DFX and Others v Coventry City Council [2021] EWHC 1328 (QB): where now for failure to remove claims?

Can a local authority social services department owe a common law duty of care to children in the community? In his judgment in *N v Poole BC [202] AC 780*, while upholding the decision to strike out the claim, Lord Reed left that question open, suggesting that it would be resolved in an appropriate case following a trial of the facts. *DFX, RFX, SFX and DGX v Coventry City Council* was such a case. Over 10 days in December 2020 and January 2021 Mrs Justice Lambert DBE heard evidence from social workers, social care experts and submissions on whether a common law duty of care could exist. In a detailed and elegant judgment, she dismissed the claim, finding that the local authority did not owe the claimants a duty of care, but that if she was wrong, there was no breach of duty and that the claimants' case on causation failed. Does this judgment provide a definitive answer and so put an end to this particular legal debate? Unfortunately, but unsurprisingly, no. Lambert J. expressed her decision on the duty of care to be based on the facts of the case. She was unwilling to rule out the possibility that in other circumstances social workers might assume a responsibility for children in the community. Nonetheless, given the factual matrix of *DFX*; the SSD were closely involved with the family for some 15 years, it is hard to envisage circumstances where such a responsibility could be assumed. Practically, this judgment will present a very high bar for claimants to clear before they can realistically argue that a duty of care exists.

The defendant, Coventry City Council, was represented by Adam Weitzman QC and Caroline Lody of 7 Bedford Row, instructed by Paul Donnelly and Samantha Chambers of DWF Law LLP. We have sought to provide a brief guide to the judgment and some preliminary thoughts on its implications.

The claimants were 4 of 9 siblings born to parents who resided in a suburban area of Coventry. Both parents suffered from mild learning difficulties, the father being more impaired than the mother. DFX, was born in 1995, RFX in 1996, SFX in 1999 and DGX in 2001. The 4 claimants were respectively the second, third, fourth and fifth of the 9 siblings. DFX, SFX and DGX all suffered from moderate learning difficulties. The value of the claim was originally put at £40,000,000, based upon the contention that the claimants' learning difficulties were caused by deficiencies in their upbringing. Expert evidence established that the cause was genetic and by trial damages had been agreed subject to liability. The individual awards ranged from £25,000 to £125,000, in effect restricting the claimants' losses to general damages.

SSD involvement with the family commenced shortly after the birth of DFX. It continued until 2010, when the Coventry Family Court made a final care order, removing all the children from their parents' care. During the 15 intervening years SSD involvement with the family had been near continuous; the SSD closed the case in June 2001 but re-engaged with the family 7 months later in February 2002. During this period the social workers had 3 main concerns: the first was whether the parents were capable of parenting the children so that they did not suffer neglect; second, whether the children had contact with, and so were at risk of harm from, dangerous adults in the local community; third, and most troubling, whether they were at risk of sexual abuse from the father, who was a Schedule 1 offender having been convicted of 4 offences of indecency towards teenage girls between 1992 and 1997.

SSD involvement with the family was very significant. Lambert J. has set out the details in her judgment, but in summary the steps taken by the local authority included section 47 investigations, various child protection conferences that placed the children on the child protection register under the categories of both neglect and sexual abuse, and child protection plans, which included the appointment of core groups, key workers and assessment of the mother and father's parenting ability and the risk of abuse that the father, and others, posed to the children. Support was also given to the family under section 17 of the Children Act 1989, including nursery places, assistance to maintain home conditions and direct work with the children to help them understand the risks of abuse, whether by third parties or from within the family.

As anyone familiar with this type of litigation can imagine, given the period of SSD involvement, the documentation was voluminous and the scope of the factual enquiry very wide. By trial, leading counsel for the claimants, Lizanne Gumbel QC, focused the allegations of breach on 3 specific failures: (a) the failure to implement the recommendations of an expert report from the Reaside Clinic. Commissioned by SSD to assess the parents' ability to care for the children and the risk of sexual abuse by the father, the psychologists who authored the report had concluded that there was a low probability of him abusing his own children but that this might increase as his daughters reached puberty, particularly if there were difficulties in his relationship with the mother; (b) a failure to properly implement the direct work undertaken with the claimants; and (c) having decided to apply for an interim care order at a child protection conference in March 2002, after it was discovered that AD, a adult male who was a potential abuser, was visiting the family home, no such application was made, instead the claimants were removed from the child protection register later in the year. The gravamen of these allegations was that in 2003 RFX, the second claimant, disclosed that that she had been indecently assaulted by AD and that in 2009 DFX and SFX, the first and third claimants, disclosed that their father had indecently

assaulted them. Following removal, in 2010, RFX also made allegations against her father. He was subsequently convicted of serious sexual offences against RFX.

None of the claimants gave evidence at trial. The judge heard evidence from 7 social and family support workers and took into account witness statements from a number of others. She also heard evidence from the social care experts, Maria Ruegger for the claimants and Felicity Schofield for the defendant.

The judge's decision on breach (paras 212 to 247) is fact specific and not of general application, however, importantly, in reaching her conclusions she rejected Ms Ruegger's expert evidence, preferring that of Ms Schofield. Given the number of claims in which Ms Ruegger features this finding is of some relevance. In cross-examination it became apparent that Ms Ruegger's direct experience of front-line social work was limited and had all taken place prior to 1983 and so before the implementation of the Children Act 1989 (para 226). The judge found that this meant her approach was "*at best, overly academic*". Although she rejected the defendant's characterisation of Ms Ruegger's approach as "*mechanistic*" she did find, "*but if by this he [Mr Weitzman] means that her opinion was detached from the reality of the circumstances as they were faced by Mr Dax [one of the social workers] and the other members of the child protection committee in 2002, then I agree with him*" (para 227).

Causation also became a problem for the claimants. Their pleaded case on causation was that the abuse, or much of it, should have been prevented by the SSD making an application under section 31 of the CA 1989 to remove them from their parents' care. The nuance of that position was explored with Ms Ruegger at trial. In cross-examination she explained that had an application for an interim care order been made in 2002, the court would have made an order commissioning expert reports from a psychologist and that, had such reports been obtained, the psychologist would have recommended the children's removal because he or she would have found that the parents were incapable of adequately caring for or protecting them. This evidence exposed a lacuna in the claimants' case. They had not asked for permission to call a psychologist and so there was no evidence before the court on this issue. To bridge this gap Ms Gumbel QC submitted that had a psychologist been instructed in 2002, as they were in 2009 after care proceedings had been commenced, the same conclusions would have been reached. Lambert J. rejected that submission, noting that much had changed between 2002 and 2009 (para 251).

This finding causes a further problem for claimants in what are colloquially described as failure to remove claims. In such actions the causative breach is almost invariably said to be the failure to remove the

children from their parents' care. The pleadings tend to assume that an application to remove under section 31 is axiomatic with an order by the court to remove. Lambert J.'s judgment shows that such an assumption cannot be safely made. While it may follow in a case where there is clear evidence of parental harm, or a proven incident of severe sexual or physical abuse, this may not be so where the allegation is one of continuing neglect or a risk of other harm, including abuse, which has not yet crystalised. In such a case establishing that the local authority should have made an application for a care order does not equate to the court granting such an order. As with a clinical negligence action, the claimant is likely to need expert causation evidence to establish that, on balance, the evidence before the court would have been sufficient for a judge to make the care order.

This is the backdrop to the judge's finding on the all-important question of whether the claimants were owed a duty of care. While the Particulars of Claim had pleaded all 4 of the Tofaris and Steel exceptions to the general rule that in omissions cases there is no duty on a private individual, or public body, to take a step to protect another from third party harm, at trial the claimants' case was limited to the assertion that the SSD had assumed a responsibility for their welfare. In her submissions Ms Gumbel relied on the steps actually taken by the local authority as evidence of that assumption, namely (a) obtaining and seeking to implement some of the recommendations of the Reaside report, (b) undertaking at the child protection conference in March 2002 to apply for a care order to protect the children and (c) performing direct work with the children and reviewing its efficacy so that it provided them with reasonable protection (para 180). In effect the submission was that by undertaking these tasks the SSD had assumed a responsibility for the plight of the claimants and that while reliance on the competent performance of these tasks was not explicit, it could be inferred. In seeking to support this argument she drew analogies with the role played by the local authority in *Barrett v Enfield London Borough Council [2001] 2 AC 550, Phelps v Hillingdon LBC [2001] 2 AC619* and *D v East Berkshire Community Health NHS Trust [2004] QB 558*.

As noted by the judge, these submissions did little more than assert the factual basis upon which an assumption of responsibility was said to rest and provided her with "*little additional flesh to add to the bones of her [the claimants'] case*" (para 181). There can be no criticism of Ms Gumbel for this. Her experience of arguing these points is second to none, having appeared for the claimants in *X v Bedfordshire* and *Poole*. Rather, we would suggest that when advancing failure to remove cases, claimants can do little more than focus on the facts which are said to give rise to reasonable reliance, so creating the platform for the assumed responsibility. The fundamental difficulty faced by claimants seeking to make these arguments is that when a local authority exercises its powers under either section

47 or section 31 it is taking a purely statutory step, and, if the complaint is of a failure to remove, when properly analysed the alleged breach is the failure to take this purely statutory step.

This was the defendant's position at trial which was pithily summarised by the judge into 3 overlapping propositions: (1) in an omissions case it is contrary to legal principle to impose a duty on a public body to undertake a purely statutory act (para 187); (2) this could be tested by seeing if there was an analogous common law situation. Where a local authority is exercising its statutory powers under section 47 and 31 there is no comparable private law analogy because no private individual or body is authorised to take measures which would interfere with a family's Article 8 rights. These statutory steps could be distinguished from actions taken pursuant to statute and which could also be taken by a private individual or body, e.g., medical treatment by the NHS. In argument the defendant sought to summarise this position by submitting that the court could not impose upon a local authority a common law duty for failing to act in a way which was not permitted under the common law (paras 188 & 189); and (3) that applying the incremental approach there was no analogous authority where the court had required a local authority to confer a benefit on a child in the community by exercising its statutory child welfare duties or powers (para 190).

Having considered these submissions, Lambert J. held that on the facts of the case the defendant did not owe the claimants a common law duty of care. In reaching that conclusion she first found that this was an omissions case, the central allegation being that the SSD had failed to confer a benefit on the claimants by exercising its statutory functions to effect a timely removal, so protecting them from abuse (para 195). Having made that finding she went on to consider whether an assumption of responsibility could be inferred from acts undertaken by the defendant and upon which it was reasonably foreseeable that the claimants would place reliance, such that there was an obligation upon the defendant to exercise reasonable skill and care (para 201). There was no such act.

In cross-examination Ms Ruegger had accepted that the direct work with the claimants had been undertaken competently. This left only on the obtaining of the Reaside report and the decision in the child protection conference to recommend an application for care proceedings to be considered.

While the defendant had taken a step in commissioning the Reaside report it was obtained not to inform the claimants or their parents, but for the local authority as part of its investigatory duties under section 47. Lambert J accepted the defendant submission that when assessing risk, both for the purposes of section 47 and section 31, the local authority was making a judgement which would inform its own

actions, not those of the family members. Both of the experts had accepted in evidence that the interests of the children, more obviously the parents, and the local authority in care proceedings were not necessarily aligned (paras 202 & 203). This difference of interest was exemplified by the separate representation given to children in care proceedings by the guardian ad litem. The recommendation that care proceedings be commenced by the child protection conference could not be characterised as a positive step that could generate a duty of care. Nor, when properly analysed, could it be characterised as provision of advice or a service upon which the claimants might reasonably foreseeably rely (para 205). Like Lord Reed in *Poole*, Lambert J. could find nothing in the exercise of the defendant's statutory functions under section 47 and 31 which gave rise to a duty of care.

Importantly, because it is not specific to this case, Lambert J. went on to consider the claimants' submission that *D*, *Barrett* and *Phelps* supported their proposition that a local authority SSD could assume a responsibility by exercising its statutory functions. Rejecting that argument, she accepted the defendant's submission, that on their facts, none of these cases were analogous: the appeals in *D* involved harm caused by the defendant public authorities, not a failure to confer a benefit; in *Phelps* the injury, the failure to ameliorate a learning disability, was inflicted not by a third party but by the negligence of a local educational authorities psychologist; in *Barrett* the local authority assumed responsibility for the child's welfare because it had taken him into their care, Lord Slynn comparing the resulting position to the relationship between a school and its pupil, a situation which the judge described as "*very different*" to the facts before her (paras 207 & 208).

Concluding her findings on the existence of a duty of care the judge held,

I have considered whether there was anything in the nature of the statutory functions being exercised by the defendant under section 47 and section 31 of the 1989 Act or the manner in which those functions were exercised which generated a duty of care. Having done so, I find nothing which suggests to me that the defendant assumed responsibility to exercise those functions with reasonable skill and care. Having looked for "something more" as I have put it, I find nothing. The facts do not fall within any category in which the common law has recognised a duty arising. That being the case I come full circle and agree with Mr Weitzman that the claimants are, in this case, impermissibly seeking to create a common law duty of care from the defendant "merely operating a statutory scheme" contrary to the, now well-established, principle set out in Stovin and Gorringe (para 209).

The judge had come "full circle" because her starting point had been to reject the defendant's submission that in an omissions case, a common law duty of care could not arise from a local authority's failure to

exercise its statutory powers under sections 47 and 31. She rejected that proposition because in *Poole* Lord Reed had held the operation of a statutory scheme could generate an assumption of responsibility "*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*" (para 196), and because in *Gorringe v Calderdale MBC [2004] 1 WLR 1057* Lord Hoffmann had recognised that where a public authority had entered into relationships, or undertaken responsibilities, the fact that they had done so in pursuance of a statutory power would not negate the existence of a duty (para 197). In reaching this position the judge also rejected what she described as the defendant's attempt to "square the circle", namely by drawing a distinction between acts which were the direct exercise of a statutory power and an act taken pursuant to statute, observing that this was not a distinction which had been made by either Lord Reed or Lord Hoffmann (para 198).

Having found that the operation of sections 47 and 31 were capable of giving rise to an assumption of responsibility Lambert J. then sought to define in what circumstances this might occur. The answer, as she accepted, was somewhat nebulous.

Whether a duty of care is generated by (on the facts of this case) an assumption of responsibility depends upon whether there is, putting it colloquially, "something more": either something intrinsic to the nature of the statutory function itself which gives rise to an obligation on the defendant to act carefully in its exercising that function, or something about the manner in which the defendant has conducted itself towards the claimants which gives rise to a duty of care (para 199).

While we would not want to look a gift horse in the mouth, in this instance our approach still differs from that of Lambert J. We consider that a distinction between conduct which is a direct exercise of a statutory power, and conduct undertaken pursuant to a statutory duty, is a valid one. The distinction was made by Lord Hoffmann in *Customs and Excise Comrs v Barclays Bank Plc [2007] 1 AC 181*, a passage which was cited with approval by Lord Reed in *Poole* [72]. If that is correct, while there will be many situations where an act taken pursuant to statute may generate an assumption of responsibility and so a duty of care, this will not occur when a local authority is exercising its powers under section 47 and section 31. This is because the exercise of those powers is a purely statutory function with no common law equivalent. This is why it is impossible to define the extra element that is necessary other than to describe it as "something more", it is why there is no analogous authority where a duty of care has been found to exist and why both Lord Reed in

Poole and Lambert J. accepted that the statutory functions under sections 47 and 31 did not give rise to an assumption of responsibility.

This argument aside, what will the effect of *DFX* be on failure to remove claims? First, it sets a very high bar for claimants. If the SSD involvement in this case over 15 years is insufficient to give rise to an assumption of responsibility it is hard to see how a claimant can plead a case so as to distinguish it. Second, claimants cannot now rely on *D*, *Barrett* or *Phelps* to argue that by analogy they provide support for the existence of a duty of care in a failure to remove case. Third, both parties will now have to consider causation more carefully, focusing on what would have occurred had there been an application by the local authority to remove children from their parents' care. As a consequence, in our view, the opportunity to now bring a failure to remove claim is significantly narrowed.

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