

Before HHJ Roberts on 26th June 2020

For the Claimant:

William Chapman, counsel

Sarah Towler, solicitor at Russell Cooke LLP

For the Defendant:

Paul Stagg, counsel

Mark Whittaker, solicitor at DWF Law LLP

The decision

1. The court declined to strike out a claim against a local authority's social services department for failing to remove a child from the care of his mother and step-father. The Defendant social services department was involved with the family following an initial hospital referral to the social services department for a suspected non-accidental injury in 2004. The department carried out two core assessments in 2004 and a further core assessment in 2005, pursuant to their statutory duties under the Children Act 1989. The department closed the claimant's file in September 2005. The step-father was later convicted of 30 specimen counts of rape against the child and his brother in the period 2004 to 2010. It was the Claimant's case that had the Defendant carried out its intervention with reasonable care and skill the Claimant would have been removed from the familial home by no later than mid-2006 and avoided all subsequent abuse by his step-father.
2. The Claimant accepted in argument that the social services department by its intervention had not made matters worse. However, by its positive intervention a special relationship had arisen between the Claimant and the Defendant such that the Claimant was entitled to rely upon the Defendant to take reasonable steps to protect him from his step-father. Such special relationship gave rise to an assumption of responsibility, applying the principles in *Hedley Byrne v Heller & Partners Ltd* [1964] AC 465, as explained in *CN v Poole Borough Council* [2019] UKSC 25.

3. For the purposes of the strike out application the Defendant accepted that if the Defendant had assumed a duty of care to the Claimant, there was an arguable case that it was in breach of that duty; but the Claimant's pleaded facts in support of an assumption of responsibility were indistinguishable from the pleaded facts in *CN* and therefore must fail.
4. Held:
 - a. A case should only be struck out under r.3.4(2)(a) in clear and obvious cases, *Hughes v Richards* [2004] EWCA Civ 266, as cited in the White Book 2020 at §3.4.2.
 - b. This is genuinely a case where it can be said that the law is emerging.
 - c. It is not obvious that an assumption of responsibility could not arise on the pleaded facts of this case. *CN* is arguably distinguished because *CN* concerned a threat to children whose source was outside the family home and the mother was blameless.

Comment

5. This case should be a relief to many claimant practitioners facing strike-out applications by Defendants in failure to remove cases.
6. The court accepted that the circumstances in which an assumption of responsibility might arise had not been definitively set down in *CN*. The dearth of reported cases since *CN* meant the law was genuinely emerging about what circumstances would give rise to an assumption of responsibility.
7. There was an important distinction between *CN* and the pleaded facts in this case: the source of the threat to the children in *CN* was outside the familial home and the mother was blameless. The children in *CN* could not rely on an assumption of responsibility in circumstances where social services were powerless to act, either to rehouse the family or remove the children from their mother. So when Lord Reed wrote at paragraph 81, 'In the present case...the council's investigating and monitoring the claimants' position did not involve the provision of a service to them on which they or their mother could be expected to rely' [emphasis added], it is the underlined words that are important.

8. This suggests the courts will be open to more nuanced arguments about assumption of responsibility. The concept is not a binary one: it will require a definition of the scope and intensity of such a duty. For what, exactly, have social services assumed a responsibility?
9. Lord Reed cited with approval the speech of Lord Morris of Borth-y-Gest in *Hedley Byrne* "...if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise," §67. Social workers hold themselves out as possessing special skill. In many failure to remove cases that special skill will be the skill of assessing i) the risk of harm to the child correctly and ii) the ability of the parents to mitigate that risk in the familial home. Where social workers have deployed that skill to assist a child, reliance will be commonly implied and an assumption of responsibility arises. The rest is an argument on causation. If social services had done that which they had assumed a responsibility to do, would the Claimant have avoided all or some of the abuse?

WILLIAM CHAPMAN