Case No: C41YM553

IN THE COUNTY COURT AT CENTRAL LONDON

Royal Courts of Justice
Thomas More Building
Strand, London
WC2A 2LL

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Before:

HIS HONOUR JUDGE ROBERTS

- -

Between:

JAMES ANDREW AYRTON CHAMPION **Claimant**

- and -

SURREY COUNTY COUNCIL **Defendant**

- -

- -

MR WILLIAM CHAPMAN for the **Claimant**
MR PAUL STAGG for the **Defendant**

- -

Approved Judgment

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HIS HONOUR JUDGE ROBERTS :

Introduction

1. This is the Defendant's application[1], dated 6 January 2020, to strike out the Claimant's claim pursuant to CPR 3.4(2)(a) on the ground that the Particulars of Claim do not disclose reasonable grounds for bringing the claim. This hearing is taking place by Skype for Business.

2. There is an electronic bundle, which contains the relevant documents and authorities. References to page numbers in the footnotes are to this bundle.

3. The Defendant has filed a witness statement in support from Mr Mark Richard Whittaker, Partner in the Defendant's solicitors' firm, dated 8 January 2020[2]. The Claimant has filed a witness statement in reply from Sarah Towler, partner at the Claimant's solicitors' firm, dated 5 February 2020[3].

4. Mr Stagg of Counsel appears on behalf of the Defendant. I am grateful for his skeleton argument, dated 20 June 2020. The Claimant is represented by Mr Chapman of Counsel. I am grateful for his skeleton argument, dated 22 June 2020.

5. There is an agreed case summary and chronology[4].

Background

6. The Claimant was born on 24 July 1995 and is now aged 24.

7. The claim arises out of the alleged failure of the Defendant to heed the risk of significant harm (including physical, emotional and sexual abuse) to the Claimant at the hands of his mother and stepfather, with whom he lived until he was removed from the family home and placed into the care of his grandfather on 10 June 2011, aged 15.

8. Following the Claimant's removal from the family home, criminal proceedings were brought against his stepfather, who was convicted in April 2013 of 30 specimen counts of rape, eight of which were with a child under 13 years of age, such offences occurring between 2004 and 2010 and relating to the Claimant and his brother. The Claimant's stepfather was sentenced to 18 years imprisonment.

Common Ground

9. In his skeleton argument Mr Stagg says,

> "8. The court is referred to the notes in *Civil Procedure 2020* para. 3.4.2 (vol 1 pp86-87) as to the appropriate approach to this case. The court must proceed on the basis that the facts

[1] p. 170-171
[2] 172-174
[3] 222
[4] 306

> alleged in the Amended Particulars of Claim are capable of being established.
>
> 9. For the purposes of this application, the defendant accepts that the claimant has an arguable case that if he was owed a duty of care at common law, that duty was breached and he suffered injury as a result. Its application is based on the absence of a duty of care at common law so as to found his claim in negligence."

Permission to amend Particulars of Claim

10. On 4 May 2020, HHJ Parfitt[5] granted the Claimant permission to amend the Particulars of Claim. The amended Particulars of Claim[6] are dated 16 May 2020.

11. In the amended Particulars of Claim it is said,

> "1 g. It will be the claimant's case that:
>
> a. The defendant assumed a responsibility at common law to protect the claimant from harm, as particularised below;
>
> b. This gave rise to a duty of care to the claimant to protect him from foreseeable harm caused by Sheila and Alan Thornby;
>
> c. The defendant was in breach of that duty. The defendant ought to have taken steps as particularised below which would have resulted in his likely removal from the care of Sheila and Alan Thornby by mid-2006 at the latest and that such a failure constituted a breach of duty.
>
> d. The claimant would thereby have avoided all subsequent abuse at their hands.
>
> The assumption of responsibility
>
> (a) The defendant's social services department and all those individuals employed as social workers by that department held themselves out as possessing reasonable care and skill in social work. That included reasonable care and skill in assessing the risk of significant harm to children in their area. Such social workers involved with the claimant in the relevant period included Ms Anika Weightman, Alison Hopper and Paul Matthews.
>
> (b) The defendant undertook a number of positive acts applying that skill for the assistance of the claimant:

[5] 225
[6] 240-252

a. Attendance by Ms Anika Weightman at the hospital following a referral by the hospital on 1st March 2004.

b. Carrying out an assessment that day. That assessment included:

i. discussing the claimant with staff from their school on 4th and 5th March 2004;

ii. a home visit on 11th March 2004.

c. Carrying out a core assessment by Ms Alison Hopper in the period from 29th April 2004 to 15th June 2004. This included:

i. home visits on 29th April 2004, 7th and 27th May 2004 and 15th June 2004;

ii. taking the claimant with his brother on three play sessions;

iii. speaking to the claimant's class teachers on 11th May 2004;
iv. speaking to the claimant's natural father on 21st May 2004;

d. Holding a network meeting on 2nd July 2004 where the welfare of the Thornby's children, including the claimant was discussed;

e. Deciding to close the claimant's case on 23rd July 2004;

f. Carrying out further investigations by Ms Hopper in August 2004.

g. Carrying out a further investigation by Mr Paul Matthews in January 2005.

h. Carrying out a further core assessment from 27th January 2005 to 17th March 2005.

i. Holding a strategy discussion on 27th January 2005.

j. Deciding to close the claimant's case on 15th September 2005.

(c) The defendant undertook further positive acts before the claimant was finally placed into the care of his grandfather in June 2011. For the purposes of this pleading, it is sufficient to rely upon **the aforesaid positive acts**. Each and together was sufficient to give rise to an assumption of responsibility.

(d) The claimant was reliant upon the skill of the defendant's social services department. In all the positive acts, the key skill relied upon was correctly assessing the risk of harm to the claimant.

> (e) Therefore the defendant made an assumption of responsibility towards the claimant."

12. The Defendant has filed an amended Defence, dated 4 June 2020[7]. At paragraph 8B it is said,

> "8B. As to paragraphs 2(a) to 2(e) of the Amended Particulars of Claim, it is denied that the Defendant assumed responsibility for the Defendant's welfare so as to give rise to a duty of care to the Claimant. Without prejudice to the generality of that denial, the Defendant responds to the allegations in those paragraphs as follows:
>
> (1) The general rule is that no duty of care is owed by a local authority or its social workers in carrying out their functions under Parts IV and V of the Children Act 1989. That this is the general rule has been authoritatively declared by the Supreme Court in *N v Poole Borough Council* [2019] UKSC 23. It is part of the general principle that subject to certain exceptions, as a matter of law D owes C no duty of care at common law to protect him from the acts or omissions of a third party, TP.
>
> (2) The concept of assumption of responsibility was recognised in the *Poole* case to be an exception to the general rule. As a matter of law, for an assumption of responsibility giving rise to a duty of care on the part of D to exist, there must be:
>
> (a) a clear promise or representation made or undertaking given, by words or conduct, that D would take reasonable steps to protect C from TP's acts or omissions; and
>
> (b) reliance by C on D's promise, representation or undertaking.
>
> (3) In relation to the requirement of reliance, the law of England and Wales recognises no concept of 'general reliance', whereby C is presumed to rely on D's discharge of statutory duties or powers, thus giving rise to a common law duty to take reasonable care to exercise those duties or powers so as to protect C.
>
> (4) Paragraph 2(a) is admitted. However, the mere fact that the Defendant's social workers had expertise and experience in their field is insufficient, of itself, to generate a duty of care, whether by way of assumption of responsibility.
>
> (5) As to paragraphs 2(b) and (c):

[7] 276-297

> (a) The Defendant responds to the factual averments, which are set out in greater detail in paragraph 4(e) of the Amended Particulars of Claim, in paragraphs 13 to 16 below.
>
> (b) As a matter of law, it is wrong to categorise the various matters relied on as "positive acts", if by that the Claimant intends to distinguish them from omissions. The question of whether, to use the language of the court in the *Poole* case, the case was one of causing injury by positive acts or failing by omission to confer a benefit in the form of protection is to be viewed taking an overall view of the nature of the Defendant's involvement with the Claimant.
>
> (c) None of the actions cited are capable of giving rise to an assumption of responsibility. In the *Poole* case, the local
>
> authority undertook similar tasks in involving itself with the claimants' family. Had such tasks been capable of giving rise to a duty of care, the claimants' appeal to the Supreme Court would have succeeded.
>
> (6) Paragraph 2(d) is denied. As a matter of law, the Claimant's reliance on the acts referred to is not presumed but must be proved in fact. The Claimant, who was aged nine or ten at the time of the acts referred to, did not place reliance on anyone.
>
> (7) Paragraph 2(e) is therefore denied."

Defendant's case

13. The Defendant's case is that the Supreme Court decision in *Poole Borough Council v GN* [2019] UKSC 25[8] is not arguably distinguishable in this case and provides a complete answer to the Claimant's allegation. Mr Stagg summarizes this case at paragraph 11 of his skeleton as follows,

> "In *CN*, the Supreme Court was considering a claim brought on behalf of two boys, one of whom suffered from severe disabilities. They had, together with their mother, been provided with accommodation on a housing estate in the defendant council's area. They suffered from persistent antisocial behaviour by a neighbouring family and their associates, including assaults and property damage. They alleged that the response of the authorities, including the defendant's social services team, was inadequate. It was alleged that the defendant had failed to exercise its powers under the Children Act 1989 appropriately, and that it ought to have removed the claimants from the care of their mother so

[8] Mr Stagg refers to this case as *CN*

> that they were no longer exposed to the antisocial behaviour. The defendant sought to strike out the claim on the basis that the defendant did not owe a duty of care at common law to protect the claimants from abuse."

14. Mr Stagg summarizes what he says are the salient parts of Lord Reed's judgment at paragraph 13 of his skeleton argument as follows:

> "(1) Public authorities are generally subject to the same principles as to tortious liability as private individuals: para 26.
>
> (2) As with private individuals, public bodies do not generally owe a duty of care "to confer benefits on individuals, for example by protecting them from harm": para 28. The mere fact that public bodies have statutory powers and duties in relation to protecting people from harm does not mean that they owe a common law duty of care to do so: para 65(2).
>
> (3) However, a duty of care might be owed in exceptional cases such as "where the authority has .... assumed a responsibility to protect the claimant from harm": para 65(3).
>
> (4) In relation to assumption of responsibility, it was usually necessary to show reliance by the claimant on the undertaking, express or implied, that reasonable care would be taken: paras 67-68. The absence of such reliance was critical to the absence of liability in *X v Bedfordshire CC* [1995] 2 AC 633: para 69.
>
> (5) An assumption of responsibility could arise in the context of a public authority performing statutory duties or exercising statutory powers, providing that the general criteria for the existence of an assumption of responsibility are met: paras 70-73.
>
> (6) In *CN*, there was no sufficient pleaded case which alleged an assumption of responsibility. The council had provided social workers, had assessed the needs of the claimant and had discussed them at meetings: para 78. However, the council's "investigating and monitoring the claimant's position did not involve the provision of a service to them on which they or their mother could be expected to rely". The council's social services duty "did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care": para 81. There was nothing in the facts alleged about particular behaviour by the council other than the performance of statutory functions to enable an assumption of responsibility to be inferred: para 82. Similarly, the social workers did not provide advice or conduct themselves so as to induce reliance on their work: paras 87-88.

> (7) The court should be cautious about striking out a case where assumption of responsibility is alleged and should not do so where there was a "real possibility that such a case might be made out": para 89. But "the Particulars of Claim must provide some basis from the leading of evidence at trial from which an assumption of responsibility might be inferred": para 82."

15. Mr Stagg referred to the case of *A v The Attorney General of St Helena [2019] SHSC 1* at paragraph 15 of his skeleton argument. This was a decision of the Chief Justice of St Helena and he accepted that the facts in this case were not set out with any detail so that it is not clear what the relationship of the defendant was to the claimant.

16. Mr Stagg referred me to the case of *Kalma v African Mineral Limited [2020] EWCA Civ 144*[9]. This case was very different case to the present case. In *Kalma* the Court of Appeal upheld a decision of Turner J. One can see from paragraph 2 of the judgment that the appellants were a group of inhabitants of Tonkolili, a remote and inaccessible district in the north of Sierra Leone in West Africa. The respondents were the owners and operators of what was at the relevant time the largest iron ore mine in that region. The impact of the mine on the inhabitants led to unrest and in November 2010 there were local disturbances, prompting an over-reaction from members of the Sierra Leone Police (SLP), and this led on both occasions to what Turner J. described as "violent chaos during the course of which many villagers were variously beaten, shot, gassed, robbed, sexually assaulted, squalidly incarcerated and in one case killed". The appellants brought proceedings against the respondents, alleging that the respondents were liable to them for the wrongful acts of the SLP on several different local residents. In this case, the judgment in the Court of Appeal was given by Coulson LJ, who upheld Turner J's decision. I was taken to a number of passages, in particular paragraph 115 where it is said:

> "Mr Hermer submitted that the correct approach to the question of the duty of care was as follows. The first question was to ask whether this was a case of pure omissions. He argued that it was not, and therefore the judge's analysis by reference to *Mitchell* was incorrect."

17. Coulson LJ said at 124,

> "The conclusion must be that the respondents were not carrying out any relevant activity, and the damage was not caused by anything which the respondents did."

18. Mr Stagg referred me to the case of *Capital Counties v Hampshire County Council [1997]*[10]. This was a case in which the question was whether there was a duty of care owed by a fire authority for alleged negligence in not extinguishing a fire. This was not a case involving an assumption of responsibility.

19. The Defendant says that in the present case, what one is dealing with is omissions, and omissions do not give rise to a duty of care. It is said that it is not arguable that

[9] 97
[10] 18

the various positive acts should be viewed as "causing harm to the Claimant or making things worse for him". It is submitted that the claim should be struck out.

Claimant's case

20. Mr Chapman made three submissions in reply.

21. Firstly, he considered what should be the approach of the Court when dealing with a strike-out application. He submitted that in the present case, the relevant area of law was still developing and as a consequence the facts should be found so that any further development of the law would be on the basis of actual facts. He referred to Civil Procedure 2020, volume 1, page 86, paragraph 3.4.2:

> "An application to strike out should not be granted unless the court is certain that the claim is bound to fail (*Hughes v Colin Richards & Co* [2004] EWCA Civ 266; 2044 P.N.L.R. 35 CA (relevant area of law subject to some uncertainty and developing, and it was highly desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts))."

22. Mr Chapman referred me to the Supreme Court decision in *Poole Borough Council v GN* (supra). Lord Reed said,

> "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.
>
> 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."

23. Mr Chapman submits that the present case involves an emerging area of law and it would not be right to strike the claim out. He says that there is more than one approach to this case. He submits that it is not good law that unless a child is in custody, a defendant authority which has children responsibilities cannot be liable in law for negligence in respect of the child. He says that cases involving the assumption of a duty of care involve a nuanced approach, and this approach is

informed by the factual matrix before the court. He says that in the present case, the Defendant undertook a number of positive acts, which he says have been particularised in detail in the amended Particulars of Claim at 1 g d. (b) (quoted at paragraph 11 above), as a result of which the Defendant made an assumption of responsibility towards the Claimant.

24. Secondly, Mr Chapman referred me to the following passage by Lord Reed in *Poole Borough Council v GN*:

> "67. Although the concept of an assumption of responsibility first came to prominence in *Hedley Byrne* in the context of liability for negligent misstatements causing pure economic loss, the principle which underlay that decision was older and of wider significance (see, for example, *Wilkinson v Coverdale* (1793) 1 Esp 75). Some indication of its width is provided by the speech of Lord Morris of Borth-y-Gest in *Hedley Byrne*, with which Lord Hodson agreed, at pp 502-503:
>
> 'My Lords, I consider that it follows and that it should now be regarded as settled that 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. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.'
>
> It is also apparent from well-known passages in the speech of Lord Devlin, at pp 528-529 and 530:
>
> 'I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Norton v Lord Ashburton* [1914] AC 932, 972 are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. ... I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. … **Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility**.' (my emphasis)"

25. Mr Chapman submits that in the present case the Defendant made an assumption of responsibility towards the Claimant by undertaking the positive acts set out in detail in the amended Particulars of Claim at 1 g d. (b). He submits that it was stated by Lord Reed in *Poole Borough Council* at paragraph 88 that where the defendant undertakes the performance of a task or service for the Claimant the undertaking that reasonable care will be given is,

> "More commonly implied, usually by reason of the foreseeability of reliance by the claimant on the exercise of such care."

He said that in the present case, the undertaking was that the Defendant would keep the Claimant safe and it is the Claimant's case that the Defendant was negligent and did not keep him safe, with the consequence that he suffered very severe physical and psychological injuries. Mr Chapman submits that this is a classic case of an assumption of responsibility by the Defendant.

26. Thirdly, Mr Chapman submits that the facts in *Poole Borough Council* are distinguishable. He summarises that case at paragraph 30 of his skeleton and says:

> "31. The important distinction on the facts of *CN* are:
>
> a. C does not rely on any failure to rehouse by D;
>
> b. C's claim is concerned with D's failure to protect him from familial abuse. The scope of the alleged assumption of responsibility is constrained to the immediate risk of harm from those in his family.
>
> 32. Cs' claim in *CN* that they should have been rehoused must have failed because no claim was made against D based on its exercise of its functions under the housing legislation, §77 *CN*. In any event, there is a long line of authority that landlords do not owe a duty of care to those affected by their tenants' anti-social behaviour."

27. He developed this in his oral submissions by saying that the facts in *Poole* were entirely distinguishable from the present. In *Poole*, the claimants and their mother were placed by the defendant in a house on an estate in Poole next to a family who to the defendant's knowledge persistently engaged in antisocial behaviour. As a result, the claimants suffered physical and psychological harm. In *Poole* it was clear law that a landlord was not responsible for antisocial behaviour by neighbours towards his tenant(s). The Supreme Court held that the claimants and their mother had not entrusted their safety to the defendant and the defendant had not accepted that responsibility. The case was not dealing with facts such as the present, where the Claimant has been sexually, physically and emotionally abused by a member of his family and the Defendant has undertaken a number of positive acts for the assistance of the Claimant, which it is alleged were carried out negligently, resulting in severe physical and psychological injury.

28. Mr Chapman referred to the cases of:

i) *Tindall v Chief Constable of Thames Valley Police* [2020] EWHC 837, a decision of Master McCloud, in his skeleton at paragraph 15.

ii) *Transport Arendork v Chief Constable of Essex Police* [2020] EWHC 212, a decision of Lang J, in his skeleton argument at paragraph 18.

iii) *Spence v Calderdale Council,* a decision of HHJ Backhouse on 19 July 2019. There is a typed summary of the judgment in the trial bundle (142-144).

My finding

29. Having considered the parties' submissions, my decision is as follows.

30. A claim should only be struck out as disclosing no reasonable cause of action under CPR 3.4(2)(a) in a clear and obvious case. As the Court of Appeal said in *Hughes v Colin Richards & Co* [2004] EWCA Civ 266, an application should not be granted unless the court is certain that the claim is bound to fail.

31. The short point is that in my judgment, the case is not bound to fail. I say that for the following reasons:

i) The case must be looked at in the context that the law of tort in relation to the assumption of responsibility is still developing and emerging.

ii) The Supreme Court was at pains to point out in *Poole Borough Council* that each case turns on its own facts.

iii) An assumption of responsibility can arise where a claimant entrusts a defendant with the conduct of his affairs in general or 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 is commonly implied by reason of the foreseeability of reliance by the claimant on the exercise of such care.

iv) 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 (para. 89 of *Poole*).

v) The Claimant has set out in detail numerous positive acts, which the Defendant undertook for the assistance of the Claimant. The Claimant was reliant upon the Defendant's Social Services Department and the positive acts taken by the Defendant are sufficient to give rise to an arguable assumption of responsibility. For the purposes of this case, it is common ground that it must be accepted that the Defendant was negligent and the Claimant has suffered sexual, physical and psychological injuries.

vi) I was taken by both parties to a number of first instance decisions, some of which had been upheld on appeal. In my judgment they provide very limited assistance because in some of them the facts are obscure and in others the facts are distinguishable or very different.

32. For all these reasons, I dismiss the Defendant's application, dated 6 April 2020, to strike out the claim.

Appeal Judgment

33. Mr Stagg makes an oral application for permission to appeal. His oral application involves a reiteration of his submissions, which I have rejected. The court has been referred to and referred to all the relevant authority and law. In my judgment, this appeal has no realistic prospect of success and I refuse permission to appeal.

This judgment has been approved by HHJ Roberts.