

IN THE COUNTY COURT AT NOTTINGHAM

Case No: B42YM055

60 Canal Street
Nottingham
NG1 7EJ

Date: 22/09/2020

Before :

HIS HONOUR JUDGE GODSMARK QC

Between :

AA **First Claimant**

BB **Second Claimant**

- and -

CC **Defendant**

Mr Nicholas Bowen QC (instructed by **Bhatia Best**) for the
Second Claimant
First Claimant in person

Mr Adam Weitzman QC (instructed by **Browne Jacobson**) for the **Defendant**

Hearing dates: 7th February 2020, 16th June 2020, 16th July 2020
Judgment handed down on 22nd September 2020.

JUDGMENT

HHJ Godsmark QC :

1. This is an application made by the Defendant, to strike out claims made against it by the First Claimant and, separately, his daughter the Second Claimant as disclosing no reasonable grounds for bringing the claim pursuant to CPR 3.4(2)(a); alternatively for summary judgment under CPR 24.
2. I have heard argument over the course of three days from leading counsel for the Defendant, leading counsel for the Second Claimant (who I shall refer to hereafter as BB) and the First Claimant in person (AA). When we started the hearing on 7th February 2020 none of us anticipated the pandemic which was to disrupt so much of life in general and court hearings in particular. There was thus a delay before we could complete the hearing by telephone on 16th June and 16th July. I should record my thanks immediately to all parties for the way in which they were able to adapt to the necessary change in the way we had to work.

Historical background

3. This matter has its roots in a family dispute. The First Claimant was married to DD and the Second Claimant is their daughter born on 6th August 2004. I shall refer to DD as “the mother”. Not long after BB’s birth the marriage broke down and there began a long dispute between the parents about residency for BB. Details of that dispute run to many pages in the (eventual) Particulars of Claim for BB and the narrative account by way of Particulars of Claim for AA. I shall seek to summarise.
4. In 2006 AA reported to the Defendant’s social services department concerns about the mother and her treatment of BB. Those concerns included

allegations that mother was administering home-made “medication” to BB including the forceful ingestion of a brown liquid through BB’s nose using a nasal aspirator. AA suggested that the mother was mentally unstable and causing BB distress through psychological abuse.

5. Such allegations triggered the Defendant’s duty to investigate under s.47 Children Act 1989, to make such enquiries as they considered necessary to enable them to decide whether they should take action to safeguard or promote BB’s welfare. Social workers visited and spoke to AA and the mother who began to make accusations of physical and emotional abuse against AA. The social workers decided that BB was not at risk, that AA’ss allegations arose out of marital conflict and that there was no evidence of administration of drugs to BB or of issues with mother’s mental health. Indeed the view expressed by the social workers was that AA allegations were malicious and that he was psychologically abusing his wife.
6. At a court hearing where the mother sought an occupation order against AA, the Defendant’s social workers supported the mother as a result of which AA left the matrimonial home and BB was placed in the care of her mother.
7. Over the years that followed AA continued to raise concerns about BB and the treatment of her by her mother. That was met by counter-allegations made by the mother as to BB’s welfare whilst in AA’s care. The Defendant’s social workers advised the mother to stop contact between BB and AA and take legal advice. Subsequently on 15 April 2009, in private law proceedings, mother was granted residence of BB with detailed contact arrangements put in place for AA.

8. BB continued to have contact with AA who remained deeply concerned about her and the way in which the Defendant had managed referrals about BB.
9. In 2012 BB herself began to make disclosures at school to the effect that her mother was abusive to her. AA redoubled his efforts to get somebody to listen to him raising his concerns with the school and also, again, with the Defendant's social workers. AA alleges that he was assured by the Defendant's social workers that they would not leave BB at risk and would investigate the referrals.
10. A further assessment undertaken by the Defendant's social worker concluded that AA concerns were not substantiated and that no further action should be taken. AA challenged that conclusion. In July 2012 the Defendant received expressions of concern from another quarter. BB's head teacher raised concerns. BB's GP was worried about what BB was saying about her home life. Then a neighbour reported to the school that mother had been abusive and threatening to BB. That led to a school referral and initial investigation by the Defendant. Investigation through the multi-agency team concluded that BB was being properly cared for.
11. In March 2013 a member of the public reported to the Defendant concerns describing BB's distress and threats of self-harm. Nonetheless in June 2013 a residence order was granted to mother with detailed contact provision for AA and a s.91(14) Children Act 1989 order made preventing AA from making further private law applications without permission of the court. It is said that CAFCASS involvement was influenced by and reliant upon the Defendant's view that BB was properly cared for by her mother and was not at risk.

12. Nevertheless, during 2014 AA continued to express concerns about BB and of her self-harming and being frightened of her mother. This culminated in November 2014 with BB refusing to return home from a visit to AA. Since then BB has remained with AA.
13. Between July 2012 and December 2014 AA made a number of complaints to the Defendant pursuant to the Statutory Complaints Procedure within the Children Act 1989 Representations Procedure (England) Regulations 2006. He alleges that his complaints were not dealt with promptly and certainly not within the time limits set out, that the Defendant admitted serious safeguarding failures but then refused to correct them and refused to undertake proper child protection assessments or investigations.
14. AA says that the failure to deal with his complaints according to the statutory procedure has meant that his now vindicated concerns about BB between July 2012 and November 2014 were unaddressed. Eventually acknowledged shortcomings in the Defendant's investigation into the well-being of BB were not acted upon promptly or at all thus protracting the abuse of BB at her mother's hands and the distress of AA.

AA's Claim

15. AA issued his claim in July 2015 on behalf of himself and BB. The position changed following orders of the court and separate representation of BB. AA then filed revised Particulars of Claim entitled "Statement of Claim for the First Claimant" which is a narrative running to some 23 pages. He alleges

breaches of duty, malfeasance and breaches of his Article 3, Article 6 and Article 8 rights.

16. The narrative chronicles a catalogue of alleged failures of the Defendant to protect BB from her mother and in failing properly to investigate the allegations being made by AA about BB's treatment by her mother.
17. The thrust of AA personal claim against the Defendant commences in 2012. He focuses upon the complaints made by him under the statutory complaints procedure, the failure to recognise and act upon investigative shortcomings of the past and the failure to follow the required statutory procedure timeously or at all as a result of which BB was left in the abusive hands of her mother until late 2014. During that time AA claims that he was suffering increasing distress and exasperation leading to mental illness.
18. It is necessary to give more detail about this part of AA's claim. Under s.26 Children Act 1989 every local authority is required to establish a procedure for considering any representation (including any complaint) made to it by (extracting the relevant provisions) the parent of any child who is not being looked after by the local authority but who is in need. The Children Act 1989 Representations Procedure (England) Regulations 2006 sets out how the complaints procedure is to operate and useful guidance is found in the Department for Education and Skills publication Getting the Best from Complaints.
19. In short, the complaints procedure has three stages with time limits on each stage. Stage 1 is the local resolution stage where it is envisaged that a complaint can be dealt with quickly at local level. There is a ten working day

time limit on this which can be extended to twenty days. If the complaint is not resolved or the complainant insists, then the matter is escalated to Stage 2. This involves an investigation by an investigating officer and an independent person. This should be completed within twenty-five working days but may be extended to a maximum of sixty-five. Once completed the Investigation Report is considered by an Adjudicating Officer who should prepare a response to the complaint. Where the Stage 2 procedure has been completed and the complainant is still dissatisfied then there can be further consideration via a Stage 3 Review Panel. The timescale here is longer - up to ninety-two days.

20. In July 2012 AA made a complaint to Derbyshire Social Services under the statutory procedure. In his original Particulars of Claim AA devoted forty-three pages to a detailed narrative of how his complaint was mismanaged. He was required by the court to reduce that to more manageable and concise proportions and so produced a twenty-three page document. I make this observation only to make clear that where I have been unable to find something in AA's current Statement of Claim, I have felt it only fair and appropriate to look also at his original more detailed case statement to see if what I sought had been there.
21. I will try to distil AA's account into a few short paragraphs.
22. In June 2012 BB's head teacher, Mr E became concerned about disclosures BB was making at school as to her treatment by her mother. Mr E made a referral to Social Services who undertook an initial assessment before concluding that the concerns could not be substantiated and closed the referral

23. AA made a statutory complaint on 2nd July 2012. Whilst I cannot find the precise terms of that, I assume that it related to the failure to do more following Mr E's referral. Shortly after that BB's GP Dr F also made a referral to Social Services stating concern about possible emotional abuse of BB by mother. AA says this was never documented.
24. On 20th July 2012 AA made a further complaint. He alleges that neither complaint was properly dealt with and there was interminable delay in undertaking a Stage 2 investigation which was not undertaken until 2013. Meanwhile referrals to social services about BB continued. In September 2012 the head teacher Mr E made a further referral based on disclosures by both BB and another parent. Mr E tried again in October or November 2012 and then in March 2013 there was a further referral by "a professional".
25. AA was not happy with the 2013 Stage 2 investigation and sought to escalate it to Stage 3. However social services elected instead to re-open the Stage 2 investigation. This led to an Addendum Stage 2 report in July 2014 which acknowledged substantial shortcomings in the way in which AA's complaints had been dealt with and also, according to AA, acknowledged that the March 2013 referral at least met the level 3 child-in-need threshold for investigation but was not investigated. After receiving the Addendum Stage 2 report AA pressed for a Stage 3 review. That led to a decision in December 2014 that there be a further (independent) Stage 2 investigation.
26. All the time this was going on, there were increasing concerns being expressed about BB from AA and others (not least Mr E) to the effect that BB was suffering emotional abuse with her mother. AA alleges that this bureaucratic

merry-go-round was a deliberate attempt by the Defendant to cover up its failings towards BB. Further, that promises made to him were broken and the Defendant lost sight of the information coming in about BB in trying to avoid dealing with AA's complaints.

27. There is particular reference by AA to the Family Court proceedings concerning BB in which CAFCASS was reporting. He says that Mr G of the Defendant's social services gave a commitment to be entirely open with AA in respect of social services' contact with CAFCASS. However that undertaking was broken, the Defendant's social services failed to inform CAFCASS of the referrals being made relating to BB or of failings identified in the handling of such referrals. As a result, at a final hearing before the Family Court in on 4th June 2013, that court had an incomplete and inaccurate picture of BB's situation and BB remained with her mother. To add insult to injury, the court made an order preventing AA from making further private law applications without permission of the court.
28. AA says that these failures on the part of the Defendant amount to a breach of the Defendant's duty of care to him at common law, that there is dishonesty and malfeasance and that there is a breach of his Article 3, Article 6 and Article 8 rights.

BB's Claim

29. Procedurally, BB's claim has had a rather longer history. Following the separation of her claim from that of AA, Amended Particulars of Claim were submitted. These identified the statutory duties of the Defendant to safeguard and promote the welfare of children in its area and its powers, and where it has

reasonable cause to suspect that a child in its area is suffering or is likely to suffer significant harm, to make enquiries. The pleading then catalogues the involvement of the Defendants children's services with BB between the end of 2006 and November 2014.

30. It is pleaded that under s.17 Children Act 1989 the Defendant has powers to provide services for a particular child in need if provided with a view to safeguarding or promoting the child's welfare. Further, that under s.47 Children Act 1989 the Defendant has both powers and duties in respect of the protection of children in its area suffering or likely to suffer significant harm – when it must make inquiries to decide what action is necessary to safeguard or promote the child's welfare.
31. However it is also recognised that breach of such statutory duties does not of itself give rise to a cause of action.
32. It is alleged that the Defendant owed BB, as a child living in its area, a duty of care at common law to exercise reasonable skill and care to safeguard her welfare and promote her well-being and safety and to protect her from harm. That duty is alleged to arise out of foreseeability of loss and damage, a relationship of sufficient proximity and it being fair just and reasonable to impose the duty in the circumstances of the case. That duty is alleged to have been breached at various points in the chronology by, in essence, carrying out a totally inadequate investigation into the concerns being expressed about BB. As a consequence, it is said that BB now suffers a mixed anxiety disorder and has been receiving therapy. It is also alleged that the Defendant's failures amount to a breach of its obligations to BB under Article 8.

33. Subsequently Re-Amended Particulars of Claim were filed dated 23 July 2019. The factual narrative is the same but the basis upon which the duty of care arose was refined to include:-
- a) assumption of responsibility towards BB in the performance of their investigative functions;
 - b) foreseeability of loss and damage;
 - c) a relationship of proximity and reliance.
34. It is then pleaded that the *Caparo* test of imposition of a duty of care is not applicable because this is not a novel case and there is then an anticipatory pleading insofar as the Defendant might rely upon the omissions principle. I do not propose to linger on the details of that pleading although it was very much at the centre of submissions made on behalf of the Defendant on the first day of the strikeout application. This is because between the first day of the hearing and the second, a further pleading was produced for BB. I will come to that.
35. The result, it is said, has been to leave BB exposed to abuse from her mother for over eight years from 2006 to 2014 resulting in physical and psychological damage.
36. The matters summarised above are alleged also to amount to breaches of BB's Article 3 rights (inhuman and degrading treatment at the hands of her mother) and Article 8 rights (unjustified and arbitrary violations of her private family and home life and her right to physical and moral integrity). The Article 3 allegation, I note in passing, was only introduced in the latest amended pleading arising during the hearing.

The Application

37. The Defendant's application to strike out is made very much upon the back of the Supreme Court decision in *N v Poole Borough Council* [2019] 2 WLR 1478 and also *Robinson v Chief Constable of West Yorkshire* [2018] AC 736 which preceded it.
38. It is accepted that the Defendant owed statutory duties to children in its area under sections 17 and 47 of the Children Act 1989. However such statutory duties do not of themselves give rise to a common law duty of care. The Defendant's case is that the alleged common law duty does not arise when these allegations are analysed alongside the Supreme Court decision in *Poole*.
39. In *Poole* the Supreme Court considered (again) the inter-relationship between the statutory duties of local authorities and a parallel common law duty. The leading judgment is that of Lord Reed. He mapped the development of the law in this area over recent years and particularly the rise and fall of the decision in *X v Bedfordshire County Council* [1995] 2 AC 633. In that case the allegation was that the council had failed to protect children from harm inflicted by others and the question arose whether there were circumstances, such as an assumption of responsibility to protect children from harm, which placed the council under a common law duty to protect them. The common law duty was rejected essentially on public policy grounds. Over the years that followed, those public policy considerations were questioned particularly following the advent of the Human Rights Act 1998. In 2005, the case of *D v East Berkshire* [2005] 2 AC 373 reached the House of Lords where Lord Nicholls observed at paragraph 82 that the law had moved on since *X* :-

“There the House held it was not just and equitable to impose a common law duty on local authorities in respect of their performance of their statutory duties to protect children. Later cases mentioned by my noble and learned friend, Lord Bingham of Cornhill, have shown that this proposition is stated too broadly. Local authorities may owe common-law duties to children in the exercise of their child protection duties.”

40. I need not analyse other authorities leading up to the case of *Poole* in any greater detail since that was undertaken by Lord Reed in *Poole* itself. In the course of his judgement Lord Reed steered away from the traditional distinction between acts and omissions. In paragraph 28 he expressed himself thus:-

“Like private individuals, public bodies did not generally owe a duty of care to confer benefits on individuals, for example by protecting them from harm..... In this context I am intentionally drawing a distinction between causing harm(making things worse) and failing to confer a benefit (not making things better) , rather than the more traditional distinction between acts and omissions, partly because the former language better conveys the rationale of the distinction drawn in the authorities, and partly because the distinction between acts and omissions seems to be found difficult to apply. As in the case of private individuals, however, a duty to protect from harm, or to confer some other benefit, might arise in particular circumstances, as for example where the public body had created the source of danger or had assumed responsibility to protect the claimant from harm.”

41. Following his analysis of recent authority the conclusion is succinctly stated at paragraph 65 of Lord Reed's judgement:-

“It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation.”

42. “Assumption of Responsibility” was then considered by Lord Reed in some detail. In paragraph 73 Lord Reid remarked:-

“There are indeed several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme. An example mentioned by Lord Hoffmann is Phelps v Hillingdon, where the teachers' and educational psychologists' assumption of responsibility arose as a consequence of their conduct in the performance of the contractual duties which they owe to their employers. Another example is Barrett v Enfield, where the assumption of responsibility arose out of the local authority's performance of its functions

under childcare legislation. The point is also illustrated by the assumption of responsibility arising from the provision of medical or educational services, or the custody of prisoners, under statutory schemes. Clearly the operation of a statutory scheme does not automatically generate an assumption of responsibility, but it may have that effect 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.

43. Earlier in his judgement at paragraph 68:

"Since Hedley Byrne, the principle has been applied in a variety of situations in which the defendant provided information or advice to the claimant with an undertaking that reasonable care would be taken as to its reliability (either express or implied, usually from the reasonable foreseeability of the claimant's reliance upon the exercise of such care), as for example in Smith v Eric S Bush, or undertook the performance of some other task or service for the claimant with an undertaking (express or implied) that reasonable care would be taken" Lord Reed then referred to Lord Goff in *Spring v Guardian Assurance*:

"All the members of the Appellate Committee in [Hedley Byrne] spoke in terms of the principal resting upon an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill." And later *"Accordingly where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct."*

44. Against that legal backdrop it is important to note what the case of *Poole* was about, what the outcome was and why. The claimants were two children. They were living with their mother in council accommodation. One of the children was disabled and had a care package and an allocated social worker. The family was subject to targeted harassment from a neighbouring family which reached levels alleged to have caused both children physical and psychological harm. Eventually the family was rehoused.
45. The claim was brought alleging that the defendant authority in the exercise of its housing functions owed the claimants and their mother a duty of care to protect them from abuse and anti-social behaviour by rehousing them. That limb of the claim was struck out.
46. In addition it was alleged that the council owed the children a duty of care in relation to the exercise of its functions under sections 17 and 47 of the Children Act 1989 and that they failed to protect the claimants from harm by allowing them to continue to live where they were. It was said that since from an early stage the council knew or should have known that the claimants were at foreseeable risk of harm, that created a duty to investigate and take reasonable steps to protect them from any such risk. The council was said to have accepted responsibility for the claimants' particular difficulties in purporting to investigate the risk that the claimant's neighbours posed to them and subsequently in attempting to monitor the claimant's plight. It was said that in so far as such investigation was shown to have been carried out negligently and/or negligently acted on, the defendant was liable for breach of duty. The alleged breach of duty was failure to remove the claimants from the

care of their mother. It was this second limb which brought the case to the Supreme Court.

47. That claim was assessed against the legal criteria for the imposition of a common law duty of care. Lord Reed initially considered whether the claim was one in which the defendant is alleged to have harmed the claimant or one in which the defendant is alleged to have failed to provide a benefit to the claimant, for example by protecting him from harm. The conclusion was that the case fell into the latter category.
48. The question then arose as to whether a common law duty of care could be based upon “assumption of responsibility.” As paragraph 78 of Lord Reed’s judgement makes clear, the special relationship was alleged to have arisen out of the defendants purported investigation into the risk that the claimant’s neighbours posed and subsequently in attempting to monitor the claimant’s plight as set out in the “sequence of events”. That was alleged to have amounted to an acceptance of responsibility for the claimant’s particular difficulties on the part of the defendant. It was then further alleged that the defendant purported to protect the claimants by such investigation. The “sequence of events” is described as a chronology detailing the assignment of social workers, the various assessments of the claimant’s needs and to meetings where options were discussed.
49. In short, Lord Reed concluded that on the pleadings the alleged duty of care could not be made out. This was essentially because there was no pleaded basis upon which an assumption of responsibility might be established.

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. It may have been reasonably foreseeable that their mother would be anxious that the council should act so as to protect the family from their neighbours, in particular by rehousing them, but anxiety does not amount to reliance. Nor could it be said that the claimants and their mother had entrusted their safety to the council, or that the council had accepted that responsibility.

At paragraph 82:

“It is of course possible, even when no such assumption can be inferred from the nature of the function itself, that it can nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Since such an inference depends on the facts of the individual case, there may well be cases in which the existence or absence of an assumption of responsibility cannot be determined on a strikeout application. Nevertheless the Particulars of Claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred. In the present case, however, the Particulars of Claim do not provide a basis for the behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred.”

At paragraph 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

strikeout application. In the circumstances which I have described, however, the particulars of claim do not in my opinion set out any basis on which an assumption of responsibility might be established trial.”

50. Lord Reed was also troubled by the nature of the alleged breach of duty, namely the failure to remove the children from the care of their mother, which had no possible basis.

51. In relation to BB’s claim the Defendant’s position is that it is effectively indistinguishable from that in *Poole*. BB’s claim is a failure to confer a benefit claim and thus no common law duty arises absent assumption of responsibility. It is said that there is no pleaded basis for that although that argument was advanced in most detail by reference to the Particulars of Claim as they stood on Day 1 of this hearing. As already noted, there was a significant re-pleading at the start of Day 2.

52. Following the Day 1 submissions from the Defendant, the Particulars of Claim were substantially amended. I set out here how the pleading, as amended stood at the start of submissions on behalf of BB on Day 2.

53. The factual allegations were set out in substantially more detail. However the legal basis of the claim was expanded in particular in relation to assumption of responsibility. The nature of the duty in negligence is put as follows:-

- a) a duty to perform the statutory functions under the Children Act 1989 and Children Act 2004 with reasonable care;
- b) to take reasonable care to investigate and monitor whether the Second Claimant was at risk of abuse and if so to consider exercising statutory

powers to assist her;

- c) to take reasonable care in the performance of the assessment / protective services that they did provide and upon which the First and Second Claimants relied.

54. The duty is then said to be owed on factual bases which run to over three pages. In essence it is alleged that it was foreseeable that BB would suffer loss and damage if the Defendant acted negligently in the performance of its functions powers and duties, that there was plainly a relationship of proximity between BB and the Defendant and that, although not a novel case, it is a fair just and reasonable to impose liability. Reliance is placed upon the Defendant's active investigation into the welfare of BB, its decisions relating to the safety and welfare of BB resulting in BB being left at risk with her mother; her father's concerns being dismissed and provision by the Defendant of a letter to the Court supporting the mother's application to exclude AA from the family home. Such matters, it is alleged, point to an assumption of responsibility towards BB.
55. It is appropriate here to reproduce the more detailed pleaded case following the last amendment.

91. In this case the Defendant's factual involvement amounted to:

- a. the provision of a service on which BB given her vulnerability through AA could be expected to rely upon; and*
- b. created a special relationship whereby AA had entrusted BB's safety to the Defendant; and*
- c. in the premises the Defendant assumed responsibility for BB's welfare and undertook a responsibility towards BB (and AA) to perform its statutory functions under the Children Act 1989 with reasonable care;*

d. *undertook positive acts which prevented the 1st Claimant from protecting BB from the danger posed by DD;*

92. *Alternatively the Defendant created a fresh danger / made matters worse, by allowing BB to remain in the care and control of her mother after August 2011(at the very latest), by which time the Defendant (directly and vicariously) were or should have been aware of the risk posed by DD's behaviour towards BB and that AA's complaints were credible and worthy of timely and competent investigation.*

93. *Liability cannot be denied on the basis that the allegations of breach are a series of pure omissions or that properly analysed this is a case merely of a failure to confer a benefit because this is a case involving multiple positive acts and the provision of a service. The Defendants purported to proactively assess BB's domestic situation but then failed to act competently within a series of positive decisions to act/ assess between 2006 – 2014, positively concluding after each inadequate assessment or failure to assess to take no further action.*

94. *Further or alternatively, a duty of care was owed because the allegations of breach in this case fall within the recognised exceptions to the omissions principle.*

Assumption of Responsibility

95. *As pleaded at paragraph 14 above and taking account of the facts and matters pleaded between paragraphs 16 – 86 above, the Defendant assumed responsibility to the 2nd Claimant because*

a. *It provided a service, advice and support to BB of the kind envisaged by Lord Reed at paragraph 81 of Poole Borough Council v GN and both her parents which (objectively and subjectively) "crossed the line" between the mere operation of the statutory scheme and the creation of a special relationship with the consequent legal obligations to act with reasonable care when taking decisions which impacted upon BB's welfare and personal safety.*

b. *On the facts of this case, as pleaded at paragraph 14(2)-(3) above, the proactive social work decisions taken also created liability in tort because:*

i. *The result of the social work input throughout the period from 2006 – 2014 was to entrust BB's safety to DD;*

- ii. *in doing so and having dismissed AA information on the risk to BB as malicious, undertook positive acts which prevented him from protecting BB from the danger posed by DD. The Defendant “crossed the line” (inter alia):*
1. *By returning medication in 2006 (which DD continued to administer on BB for at least a further five years until a date in 2012);*
 2. *By suppressing / dismissing evidence that DD was suffering from mental illness, either a personality disorder or induced (see paragraph 20 above and 134 below);*
 3. *By providing evidence / a letter to help persuade a judge to order AA exclusion from the family home (see paragraph 42, 34 – 35 above);*
 4. *By advising DD to stop contact to AA in 2008 (see paragraph 50 above);*
 5. *Refusing to assess under the Children Act 1989 in response to AA concerns on the basis that CAFCASS were involved with various private law hearings in circumstances where CAFCASS were simply relying on the social work view that at BB was not at risk from DD and that AA’s reported concerns were malicious and/or without foundation.*

Control of the Risk

96. *Further or alternatively the Defendant was in a position to control the risk posed by the 2nd Claimant’s mother.*

Status

97. *The status of the Defendant as a professional and publicly funded state provider of child protection services is sufficient alone and / or in tandem with the matters aforesaid to impose a duty of care at common law in the terms pleaded herein.*

56. There are then thirty allegations of breach. These are for the most part, as usual, couched as “failures”. They amount to a list of instances of inadequate

investigation, ignoring evidence of abuse, failing to attach any or any appropriate weight to the concerns and allegations expressed by AA, failing to interview or listen to BB in circumstances where she was not under the influence of her mother and essentially siding with mother without proper or careful consideration of the allegations being made against her.

57. Mr Weitzman QC for the Defendant responded to the new pleading in his reply at the end of submissions. He maintained that whether the allegations of common law negligence were couched as positive acts or omissions they could only be properly classified as failure to provide a benefit – a failure to protect from harm.
58. The Defendant also says that the operation of the statutory scheme does not of itself give rise to a common law duty of care without assumption of responsibility. For there to be assumption of responsibility there must be provision of something akin to a contractual service coupled with reliance that reasonable skill and care would be exercised in the provision of that service. It is said that BB's case fails to identify what service was provided, what reliance was placed upon any such service and how.
59. BB also advances claims under Article 3 and Article 8. As now pleaded her case is that the Defendant knew or ought to have known that BB was suffering inhuman and degrading treatment at the hands of her mother from 5th September 2006. Further that AA's complaints of what he considered to be akin to the torture of BB by her mother were ignored or not properly investigated. The Defendant concedes that there should be no strike out or summary judgment on the Article 3 claim as now formulated.

60. As to the Article 8 claim, at least as pleaded before June 2020, the Defendant's position was that the breach towards BB was not properly particularised.
61. In relation to AA's claim the same point is taken: that this is a claim arising out of failure to confer a benefit and thus there must be assumption of responsibility before a common law duty of care can arise. However the additional point is raised that in a case of parents in conflict over their child, there can be no duty of care to the individual parents whose interests diverge. Thus a concurrent duty of care to each parent would create a conflict of interest and hamper any investigation into the circumstances of BB.
62. That argument found favour with HHJ Bidder QC sitting as a High Court Judge in the case of *F-D v CAFCASS* [2014] EWHC 1619 (QB). The Defendant submits there can be no duty of care owed by it towards AA as to any investigation into the welfare of BB. This was a case where a parent alleged negligence in CAFCASS in its report to a court relating to a child the subject of private law family proceedings pursuant to s. 12 Criminal Justice and Court Services Act 2000. After a trial the judge found that there could be no duty of care owed by CAFCASS to a parent where the primary concern was the child and the parents were in dispute.
63. The Defendant also makes the submission that AA cannot recover for psychiatric injury as he is neither a primary nor secondary victim.
64. As to AA's claim in misfeasance the Defendant points to the test set out in *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1. Liability may arise in the case of targeted malice by a public officer i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in

the sense of the exercise of public power for an improper or altering a motive.

It may also arise where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff.

65. Here, it is said, there is no allegation of deliberately trying to harm AA or BB.

Further there is no pleaded basis upon which the court can properly infer that one or more of the Defendant's social workers acted in a way intending to cause injury to AA due to some improper or ulterior motive.

66. As to AA claim under Article 3 the Defendant notes that he was never under

the control of the Defendant and that his complaints are limited to a psychological reaction to the mother's ill-treatment of BB and the Defendant's failure to provide the service he expected. The acts complained of are those of the mother and not the Defendant and thus there was no act by the Defendant which is incompatible with Article 3. In any event AA distress at having to deal with BB's disturbed behaviour is incapable of amounting to torture or inhuman or degrading treatment.

67. As to AA Article 6 claim, insofar as that relates to the private law proceedings

before the court those were not proceedings to which the Defendant was a party. Insofar as the claim relates to the Statutory Complaints Procedure then that procedure contains its own remedies but that the procedure ends when AA decided to litigate: by Regulation 8 of the Children Act 1989 Representations Procedure (England) Regulations 2006 the local authority shall not consider, or further consider, representations concerning any matter to which the complainant has stated in writing that he is taking, or intends to take, legal proceedings.

68. It is also submitted that this is a complaints procedure and not a civil right.

Reference is made to the principles upon which Article 6 is engaged in a civil case through the decision of the European Court of Human Rights in *Regner v Czech Republic* (2018) 66 EHRR 9 starting at paragraph 99.

99. The Court reiterates that for Art 6 to be applicable under its “civil” limb, there must be a “dispute” regarding a “right” which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Art 6(1) into play.

100. With regard firstly to the existence of a right, the Court reiterates that the starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts. Article 6(1) does not guarantee any particular content for “rights and obligations” in the substantive law of the Contracting States: the Court may not create by way of interpretation of art.6(1) a substantive right which has no legal basis in the State concerned.

101. In that connection the Court observes that the rights thus conferred by the domestic legislation can be substantive, or procedural, or, alternatively, a combination of both.

102. There can be no doubt about the fact that there is a right within the meaning of art.6(1) where a substantive right recognised in domestic law is accompanied by a procedural right to have that right enforced through the courts. The mere fact that the wording of a legal provision affords an element of discretion does not in itself rule out the existence of a right. Indeed, art.6 applies where the judicial proceedings concern a discretionary decision resulting in interference in an applicant’s rights.

103. However, art.6 is not applicable where the domestic legislation, without conferring a right, grants a certain advantage which it is not possible to have recognised in the courts. The same situation arises where a person’s rights under the domestic legislation are limited to a mere hope of being granted a right, with the actual grant of that right depending on an entirely discretionary and unreasoned decision of the authorities.

104. There are also cases where the domestic legislation recognises that a person has a substantive right without at the same time, for one reason or

another, there being a legal means of asserting or enforcing the right through the courts. This is the case, for example, of jurisdictional immunities provided for in the domestic law. Immunity is to be seen here not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right.

105. In some cases, lastly, national law, while not necessarily recognising that an individual has a subjective right, does confer the right to a lawful procedure for examination of his or her claim, involving matters such as ruling whether a decision was arbitrary or ultra vires or whether there were procedural irregularities. This is the case regarding certain decisions where the authorities have a purely discretionary power to grant or refuse an advantage or privilege, with the law conferring on the person concerned the right to apply to the courts, which, where they find that the decision was unlawful, may set it aside. In such a case art.6(1) of the Convention is applicable, on condition that the advantage or privilege, once granted, gives rise to a civil right.

69. In relation to AA Article 8 claim, this is said to be inadequately particularised.

Any limitation of AA's contact with BB was a result of orders made by the Family Court in private law proceedings. Article 8 does not require the Defendant to take positive steps to promote the claims of one parent above the other.

70. It is also said that insofar as AA alleges injury as a result of the treatment of BB (or failure to protect BB) then he is a secondary victim only and thus has suffered no loss or damage recognised by law.

Second Claimant's (BB's) response

71. I deal with the responses in the order in which I heard submissions during the course of the hearing. Because AA is a litigant in person I asked to hear submissions from Mr Bowen QC on behalf of BB before hearing AA. This was to enable AA simply to adopt submissions made by leading counsel where he thought they were applicable to his own position.

72. On behalf of BB it was submitted that I should be wary of striking a case out before evidence on what would be a fact sensitive enquiry. In particular it was emphasised that the threshold for the Claimant(s) at this stage of proceedings was low. If the case was arguable in law on the facts as they might be found at trial then the case should proceed.
73. It was submitted for BB that this is a positive act case and not an omissions case. Reference was made to a number of factual allegations within the pleadings where positive decisions were taken and positive actions undertaken all of which affected BB. Examples given include a positive decision to treat AA allegations against the mother as malicious, subsequent positive decisions not to respond to AA subsequent complaints, to support the mother in private law proceedings by writing a letter supporting her and in deciding how to interview BB.
74. Thus, it is said, this is a case in which the Defendant has actually done acts rather than done nothing. It is the “doing nothing” cases in which no common law duty of care can arise as was seen in cases such as *Gorringe v Calderdale MBC* [2004] 1 WLR 1057. Before one can properly categorise the behaviour of this Defendant, there needs to be evidence and the finding of facts based upon the evidence.
75. In the alternative it is argued that if this is an omissions case then a common law duty of care may still arise on the basis of assumption of responsibility, control of risk or status.
76. It is said that assumption of responsibility is clearly illustrated by the advice given to mother to terminate BB’s contact with AA and by providing evidence

/ a letter to help persuade a judge to order AA's exclusion from the family home. The concomitant reliance on the part of BB is said to arise out of her vulnerability and her dependence upon the Defendant in promoting her welfare.

77. The Article 3 case is put on the basis that BB was suffering ill-treatment within the ambit of Article 3, that the Defendant knew or ought to have known about that and failed to take reasonable steps to bringing to an end.
78. The Article 8 claim is essentially the presentation of the same or similar facts within the context of family life.

AA's Response

79. AA's response has been predominantly written but no less cogent for that. He felt more comfortable submitting his representations in this form given that Day 2 and Day 3 of this hearing had to be undertaken by telephone.
80. AA echoed the submissions made on behalf of BB in that he said that part of his claim related to numerous specific acts by the Defendant. These positive acts affected both he and BB. So far as he was concerned, the dismissal by the Defendant of his concerns about BB and complaints about her mother caused him distress leading to a diagnosis of Moderate Depressive Disorder.
81. AA goes on to suggest that there was also an assumption of responsibility on the part of the Defendant by reference to specific undertakings given to him as to their performance and what they agreed to do. However as I read this, those

alleged undertakings related to the handling of his complaints under the Statutory Complaints Procedure and the Defendant's communications with CAFCASS rather than their investigations during the earlier part of the history.

82. AA response to the case of *F-D v CAFCASS* is to point to the decision in *Merthyr Tydfil CBC v C* [2010] EWHC 62 QB where a mother's claim in negligence against a local authority in respect of failure to protect her children was not struck out. That was a case where a mother was reporting to the Council that her children were being abused by a third party and her claim arose out of mismanagement of her reports. Her claim for psychiatric injury based on the existence of a duty to her was allowed to proceed by Hickinbottom J. That, submits AA, is analogous to his own case.
83. Much of AA's complaint relates to the manner in which he was dealt with under the Statutory Complaints Procedure. He first submitted his complaint in July 2012 while BB was still with her mother. He alleges that his complaints were ignored or mismanaged, that the mounting evidence from other sources (not just himself) to the effect that BB was being abused by her mother was ignored or not separated from the complaints procedure.
84. AA suggests that the Defendant formed an adverse view of him back in 2006, considering his allegations against the mother to be vindictively founded in a matrimonial dispute. That adverse view coloured all subsequent dealings with AA whose reporting of concerns for BB was largely dismissed. It also resulted in the Defendant regarding AA as a nuisance and not taking seriously his complaints made from 2012. Further that such adverse view of AA blinded the

Defendant to the independent referrals from third parties made from 2012. As a result, the Defendant was biased against AA in the provision (or non-provision) of information about BB via CAFCASS to the Family Court. As I understand AA's case, he also alleges that individuals within the Defendant's social services department were biased against him and did all they could to thwart his complaints and undermine his position as BB's father. That extended to not acting upon his reports of what was happening to BB and ignoring or dismissing any third party report which corroborated AA.

85. As for his Article 3 claim AA points to the case of *Kurt v Turkey*. In that case a mother alleged that she had witnessed her son being detained by security forces. She approached the public prosecutor to try and establish her son's whereabouts. The public prosecutor failed to carry out any proper investigation. As a result the mother was left with the anguish of knowing that her son had been detained with a complete absence of official information as to his subsequent fate. That anguish endured over a prolonged period of time. The European Court of Human Rights found that the circumstances described coupled with the fact that the complainant was the mother of the victim of a human rights violation and herself the victim of the authority's complacency in the face of her anguish and distress amounted to a breach of Article 3.
86. AA says that the way in which his complaints were dealt with under the Statutory Complaints Procedure may amount to a violation of Article 6. He points out that a complaint which is upheld may attract a number of means of redress. These include a reassessment of the child's needs, practical action

specific to the particular complainant and financial redress. (See section 6 of Getting the Best from Complaints, citing s.92 Local Government Act 2000.)

87. AA suggests that his Article 8 claim is self-evident. His right to respect for his private and family life was violated not only by the poor quality of the initial investigation into BB's welfare but also by the Defendant's failure to deal with his complaints over something like three years. In addition the Defendant's bias against him and its passing of flawed information to the Family Court resulted in gross disruption of his family life.

Discussion

88. It is tempting simply to say that any application such as this which takes three days to argue has, by virtue of the length of argument, defeated itself. I shall resist that temptation.
89. This is an application to strike out these claims under CPR 3.4(2)(a) - that the statement of case discloses no reasonable grounds for bringing or defending a claim. In short, that the pleaded facts even if true, do not disclose any legally recognisable claim against the Defendant. The alternative application for summary judgment under CPR 24 can succeed in the alternative if the Claimant has no real prospect of succeeding on the claim.
90. Much of the argument before me has turned on a consideration of the law as to whether a common law duty of care can arise in the circumstances of these claims. I have been taken to a raft of authorities both before and after *Poole*. For authority on the interplay between statutory and common law duties of

care I am reluctant to look beyond *Poole*. It is a Supreme Court analysis of the law in this area from last year.

91. I have been referred to a number of first instance decisions since then - essentially applications to strike out – but these I have not found helpful. As Lord Reed in *Poole* was at pains to point out, whether or not a common law duty of care arises, parallel to a statutory duty, may be fact sensitive: particularly on the issue of assumption of responsibility.
92. One case has been sent to me after argument was concluded and that is *C v Surrey County Council* (unreported). This is a decision of HHJ Roberts at Central London County Court on 26th June 2020. It is said by the Second Claimant to be binding on me so I should deal with it specifically. This was a claim brought by an abused Claimant against a local authority alleging failure to protect. The case was put on the basis of positive acts and assumption of responsibility. HHJ Roberts declined to strike out the claim on the basis that this is a developing area of law, each case turns on its own facts and that positive acts averred by the Claimant gave rise to an arguable assumption of responsibility.
93. The suggestion has been made that I am bound to follow HHJ Roberts on the basis of comments made by Neuberger LJ in *Re Lune Metal Products Ltd (In Administration)* [2006] EWCA Civ 1720.

It is obviously desirable that the law on any topic is as clear as reasonably possible, and that is as true in insolvency as any other field. Those administering and advising on insolvencies, and those with interests in insolvencies, need to know where they stand as certainly, cheaply and promptly as possible. Albeit that any well advised person will always be aware that a decision at first instance can be overruled by this court, that cannot possibly justify judges

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effectively ignoring decisions of their colleagues, even though they are not, of course, bound by them.

94. As that passage makes clear, I am not bound by the decision of a fellow County Court judge but it is of course persuasive. I certainly do not feel bound by the decision of HHJ Roberts since:
- a) His decision was not on a pure point of law, it was the application of legal principles to the specifics of the case in front of him: and
 - b) HHJ Roberts does not appear to have had the advantage which I have enjoyed of three days legal argument supported by six lever arch files of material.

Second Claimant (BB)

95. Much argument surrounded the question of whether the factual allegations levelled against the Defendant amounted to causing harm (making things worse) or failing to confer a benefit (not making things better). This is a case where the Defendant did involve itself with BB. There was a positive decision to investigate, to talk to AA and BB's mother. Positive decisions were taken as to who was being truthful and how that should be managed - views reported to CAFCASS for communication to the court, allowing CAFCASS access to the social work file, advising mother to terminate BB's contact with AA, supporting mother in her application for an occupation order, interviewing BB in the presence of her mother.
96. For BB it is argued that these were positive acts which made things worse. In taking mother's side and treating AA's allegations as vindictive the Defendant adopted a stance (based on a flawed investigation) which tipped the balance

inexorably in favour of mother in the family law dispute. That led to BB remaining with her mother for some years throughout which time the damage being suffered by her increased.

97. The counterargument is that however you describe these allegations they amount to a failure to protect. It was not the Defendant who was harming BB, it was mother. Thus these allegations must be described as failure to confer a benefit, as Lord Reed described similar allegations in *Poole*.
98. For my part I can see the argument that in this case the Defendant did rather more than appears to have been the case in *Poole*. In this case the Defendant is said to have taken positive steps which influenced what happened to BB. That might, depending on the eventual findings of fact, be held to be causing harm to her. This can be argued as a “causing harm” case.
99. If I am wrong about that and this is a “failure to confer benefit” case then a common law duty may still arise if there is assumption of responsibility. For the Defendant it is said that in undertaking no more than its statutory duty there could be no assumption of responsibility. There is no provision of service and no reliance.
100. Whilst I accept that there must be more than bare exercise of statutory duty, I do not accept that no more than that was done here. One can see elements of provision of service and reliance in the provision by social services of information to CAFCASS which could be and was used in private law proceedings. The service was the provision of information although the reliance would have been on the part of CAFCASS. However it is not a big step to say that if BB was relying upon CAFCASS to present the court with

balanced information then she was also relying upon those who were providing that information to CAFCASS.

101. I can see the argument that by taking sides in the dispute between AA and the mother, advising mother and presenting views to the court about AA, the role of the Defendant could be said to be closer to adviser to mother. In that sense the service is provided to mother and not BB. The subject of the enquiry however is BB and she is the one needing protection and who is reliant on others to look out for her.
102. It was in this context that I posed the question to Mr Bowen QC for BB “assuming responsibility to do what?” This was not a question readily answered. In a later Note Mr Bowen fell back on the terms of his latest pleading at paragraph 14 and paragraph 95 (see above). There, emphasis is placed on the Defendant going beyond a simple investigation and report but assuming responsibility for assigning motives to AA and thus pigeon-holing him thereafter. That led to the involvement of the Defendant in offering advice and information to those involved in the private law case which would have great ramifications for BB. The responsibility assumed was thus to BB in respect of her future residence and contact arrangements.
103. That argument I accept as viable. My conclusion is that it is arguable that on the facts of this case there was an assumption of responsibility in terms of the provision of a service and/or advice with reliance by BB that reasonable skill and care be used in the provision of that service/advice.

104. Accordingly I decline to strike out the Second Claimant's claim in common law negligence against the Defendant. Whether the legal submissions succeed at trial in the light of the evidence is of course quite a different matter.
105. It was conceded that BB's Article 3 claim was arguable. That concession seems to me to have been rightly made. The case of *Z v United Kingdom* [2001] 5 WLUK 297 illustrates a claim made under both Article 3 and Article 8 for damages arising out of a local authority failure to protect children from abuse by their parents. Both Article 3 and Article 8 were found to be engaged and damages awarded under Article 3, the domestic claim having been struck out as domestic law did not (then) impose an actionable duty of care. No separate issues arose under Article 8.
106. The Article 8 claim was originally attacked for lack of particularity. The Re-Amended Particulars of Claim at paragraph 135 and 139 – 142 make it clearer that the claim is put on the basis of basis of the Defendant's failure to protect BB. The skeleton argument refers to a public authority's Article 8 duty to take reasonable steps within its power to prevent ill-treatment and violations of private / family / home life of which the authority had, or ought to have, knowledge. As in *Z v United Kingdom* such issues may engage either or both of Article 3 and Article 8 with the latter being perhaps more appropriate if the facts as established did not cross the severity threshold for Article 3.
107. My conclusion is therefore that the Human Rights claims are also arguable and I decline to strike them out as against the Second Claimant.
108. There is also the application for summary judgment in the alternative but quite rightly there has been little reference to this. The facts as pleaded may give

rise to claims in law either at common law or under the Human Rights Act.

No-one has suggested that I make any assessment of the evidence which may support those factual allegations (much of which I anticipate will be documentary). This is not a case for summary judgment.

First Claimant (AA)

109. AA's common law claim against the Defendant can be viewed in two parts:-

- a) From 2006 to 1st July 2012; and
- b) From 2nd July 2012 until issue of current proceedings (July 2015).

During the former period his complaint is that social services failed to accept his claims that BB was being abused by her mother during the course of investigation. During the second period that claim is advanced again but is bolstered by the alleged failures on the part of the Defendant to deal with his complaints and the referrals of others due to bias against him.

110. In relation to the first period the same issues arise as they do with BB - whether this is a claim based on positive acts (causing harm) or omissions (failing to confer a benefit). For the reasons set out above in relation to BB's case I am of the view that it is arguable that the Defendant's positive acts caused harm rather than being simply failure to confer benefit.

111. Likewise, if that is wrong then for the same reasons as given in relation to BB I can see the argument for assumption of responsibility giving rise to a common law duty.
112. The key difference lies in who any duty is owed to. AA was not the one who the Defendant was required to protect from abuse. However his claim is not based on any abuse suffered by him at the hands of the mother. The harm allegedly suffered by AA was within the matrimonial proceedings where he was disadvantaged due to the (he would say) negligent investigation into the welfare of BB.
113. In that sense there is a claim by AA that he was caused harm by the positive acts of the Defendant. Those positive acts involved the way in which the investigation was conducted, conclusions reached as to AA's motives and the entry into the matrimonial dispute with advice tendered to the mother and evidence offered to the court. All of that impacted AA directly and prejudiced his position in his attempt to help BB.
114. There are difficulties with such a claim, not least the point that a duty owed to parents in any investigation such as this would create a potential conflict of interest. It is on that point that I am assisted by what I regard as binding authority from the High Court in *F-D v CAFCASS*.
115. I find the position there to be indistinguishable from the position here. If CAFCASS owe no common law duty to parents in conflict when investigating the welfare of a child under its statutory duties I cannot see that the position is any different where it is social services investigating. Whilst I understand AA's reliance upon *Merthyr Tydfil* to counter that, the fact is that *Merthyr*

Tydfil did not raise the issue of conflict of interest since there was none. On the authority of *F-D v CAFCASS* I conclude that there is no common law duty owed to parents in conflict over their child by a local authority exercising s.47 duties in relation to that child. Thus there is no common law duty of care owed by the Defendant to AA in the exercise of its child protection role in this case. Furthermore I cannot see that the position changes as a matter of principle from July 2012.

116. Accordingly I will strike out AA's claim for damages arising out of a breach of a common law duty owed to him as a parent.
117. I should add that I would not have acceded to the Defendant's submission that AA could not recover for psychiatric injury. AA's case is that the manner in which the Defendant dealt with him directly in emotionally fraught circumstances led to psychiatric injury. It seems to me that it is at least arguable that the Defendant's alleged failures towards AA made it foreseeable that he might suffer some psychiatric injury as a result. Even as a secondary victim, as the father of BB with a close tie of love and affection to her, he may come within the compass of those suffering foreseeable psychiatric injury in witnessing and managing damage done to BB. Again, whether such claims are made out on the evidence will be a matter for trial.
118. The second element of AA claim over the Statutory Complaints Procedure concerns the way in which that procedure was managed as opposed to the collateral effect it had upon BB. AA alleges that those responsible for administering the process did their utmost to thwart any proper investigation into his complaints. AA alleges that this was done as a cover-up of the failings

which had gone before. As a result his complaints have never been adjudicated upon within anything like the timescales envisaged within the procedure itself and he has been denied redress.

119. I have heard no specific argument as to the separate existence of a common law duty of care in the management of the Statutory Complaints Procedure. It does not seem to me that this is how AA puts his case (even allowing for any handicap as a litigant in person in framing his claim in legal compartments).
120. AA's allegations as to the handling of his complaints include dishonesty towards him, bias against him and attempts to cover up previous failings. Those are serious allegations which might ordinarily lack credibility. However there is no obvious explanation for the apparently extraordinary timescale for dealing with AA's complaints nor the attempts not to let the complaints escalate to Stage 3 and so these allegations cannot simply be dismissed. There may well be perfectly sound explanations, but they are yet to be articulated.
121. The suggestion that the Statutory Complaints Procedure ceases when litigation is indicated (Regulation 8) may well be correct but it does not expunge what has gone before. It is events from 2012 to 2015 which form the basis of AA's case. Regulation 8 I consider to be irrelevant to AA's claim.
122. The Statutory Complaints Procedure seems to me to be the type of process envisaged in paragraph 105 of *Regner v Czech Republic*. It involves a lawful procedure for examination of a claim. There is a power to grant redress and once granted, that could give rise to a civil claim to obtain such redress. Thus the Statutory Complaints Procedure is one which, at least arguably, engages Article 6.

123. The delay in dealing with AA's complaints, the failure to progress the procedure to Stage 3 all arguably deny AA the redress to which he says he is entitled. It can be said that in determination of his civil rights AA has been deprived of a fair hearing within a reasonable time by an independent and impartial (Stage 3) tribunal established by law. That claim is in my judgment at least arguable.
124. AA goes further however. He alleges misfeasance in public office by certain of the Defendants employees. For this claim to be made good there must be targeted malice against AA by a public officer i.e conduct specifically intended to injure a person. AA is clear about this. He alleges that he was lied to, that the complaints procedure was manipulated specifically to thwart him because of preconceived bias against him and to cover up previous failings which would vindicate AA.
125. If those allegations are made out then there is, in my judgment the basis of a claim of targeted malice against AA. Whether those allegations are in fact made out is for another day but in relation to the current application to strike out the misfeasance claim, I decline to do so.
126. AA's Article 3 claim is based very much on analogy with the decision in *Kurt v Turkey*. In this case BB has a potential Article 3 claim. In *Kurt*, the mother's claim succeeded at least partly because her son had suffered Article 3 violations. AA says that, as in *Kurt*, he as a parent approached the appropriate authority for help. Neither in *Kurt* nor here did the parent receive any help. AA says that, as in *Kurt*, he subsequently suffered the anguish of a parent. The

difference is that in *Kurt* the prosecutor did nothing whereas in this case the Defendant did investigate but, says AA, ineffectually.

127. That difference may prove to be critical. However in my judgment it can only be assessed and put in context following the hearing of evidence and the finding of facts. I decline to strike out AA's Article 3 claim although it may be weak.
128. That brings me finally to AA's Article 8 claim. As with BB, AA alleges that the actions of the Defendant and the manner in which it unjustifiably took against him has disrupted his family life. It has resulted in the limitation of his contact with BB and his concerns about her being ignored.
129. It is within this framework that AA's claim as to the mismanagement of the investigation into BB's situation most properly sits. Although I have found no common law duty of care owed to AA in the exercise by the Defendant of its statutory duties, that does not bar an Article 8 claim based on the same allegations. Indeed in *F-D v CAFCASS* it was recognised that an Article 8 claim might fill the gap left by absence of a common law duty of care although in that case it was not made out on the facts.
130. Thus for AA his allegations of failures in the exercise of statutory duties still give rise to a valid cause of action and potential damages, but under Article 8 rather than domestic common law.
131. As with BB's claim, this is not a case where I can (or am asked to) make any valid assessment of the strength of evidence. It is not a matter for summary judgment.

Conclusion

132. For the reasons set out:-

- a) I strike out the First Claimant's claim in common law negligence against the Defendant in relation to the exercise of its statutory duties;
- b) otherwise the Defendant's application to strike out these claims under CPR 3.4(2)(a) or for summary judgment are dismissed.