreme Court said there would be an assumption of responsibility. And when the courts are faced with arguments like this, they will find no assistance from the UK Supreme Court's decision because that decision offers no clear definition *in this area* of what amounts to an assumption of responsibility.

Taking the stronger and stricter line set out above on when a defendant will assume a responsibility to the claimant would have made it easy for the courts to know whether or not there had been an assumption of responsibility in the case before them. And, as has already been observed, the answer in this area would normally be that there was no assumption of responsibility by the defendant to the claimant. And this may be the other reason why the UK Supreme Court refused to take this strong and strict line on when there is an assumption of responsibility. Perhaps they wanted to find that a duty of care was owed by a defendant local authority to a child in the two situations that they identified (obtaining a care order, and providing respite care) and thought that the only possible basis for finding a duty of care in those situations was that there was an assumption of responsibility by the defendant to the child. But that is plainly not true. Parents standardly owe a duty of care to their children to protect them from harm, and that duty of care is not based on an assumption of responsibility. Given this, it is hard to see why a duty of care owed by a defendant local authority that has parental responsibility for a child in its care should be said to be based on an assumption of responsibility. And the duty of care that defendant local authority owes a child that it is accommodating as part of a respite care program for the child's parents can be said to be based variously on (a) the defendant being the occupier of the premises the child is on; (b) the defendant having created a danger for the child by accommodating them and having a duty to take reasonable steps to eliminate that danger; and (c) the defendant having interfered with the child's parents looking after the child, and consequently having a duty to take reasonable steps to look after the child themselves.

So a danger in the UK Supreme Court's decision in *HXA* and *YXA* is not just that assumption of responsibility will loom larger than it ought to do in determining whether or not a defendant owed a duty of care to a child in danger of abuse, but that it might become the *exclusive* criterion for determining whether such a duty of care was owed and crowd out all the other possible bases for finding such a duty of care. Consequently, the Court's decision is not as welcome as it should have been. Maybe they will do better with the other omissions case that was reprovved in my note on the Court of Appeal's decision in *HXA* and *YXA*: *Tindall v*

Chief Constable of Thames Valley Police. At least in that case no one will be arguing that the police owed the claimant in that case a duty of care based on their assuming a responsibility to the claimant. Or if they do (and if the UK Supreme Court decides the case on that basis), we will know that this area of the law has lost its way again, just a few years after it had seemed to find it again.

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